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# California Supreme Court Survey - A Review of Decisions: September 1985–November 1985

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# California Supreme Court Survey September 1985-November 1985

*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.*

## I. ATTORNEYS

*Contingency fees violate the neutrality requirement imposed on government attorneys when used in hiring attorneys to handle governmental nuisance actions:* **People ex rel. Clancy v. Superior Court.**

In *People ex rel. Clancy v. Superior Court,* 39 Cal. 3d 740, 705 P.2d 347, 218 Cal. Rptr. 24 (1985), the court used a two-part analysis to invalidate a contingency fee arrangement between a city and a private attorney. First, the court found that the requirement of neutrality imposed on government attorneys may apply equally to civil and criminal actions. Second, since the case involved a nuisance action, the court held the neutrality requirement applicable.

The City of Corona attempted to close the Book Store, an establishment which sold sexually explicit reading material. The city first attempted to shut down the establishment through the enforcement of its ordinances regulating adult bookstores. However, a federal court held the ordinances were unconstitutional. The city's next step was to hire James J. Clancy, a private attorney, using a contingency fee employment contract. Clancy's efforts to abate the nuisance under local law included serving a subpoena duces tecum upon Thomas Ebel, a clerk at the Book Store, demanding production of 262 allegedly "obscene" publications. After the trial court prevented production of the magazines, the city appealed and the defendant cross-petitioned, seeking to have Clancy disqualified as attorney for the city.

A minor issue, which the court quickly dismissed, involved the enforcement of the subpoena duces tecum. Since the clerk, Ebel, was subject to a criminal prosecution under California Penal Code section 311.2, which prohibits the sale of obscene material, he sought to avoid compliance with the subpoena by invoking the privilege against self-incrimination guaranteed by the fifth amendment. CAL. PENAL CODE § 311.2 (West 1986). The court, however, held that in such situations the privilege may be used only by a person who owns the property the subpoena demands. Hence, Ebel could not use the defense since his possession of the magazines stemmed solely from his capacity as Book Store clerk.

In the first part of its majority holding, the court determined that the neutrality requirement for government attorneys may apply with equal vigor to civil as well as criminal cases. Regardless of the type of case, a prosecutor's duty of neutrality stems from two key aspects of his employment. First, since he is a representative of the sovereign, he must act with the impartiality required of those who govern. Second, since he has the vast power of the government available to him, he must refrain from abusing that power by failing to act even-

handedly. The court held that since Clancy's fee would double if he was successful in the litigation, his interest was extraneous and inherently not neutral.

Finally, the court determined that since the neutrality requirement applies to nuisance actions, the interests of justice required that Clancy be disqualified. In so holding, the court focused upon the close connection between an abatement action and the criminal law: a suit to abate a public nuisance can trigger a criminal prosecution of the owner of the property. The court narrowed its holding by stating that contingency arrangments may be proper in certain situations, such as a city hiring a private attorney to represent it in all matters relating to the protection of its oil rights. However, because Clancy was handling an abatement of public nuisance action, his contingency fee violated the neutrality requirement.

JOHN EDWARD VAN VLEAR

## II. CIVIL PROCEDURE

### A. *The ordinance in effect at the time of appeal is the relevant legislative enactment to be considered if an appeal seeks injunctive relief, even if the ordinance was amended after the trial:* **Building Industry Association v. City of Oxnard.**

The court in *Building Industry Association v. City of Oxnard,* 40 Cal. 3d 1, 706 P.2d 285, 218 Cal. Rptr. 672 (1985), determined that when an appeal questions the validity of an ordinance for purposes of injunctive relief, the correct ordinance to consider is the one in effect at the time of appeal. The plaintiff, Building Industry Association of Southern California, sought injunctive relief against three ordinances enacted by the City of Oxnard in 1981. The ordinances required constructors of new developments to pay fees for (1) a water system connection, (2) a waste water connection, and (3) a "Growth Requirements Capital Fee." The trial court found the ordinances were a reasonable exercise of the city's police power and held for the city.

On appeal, the plaintiff challenged the validity of the third ordinance, the "Growth Requirements Capital Fee." Subsequently, while the appeal was pending, the city amended the third ordinance, modifying its formula and clarifying its uses. The plaintiff's contentions upon appeal were that the old ordinance was invalid, and that the or-

dinance should be construed to benefit developers who may be entitled to a refund. The court determined that because there was no specific fee at issue, there was no aggrieved party with regard to the old ordinance and the newly amended ordinance was the proper ordinance to be considered in the appeal of the case. The judgment was reversed and remanded to the trial court for consideration of the validity of the new ordinance.

MARIE P. HENWOOD

B. *Failure to argue in support of admission of evidence under the inevitable discovery doctrine at trial does not necessarily preclude application of the doctrine upon appeal:* **Green v. Superior Court.**

In *Green v. Superior Court,* 40 Cal. 3d 126, 707 P.2d 248, 219 Cal. Rptr. 186 (1985), the defendant Green was charged with the murder and robbery of a garage attendant. The crime was allegedly committed while Green worked as the garage janitor. Green was first considered an important witness by officers investigating the crime because he was the last person to see the victim alive. The police interviewed Green, picking him up at work to do so. Green then voluntarily agreed to be interviewed and was told that he would be returned to work any time he desired. The interview with Green took place in a police station interview room which had no windows and required a key to enter or exit. The questions asked were detailed but non-accusatory. Green was given no *Miranda* warning, because the police did not consider him a suspect at that time. Officers interrupted the interview, told Green they were late for a meeting, and returned to the garage, his place of work, to meet with crime experts. Green agreed to wait until the officers returned and was left in the locked room. He was never again told he was free to leave.

At the garage, officers learned that Green's story concerning the night of the murder did not match an eyewitness report. Officers also learned that Green's coveralls, worn while at work, had been hung in an unlocked supply area. After obtaining Green's permission, an officer examined the coveralls, which were in plain sight on top of a box. When obvious blood stains were found on the coveralls, Green became a suspect. Crime lab technicians then found blood traces on the floors and walls of the garage. Officers later testified that during the search of the garage, they would have seized Green's coveralls, even without a warrant or his consent. Back at the station, the officers gave Green the *Miranda* warning, obtained a waiver of his rights, interrogated him, and obtained Green's confession.

Green appealed the trial court's denial of his motion to suppress

statements made to the police officers, his seized coveralls, and his confession. The trial court did not believe Green's coveralls were the product of a custodial interrogation without the *Miranda* warning, finding the officers' testimony that Green was not a suspect and had been free to leave at any time to be the deciding factor. Green thereupon sought writ review of the court's rulings.

Justice Kaus, writing for the majority of the supreme court, acknowledged that although *Miranda* warnings are required in a custodial interrogation, *Miranda v. Arizona,* 384 U.S. 436 (1966), *custody* occurs when the defendant is actually physically deprived or reasonably believes he or she is being deprived of freedom. *People v. Arnold,* 66 Cal. 2d 438, 448, 426 P.2d 515, 521, 58 Cal. Rptr. 115, 121 (1967). The court chose to focus on the officers' words, the physical surroundings, and whether or not Green was considered a suspect when interviewed.

The adopted test is whether Green was either under formal arrest or was restrained to the degree associated with a formal arrest. *California v. Beheler,* 463 U.S. 1121, 1125 (1983). Although the issue was close, the court found no custodial interrogation because a reasonable person in Green's position would not have felt he was in custody. The court so held for the following reasons: 1) the court believed the defendant was not a suspect when he cooperated and was initially interviewed; and 2) although the interview took place in a locked room, the defendant would have been allowed to leave if he desired and the defendant was assured before the interview that he could leave at any time. Therefore, *Miranda* warnings were not required and the court's denial of suppression on this ground was affirmed. *See generally* 19 CAL. JUR. 3D (Rev.) *Criminal Law* §§ 2189-2220 (1984).

Secondly, the court agreed with the defendant's argument that when Green was left alone in the locked interview room without means of leaving, he was unlawfully placed "in custody." However, this unlawful detention and the coveralls and confession obtained thereby do not constitute grounds for reversal of the denial of the suppression motion. Although not fully urged as a theory of admissibility at trial, the "inevitable discovery doctrine" was applied by the court as the case record provided sufficient evidence to determine the doctrine's applicability. *See Nix v. Williams,* 467 U.S. 431 (1984).

The court record showed that under the inevitable discovery doctrine: 1) the coveralls would inevitably and lawfully have been discovered, since officers knew about defendant's coveralls through an independent source; 2) the police did not need defendant's permission

to lawfully search for the coveralls; and 3) they found the coveralls in plain view, subject to lawful seizure as evidence at a crime scene. Therefore, suppression was unwarranted since there was an insufficient link between the unlawful detention of Green (as the "taint") and the discovery of the coveralls and Green's subsequent confession (as the "products").

Finally, the lower court's decision to deny suppression was upheld through the supreme court's application of the inevitable discovery doctrine. The court applied the doctrine because: 1) the record firmly established sufficient grounds for applicability; 2) no additional evidence was necessary to establish the doctrine; 3) the defendant had notice and an opportunity to examine, present, and attack the facts supporting the theory; and 4) there appeared to be no further evidence which could have been introduced to defeat the doctrine. *See generally* Comment, *The Inevitable Discovery Exception in California: A Need for Clarification of the Exclusionary Rule,* 15 U.S.F.L. REV. 283 (1981).

BRENDA L. THOMAS

### C. *Discovery limitations period for medical malpractice claims is not tolled when a plaintiff with presumptive knowledge of the facts underlying his malpractice claim is advised by an attorney that he has no legal remedy:* **Gutierrez v. Mofid.**

In *Gutierrez v. Mofid,* 39 Cal. 3d 892, 705 P.2d 886, 218 Cal. Rptr. 313 (1985), the court was asked to decide whether section 340.5 of the Code of Civil Procedure, which provides for a medical malpractice statute of limitations, is suspended or tolled when the plaintiff is advised that there was no provable malpractice. The court held that reliance on an attorney's advice does not suspend or toll the time of discovery when the plaintiff has presumptive knowledge of his injury. This decision disapproved *Jones v. Queen of the Valley Hospital,* 90 Cal. App. 3d 700, 153 Cal. Rptr. 662 (1972), to the extent that it is inconsistent with the *Gutierrez* opinion.

In *Gutierrez,* the plaintiff consented to an exploratory operation to remove either a tumor or her appendix. However, the doctors performed a complete hysterectomy. The plaintiff became aware of this fact upon awakening from surgery and immediately suspected malpractice. Her discussions with other doctors confirmed her suspicions that the surgery had been too extensive. In April, 1979, plaintiff consulted a malpractice firm, who advised her that there was no "provable malpractice." In November, 1980, plaintiff consulted a second firm of attorneys who filed this suit on November 21, 1980.

Pursuant to section 340.5 of the Code of Civil Procedure, an action for injury or death against a health care provider based on alleged professional negligence must be brought within "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." CAL. CIV. PROC. CODE § 340.5 (West 1982). The term "injury," as used in section 340.5, is defined as both " 'a person's physical condition *and* its negligent cause.' " *Gutierrez,* 39 Cal. 3d at 896, 705 P.2d at 888, 218 Cal. Rptr. at 315 (quoting *Sanchez v. South Hoover Hospital,* 18 Cal. 3d 93, 99, 553 P.2d 1129, 1133, 132 Cal. Rptr. 657, 661 (1976) (emphasis in original)). The three year period is tolled for fraud, concealment, or the presence of a foreign object that has no medical purpose. CAL. CIV. PROC. CODE § 340.5 (West 1982). However, there are no tolling provisions for the one year limitations period.

The court held that the plaintiff had presumptive knowledge of her injury and that the statute of limitations commenced no later than April, 1979. Great emphasis was placed on the fact that the plaintiff had conceded in her deposition that she immediately suspected malpractice and that her discussion with other physicians substantiated these suspicions. The court relied heavily on its earlier decision in *Sanchez* in which it stated: " 'when the plaintiff has notice or information of circumstances to put a reasonable person *on inquiry,* or *has the opportunity to obtain knowledge* from sources open to his investigation . . . the statute commences to run.' " *Sanchez,* 18 Cal. 3d at 101, 553 P.2d at 1135, 132 Cal. Rptr. at 663 (quoting 2 B. WITKIN, CALIFORNIA PROCEDURE, *Actions* § 339 (2d ed. 1970) (emphasis in original).

The court further stated that a plaintiff's ignorance of legal rights is irrelevant. Thus, reliance on an attorney's advice does not affect the limitations period. The plaintiff who obtains discouraging advice from an attorney must bear the risk that this advice will lead to a loss of a cause of action. The appropriate remedy available to the plaintiff is a legal malpractice action against the attorney whose alleged misconduct caused her claim to be barred by the statute of limitations.

TAMI J. TAECKER

## III. CIVIL RIGHTS

*Authorization of non-therapeutic sterilization for mentally retarded individuals who are unable to consent will be approved subject to compliance with stringent procedural safeguards:* **Conservatorship of Valerie N.**

### I. INTRODUCTION

In *Conservatorship of Valerie N.*,[1] the court was asked to decide whether section 2356 of the Probate Code[2] prohibited non-therapeutic sterilization of mentally retarded individuals in all circumstances, and if so, whether this prohibition impinged upon the constitutional rights of the mentally retarded. The court held that section 2356 is constitutionally overbroad on the grounds that it prohibits sterilization in all circumstances absent any compelling state interest. However, the judgment denying authorization to sterilize Valerie was affirmed, without prejudice, on the grounds of insufficient evidence.

### II. FACTUAL BACKGROUND

Valerie is a severely retarded 29 year-old woman who has exhibited strong, aggressive behavior with men.[3] Therapy and behavior modification proved unsuccessful in eliminating her aggressive sexual behavior, and a satisfactory method of birth control had not been found.[4] In 1980, Valerie's mother and stepfather petitioned the superior court, sitting in probate, for appointment as her conservators and for authorization to have her sterilized.[5]

The probate court granted the appointment of her mother and stepfather as co-conservators but denied the application for authority to have Valerie sterilized on the grounds that the court did not have jurisdiction to authorize sterilization.[6] The court of appeal in affirming the judgment, held that the probate courts lack the statutory

1. 40 Cal. 3d 143, 707 P.2d 760, 219 Cal. Rptr. 387 (1985). Justice Grodin wrote for the majority with Justices Mosk, Kaus, and Broussard concurring. Justices Reynoso and Lucas wrote separate concurring and dissenting opinions. Chief Justice Bird filed a dissenting opinion.

2. Probate Code section 2356(d) provides in pertinent part: "No ward or conservatee may be sterilized under the provisions of this division." CAL. PROB. CODE § 2356(d) (West 1981).

3. *Valerie N.*, 40 Cal. 3d at 148, 707 P.2d at 763, 219 Cal. Rptr. at 390. Valerie had made several inappropriate sexual advances toward men, including approaching them on the street and hugging and kissing them. *Id.*

4. *Id.* at 149, 707 P.2d at 763, 219 Cal. Rptr. at 390. Valerie tried birth control pills when she was a teenager, but had to discontinue using them because of the adverse side effects. She has been unable to use other methods of birth control, such as a diaphragm or an intrauterine device.

5. *Id.* at 148, 707 P.2d at 763, 219 Cal. Rptr. at 390.

6. *Id.* at 149-50, 707 P.2d at 763-64, 219 Cal. Rptr. at 390-91.

authorization and equitable jurisdiction to order sterilization.[7] In addition, the court held section 2356(d) of the Probate Code to be constitutional.

The supreme court held that section 2356(d), intended by the legislature to discontinue eugenic sterilization, is constitutionally overbroad and deprives the mentally retarded of their constitutional rights.[8] However, the court affirmed the judgment without prejudice. It held that there was insufficient evidence to support a conclusion that sterilization was necessary and that less intrusive means of birth control were unavailable.[9]

## III. HISTORICAL BACKGROUND

Historically, eugenic sterilizations were routinely performed on certain groups of people, including the mentally retarded[10] and criminals.[11] The eugenics movement assumed that certain types of individuals were socially undesirable and should be prohibited from genetically passing on their aberrant characteristics.[12] Sterilization procedures were implemented to prevent the perpetuation of hereditary genetic defects.[13] As a result, compulsory sterilization statutes were enacted in many states.[14]

In recent years, significant advances have been achieved in understanding mental retardation. These advances have led to a growing recognition of the needs and rights of the developmentally disabled. Courts and legislatures are now acknowledging the procreative rights of the retarded and exhibiting a genuine concern for the special needs of these individuals. Nevertheless, difficulties arise when dealing with the intricate problems that severe mental retardation causes to an individual's ability to comprehend his own sexuality. As a re-

7. Conservatorship of Valerie N., 152 Cal. App. 3d 224, 199 Cal. Rptr. 478 (1983).
8. *Valerie N.*, 40 Cal. 3d at 148, 707 P.2d at 762, 219 Cal. Rptr. at 389.
9. *Id.*
10. Buck v. Bell, 274 U.S. 200 (1927). *See also* Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 TEMP. L.Q. 995 (1977).
11. Skinner v. Oklahoma, 316 U.S. 535 (1942).
12. Comment, *A Conflict of Choice: California Considers Statutory Authority For Involuntary Sterilization of the Severely Mentally Retarded*, 4 WHITTIER L. REV. 495 (1982). The term "eugenics," which was first used by Sir Francis Galton, was defined as " 'the study of agencies under social control that may improve or impair the racial qualities of future generations either physically or mentally.' " *Id.* at 496.
13. Comment, *Eugenic Sterilization Statutes: A Constitutional Re-Evaluation*, 14 J. FAM. L. 280 (1975).
14. Buck v. Bell, 274 U.S. 200 (1927).

sult, these individuals are also vulnerable to sexual exploitation. Furthermore, a pregnancy can adversely affect a woman who is unable to comprehend this natural process.

The courts which have addressed the issue of sterilization have reached inconsistent results.[15] Generally, most courts agree that the right to choose whether or not to bear children is a fundamental right guaranteed by the federal Constitution.[16] In addition, they agree that mentally retarded individuals should not be deprived of this right due to their legal inability to consent. However, courts and legislatures vary widely on the means by which this right should be protected.

## IV. THE MAJORITY OPINION

The supreme court addressed two major issues: (1) whether section 2356(d) of the Probate Code precludes non-therapeutic sterilizations of mentally retarded individuals in *all* circumstances, and (2) if so, whether the application of this section deprives Valerie of her constitutional rights to privacy, due process, and equal protection.

### *A. Statutory Authorization*

The court held that the present legislative scheme precludes non-therapeutic sterilization of developmentally disabled individuals in all circumstances.[17] The analysis began by tracing the statutory development of involuntary sterilization in California.[18] The court noted that the first California statute permitting sterilization of mentally retarded individuals was enacted in 1909.[19] During the first part of the century, California performed more sterilizations than any other state.[20] Although similar statutes throughout the country have been challenged on various constitutional grounds, the majority were upheld if adequate procedural safeguards were provided.[21] This practice of non-consensual eugenic sterilization continued until 1979 when section 7245 of the Welfare and Institutions Code was repealed.[22] The court noted that this action clearly expressed the

15. *See* Matter of Guardianship of Eberhardy, 102 Wis. 2d 539, 307 N.W.2d 881 (1981) (court refrained from exercising its jurisdiction). *But see* Matter of Moe, 385 Mass. 555, 432 N.E.2d 712 (1982) (court invoked doctrine of substitute judgment and authorized sterilization).

16. *See In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980).

17. Justice Grodin wrote for the majority.

18. *Valerie N.*, 40 Cal. 3d at 151, 765 P.2d at 764, 219 Cal. Rptr. at 391.

19. *Id.* at 151, 707 P.2d at 765, 219 Cal. Rptr. at 391.

20. *Id.* at 152, 707 P.2d at 765, 219 Cal. Rptr. at 392.

21. *See Buck*, 274 U.S. at 200.

22. Section 7245 authorized sterilization of patients in state institutions. The repeal became effective January 1, 1980. *Valerie N.*, 40 Cal. 3d at 153, 707 P.2d at 766, 219 Cal. Rptr. at 393.

legisature's intent to prevent the non-therapeutic sterilization of persons unable to give informed consent.[23]

The court, in the second phase of its analysis, sought to determine whether the Lanterman Developmental Disabilities Services Act (LDDSA) afforded an alternative source of authority to permit sterilization in the present case.[24] Under the LDDSA the court examined whether providing "preventive services" to persons likely to parent a developmentally disabled infant permitted sterilization of adults.[25] While the Act may permit sterilization, it provides "preventive services" only on request of the individual receiving these services.[26] The LDDSA does not grant a conservator power to request sterilization for his ward. Thus, while the section may provide for sterilization of consenting adults, the LDDSA could not be invoked to authorize Valerie's sterilization because she was incapable of requesting or consenting to the procedure.[27] The court noted ironically that sterilization of Valerie, or any other non-consenting individual, could not be authorized under the act even though necessary to effectuate an express goal of the act.[28]

### *B. Constitutionality of Statutory Authorization*

The court concluded that section 2356(d) deprives the mentally retarded of privacy and liberty interests guaranteed by the United States and California Constitutions.[29] No compelling state interest was found to justify the denial of sterilization for *all* mentally retarded persons who are unable to consent. Thus, the court held that the statute was constitutionally overbroad and noted that the procedures set forth in section 2357 of the Probate Code should be followed pending action by the legislature.

The court commented that the right to privacy encompasses a woman's right to "choose not to bear children, and to implement that choice by use of contraceptive devices . . . medication," abortion, or sterilization.[30] Women have the right to "exercise [their] procreative

23. *Valerie N.*, 40 Cal. 3d at 155, 707 P.2d at 767, 219 Cal. Rptr. 394.
24. Lanterman Developmental Disabilities Services Act, CAL. WELF. & INST. CODE §§ 4500-4830 (West 1984).
25. *Id.* § 4644.
26. *Id.*
27. *Valerie N.*, 40 Cal. 3d at 158, 707 P.2d at 770, 219 Cal. Rptr. at 397.
28. *Id.* at 160, 707 P.2d at 771, 219 Cal. Rptr. at 398.
29. *Id.* at 160-61, 707 P.2d at 771-72, 219 Cal. Rptr. at 398-99.
30. *Id.* at 161, 707 P.2d at 772, 219 Cal. Rptr. at 399.

choice 'as they see fit.' "[31] The court contended that section 2356(d) denies mentally retarded females the "procreative choice that is recognized as a fundamental, constitutionally protected right of all other adult women."[32] The court also recognized that without the mental capacity to understand the implications of sterilization, no true consent, and therefore, no true choice is possible. Any decision made regarding sterilization would be made by others on behalf of retarded woman. However, both competent and incompetent women share the same right to personal growth and development. Thus, the court held that legal inability to consent is insufficient justification to deprive them of this right.[33]

Commenting further, the court noted that section 2356(d) deprived Valerie of her liberty interest as guaranteed by the fourteenth amendment. This interest has been expanded to encompass the right of every individual to develop his or her "maximum economic, intellectual, and social level."[34] This includes the right to pursue a life free of the burden of unwanted pregnancy. Sometimes, the court reasoned, the only satisfactory method of birth control for certain retarded women is sterilization. Thus, the denial of this option limits the opportunity these women have to experience a fulfilling life.

Having determined that Valerie's constitutional rights had been deprived, the court examined whether any compelling state interest existed to justify this denial, and whether prohibition of all non-therapeutic sterilizations would be necessary to effectuate that purpose. The state argued that it has an interest in protecting the retarded from non-consensual sterilization.[35] The court recognized that this might be a reasonable means of protecting certain individuals, but stated that it "sweeps too broadly for it extends to individuals who cannot make that choice and will not be able to do so in the future."[36]

The state further argued that prohibition of all sterilizations was necessary to prevent further abuse of the mentally retarded.[37] The court responded by noting that there was no evidence of abuse in jurisdictions where such an option existed.[38] Any potential for possible

31. *Id.* (quoting Committee to Defend Reproduction Rights v. Myers, 29 Cal. 3d 252, 263, 625 P.2d 779, 784, 172 Cal. Rptr. 866, 871 (1981)).

32. *Valerie N.*, 40 Cal. 3d at 161, 707 P.2d at 772, 219 Cal. Rptr. at 399.

33. *Id.* at 162, 707 P.2d at 772, 219 Cal. Rptr. at 399.

34. *Id.* at 163, 707 P.2d at 773, 219 Cal. Rptr. at 400.

35. *Id.* at 164, 707 P.2d at 774, 219 Cal. Rptr. at 401.

36. *Id.*

37. *Id.* at 165, 707 P.2d at 774-75, 219 Cal. Rptr. at 401-02.

38. *Id.* at 165, 707 P.2d at 775, 219 Cal. Rptr. at 402. Eighteen states currently have statutes permitting sterilization of mentally retarded individuals. These states include: Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Kansas, Maine, Minnesota, Mississippi, New Jersey, North Dakota, Oklahoma, Oregon, South Carolina, Vermont, Virginia, and West Virginia.

abuse could be eliminated if certain procedural safeguards were enacted. In support of this proposition, the court referred to decisions from the supreme courts of Washington,[39] New Jersey,[40] Massachusetts,[41] and Alaska[42] for illustrations of less drastic alternatives to section 2356(d).[43] The court followed the standards that the Washington Supreme Court established in *In re Guardianship of Hayes.* The *Hayes* court mandated that the clear and convincing evidence standard be established to show that: (1) the individual is incapable of making a decision as to sterilization; (2) the individual is unlikely to develop the capacity to make an informed judgment in the foreseeable future; (3) the individual is capable of conceiving; (4) contraception is necessary; (5) the individual is likely to be sexually active in the near future; (6) the individual is incapable of caring for a child; (7) all less drastic methods of birth control are unsatisfactory, and sterilization entails the least invasion of the body; and (8) the current state of medical science does not suggest that other less drastic methods of birth control will become available.[44]

The court emphasized that a women's procreative choice can be protected only when a "state permits the court-supervised substituted judgment of the conservator to be exercised on behalf of a conservatee who is unable to personally exercise this right."[45] Therefore, mentally retarded women, incapable of giving consent, would be denied a right available to all other women if substituted judgment was not allowed.

The court, however, affirmed the judgment of the court of appeal without prejudice.[46] Insufficient evidence was presented in Valerie's case to support a conclusion that contraception was necessary or that less intrusive means of contraception were not available.

## V. CONCURRING AND DISSENTING OPINIONS

### *A. Justice Reynoso*

Justice Reynoso concurred with the majority's opinion affirming the lower court. He dissented on grounds similar to those set forth in

39. *In re* Hayes, 93 Wash. 2d 228, 608 P.2d 635 (1980).
40. *In re* Grady, 85 N.J. 235, 426 A.2d 467 (1981).
41. *In re* Moe, 385 Mass. 555, 432 N.E.2d 712 (1982).
42. *In re* C.D.M., 627 P.2d 607 (Alaska 1981).
43. *Valerie N.*, 40 Cal. 3d at 165-66, 707 P.2d at 775-76, 219 Cal. Rptr. at 402-03.
44. *Id.*
45. *Id.* at 168, 707 P.2d at 777, 219 Cal. Rptr. at 404.
46. *Id.* at 169, 707 P.2d at 778, 219 Cal. Rptr. at 405.

Chief Justice Bird's dissent.[47]

### *B. Justice Lucas*

Justice Lucas also concurred that the lower court's judgment should be affirmed, but disagreed with the majority's analysis.[48] He criticized the court's application of the substituted consent doctrine on the grounds that it would lead to widespread abuse of the sterilization procedure.

Justice Lucas commented that an inherent problem with the doctrine of substituted consent is the possibility that a conflict of interest will exist. He expressed concern that "the 'rights' which we are 'protecting' are in fact more likely to become those of the incompetent's caretaker" rather than the incompetent.[49] In addition, he argued that the court's decision will create a possibility for abuse by permitting sterilizations based on insufficient justifications. For example, he noted that the trial judge would have permitted sterilization on the basis of the "skimpy and . . . totally inadequate record" presented to the trial court.[50]

### *C. Chief Justice Bird*

In a lengthy dissent, Chief Justice Bird concurred in the affirmance of the judgment, but strongly attacked the court's procreative choice theory and its use of the substituted consent doctrine. She criticized the court for permanently depriving many women of the fundamental constitutional right to conceive and to bear children and for opening the door to "abusive sterilization practices which will serve the convenience of conservators, parents, and service providers rather than the incompetent conservatees."[51]

#### 1. The Procreative Choice Theory

The Chief Justice premised her attack on the theory that "sterilization, abortion and contraception all necessarily involve the exercise of choice" while the right to procreate goes much deeper and does not depend upon a capacity for rational choice.[52] She critized the majority's use of the procreative choice model in a manner which created a "false impression of equivalence between the 'decision' to

47. *Id.* at 169-70, 707 P.2d at 778, 219 Cal. Rptr. at 405 (Reynoso, J., concurring and dissenting).

48. *Id.* at 170, 707 P.2d at 778, 219 Cal. Rptr. at 405 (Lucas, J., concurring and dissenting).

49. *Id.* at 171, 707 P.2d at 779, 219 Cal. Rptr. at 406.

50. *Id.* at 173, 707 P.2d at 780, 219 Cal. Rptr. at 407.

51. *Id.* at 175, 707 P.2d at 782, 219 Cal. Rptr. at 409 (Bird, C.J., dissenting).

52. *Id.* at 180, 707 P.2d at 785, 219 Cal. Rptr at 412.

procreate and the 'decision' to be sterilized."[53] The Chief Justice explained that sterilization requires a conscious choice based on an awareness of the consequences and implications of the procedure. Conversely, procreation is a natural function which does not require a conscious and informed decision.

The Chief Justice argued that the majority's analysis was flawed because it failed to weigh the permanent consequences of sterilization against the possible deprivation of a liberty interest. While the majority admitted that the evidence was insufficient in Valerie's case, the Chief Justice specifically disdained the court's implication that "unacceptable restrictions are 'necessarily placed upon sexually mature mentally retarded women in the effort to prevent pregnancy . . . .' "[54]

2. The Substituted Consent Doctrine

The Chief Justice continued her dissent by criticizing the majority's use of the substituted consent doctrine. The doctrine, which courts developed to permit third persons to make decisions on behalf of incompetents in situations affecting their individual rights, was premised on the belief that the individual at one time possessed the capacity to consent or will be able to in the future.[55] Thus, it was incorrect to apply this doctrine to individuals, such as the mentally retarded, who have never had, nor would have, the capacity to articulate choices.

Several serious problems were enunciated by the Chief Justice. One problem is that third persons are unable to know the wishes of the incompetent individual. Another problem is that the courts, the incompetent, and the third party who makes the decision may have conflicting interests. "For example, a parent seeking sterilization for the incompetent may be motivated by such concerns as illegitimate mentally deficient offspring, and the care and financial support of such offspring."[56]

The Chief Justice concluded her dissent by describing the court's suggested standards and procedural requirements set forth in section 2357 of the Probate Code and in the *Hayes* decision as "an unsatisfactory patchwork of contradictory standards."[57] She contended that

53. *Id.* at 181, 707 P.2d at 786, 219 Cal. Rptr. at 413.
54. *Id.* at 182, 707 P.2d at 787, 219 Cal. Rptr. at 414.
55. *Id.* at 184, 707 P.2d at 788, 219 Cal. Rptr. at 415.
56. *Id.* at 188, 707 P.2d at 791, 219 Cal. Rptr. at 418.
57. *Id.* at 190, 707 P.2d at 792, 219 Cal. Rptr. at 419.

section 2357 was intended for application in entirely different situations and should not be applied in cases such as this one. In addition, she criticized the standards set forth in *Hayes* for "suffer[ing] from all the problems inherent in the application of the procreative choice model and the substituted consent device . . . ."[58] As a result, she found the majority opinion to be both impractical and logically flawed.

## VI. CONCLUSION

The majority decision represents the continuation of a trend toward the careful balancing of the rights of the mentally retarded and the interests of the state. The court recognized that in certain limited circumstances, sterilization would be in the best interest of the mentally retarded individual. Thus, section 2356 of the Probate Code prohibiting sterilization in *all* circumstances is constitutionally overbroad.

Contrary to the arguments presented in the dissenting opinions, the doctrine of substituted judgment recommended by the court is more than merely having the court " 'don the mental mantle of the incompetent' and substitute itself as nearly as possible for the individual in the decision making process."[59] Rather, the court emphasized that certain stringent procedural safeguards must be strictly established and adhered to before consent can be given.

If the analysis presented by the dissenting opinions were followed, the mentally retarded would be barred from obtaining non-therapeutic sterilizations, regardless of whether it was in their best interests. The legislature must adopt a statutory scheme that protects the mentally retarded by balancing the possibility of future abuse against the social needs and concerns of the mentally retarded.

TAMI J. TAECKER

58. *Id.*

59. Superintendent of Belchertown State School v. Saikewicz, 373 Mass. 728, 752, 370 N.E.2d 417, 431 (1977) (quoting *In re* Carson, 39 Misc. 2d 544, 545, 241 N.Y.S.2d 288, 289 (N.Y. Sup. Ct. 1962)).

## IV. CONSTITUTIONAL LAW

### A. *Residential developer required to pay school-impact fees since state School Facilities Act did not preempt local government imposition of such fees:* **Candid Enterprises, Inc. v. Grossmont Union High School District.**

In *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 39 Cal. 3d 878, 705 P.2d 876, 218 Cal. Rptr. 303 (1985), Candid Enterprises, a San Diego condominium developer, petitioned for a writ of mandate to have fees refunded that had been paid under protest. The developer claimed that the School Facilities Act allowed for imposition of fees only for temporary facilities and only under conditions of potential overcrowding. Candid also claimed that it was denied equal protection. It argued that the school district declined to collect fees from new developers because it had been assured of sufficient funds through previous assessments. The court held the writ of mandate to be a proper course of action, and that other remedies did not exist in the absence of an alleged breach of contract. The court further stated that a writ may be used to challenge the validity of legislation.

The main issue was whether the State School Facilities Act, CAL. GOV'T CODE §§ 65970-65981 (West 1983), which permits funding of temporary facilities but has no provision for permanent schools, preempts local law and therefore prevents the district's imposition of such fees for permanent sites. A second issue was whether the district can assess fees to some developers, but not all, and if so, whether this violates the equal protection rights of Candid.

Local legislation is preempted and void if it conflicts with state law. *People ex rel. Deukmejian v. County of Mendocino*, 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). *See also* CAL. CONST. art. 11, § 7. Since the Act contained no express preemption statement, the court looked at the language and intent of the Act to determine if imposition of fees for the construction of permanent facilities was preemptively implied. The court found no implied preemption under any of the three tests it applied, which was contrary to the conclusions reached by both the appellate court and the attorney general. *Candid Enterprises, Inc. v. Grossmont Union High School Dist.*, 150 Cal. App. 3d 28, 197 Cal. Rptr. 429 (1983); 62 Op. Cal. Att'y Gen. 601 (1979).

The court stressed that under the tests it applied preemption is to be implied in three situations: 1) the area is fully covered by general

law and clearly of a state concern; 2) it is partially covered by general law and clearly will not tolerate local action; or 3) it is partially covered by general law and the adverse effect of the local law outweighs the benefit to the government. Under the first test, there was no preemption since the Act only limits fees for temporary facilities and does not provide for fees for permanent facilities, and, therefore, does not fully cover the area. Furthermore, the court held that the language of "shall include, but are not limited to" allowed local assessment for permanent facilities. CAL. GOV'T CODE § 65973(b) (West Supp. 1986).

Preemption fails under the second test because the Act expressly provides for local action by allowing the assessment of school-impact fees. Finally, the third test fails, because the imposition of $23,500 in fees is outweighed by the benefit to the community of having schools funded. Therefore, since preemption is neither express nor implied, local law, which supplants and does not conflict with state law, is presumed valid.

The court also dismissed Candid's equal protection claim using the rational basis test because developers are not a suspect class and development is not a fundamental right. For background on equal protection analysis, see 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 404 (8th ed. 1974 & Supp. 1984). Candid was required in 1980 to pay fees under a 1977 agreement even though other new builders were not assessed fees due to declining school enrollments. The district had maintained its interest in collecting fees under previous agreements, and in 1980, twenty-four such agreements were in effect with potential payments of $4,716,000.

Recognizing the difficulty school districts face in funding potential overcrowding, the court found that the different treatment afforded Candid was reasonable and rationally related to the legitimate economic interest of planning for growth. Therefore, the court held that the fees were lawful and that developers who cause the overcrowding are thus required to pay for it.

CYNTHIA M. WALKER

### B. *A Boy's Club is a business establishment encompassed by the Unruh Civil Rights Act and cannot arbitrarily deny membership to females:* Isbister v. Boys' Club of Santa Cruz, Inc.

#### I. INTRODUCTION

The Unruh Civil Rights Act forbids "business establishments of every kind whatsoever" from discriminating on the basis of sex, race,

color, religion, ancestry, or place of origin.[1] In *Isbister v. Boys' Club of Santa Cruz, Inc.*,[2] the California Supreme Court held that a boys' club is a "business establishment" within the meaning of the Unruh Act, and hence could not arbitrarily discriminate on the basis of sex in denying membership to females. The court's decision could seriously impact the future of similar nonprofit clubs and organizations.

## II. FACTUAL BACKGROUND

The Boys' Club of Santa Cruz, Inc., is a nonprofit corporation affiliated with the Boys' Clubs of America, Inc. The club owns and operates a building which houses an indoor swimming pool, a snack bar, and various game areas. Membership is limited to males between the ages of eight and eighteen. About fifty percent of the club's annual operating budget comes from a trust "unrestricted" as to gender. No other club in the Santa Cruz area contains recreational facilities similar to the Boys' Club in quality or quantity.[3]

Victoria Isbister and several other females were denied access and membership to the club in 1977 solely on the basis of sex. They instituted an action pursuant to the Unruh Act for injunctive and declaratory relief. The trial court found the club's membership policy to be discriminatory, and enjoined the club from denying access of membership to females.[4] The court of appeal reversed, finding that no evidence existed proving that the Boys' Club was a "business establishment" subject to the restrictions of the Unruh Act.[5] The club then appealed.

## III. THE MAJORITY OPINION

### A. *The Boys' Club as a "Business Establishment"*

Justice Grodin[6] began the court's analysis by determining whether

1. "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1982).

2. *Boys' Club*, 40 Cal. 3d 72, 707 P.2d 212, 219 Cal. Rptr. 150 (1985).

3. *Id.* at 77, 707 P.2d at 214-15, 219 Cal. Rptr. at 152-53.

4. *Id.* at 77, 707 P.2d at 215, 219 Cal. Rptr. at 153.

5. Isbister v. Boys' Club of Santa Cruz, Inc., 144 Cal. App. 3d 360, 192 Cal. Rptr. 560 (1983) (opinion withdrawn from official reporter).

6. Justices Broussard, Reynoso, and Chesney concurred in the majority opinion authored by Justice Grodin. Chief Justice Bird filed a separate concurring opinion. Justices Mosk and Kaus filed separate dissenting opinions. Justice Chesney was assigned by the chairperson of the judicial council.

the Boys' Club was a "business establishment" within the meaning of the Unruh Act.[7] The Unruh Act had evolved from an earlier civil rights statute forbidding discrimination in providing "public accommodations."[8] The Unruh Act expanded the statute's reach to all business establishments of any kind, evidencing the legislature's intent to have the Act's scope interpreted "in the broadest sense reasonably possible."[9] Because the Unruh Act expanded protection against discrimination, it clearly encompasses any facility subject to the older "public accommodation" statute.[10]

The court found that nonprofit organizations such as the Boys' Club are "public accommodations" within the meaning of the older civil rights statute.[11] The court analogized this definition to the Federal Civil Rights Act of 1964,[12] which defined "public accommodation" as including places of "exhibition or entertainment."[13] New Jersey courts have also found "places of amusement" to be "places of public accommodation."[14] Because the Boys' Club is a public accommodation which "opens its recreational doors to the entire youthful population of Santa Cruz," it is a "business establishment" within the meaning of the Unruh Act.[15]

The court rejected the argument that "business establishments" include only profit-seeking ventures. The court noted that the profit motive has never been the *sine qua non* of the Unruh Act's coverage.[16] If the legislature had intended to exclude nonprofit organiza-

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7. *Boys' Club*, 40 Cal. 3d at 78, 707 P.2d at 215, 219 Cal. Rptr. at 153.

8. "Emanating from and modeled upon traditional 'public accommodations' legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, retaurants, theaters and the like . . . ." Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 731, 640 P.2d 115, 120, 180 Cal. Rptr. 496, 502 (1982), *cert. denied*, 459 U.S. 858 (1982). *See also In re* Cox, 3 Cal. 3d 205, 211-12, 474 P.2d 992, 995, 90 Cal. Rptr. 24, 27 (1970).

9. Burks v. Poppy Constr. Co., 57 Cal. 2d 463, 468, 370 P.2d 313, 316, 20 Cal. Rptr. 609, 612 (1962).

10. *Boys' Club*, 40 Cal. 3d at 79, 707 P.2d at 216, 219 Cal. Rptr. at 154. *See also* O'Connor v. Village Green Owners Ass'n, 33 Cal. 3d 790, 795-96, 662 P.2d 427, 430-31, 191 Cal. Rptr. 320, 323-24 (1983). At least 40 states and the District of Columbia presently have public accommodation laws. *See* Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443, 445 n.15 (1983).

11. *Boys' Club*, 40 Cal. 3d at 79, 707 P.2d at 216, 219 Cal. Rptr. at 154.

12. "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin." 42 U.S.C. § 2000a(a) (1982).

13. *Id.* § 2000a(b)(3).

14. *See* National Org. for Women v. Little League Baseball, Inc., 127 N.J. Super. 522, 318 A.2d 33 (1974).

15. *Boys' Club*, 40 Cal. 3d at 81, 707 P.2d at 217, 219 Cal. Rptr. at 155. *See* Curran v. Mount Diablo Council of the Boy Scouts, 147 Cal. App. 3d 712, 733, 195 Cal. Rptr. 325, 338 (1983) (business establishments include "all commercial and noncommercial entities open to and serving the general public").

16. "[W]e see no reason to insist that profit-seeking be a *sine qua non* for coverage

tions from the statute's reach, it could have easily drafted an exception into the Act.[17] The court also did not find that forced female participation would interfere with state and federal constitutional rights of association.[18] Moreover, the United States Supreme Court had previously ruled that the right of association does not invalidate statutes designed to end sex-based segregation.[19]

### *B. Application of the Unruh Act*

Justice Grodin next turned to the substantive provisions of the Unruh Act and its application to the Boys' Club. The Unruh Act accords protection against "arbitrary" discrimination.[20] The court rejected plaintiffs' argument that all discrimination against females was arbitrary;[21] it instead adhered to the established rule that exclusion of an entire class was "arbitrary" unless the business establishment contained "specialized facilities for those particularly in need of such services or environment."[22]

The majority did not believe the Boys' Club was a "specialized facility." The facilities it offers are suitable for females as well as males,[23] especially if the club's primary goal is to combat delinquency of both males and females without losing its present effectiveness.[24] The Justice also did not believe funding problems would result from lifting the ban on females as the club's major funding source was not gender restrictive, and the admission of girls could possibly produce revenue from new sources.[25]

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of the act. Nothing in the language or history of its enactment calls for excluding an organization from its scope simply because it is nonprofit." *O'Connor*, 33 Cal. 3d at 796, 662 P.2d at 431, 191 Cal. Rptr. at 324. *See also* Horowitz, *The 1959 California Equal Rights in "Business Establishments" Statute - A Problem in Statutory Application*, 33 SO. CAL. L. REV. 260, 290-91 (1960).

17. *Boys' Club*, 40 Cal. 3d at 82, 707 P.2d at 219, 219 Cal. Rptr. at 157.

18. *See* U.S. CONST. amend. I; CAL. CONST. art. I, § 1.

19. *See* Roberts v. United States Jaycees, 104 S. Ct. 3244 (1984) (compelling Jaycees to accept female members did not abridge male members' rights of intimate and expressive association).

20. *Boys' Club*, 40 Cal. 3d at 86, 707 P.2d at 221, 219 Cal. Rptr. at 159. *See also* CAL CIV. CODE § 51 (West 1982).

21. *Boy's Club*, 40 Cal. 3d at 86-87, 707 P.2d at 221-22, 219 Cal. Rptr. at 159-60.

22. *Marina Point*, 30 Cal. 3d at 743, 640 P.2d at 129, 180 Cal. Rptr. at 510. *See also* 58 Op. Cal. Att'y Gen. 608, 613 (1975).

23. "There is no indication that the crafts, games, counseling programs, and recreational facilities offered by the Club are suited or safe only for males." *Boys' Club*, 40 Cal. 3d at 88, 707 P.2d at 223, 219 Cal. Rptr. at 161.

24. *Id.* at 88-89, 707 P.2d at 223, 219 Cal. Rptr. at 161.

25. *Id.* at 90, 707 P.2d at 224, 219 Cal. Rptr. at 162. The court brushed aside the fact that the Boys' Club stood to lose a $200,000 trust conditioned on the continuation

## IV. THE SEPARATE OPINIONS

### A. *Chief Justice Bird's Concurrence*

Chief Justice Bird authored a concurring opinion mainly to adopt the views of Justice Poche's dissent in the court of appeal.[26] If the profit motive indeed became the touchstone of Unruh Act protection, then groups such as the Ku Klux Klan would be left free to discriminate at their own discretion.[27] Conditioning protection on the amount charged for membership would result in clubs with wealthy patrons unfettered by the Unruh Act.[28] Because the legislature could not have intended to produce such absurd results, the Chief Justice concurred with the majority.

### B. *Justice Mosk's Dissent*

Justice Mosk vehemently dissented because he believed the majority's holding would produce disturbing results.[29] The end of sex-based segregation in youth organizations will result in a culture shock, changing forever the character of scouting groups, athletic organizations, fraternities, sororities, and college dormitories.[30] Justice Mosk would exclude nonprofit groups from the meaning of "business establishments" because they are gratuitous, continuous, and noncommercial.[31]

Justice Mosk found the intent of the club's financial providers to be important. Their charitable donations should be spent as they see fit, not as society sees fit. Plaintiffs are free to solicit their own funds for similar facilities, instead of forcing an existing charitable group to change its own views.[32]

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of its male-only membership policy. It strangely concluded that there was "no evidence of severe, permanent financial danger should the club be forced to comply with the Act." *Id.*

26. *Boys' Club,* 40 Cal. 3d at 91, 707 P.2d at 225, 219 Cal. Rptr. at 163 (Bird, C.J., concurring). *See* Isbister v. Boys' Club of Santa Cruz, Inc., 144 Cal. App. 3d 338, 192 Cal. Rptr. 560, 567 (1983) (Poche, J., dissenting) (opinion withdrawn from official reporter).

27. *Boys' Club,* 40 Cal. 3d at 92, 707 P.2d at 225, 219 Cal. Rptr. at 163 (Bird, C.J., concurring). The profit motive test would allow "the Ku Klux Klan or neo-Nazis to engage in the nonprofit, volunteer and fraternal offering of athletic facilities to some white children to combat the rise in juvenile delinquency." *Boys' Club,* 144 Cal. App. 3d 338, 192 Cal. Rptr. at 570 (Poche, J., dissenting).

28. *Boys' Club,* 40 Cal. 3d at 92, 707 P.2d at 225-26, 219 Cal. Rptr. at 163-64 (Bird, C.J., concurring).

29. *Id.* at 93, 707 P.2d at 226, 219 Cal. Rptr. at 164 (Mosk, J., dissenting).

30. *Id.* at 93-94, 707 P.2d at 226-27, 219 Cal. Rptr. at 164-65. The Justice noted that numerous girls' clubs filed amici curiae briefs on behalf of the Boys' Club. *Id.* at 93, 707 P.2d at 226, 219 Cal.Rptr. at 164.

31. *Id.* at 95-97, 707 P.2d at 227-28, 219 Cal. Rptr. at 165-66.

32. *Id.* at 98, 707 P.2d at 229, 219 Cal. Rptr. at 167.

### *C. Justice Kaus' Dissent*

Justice Kaus believed that the exclusion of females from the Boys' Club was reasonable, and therefore not arbitrary, under the Unruh Act.[33] Unlike the majority, Justice Kaus found the Boys' Club to be open to a small, and not broad, segment of the population: males between the ages of eight and eighteen. Even if the club does discriminate against a "broad segment," its concentration on curing male delinquency is entirely reasonable.[34] Because courts cannot force their own contrary theories upon those "who have devoted considerable time, energy, devotion, and financial resources to the problem," Justice Kaus would affirm the court of appeal.[35]

## V. CONCLUSION

The California Supreme Court's decision in *Isbister* was a natural extension of the court's continuing desire to promote equal rights. Whether Justice Mosk's fears will come to pass remains to be seen, but any upheaval of inherently discriminatory social habits must be seen as more positive than negative in the long run.

MICHAEL R. GRADISHER

## C. *Sex-based price discounts violate the Unruh Civil Rights Act:* **Koire v. Metro Car Wash.**

In *Koire v. Metro Car Wash,* 40 Cal. 3d 24, 707 P.2d 195, 219 Cal. Rptr. 133 (1985), the plaintiff challenged the practice of several Orange County bars and car washes which offered special "Ladies Day" or "Ladies Night" discounts for admission or services. Those discounts were based solely upon the sex of the patron and were offered as promotionals to increase revenue at the defendants' businesses. During the promotions, the male plaintiff patronized defendants' businesses, demanding that the terms of these "Ladies" promotions be equally applied to him. When defendants refused, plaintiff filed suit claiming that these sex-based discount promotions violated the Unruh Civil Rights Act. CAL. CIV. CODE § 51 (West 1982) (hereinafter the Act). *See* Comment, *The Unruh Civil Rights Act: An Uncertain Guarantee,* 31 UCLA L. REV. 443 (1983). The trial court granted

33. *Id.* at 98, 707 P.2d at 230, 219 Cal. Rptr. at 168 (Kaus, J., dissenting).
34. *Id.* at 99, 707 P.2d at 230, 219 Cal. Rptr. at 168-69.
35. *Id.* at 101, 707 P.2d at 232, 219 Cal. Rptr. at 170.

judgment in favor of the defendants, finding no violation of the Act. The plaintiff appealed.

In an opinion written by Chief Justice Bird, the supreme court reversed, finding instead that the Act prohibits such sex-based price discounts. The Act states that, "All persons within the jurisdiction of this state are free and equal, and no matter what their sex . . . are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever." CAL. CIV. CODE § 51 (West 1982). The court holds the Act to be clear and unambiguous in its application to sex-based discrimination. *See generally* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 423 (8th ed. 1984). The Act is liberally interpreted to go beyond prohibition of practices which exclude certain classes or groups totally from businesses, to include as discriminatory price discounts given to certain classes or groups.

The court distinguished certain situations in which the Act has been held inapplicable to business practices. These are rare situations in which the nature of the business or facility provided allows for exclusion of certain patrons who may have a detrimental effect upon the business, its specialized services, or themselves. *See e.g., Wynn v. Monterey Club,* 111 Cal. App. 3d 789, 168 Cal. Rptr. 878 (1980) (gambling establishment). These rare situations have been exempted from the Act only when a strong public policy favors such an exemption. The defendants in the present case attempted to show that the promotional discounts offered to patrons were in the same way substantiated by strong business and social policies. The court however reduced this argument to largely an economic rationale (reduced rates in favor of women resulted in greater profits to the businesses involved) coupled with a very weak social policy (promoting more interaction between the sexes). These factors were not compelling enough to warrant an exception to the Act.

Although the defendants argued that the discount promotions caused no injury to either men nor women since no embarrassment or discouragement of patronage by either sex was purposed, the Act does not require intent to discriminate nor actual damage for proof of discriminatory conduct. The court found both actual injury in the price differentials plaintiff was forced to pay and in the hostility he encountered from defendants unwilling to treat him as an equal patron. Additionally, the court recognized that sex-based price differentials could potentially reinforce sexual stereotypes, something the court would not hereby promote. *See,* Kanowitz, *"Benign" Sex Discrimination: Its Troubles and Their Cure,* 31 HASTINGS L.J. 1379, 1394 (1980). *But see Maclean v. First Northern Industries,* 96 Wash. 2d 338, 635 P.2d 683 (1981) (upholding the Seattle Supersonics' "La-

dies Night"). The court also did not agree that the elimination of sex-based discounts will end all money-making promotions. Instead the court contends that non-discriminatory promotions will be further encouraged.

California, the court contends, has been at the forefront of equal protection laws, mandated by the strong public policy in favor of equal treatment of men and women. *See e.g.,* CAL. LAB. CODE § 1197.5 (West Supp. 1986) (Equal Pay Act). Social policy has recognized exceptions for children and the elderly, entitled to similar price discounts in various situations, but no analogous justification warrants discriminatory treatment between men and women. Although other courts have hesitated to attack sex-based discount practices which they have found of little harm or importance, the California court holds that all such discounts must provide advantages and privileges to *all* customers, regardless of sex, in order to be sufficient under law.

BRENDA L. THOMAS

D. *In a misdemeanor prosecution, the right to a speedy trial guaranteed by the sixth amendment of the U.S. Constitution attaches when a complaint is filed and prejudice to the accused is presumed when the time between the filing of the complaint and the arrest of the defendant exceeds one year:* **Serna v. Superior Court.**

## I. INTRODUCTION

In *Serna v. Superior Court,*[1] the court held that a delay in excess of four years, from the time in which a misdemeanor complaint is filed until the accused is arrested, presumes prejudice to the accused by violating his sixth amendment right to a speedy trial.[2] This shifts the burden to the prosecution to prove that the delay was "reasonable." The court also held that the petitioner's state constitutional right to a speedy trial is not violated until the accused shows actual prejudice.[3] It further held that the sixth amendment and state con-

1. 40 Cal. 3d 239, 707 P.2d 793, 219 Cal. Rptr. 420 (1985). Justice Grodin wrote for the majority, with Justices Mosk, Broussard, and Reynoso concurring. Chief Justice Bird wrote a separate concurring and dissenting opinion. Justice Lucas wrote a separate dissenting opinion with which Justice Kaus concurred.

2. *See* U.S. CONST. amend. VI.

3. *See* CAL. CONST. art. I, § 15.

stitutional right to a speedy trial attach to a defendant when the complaint is filed or the defendant is arrested, whichever occurs first.

## II. FACTUAL BACKGROUND

A complaint was filed against the defendant on September 29, 1978 for embezzlement.[4] The offense was alleged to have been committed on September 8th or 9th, 1978.[5] Petitioner was subsequently arrested on February 16, 1983, almost four and one-half years later. The defendant moved to dismiss the case for lack of speedy prosecution in violation of his state and federal constitutional rights. In his declaration, he stated the following facts: 1) he had no knowledge of the charge prior to his arrest, he had lived with his grandmother from the date of the alleged incident until December 1978, when he moved to Montebello, California; 2) he had left a forwarding address with the United States Post Office; and 3) his father and grandmother knew his whereabouts at all times.[6] He also stated that he had no recollection of his activities on September 8, 1978, and that witnesses who could testify on his behalf might exist, but he was unaware of their names or whereabouts.[7] He further alleged that he had been available at all times for service of process and in no way caused delay in the prosecution.

The municipal court denied the motion to dismiss on the ground that there was an inadequate showing of prejudice. This was due to the fact that the declaration neither named the witnesses, nor did it state why they would be unavailable at trial.[8] The defendant then sought a writ of mandate in superior court to compel the municipal court to grant the motion to dismiss. The superior court refused to issue the writ. The defendant then appealed to the supreme court pursuant to California Civil Procedure Code section 904.1(a).[9] The

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4. CAL. PENAL CODE § 508 (West 1970) provides:

> Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement.

*Id.*

5. The defendant evidently was working his father's shift as a gas station attendant at a service garage, where the defendant had been previously employed. The prosecution alleged that the defendant failed to deposit $995.00 in the station's safe which was the amount of gasoline sold during his shift.

6. *Serna*, 40 Cal. 3d at 247, 707 P.2d at 797, 219 Cal. Rptr. at 424.

7. *Id.*

8. *Id.* at 248, 707 P.2d at 798, 219 Cal. Rptr. at 425.

9. Section 904.1(a) states:

> An appeal may be taken from a superior court in the following cases: (a) from a judgment, except (1) an interlocutory judgment . . . (2) a judgment of contempt which is made final and conclusive by section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) *a judgment granting or denying a petition for issuance of a writ of manda-*

court granted an alternative writ to review the matter.

## III. ANALYSIS

### *A. Majority Opinion*

#### 1. The California Constitution

The majority analyzed the question of whether or not the petitioner was denied his right to a speedy trial under both the California and United States Constitutions. Article I, section 15 of the California Constitution provides that "[t]he defendant in a criminal cause has the right to a speedy public trial. . . ."[10] The court held that a complaint in a misdemeanor prosecution triggers the defendant's right to a speedy trial.[11] The court then reached the issue whether the delay in prosecution was "reasonable." The court stated that delays necessary to locate the accused or witnesses, or to conduct further investigation and gather evidence, were not unreasonable unless the prejudicial effect on the defendant outweighed the justification for the delay.[12] This balancing test weighs the relative interests of the parties.

The court, when reviewing the state constitutional grounds, stated that the burden was on the defendant to show actual prejudice attributable to the delay in arrest. This statement was based on the court's holdings in *Crocket v. Superior Court*,[13] and *Scherling v. Superior Court*,[14] which stood for the proposition that the defendant must show actual prejudice before the court will utilize the balancing test.[15] This prerequisite is contrary to the requirements for invoking

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*mus or prohibition directed to a municipal court or a justice court or the judge or judges thereof. . . .* CAL. CIV. PROC. CODE § 904.1(a) (West Supp. 1986) (emphasis added).

10. CAL. CONST. art. I, § 15.

11. *Serna*, 40 Cal. 3d at 248, 707 P.2d at 798, 219 Cal. Rptr. at 425. *See also* R. ZIMMER & R. CALHOUN, JR., CALIFORNIA CRIMINAL LAW PRACTICE SERIES — SPEEDY TRIAL: PRACTICE AND PROCEDURES § 1.3 at 4 (1981) ("[i]t is now established under case law interpreting the California speedy trial provision that an individual becomes an accused at the time of the filing of either a felony or misdemeanor complaint or an arrest, whichever occurs first.").

12. *Serna*, 40 Cal. 3d at 249, 707 P.2d at 798, 219 Cal. Rptr. at 425. *See also* Jones v. Superior Court, 3 Cal. 3d 734, 478 P.2d 10, 91 Cal. Rptr. 578 (1970) (holding that the prejudicial effect of the delay on the accused must be weighed against the justification for the delay).

13. 14 Cal. 3d 433, 535 P.2d 321, 121 Cal. Rptr. 457 (1975).

14. 22 Cal. 3d 493, 585 P.2d 219, 149 Cal. Rptr. 597 (1978).

15. *Serna*, 40 Cal. 3d at 249, 707 P.2d at 798-799, 219 Cal. Rptr. at 425-426.

the sixth amendment's balancing test. In *Barker v. Wingo*,[16] the United States Supreme Court held that a delay in prosecution can be presumptively prejudicial and the balancing process must be applied.[17] Therefore, the court held in order to invoke the protection of the California Constitution's right to a speedy trial, the defendant must show actual prejudice, even though prejudice may be presumed under the sixth amendment's right to a speedy trial.[18]

In determining whether the defendant had met his burden, the court reviewed the facts which might show prejudice. The court stated that although a significant delay may allow an inference that there was prejudice, as memories may have faded and witnesses may have disappeared, these facts do not necessarily show prejudice. In the present case, the defendant stated only that he had no recollection of his activities on the date of the alleged incident and that he was unaware of the names or whereabouts of certain people that could possibly be witnesses. The court agreed with the trial court's decision that these facts did not show actual prejudice because the defendant did not even attempt to refresh his memory.[19] Therefore, the court held that there was no violation of petitioner's right to a speedy trial as provided in California Constitution article I, section 15.

2. The United States Constitution

The sixth amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."[20] In *United States v. MacDonald*,[21] the Supreme Court held that the sixth amendment right to a speedy trial only attaches upon the filing of accusatory pleadings. In *United States v. Marion*,[22] the court referred to the filing of an indictment or

16. 407 U.S. 514 (1972).

17. *Id.* at 530.

18. Here the court avoided an issue which it should have addressed. The sixth amendment right to a speedy trial applies to the states through the fourteenth amendment. *See* Klopfer v. North Carolina, 386 U.S. 213 (1967). The California Supreme Court in *Serna* held that the sixth amendment right to a speedy trial attaches to the accused when the complaint is filed. The court further held that under the sixth amendment, prejudice can be presumed, but under the California Constitution it cannot be presumed. In effect, the California Constitution provides less protection than the United States Constitution. While the states can afford greater protection than the federal constitution, they generally cannot afford less. At least insofar as the state constitutional provision gives less protection than the federal provision, it is probably invalid.

19. The police report which listed the names of potential witnesses was available. *Serna*, 40 Cal. 3d at 250, 707 P.2d at 799, 219 Cal. Rptr. at 426.

20. U.S. CONST. amend. VI.

21. 456 U.S. 1 (1982).

22. 404 U.S. 307 (1971).

an information as the events which would trigger the sixth amendment's right to a speedy trial protection.

The prosecution argued that the delay in the case was not an issue because a misdemeanor complaint is not the type of accusatory pleading which triggers sixth amendment rights upon filing. It relied on the language of the Court in *Marion*, which stated an indictment or information was the type of accusatory pleading contemplated by the sixth amendment.

Rejecting this contention, the California Supreme Court said that "[t]he Sixth Amendment guarantees the right to a speedy trial to the accused in 'all criminal prosecutions.' "[23] The court also pointed out that elsewhere in *Marion*, the United States Supreme Court used the phrase "indictment, information, or other formal charge."[24] In further support of the holding that the filing of a misdemeanor complaint triggers sixth amendment speedy trial guarantees, the court stated that the filing of the complaint, even if the defendant is unaware of it, may disrupt his life in that it may affect his ability to get credit, a job, or be admitted to a university.[25] Since the sixth amendment right to a speedy trial is triggered by the filing of a misdemeanor complaint, it was necessary for the court to determine whether the delay was sufficiently long that a presumption of prejudice would be found, thus shifting the burden to the prosecution to show a "reasonable" delay.

The court held that the prearrest delay which was a time period of over four years, was sufficient to invoke a presumption of prejudice. The court then articulated a test concerning the presumption of prejudice: "A court may appropriately conclude that delays between the filing of a complaint and the arrest of a defendant which exceed the typical one-year period of limitation generally applicable to misdemeanors are unreasonable and thus presumptively prejudicial within the contemplation of the speedy trial guarantee."[26] Therefore, since the defendant's prearrest delay was longer than one year, prejudice

23. *Serna*, 40 Cal. 3d at 255, 707 P.2d at 803, 219 Cal. Rptr. at 430.

24. *Id.* at 256, 707 P.2d at 803, 219 Cal. Rptr. at 430 (quoting *Marion*, 404 U.S. at 321).

25. This is because a misdemeanor complaint is a public document and according to the California Attorney General, local government may publish the names of persons for whom arrest warrants have been issued. *See* 67 Op. Att'y Gen. No. 83-906 (1984).

26. *Serna*, 40 Cal. 3d at 252, 707 P.2d at 801, 219 Cal. Rptr. at 428. This is because the statute of limitations reflects a legislative construction of the speedy trial guarantee. *Id. See* 40 Cal. 3d 702a (1985) (modification of original opinion).

to the defendant was presumed. This puts the burden on the prosecution to show that the delay was "reasonable." This determination must meet the requirements set forth in *Barker v. Wingo,* which states, "the court must balance the relevant factors — the length of the delay, the defendant's assertion of the right, and the prejudice to the defendant . . . ."[27] Accordingly, the court issued a peremptory writ directing the superior court to vacate its order denying the petition for a writ of mandate. The court then ordered the issuance of the writ of mandate to the municipal court ordering further proceedings consistent with its opinion.

### *B. Separate Opinions*

Chief Justice Bird wrote a separate concurring and dissenting opinion. She agreed with the majority's analysis of the right to a speedy trial under the federal constitution, but disagreed on the analysis of the state constitutional right to a speedy trial. She stated that the California constitutional right to a speedy trial reflects the "letter and spirit" of the sixth amendment[28] and should therefore provide the same degree of protection. She questioned whether the court consciously chose to construe the state's speedy trial right to provide less protection than the federal right in its holding in *Scherling v. Superior Court.*[29] In her opinion, the language in *Scherling* evolved from earlier cases in which the speedy trial right did not apply.[30]

Justice Lucas authored a separate dissenting opinion and Justice Kaus concurred. He did not believe that a misdemeanant's federal speedy trial rights attach upon the filing of a complaint when no arrest has occurred.[31] Justice Lucas believed the majority's holding to be contrary to the supreme court's holding in *People v. Hannon,*[32] and further stated that the sixth amendment right to speedy trial guarantees are triggered only when there is a "realistic probability of (1) pretrial incarceration, (2) anxiety to the accused, or (3) public scorn arising from widespread knowledge of the charges."[33] None of these probabilities were evident in this type of case. Furthermore, he

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27. *See Barker,* 407 U.S. 514, 530 (1972).

28. *Serna,* 40 Cal. 3d at 264, 707 P.2d at 810, 219 Cal. Rptr. at 437 (Bird, C.J., dissenting) (quoting People v. Wilson, 60 Cal. 2d 139, 144 n.2, 383 P.2d 452, 456 n.2, 32 Cal. Rptr. 44, 48 n.2 (1963) (quoting Harris v. Municipal Court, 209 Cal. 55, 60, 285 P. 699, 701 (1930)). *See also* Barker v. Municipal Court, 64 Cal. 2d 806, 810-11, 415 P.2d 809, 812, 51 Cal. Rptr. 921, 924 (1966).

29. 22 Cal. 3d 493, 585 P.2d 219, 149 Cal. Rptr. 597 (1978).

30. *Serna,* 40 Cal. 3d at 265, 707 P.2d at 810, 219 Cal. Rptr. at 437 (Bird, C.J., dissenting).

31. *Id* at 270, 707 P.2d at 814, 219 Cal. Rptr. at 441 (Lucas, J., dissenting).

32. 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 885 (1977) (holding that the filing of a complaint does not trigger federal speedy trial guarantees).

33. *Serna,* 40 Cal. 3d at 271, 707 P.2d at 814, 219 Cal. Rptr. at 441 (Lucas, J., dissenting).

was unpursuaded that the defendant's life would be disrupted by the mere filing of a misdemeanor complaint.[34]

## IV. CONCLUSION

The court's holding that the sixth amendment right to a speedy trial attaches upon the filing of either a misdemeanor complaint or arrest, expands protection afforded to the criminally accused. Prior to this determination, California courts would have held to the contrary.[35] This expansion is a significant change in the law, which now will presume prejudice whenever a misdemeanor complaint is filed and the accused is not arrested within one year. The holding will also relieve the defendant of the burden to show actual prejudice from the delay and will shift the burden of a showing of reasonableness to the state.

JAMES G. BOHM

### E. *New statutory plan increasing the penalty for prison misbehavior by reducing "good behavior credits" does not violate the ex post facto clauses of the United States or California Constitutions when applied to criminals who were convicted prior to the enactment of the new plan:* In Re Ramirez.

In the case of *In Re Ramirez*, 39 Cal. 3d 931, 705 P.2d 897, 218 Cal. Rptr. 324 (1985), the court held that the 1982 amendments to California Penal Code sections 2931 and 2932 (hereinafter "the 1982 amendments"), which increase the penalty for prison misbehavior, did not violate the *ex post facto* clauses of the United States and California Constitutions. CAL. PENAL CODE §§ 2931, 2932 (West Supp. 1985); U.S. CONST. art. I, § 10; CAL. CONST. art. I, § 9 (hereinafter the *ex post facto* clauses). The petitioner contested his imprisonment and conviction for acts which occurred prior to the enactment of the 1982 amendments.

Prior to the 1982 amendments, Penal Code sections 2931 and 2932 allowed prisoners to reduce their effective prison sentence by obtaining "good behavior credits" and "participation credits." If the inmate refrained from certain specified acts while in prison, he would receive "good behavior credits" in the amount of three months for

34. *Id.* at 275, 707 P.2d at 817-818, 219 Cal. Rptr. at 444-45 (Lucas, J., dissenting).
35. *See* People v. Hannon, 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 885 (1977).

every eight months served. If he participated in certain designated activities, he would obtain one month of "participation credits" for each eight month period served. The "good behavior credits" were subject to forfeiture in the amount of 15, 30, or 45 days if the prisoner committed a proscribed act. Thirty days of "participation credits" would be lost if the inmate failed to participate in designated activities. The maximum penalty for any eight month period was a loss of ninety days of "good behavior credits" and thirty days of "participation credits."

The 1982 amendments changed the prior law in several respects. First, they completely restructured the type and amount of credits which could be earned. This part of the 1982 amendments was optional for those who were convicted prior to its enactment and the petitioner in this case chose not to be governed by it. For those inmates, like the petitioner, who opted not to have the new "plan" apply, the 1982 amendments increased the number of "good behavior credits" which would be forfeited. Under the new plan, a prisoner could lose "good behavior credits" for the commission of an act which could be prosecuted as a felony, misdemeanor, or any act described by the Department of Corrections as a "serious disciplinary infraction" in the amount of 180, 90, and 30 days respectively. *See* CAL. PENAL CODE § 2931 (West Supp. 1985).

In rejecting the petitioner's contention that the 1982 amendments violated the *ex post facto* clauses, the court used the test articulated in *Weaver v. Graham,* 450 U.S. 24 (1981). Under *Weaver,* a statute violates the *ex post facto* clauses if it is retrospective and disadvantageous to the offender. The court had no difficulty finding that the statute was disadvantageous to the petitioner. This finding was based on the fact that the acts which could result in a forfeiture had been expanded, the amount of credits which could be forfeited had been increased, and the limit on credits which could be forfeited had been deleted. However, the court failed to find that the 1982 amendments were retrospective, and thus held that the 1982 amendments did not violate the *ex post facto* clauses. For a statute to be retrospective, it must apply to acts occurring before its enactment and it must substantially alter the consequences and punishment of a previously committed crime.

Although the petitioner was imprisoned for an offense committed prior to the enactment of the 1982 amendments, the increased sanctions were imposed only because of his prison misconduct which occurred after the amendments became effective. The court held that the change in sanctions was due to the conduct which occurred during the petitioner's imprisonment. The new conduct did not relate to the original crime and was therefore not retrospective under *Weaver.*

However, if the statute reduced the amount of "good behavior credits" which could ultimately have been earned, then the court probably would have found the amendments violative of the *ex post facto* clauses.

The court further stated in dictum that even if the 1982 amendments were retrospective, the *ex post facto* clauses really do not apply to the case at hand, because the increase in the forfeiture amount of "good behavior credits" was not a punitive condition outside the sentence, but was only a prison condition which merely changed one aspect of the petitioner's life in prison. Additionally, the court stated that it would not be feasible to run a prison where inmates were being punished differently for the same offense.

JAMES G. BOHM

## V. CONTRACTS

*A willfully defaulting vendee who has substantially performed has an absolute right of redemption with regard to an installment land sale contract:* **Petersen v. Hartell.**

### I. INTRODUCTION

In *Petersen v. Hartell*,[1] the court determined that a strong policy against unjust forfeiture justifies giving a willfully defaulting vendee the absolute right to redeem an installment land sale contract. The vendee may in certain situations obtain specific performance in exchange for the vendee's payment of the entire balance due under the contract, plus damages. The requirement that the vendee pay in full as a prerequisite to specific performance of the contract (as distinguished from a claim for reinstatement of the present contract terms) assures that vendor need no longer rely upon vendee's future performance and therefore gives both vendor and vendee the benefit of their bargain. Alternatively, a vendor may seek the termination of a vendee's contract interest in the property through formal foreclosure sale or strict foreclosure. However, absent these formal court proceedings, a vendor is prohibited from disregarding the vendee's interest in the property and their contract relationship must stand.

1. 40 Cal. 3d 102, 707 P.2d 232, 219 Cal. Rptr. 170 (1985). Justice Reynoso wrote for the majority. Justices Grodin, Broussard, and Retired Associate Justice Kaus, sitting under assignment, concurred. Chief Justice Bird concurred and dissented. Justice Mosk filed a dissenting opinion, to which Justice Lucas concurred.

Should the vendee fail to render payment to the vendor in full within a reasonable time, the vendee will have no further property interest under the contract and the vendor must return the vendee's previous installment payments due vendee as restitution.

## II. THE FACTUAL BACKGROUND

The defendant was administratrix of the estate of Juanita Gaspar. Mrs. Gaspar owned a 160-acre tract of land which she gave her grandchildren the opportunity to acquire. Kathy Petersen and her husband Richard entered into an agreement with Mrs. Gaspar to purchase approximately six acres for $9,612, payable in $50 monthly installments. The agreement contained no provisions for default remedies, nor did it make time of the essence. Mrs. Gaspar, who was dependent upon the payments for support, received 58 out of 65 payments due between November 1967 and March 1973. In April 1973, the Petersens separated and the payments ceased. Mrs. Petersen then spoke with her grandmother, who assured her she could could "get by." Over two years later, when Mrs. Petersen sent her grandmother $250 in back payments, Mrs. Gaspar's attorney returned the check and informed Mrs. Petersen that the contract was terminated. In September 1976, Mrs. Petersen again attempted to make back payments with the same result. After Mrs. Gaspar's death in October 1976, Richard Petersen and his two minor children, through their guardian ad litem (hereinafter vendee) sued Hartell, Gaspar's administratrix, (hereinafter vendor) for specific performance, declaratory relief, damages, and to quiet title to an easement of necessity. The vendee desired to tender the entire contract balance due in exchange for a deed to the property.

In a nonjury trial, the court found plaintiff vendee's failure to tender the balance due in a timely manner and the subsequent breach of contract as willful, thereby denying their request for specific performance. The court found the defendant vendor entitled to restitution of the property, but required the vendor to make restitution of $2,900 plus interest for past installment payments made by the vendee.

## III. THE MAJORITY OPINION

Historically, a defaulting vendee could obtain relief only if the default occurred without fraud, negligence, or willful breach of contract duty.[2] However, in 1951 in *Freedman v. The Rector,*[3] the court deter-

2. CAL. CIV. CODE § 3275 (West 1970). The problem presented by this case was first examined in Corbin, *The Right of a Defaulting Vendee to the Restitution of Installments Paid,* 40 YALE L. J. 1013 (1931).

3. 37 Cal. 2d 16, 230 P.2d 629 (1951). *Freedman* held that section 3275 of the Civil

mined that to be in accord with the general contract policy excluding punitive damages,[4] and due to the court's aversion to enforcement of penalties, forfeiture,[5] or liquidated damages,[6] the court's anti-forfeiture policy must necessarily confer the right of specific performance upon willfully defaulting vendees in certain cases.[7] The court precluded any unjust enrichment to vendor (the title holder or offeror of the bargain) through the act of a defaulting vendee (the offeree or a party paying monthly installments) by requiring the vendor to make restitution to the vendee of that part of installments paid in excess of the vendor's damages for the breach.[8] However, the court reasoned that this restitution alone could often not fairly compensate the vendee for loss of the contract and opportunity to completely perform.[9] Therefore in the present case, the court attempted to fashion an equitable remedy,[10] which will uphold the integrity of the bargain yet protect the interests of both vendor and vendee.

The court also stated that for specific performance, a plaintiff must properly plead that the contract was just, reasonable, and made for sufficient consideration to obtain the remedy of specific performance.[11] The defendant may then use any available equitable defense, for example by offering proof of plaintiff's unclean hands,[12] or

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Code was not the exclusive source of relief for forfeiture. CAL. CIV. CODE § 3275 (West 1970).

4. CAL. CIV. CODE § 3294 (West Supp. 1986).

5. CAL. CIV. CODE § 3369 (West Supp. 1986).

6. CAL. CIV. CODE § 1671 (West 1985).

7. Although in *Freedman*, 307 Cal. 2d 16, 230 P.2d 629 (1951), the court could not provide specific performance as a remedy since the vendor had already sold the property to an innocent third party, the court in this decision still applies the underlying policy promulgated in *Freedman*. For a further discussion of antiforfeiture policy, see J. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS § 3.60 (1970); *see also* D. AUGUSTINE & S. ZARROW, 5 CALIFORNIA REAL ESTATE LAW AND PRACTICE ch. 122 (1985) (antideficiency legislation and its effects).

8. *Freedman*, 37 Cal. 2d at 20-21, 230 P.2d at 631-32. *See generally* D. AUGUSTINE & S. ZARROW, *supra* note 7, § 113.91.

9. *Petersen*, 40 Cal. 3d at 109, 707 P.2d at 236, 219 Cal. Rptr. at 174. *See, e.g.*, Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367 (1949) (vendee who had defaulted through simple negligence was entitled to reinstatement of the contract).

10. For a general overview of this complex area of the law, see 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §§ 61-63 (1974 & Supp. 1984); *see also* D. AUGUSTINE & S. ZARROW, *supra* note 7, ch. 113 (installment land contracts); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES § 12.14 (1973); J. HETLAND, *supra* note 7; J. HETLAND, SECURED REAL ESTATE TRANSACTIONS (1974).

11. CAL. CIV. CODE § 3391 (West 1970).

12. *See generally* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* §§ 8-9 (1974 & Supp. 1984).

laches, to oppose such relief.[13] The defendant must still be granted the benefit of the bargain.[14] The court found that the lower court failed to make a determination of these issues.[15] However, the supreme court determined that these issues should be resolved in favor of the plaintiff-vendee,[16] and this determination satisfied the threshold requirements for specific performance of the contract. The lower court distinguished the present case from *MacFadden v. Walker,*[17] a case in which specific performance was granted to a willfully defaulting vendee. The lower court's distinctions were held to be immaterial and an improper basis upon which to deny specific performance in this case.[18] Specifically, the court stated that although the property is unoccupied and unimproved, the contract was silent as to right of possession. Furthermore, although the installments paid amounted to a smaller proportion of the purchase price than in *McFadden,* the vendee's payments "constituted sufficient part performance to qualify them for equitable relief regardless of protection."[19]

The court's power to grant specific performance is discretionary.[20] It found that the trial court had erred by seriously considering the vendee's erratic and delinquent payments[21] and on that basis denied specific performance. The supreme court recognized the vendee's absolute right of redemption by virtue of their substantial part performance[22] and the vendor's notice of contract termination. This absolute right is based upon the following rationale: 1) a vendee should be given a reasonable opportunity to complete performance; 2) equity should not be used to enforce a penalty or forfeiture; and 3) since a vendor retained legal title to the property merely as security for payment, payment in full will necessarily fulfill his expectation of

13. *Id.* §§ 14-17.

14. CAL. CIV. CODE § 3386 (West 1970).

15. These issues were, however, discussed in a similar case, Macfadden v. Walker, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971), which is used as a guide by this court to present the applicable issues and contrast the facts.

16. Using the trial court's memorandum of intended decision as a basis, the court found no undue influence by vendees as the vendor/decedent herself knowingly set the contract terms and price. Consideration was also adequate. The adequacy of the consideration was shown through the parties' relationship and the object of the contract.

17. 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971). *See also Recent Decisions, Vendor and Vendee — Specific Performance,* 5 LOY. L.A.L. REV. 435 (1972) (McFadden v. Walker).

18. *Petersen,* 40 Cal. 3d at 111, 707 P.2d at 238, 219 Cal. Rptr. at 176.

19. *Id.*

20. Pasqualetti v. Galbraith, 200 Cal. App. 2d 378, 382, 19 Cal. Rptr. 323, 326 (1962).

21. The Petersens made only 58 out of 65 payments and did not attempt to make back payment until over two years later, paying at that time only $250 out of the $1,800 balance owed.

22. *See infra* notes 30-36 and accompanying text for Chief Justice Bird's criticism of this point.

the contract.[23] A vendor, however, should not be forced to wait indefinitely for payment. The court stated that a reasonable time in which vendee must pay the contract balance, plus costs, or lose the property, should be determined.

The court specifically rejected the conclusion drawn in *Bartley v. Karas*[24] and other similar cases which held that a vendee's absolute right to redemption is conditioned upon a balancing of equities including the seriousness of the vendee's default.[25] The court instead held that where a vendee has made substantial payments on or improvements of property under an installment land sale contract, despite later willful default of the payments, the vendee maintains an unconditional right to complete the purchase of the property, regardless of the seriousness factor. The vendee retains the duty to pay the vendor's damages or interest, if ordered by the court.

The lower court, again basing its conclusions upon a *McFadden*-type analysis and therefore finding a lack of equity in this case, mistakenly concluded that the vendor had a right to nonjudicial foreclosure of the property. This action precluded the vendee's absolute right of redemption. However, the supreme court found that the vendor maintained only a mere security interest in the property.[26] The court then interpreted California Civil Code section 2985.1[27] to include vendee's transaction. The court prohibited the vendor from terminating its contractual relationship with the vendee until the title was conveyed to the vendee or a foreclosure sale or strict foreclosure proceeding was concluded.[28]

Finally, the court refused to further the costly and timely task of

23. The court adopts the law and draws conclusions from the development of a long line of cases in equity beginning with Keller v. Lewis, 53 Cal. 113 (1878). Justice Mosk's dissent criticizes the majority's interpretation of the *Keller* line of cases and attempts to distinguish the treatment of the present case from the redemption granted vendees in the *Keller* line of cases. *Petersen*, 40 Cal. 3d at 122-23, 707 P.2d at 246, 219 Cal. Rptr. at 184.

24. 150 Cal. App. 3d 336, 197 Cal. Rptr. 749 (1983). The court also specifically disaffirmed Kosloff v. Castle, 115 Cal. App. 3d 369, 171 Cal. Rptr. 308 (1981).

25. *Petersen*, 40 Cal. 3d at 114, 707 P.2d at 240, 219 Cal. Rptr. at 178 (quoting *Bartley*, 150 Cal. App. 3d at 344, 197 Cal. Rptr. at 754-55).

26. *Petersen*, 40 Cal. 3d at 115, 707 P.2d at 241, 219 Cal. Rptr. at 179.

27. CAL. CIV. CODE § 2985.1 (West 1974).

28. The court extensively discusses foreclosure sale remedies available to vendors faced with vendee's breach of a land sale contract. *Petersen*, 40 Cal. 3d at 115 n.5, 707 P.2d at 241 n.5, 219 Cal. Rptr. at 179 n.5. For a further discussion, see Note, *Reforming the Vendor's Remedies for Breach of Installment Land Sale Contracts*, 47 SO. CAL. L. REV. 191 (1973); Note, *Contracts: Forfeiture Clauses: Relief to Vendee in Default in California*, 40 CALIF. L. REV. 593 (1952).

settling land installment contract disputes.[29] The court noted that similar suits to quiet title could be handled in much simpler terms, avoiding costs and delay. Similarly, suits such as this, which really ask for redemption of the vendee's interest in real property rather than for specific performance, can in similar cases be simplified by eliminating the seriousness of vendee's default as a factor. The lower court's judgment in favor of the defendant/vendor was reversed.

## IV. THE CONCURRENCE AND DISSENT

Chief Justice Bird's concurrence and dissent[30] focused upon the majority's finding that vendees must have paid a "substantial part of the purchase price"[31] in order to maintain a right of redemption. The Chief Justice agreed that an unconditional right to redemption should be given most willfully defaulting vendees under land installment contracts, however she felt that the prerequisite of substantial payment is unnecessary to this holding.

Historically, substantial payment was required only in cases of reinstatement of the contract, not redemption.[32] In this case the vendee had deposited the full balance of the purchase price plus interest with the court and the court had no need to fear vendee's nonpayment or future delinquency. An assurance of future payment evidenced by past payment was therefore unnecessary to protect the vendor's interest, and the majority's holding that the vendees must have paid a substantial portion of the purchase price was unnecessary. Chief Justice Bird advocated treating land installment contracts the same as mortgages[33] by using an approach analogous to California Civil Code section 2924.[34] This approach would allow the remedy of reinstatement of the contract in addition to the redemption remedy.[35] Although vendors relying on the existing law might be inconvenienced,[36] the aim of California law is to promote equality

29. Costs are incurred through witness fees and court costs of a possibly lengthy trial which may be the result of a dispute of small monetary proportions.

30. The majority counters this concurrence and dissent at *Peterson*, 40 Cal. 3d at 106 n.1, 707 P.2d at 234 n.1, 219 Cal. Rptr. at 172 n.1.

31. *Petersen*, 40 Cal. 3d at 111, 707 P.2d at 238, 219 Cal. Rptr. at 176.

32. Barkis v. Scott, 34 Cal. 2d 116, 208 P.2d 367 (1949).

33. This position was argued in the amicus curiae brief submitted by a noted authority in the fields of real estate and security transactions, Professor John Hetland. Professor Hetland is the author of California Real Estate Secured Transactions, which is published by the California Continuing Education of the Bar, and California Real Estate Secured Transactions, its companion volume. *See supra* notes 7 & 10.

34. CAL. CIV. CODE § 2924 (West Supp. 1986). The Chief Justice extensively examined this statute in her concurrence and dissent. *Petersen*, 40 Cal. 3d at 119 n.1, 707 P.2d at 243 n.1, 219 Cal. Rptr. at 181 n.1 (Bird, C.J., concurring and dissenting).

35. CAL. CIV. CODE § 2924(c) (West Supp. 1986).

36. Vendor's remedies would be limited to judicial foreclosure sale under CAL. CIV. PROC. CODE § 2924 (West Supp. 1986).

for defaulting mortgagees and installment contract purchasers who often have low incomes or are unsophisticated purchasers. The installment contract purchaser would thereby be afforded the same protection as the mortagee. Under the majority opinion, installment contract purchasers are now forced to pay the balance of the contract in full for redemption. Under the Chief Justice's approach, installment contract purchasers could choose to reinstate the contract and avoid the harsh burden required by full payment of the outstanding contract balance.

## V. THE DISSENTING OPINION

Justice Mosk's dissent advocates affirming the trial court's decision to reject the vendee's right of redemption. Justice Mosk believed that the trial court had the discretion to deny specific performance to a vendee who was "willfully untrustworthy and derelict in the performance of contract duties."[37] The majority, he argued, failed to respect stare decisis and instead chose to forge an unprecedented rule by denying the trial court its discretion in this case. Specifically, Justice Mosk found that the majority misapplied precedent to satisfy its finding of an absolute right of redemption. In past cases the right to redeem has either been held at the request of the *vendor*, or as a result of examination of case equities. Here, the vendor requested no such redemption and the equities weighed heavily against the vendee.[38] Therefore, the trial court's denial of specific performance should have been affirmed. Justice Mosk also found the policy against forfeiture in the past has not been applied to a vendee's loss of the benefit of the bargain as a measurement of relief and has been applied only to loss of installment previously paid. Therefore, although a vendor is required to give a vendee restitution of past installment payments, thereby preventing vendor's unjust enrichment, the protection of the defaulting vendee's benefit of the bargain is beyond the scope of anti-forfeiture policy.

Specifically addressing the Chief Justice's proposition that installment contracts should be given an analogous treatment to mortgages, Justice Mosk stated that mortgages and land installment contracts should not be treated equally because: 1) installment land sale con-

37. *Petersen*, 40 Cal. 3d at 122, 707 P.2d at 246, 219 Cal. Rptr. at 184 (Mosk, J., dissenting).

38. *See supra* note 21. Additionally, the elderly vendor had relied upon the installment payments for her support.

tracts and mortgages or deeds of trust fundamentally differ, as only the latter involves a transfer of title; 2) risk of loss passes only upon transfer of title, not under mere contract; and 3) the distinctions between mortgage type arrangements and land installment contracts provide buyers and sellers with the choice of an agreement best suited to their needs and a blurring of these two secured transactions will eliminate their ability to choose.

Finally, Justice Mosk argued that the equities in the case distinctly favored the decedent/vendor, an elderly woman who was deprived a means of modest income through the vendee's flagrant default. Removal of the court's discretion to weigh the equities under similar circumstances will in the future lead to another "callous result."[39]

### VI. CONCLUSION

The court's opinion will have a broad effect upon the future status of land installment contracts in default. Equitable proceedings will no longer include a focus on the seriousness of a vendee's misdeeds. However, vendees must still prove a substantial monetary stake in the property to evoke their absolute right to redemption. Chief Justice Bird's opinion portends a new approach to installment contract vendees' rights, moving toward equality with the right of mortgagees. This complicated decision is a signal that the rights and liabilities of vendors and vendees engaged in land installment contracts will continue to be challenged and the law will continue to change.

BRENDA L. THOMAS

## VI. CRIMINAL LAW

### A. *Former Penal Code § 799, which provided an exception to the general three year statute of limitations for prosecutions, held inapplicable to violations of Penal Code § 115:* **People v. Garfield.**

In *People v. Garfield,* 40 Cal. 3d 192, 707 P.2d 258, 219 Cal. Rptr. 196 (1985), the supreme court held that a violation of section 115 of the Penal Code, offering a false or forged instrument to be filed in a public office, does not constitute falsification of public records as used in section 799 of the Penal Code, which provided an exception to the general three year statute of limitations for felony prosecutions. Since a violation of section 115 was governed by the three year statute of limitations for felony prosecutions. The court held the defendant's prosecution was barred.

39. *Petersen,* 40 Cal. 3d at 125, 707 P.2d at 248, 219 Cal. Rptr. at 186 (Mosk, J., dissenting).

In *Garfield,* an attorney altered a client's will to include his own wife as a beneficiary without the client's knowledge. He offered the false will for probate in 1978, although it took more than three years for the primary beneficiary to suspect that the will was a false or forged instrument. In 1981, the defendant was charged with a violation of section 115. Defendant demurred on the grounds that the statute of limitations had expired, while the Attorney General argued that this violation had no statute of limitations under section 799. The motion was denied without explanation, and defendant was found guilty by a jury.

Pursuant to section 115 of the Penal Code, it is a felony to offer a forged or false instrument to be filed in a public office. CAL. PENAL CODE § 115 (West 1970). Felony prosecutions are generally subject to the three year statute of limitations set forth in section 800 of the Penal Code. However, at the time of the offense, Penal Code section 799 did provide an exception to prosecutions for falsification of public records.

The court, in an opinion by Justice Broussard, held that the offering of a false document for filing in a public office is different than falsifying a document which is already part of the public record. This distinction between the two offenses is supported by the separate statutory sections prohibiting the falsification of public records set forth in the Government Code. *See* CAL. GOV'T CODE §§ 6200-6201 (West 1980). The court reasoned that prior to probate, a will is not a public document and therefore the falsification of a will prior to filing does not constitute the falsification of a public record.

The appellant's violation of section 115 was complete as soon as he *offered* the will for probate with the knowledge it was false. Whether the false will was actually accepted as part of the public record is not a necessary element of section 115. *See* 55 CAL. JUR. 3d *Records and Recording Laws* § 19 (1980). The court dismissed the respondent's contention that there is no distinction between filing a false document with the intent of creating a false public record and falsifying a public record.

An analgous factual situation had been presented to the court of appeal in *People v. Horowitz,* 70 Cal. App. 2d 675, 161 P.2d 833 (1945). The court relied upon the *Horowitz* case to support its distinction between the two offenses. In *Horowitz,* the defendant forged a will with his mother's signature and obtained possession of the will after it had been probated. Unlike *Garfield,* the prosecution charged him only with a violation of section 115. The supreme court concluded

that since the defendant in *Horowitz* was not charged with violating sections 6200-6201, the prosecution correctly believed that the defendant's conduct did not constitute falsification of a public record.

The court emphasized the Law Revision Commission's determination that only sections 6200-6204 of the Government Code were included violations of Penal Code section 115 in further support of its interpretation of the statutory scheme. This indicated that the legislature had intended that violations of section 115 be governed by the three year statute of limitations.

The legislature enacted the recommendations offered by the report. *See Recommendations Relating to Statutes of Limitations for Felonies,* 17 Cal. Law Rev. Com. Rep. 301 (1984). At present, section 799 exempts only those offenses punishable by death or life imprisonment, or for embezzlement of public funds, therefore falsification of public records is now subject to a three year statute of limitations. CAL. PENAL CODE §§ 801-803 (West 1985). Section 803 replaces the unlimited statute of limitations with a provision tolling the statute of limitations until discovery of the offense. *Id.* § 803.

TAMI J. TAECKER

### B. *Prisoner's demand at gunpoint that police officers release him does not constitute kidnapping for the purpose of extortion because officers' compliance is not an "official act":* People v. Norris.

In *People v. Norris,* 40 Cal. 3d 51, 706 P.2d 1141, 219 Cal. Rptr. 7 (1985), the court was asked to decide whether the defendant had committed kidnapping for the purpose of extortion when he demanded at gunpoint that the police officers who were transporting him to the county jail release him. The court held that the defendant's demand that the officers drive him to San Francisco did not constitute an "official act" pursuant to section 518 of the Penal Code, and thus, defendant's conduct did not fall within the statutory definition of kidnapping for the purpose of extortion, set forth in section 209(a) of the Penal Code. *See* CAL. PENAL CODE § 209(a) (West Supp. 1986).

Extortion is defined by section 518 of the Penal Code as "the obtaining of an official act of a public officer, induced by a wrongful use of force or fear, or under color of official right." CAL. PENAL CODE § 518 (West 1970). In *Norris,* the court limited the term "official act" to mean acts committed in an officer's official capacity. The *Norris* court explicitly held that an "official act" does not include *every* act performed by an officer. However, the term "official act" is not merely limited to authorized acts. The court relied on its earlier

analysis in *Abbott v. Cooper*, 218 Cal. 425, 23 P.2d 1027 (1933). It indicated that the "functional nature" of an officer's conduct determines whether that conduct constitutes an official act. The court held that an official act, as opposed to a private act is conduct occuring while in an official capacity. The court noted that any person licensed to drive a motor vehicle could have performed the requested act. The *Norris* decision disapproves the court of appeal decision in *McGee v. Superior Court*, 34 Cal. App. 3d 201, 109 Cal. Rptr. 758 (1973), to the extent that *McGee* implies that *any* conduct aimed at interfering with official duties is punishable under section 209 of the Penal Code.

TAMI J. TAECKER

## VII. CRIMINAL PROCEDURE

### A. *Intent to kill is required for a felony-murder special circumstance finding:* **People v. Chavez.**

In *People v. Chavez*, 39 Cal. 3d 823, 705 P.2d 372, 218 Cal. Rptr. 49 (1985), the court heard an appeal which automatically follows a judgment imposing the death penalty pursuant to the 1978 death penalty law. *See* CAL. PENAL CODE § 1239 (West Supp. 1986). *See also* CAL. PENAL CODE § 190.1-.4 (West Supp. 1986). The defendant allegedly shot and killed a man after robbing him. The jury found the defendant guilty of robbery and murder, as well as the special circumstance that the murder was committed while the defendant was engaged in a robbery and the allegation that the defendant personally used a firearm. Although this jury was not able to reach a verdict in the penalty phase, a second jury returned the verdict of death. *See* 22 CAL. JUR. 3d *Criminal Law*, §§ 3342-3347 (1985).

On appeal, the supreme court first rejected the defendant's claim that the jury was conviction-prone and did not consist of a fair cross section of the community. The court held that it was not improper to exclude potential jurors who would automatically vote against the death penalty. The court also rejected the argument that excluding these jurors resulted in the exclusion of an identifiable group on racial, religious, ethnic, or similar grounds. *See also People v. Turner*, 37 Cal. 3d 302, 313-15, 690 P.2d 669, 675-77, 208 Cal. Rptr. 196, 202-03 (1984). The court next considered the possible error in allowing a medical doctor, who specialized in pathology and who performed the autopsy on the victim, to testify as an expert witness. Most of the doctor's experience had been with corpses rather than with living

people and he had no experience estimating blood alcohol based on the actions of living people. The court rejected the defendant's claim that the doctor was not qualified to testify as to whether a person who had consumed as much alcohol as the defendant would have the requisite intent to commit the acts allegedly committed by the defendant.

Next, the court considered the defendant's contention that jury instructions were not properly given regarding the weight the jury was to give to the testimony of a man who was with the defendant at the time of the murder. The court instructed the jury that the testimony of an accomplice must be corroborated, and that the jury may find any fact based on the testimony of only one witness. *See* CALJIC Nos. 2.27, 3.11 (4th ed. West 1979). The court, however, refused to instruct the jury that the man who testified was an accomplice as a matter of law. Therefore, the defendant argued that the jury could have convicted him based solely on the testimony of the man who was his accomplice. The court found no error because the jury had been instructed as to the requirements for corroboration and told that an accomplice's testimony should be viewed with distrust. Thus, the court held that the jury was not misled as to the need for corroboration and that no prejudice resulted.

Finally, the court considered the finding that the murder constituted a felony-murder special circumstance because it had been committed during the commission of a robbery. The defendant sought reversal of the special circumstance finding because the jurors were not given the required instruction that the defendant must have had the intent to kill in order to be convicted under the felony-murder special circumstance. *See Carlos v. Superior Court,* 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). The court agreed that the record did not show that the defendant possessed the required intent to kill. The court also found that this case did not fall under any exception to the *Carlos* rule and rejected the contention that the jury instructions implied a finding of intent in the requirements for conviction under the felony-murder special circumstance.

The court affirmed the judgment of guilty as to both counts and the firearm allegation. However, because the court found that the record did not show that the defendant possessed the requisite intent to kill, it overturned the special circumstance finding and vacated the death penalty sentence. The case was reversed and remanded for retrial of the special circumstance allegation and the penalty to be imposed.

JOHN THOMAS MCDOWELL

B. *Defense counsel in a capital case must present the defense according to the express wishes of the defendant when his fundamental rights are at stake:* **People v. Frierson.**

In *People v. Frierson,* 39 Cal. 3d 803, 705 P.2d 396, 218 Cal. Rptr. 73 (1985), the court held that in a capital trial defense counsel does not have absolute discretion to withhold presentation of defendant's diminished capacity defense from the guilt/special circumstance stage when the defendant indicates that he wants the defense presented. The trial court found the defendant guilty of first degree murder and sentenced him to death. The defendant appealed, asserting that his conviction should be reversed because his defense attorney went against his express wishes and did not present his only defense at the guilt/special circumstance phase of the trial. The defense counsel, for strategic purposes, chose to wait and present the defendant's diminished capacity defense for the first time at the penalty phase of the trial.

The trial court agreed with the defense counsel that it was within counsel's discretion to determine at which stage to present a defense. The supreme court affirmed the guilt conviction but reversed the special circumstance findings and penalty judgments. The court recognized the defendant's right to make the ultimate decision as a check to prevent the deprivation of fundamental rights. This reasoning remains consistent with previous United States Supreme Court and California decisions. *See, e.g., Brookhart v. Janis,* 384 U.S. 1 (1966); *People v. Robles,* 2 Cal. 3d 205, 466 P.2d 710, 85 Cal. Rptr. 166 (1970).

The defendant's situation in *Frierson* epitomizes the particular circumstance where a defendant's express wish should take precedence over defense counsel's trial strategy. The jury was almost certain to convict the defendant of first degree murder. In order to protect the defendant's fundamental rights, the supreme court reversed the penalty and special circumstance judgments, and held that a defendant facing a capital sentence retains the right to control the presentation of his defense at trial. Therefore, defense counsel cannot go against the express wishes of a client who faces a capital conviction merely because of trial strategy.

MISSY KELLY BANKHEAD

C. *A trial court, in sentencing a defendant who has previously been convicted of a "serious felony" within the meaning of Penal Code § 667, retains discretion to strike the prior conviction in furtherance of justice pursuant to Penal Code § 1385:* **People v. Fritz.**

In *People v. Fritz,* 40 Cal. 3d 227, 707 P.2d 833, 219 Cal. Rptr. 460 (1985), the court vacated judgment against the defendant and remanded the case to the trial court with directions to resentence the defendant. The court held, pursuant to Penal Code section 1385, which gives a trial court authority to dismiss an action, a court may strike a prior conviction for purposes of sentencing even if the conviction is not in evidence.

The defendant, Robert Fritz, pled nolo contendere to several charges against him. In addition, the defendant admitted a 1977 felony conviction and a 1982 "serious felony" conviction. The trial court sentenced the defendant to fifteeen years, which included a consecutive five year term for the 1982 "serious felony." *See* CAL. PENAL CODE § 667 (West Supp. 1986), which allows a five year enhancement for previous felony conviction.

Penal Code section 1385 provides in relevant part: "The judge or magistrate may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." CAL. PENAL CODE § 1385 (West 1982). The trial court concluded it had no discretion under Penal Code section 1385 to strike the "serious felony" prior for purposes of sentencing. The people contended that a portion of Proposition 8 eliminated a trial court's traditional discretion. Article I, section 28, subdivision (f) of the California Constitution provides:

> Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal proceeding. When a prior felony conviction is an element of any felony offense, it shall be proven to the trier of fact in open court.

CAL. CONST. art I, § 28(f).

The court determined that the legislature would have expressly used language referring to section 1385 and the trial court's discretion, therefore, neither section 667 nor article I, section 28, subdivision (f) could be construed to abrogate a trial court's well established statutory authority to strike a prior conviction. *See also People v. Williams,* 30 Cal. 3d 470, 639 P.2d 1029, 179 Cal. Rptr. 443 (1981).

MARIE P. HENWOOD

D. *Failure to instruct the jury that intent to kill is an element of the felony-murder rule special circumstances requires reversal of the death penalty:* **People v. Guerra.**

In *People v. Guerra,* 40 Cal. 3d 377, 708 P.2d 1252, 220 Cal. Rptr. 374 (1985), the court held that in order to uphold a lower court's death penalty judgment on the basis of a felony-murder special circumstance conviction the jury must have been instructed to find an intent to kill. In this case, the defendant was employed as a security guard with a private company and was scheduled to work the "graveyard" shift at a store in San Bernardino. Two hours before his shift began, Guerra went to the store where two other guards were working. He approached the first guard, Birles, who was stationed in his automobile at one side of the store and questioned him regarding the whereabouts of the other guard, Mesa. After learning that the second guard was deployed in his own car at the other side of the store, the defendant left, later to return in the second guard's car with that guard in the trunk. At that point, the defendant approached Birles demanding that he hand over his gun and sit on the floor of Mesa's vehicle.

After driving some distance with the defendant, the guards were told that they would not be hurt, however, a shotgun Guerra was carrying discharged killing Mesa. Birles managed to escape. The defendant was subsequently charged and convicted of murder, attempted murder, robbery, and kidnapping. Two special circumstances were proven, felony-murder robbery and felony-murder kidnapping, and the death penalty was imposed. At trial, the defendant claimed that he was merely attempting to prove his dissatisfaction with the security company because the security was insufficient and that the shooting was an accident.

The defendant raised several contentions on appeal bearing on the guilt phase of the trial, two of which related to his mental competency. First, he argued that the court erred in failing to conduct a full hearing regarding his mental competence, especially in light of the fact that substantial evidence of incompetence had been presented to the court. He claimed that the withdrawal of his not guilty plea by reason of insanity was ineffective unless the court had advised him of his rights. This was especially true of his rights of confrontation, to a jury trial, and against self-incrimination. The court rejected both arguments and noted that at the initial trial the defendant not only failed to submit substantial evidence of incompe-

tence and was also informed that if he withdrew his plea, his sanity at the time of the crime would be conclusively presumed.

In attacking the first degree felony-murder rule, the defendant contended that there was an insufficient showing of evidence to support the finding that he had the specific intent to permanently deprive Birles of his gun and thus was not guilty of robbery. The court was unpersuaded and held that a rational trier of fact could have determined beyond a reasonable doubt that there was a specific intent to permanently deprive Birles of his gun. *See People v. Johnson,* 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980). Thus, the instruction by the lower court regarding robbery and intent was held to be correct.

The defendant successfully argued that the trial court erred in its instruction on the attempted murder count. The court found reversible error because the trial court did not instruct the jury that they should find a specific intent to kill in order to return a guilty verdict for attempted murder. Therefore, the supreme court could not determine if the conviction on this count was based on a specific intent to kill or on another impermissible basis.

The defendant also correctly contended that the special circumstance findings were invalid, thereby requiring the reversal of the death penalty judgment. In reaching this holding, the court relied on *Carlos v. Superior Court,* 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). The court in *Carlos* held that a specific intent to kill is an element of felony-murder special circumstances. Since this instruction was not given, there was reversible error. The People argued that the error was harmless under *People v. Sedeno,* 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974). In rejecting this contention, the court held that in *Sedeno,* the question of intent to kill was necessarily resolved adversely to the defendant and thus, the exception was inapplicable to the case at hand.

The court also rejected the state's reliance on the *Cantrell-Thornton* exception stating that it was likewise inapplicable. *People v. Thornton,* 11 Cal. 3d 738, 523 P.2d 267, 114 Cal. Rptr. 467 (1974), *cert. denied,* 420 U.S. 924 (1975); *People v. Cantrell,* 8 Cal. 3d 672, 504 P.2d 1256, 105 Cal. Rptr. 742 (1973). That exception, giving the court the option to construe the erroneous instruction as harmless error, was not justified in this case as the evidence presented was not more or less probative of the defendant's intent to kill. Based on the record the jury could not dismiss the defendant's evidence and consider it "not worthy of consideration." Consequently, the *Carlos* rule must be applied.

This case is another example of the current court's unwillingness to enforce California's death penalty law. The court appears to be

willing to "go out on a limb" to reverse death penalty convictions based on procedural technicalities. The court is taking an ideological position against the imposition of the death penalty contrary to the existing law without declaring that law unconstitutional. One can only conclude that the court is unwilling to enforce California's statutory law so that it can impose its own political philosophy with regard to the death penalty. Of primary significance was the opinion written by Justice Lucas indicating a shift in his posture away from an affirmance of the *Carlos* rule. With this opinion he joins three of his colleagues advocating an ultimate overruling of that case, the bulwark of the death penalty reversal argument.

JAMES G. BOHM

### E. *Specific intent to kill required for felony-murder special circumstances:* **People v. Montiel.**

#### I. INTRODUCTION

In *People v. Montiel*,[1] the supreme court reviewed various issues which proved insufficient for reversible error: 1) after commencement of trial, defendant was not entitled to enter an insanity plea; 2) removal of potential jurors opposed to the death penalty did not violate defendant's constitutional rights; 3) the judge sufficiently examined photographs and correctly ruled them admissible; and 4) a murder intentionally committed for financial gain is sufficient to establish the requisite "intent to kill" felony-murder special circumstance. Reversible error was based upon: 1) an unqualified "Briggs Instruction"; and 2) a "sympathy instruction" given to jurors.[2]

#### II. FACTUAL BACKGROUND

On January 13, 1979, Gregorio Ante was killed by stabbing. The defendant, Richard Montiel, on the day of the murder had committed a separate robbery in the home of Eva Mankin. Later, the defendant and a friend, Victor Cardova, stopped in Ante's neighborhood. While Cardova attempted to repair a motorcycle, defendant entered Ante's

1. 39 Cal. 3d 910, 705 P.2d 1248, 218 Cal. Rptr. 572 (1985). Justice Lucas delivered the majority opinion in which Justices Mosk, Broussard, Reynoso, and Grodin concurred. Justice Kaus filed a separate concurring opinion, to which Chief Justice Bird and Justices Broussard and Reynoso concurred.

2. An appeal automatically follows a judgment imposing the death penalty. CAL. PENAL CODE § 1239 (West Supp. 1986).

home. When Ante came upon defendant, defendant obtained a knife from the kitchen, stabbed Ante in the throat, and robbed him.

Testimony at trial alluded that the defendant used PCP and alcohol.[3] Other testimony indicated that defendant had acted and had spoken strangely before and after the incident.[4] However at trial, expert testimony disclosed that the defendant had sufficient mental capability to form an intent to kill, to steal, and to premeditate and reflect upon the consequences of his actions.[5]

The defendant was charged and a jury convicted him of robbery[6] and burglary[7] as against Mankin, and of murder[8] and robbery[9] against Ante. Defendant was found to have used a knife in the crime against Ante.[10] Additionally, three special circumstances were alleged: 1) the murder was intentional and for financial gain;[11] 2) the murder was especially heinous, atrocious, and cruel;[12] and 3) the murder occurred during the commission of a robbery.[13] The jury found the first and third exception true. The defendant's penalty was set at death and the supreme court reviewed this matter upon automatic appeal.[14]

## III. THE MAJORITY OPINION

### *A. Guilt Phase*

The court affirmed the trial court decisions with regard to three minor issues.

#### 1. Removal of Jurors Opposed to the Death Penalty

In *People v. Fields*,[15] the court decided the issue of whether re-

3. Defendant testified he used three to four PCP cigarettes each day and that on the morning of the murder, he purchased a six-pack of beer and smoked a joint of PCP; later, he smoked an additional joint and bought two more cans of beer. *Montiel*, 39 Cal. 3d at 919, 705 P.2d at 1252, 218 Cal. Rptr. at 576.

4. Defendant testified he could feel no pain, saw people in white uniforms, and felt a floating sensation. Before the incident, defendant was "acting mean" and testimony indicated he "flipped out" and said he was the devil. *Id.* at 916-19, 705 P.2d at 1250-52, 218 Cal. Rptr. at 574-77.

5. While under the influence of PCP and alcohol, defendant did not display certain physical indications of the PCP effect. *Id.* at 919, 705 P.2d at 1252, 218 Cal. Rptr. at 576.

6. CAL. PENAL CODE § 211 (West 1970).

7. *Id.* § 459 (West Supp. 1986).

8. *Id.* § 187 (West 1970).

9. *Id.* § 211.

10. *Id.* § 12022(b) (West 1982).

11. *Id.* § 190.2(a)(1) (West Supp. 1986).

12. *Id.* § 190.2(a)(14).

13. *Id.* § 190.2(a)(17)(i).

14. *See supra* note 2.

15. 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983), *cert. denied*, 105 S. Ct. 267 (1984).

moval of jurors opposed to the death penalty violated the defendant's right to have a jury composed of a representative cross-section of the community. In *Fields* the court denied recognition of death penalty opponents as a cognizable class.[16] A jury without death penalty opponents does not therefore violate any constitutional right of defendant, nor render the jury inadequate as to warrant reversal in this case.[17]

2. Attempt to Insert the Insanity Plea after Commencement of Trial

Three days into the trial, the defense attempted to change the defendant's plea to not guilty by reason of insanity. The trial court denied the change. California law is settled that changes in plea before commencement of trial shall be allowed for good cause.[18] After commencement of trial, the standard of "good cause" is also needed for entry of a new plea.[19] The meaning of "good cause" has been established by two standards.[20] In *People v. Herrera*,[21] these tests were established as co-equal.

A showing on the merits traditionally required reasonable grounds that, at the time the crime was committed, the defendant was legally insane.[22] In *People v. Lutman*,[23] the court held that an inquiry into the merits of a proposed defense (for example, a showing of insanity) was precluded, since any such disclosure might give the prosecution an unfair advantage and thereby also violate the defendant's right against self-incrimination. In this case, the court determined that even under the strict test of *Lutman*, there was an insufficient plau-

16. "In sum, we conclude that the group of persons who would automatically vote against death at the penalty phase, yet profess impartiality at the guilt phase - the 'guilt phase includables' - are not a cognizable group; the exclusion of which makes a jury unrepresentative and unconstitutional." *Fields*, 35 Cal. 3d at 353, 673 P.2d at 695, 197 Cal. Rptr. at 818. Cognizable classes include groups defined by race, gender, and religion. *See generally* Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 66-73 (1982), and cases cited therein.

17. For a general overview of juror selection, voir dire examinations, and challenges, see 4 R. ERWIN, M. MILLMAN, K. MONROE, C. SEVILLA, B. TARLOW, CALIFORNIA CRIMINAL DEFENSE PRACTICE §§ 81.01-81.32 (1985).

18. Defendants who failed to plead not guilty by reason of insanity are conclusively presumed to be sane, but the court will allow a change of plea for good cause. *See* CAL. PENAL CODE § 1016 (West 1985).

19. People v. Boyd, 16 Cal. App. 3d 901, 908, 94 Cal. Rptr. 575, 579 (1971).

20. *See infra* notes 22 and 23.

21. 104 Cal. App. 3d 167, 173, 163 Cal. Rptr. 435, 438-39 (1980).

22. The traditional rule included an inquiry into the merits of the insanity defense. *See* People v. Morgan, 9 Cal. App. 2d 612, 615, 50 P.2d 1061, 1062 (1935).

23. 104 Cal. App. 3d 64, 163 Cal. Rptr. 399 (1980).

sible reason for delaying the plea. Hence, even in a strict application of *Lutman,* diligence must be established.

Defense counsel argued that their lack of awareness as to Cardova's testimony regarding defendant's mental condition and the inadequacy of the psychiatrist's examination were grounds for a change of plea. The court rejected both these theories for failing to establish surprise or provide adequate excuse for a delay in plea, since the defense had adequate opportunity to interview Cardova.[24]

3. Photographs of the Victim as Evidence

Under section 352 of the Evidence Code,[25] the trial judge must weigh potential prejudicial effect against the probative value before deciding upon the admissibility of photographs into evidence. The record must affirmatively show this judicial decision making process.[26] Since the judge considered brief arguments, expressly referred to his power of discretion, examined the photographs, and then denied their admission, his judicial reflection was sufficient to satisfy the code requirements.[27]

*B. Intent to Kill*

1. The Per Se Reversal Rule and Its Exceptions

The court had previously imposed a requirement in its interpretation of Penal Code section 190.2, felony-murder special circumstances,[28] that for conviction, the actual killer must be found to have had specific intent to kill.[29] The court additionally identified three exceptions to a retroactive application of this rule, which would thereby override a per se reversal for failure to instruct: 1) if the improper instruction was given with regard to an offense from which defendant had been acquitted;[30] 2) if the instruction would be irrelevant to the conviction;[31] and 3) though the instruction was improperly given, certain circumstances existed that allowed the jury to resolve the "intent to kill" question in another context through other

24. For more on the insanity defense, see B. WITKIN, CALIFORNIA CRIMES 134-42 (1963 & SUPP. 1986).

25. CAL. EVID. CODE § 352 (West 1966).

26. People v. Green, 27 Cal. 3d 1, 24-27, 609 P.2d 468, 481-83, 164 Cal. Rptr. 1, 14-16 (1980).

27. For other cases on the discretionary use of photographs, see 2 B. WITKIN, CALIFORNIA EVIDENCE § 634 (1966 & Supp. 1984).

28. CAL. PENAL CODE § 190.2 (West Supp. 1986).

29. Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

30. People v. Garcia, 36 Cal. 3d 539, 554-55, 684 P.2d 826, 834-35, 205 Cal. Rptr. 265, 273-74 (1984). In *Garcia,* the application of the *Carlos* rule was held applicable to all cases not yet final.

31. *Id.*

properly given instructions.[32] Under these three exceptions, failure to give a specific "intent to kill" instruction would not prejudice the defendant.

The court determined that the third exception applies in this case. Although the trial court failed to deliver to the jury a specific instruction regarding intent to kill, the jury sufficiently found under a special circumstance that "the murder was intentional and carried out for financial gain."[33] Although defense counsel attempted to distinguish between a finding of intent to kill and one of intentional murder, the court found that under these facts, the jury understood the specific intent rule and could not reasonably have confused their finding with unintentional murder.[34] Therefore, under the third exception rule, no per se reversal was required on this issue.

2. Use of Special Circumstance section 190.2(a)(1)

Section 190.2(a)(1)[35] of the California Penal Code details a finding of special circumstance if the murder is intentional and for financial gain. The court narrowly construed this special circumstance and limited its applicability to only those cases "when the victim's death is an essential prerequisite to the financial gain sought by the defendant."[36]

The victim's death was not a prerequisite to financial gain in this case. Therefore, the court found it error to use the section 190.2(a)(1) special circumstance, but failed to address the prejudicial effect[37] of this error as the case had been remanded on other grounds.[38]

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32. People v. Sedeno, 10 Cal. 3d 703, 721, 518 P.2d 913, 924, 112 Cal. Rptr. 1, 13 (1974).

33. *Montiel*, 39 Cal. 3d at 926, 705 P.2d at 1257, 218 Cal. Rptr. at 581.

34. Defense counsel's argument relied upon the court's finding in People v. Murtishaw, 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981). The court distinguishes the present case from *Murtishaw* finding that a difference in the language used to instruct the jurors in *Montiel* implied that certain murders are *unintentional* and that special circumstance findings do not apply to such murders. This implied language was clear enough to properly instruct the jurors, unlike the language in *Murtishaw*.

35. CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1986).

36. People v. Bigelow, 37 Cal. 3d 731, 752, 691 P.2d 994, 1006, 209 Cal. Rptr. 328, 340 (1984).

37. The court may in the future be required by different facts to determine the prejudicial effect of this misuse of the § 190.2 special circumstance rule. Reasonably, the court may then overrule convictions based on the confusion of jurors this misapplication can cause.

38. *Montiel*, 39 Cal. 3d at 927, 705 P.2d at 1258, 218 Cal. Rptr. at 582.

### C. *Penalty Phase: Grounds for Remand*

#### 1. Use of the "Briggs Instruction"

The court affirmed an earlier ruling[39] holding the "Briggs Instruction," which explains the power of the governor to commute, pardon, reprieve, or modify the defendant's sentence, is unconstitutional and violates defendant's right to due process,[40] since it may mislead the jurors. Error in the giving of this instruction required reversal of the penalty phase in defendant's case.

#### 2. Use of the "Sympathy Instruction"

The jury in this case was given instruction that they "must not be swayed by . . . sympathy . . . ." The court held, in accord with other recent cases,[41] that such instruction denied defendant's right to jury consideration of a sympathy factor on his behalf, was ambiguous, and could not be cured by instruction of mitigating factors. Error in giving this instruction required retrial in defendant's case.[42]

#### 3. Testimony Predicting the Defendant's Future Violence

During the penalty phase of this case, an expert testified that the defendant had a poor prognosis for rehabilitation and had a potential for future violence.[43] Prediction testimony should not be permitted.[44] However, defense counsel failed to object to the admission of the expert testimony. Therefore, the court hesitantly concluded that defendant's failure to object would preclude reversal on this ground.

## IV. THE CONCURRING OPINION

In their opinion, the concurring justices accept the application of an exception to cure the failure of specific jury instruction on intent to kill, but acknowledge that under some circumstances, the applica-

39. *Id.* at 928, 705 P.2d at 1258, 218 Cal. Rptr. at 582. *See* People v. Ramos, 463 U.S. 992 (1983); and upon remand from the U.S. Supreme Court, *see* People v. Ramos, 37 Cal. 3d 136, 689 P.2d 430, 207 Cal. Rptr. 800 (1984).

40. California Supreme Court Survey, *"Briggs Instruction" Violates Due Process: People v. Haskett*, 10 PEPPERDINE L. REV. 212 (1982).

41. People v. Lanphear, 36 Cal. 3d 163, 169, 680 P.2d 1081, 1085, 203 Cal. Rptr. 122, 126 (1984) (specifically held that the instruction required an order for retrial because of its ambiguity).

42. 1 CALJIC Criminal, CALJIC No. 1.00 (4th ed. 1979 & Supp. 1984). As revised by the 1984 supplement: "This instruction 1.00 should not be used in the penalty phase of a capital case as it admonishes the jury not to be influenced by pity for the defendant. CALJIC 8.84.1 and 8.84.2 more properly cover the subject." *See, e.g.*, People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983) (use of this instruction in death penalty cases constitutes reversible error).

43. *Montiel*, 39 Cal. 3d at 929, 705 P.2d at 1259, 218 Cal. Rptr. at 583.

44. People v. Murtishaw, 29 Cal. 3d 733, 767, 631 P.2d 446, 466, 175 Cal. Rptr. 738, 758 (1981).

tion of an exception may be inappropriate. If the defendant builds a defense upon the mistaken theory that intent to kill is not a part of the prosecution's burden of proof, or upon an erroneous ruling, the application of an exception to the general "intent to kill" rule would be inappropriate. In this case, the defendant failed to show proof that he was under such a mistaken belief.

## V. CONCLUSION

In the context of this specific conviction for murder and robbery, the court has instructed California criminal defense attorneys and prosecutors to beware of pitfalls and to know the current law. The defense attorney's failure to enter a timely plea of insanity proved to be a fatal error. Failure to object to "sympathy instructions" cost the defendant what might have been his only chance for retrial. Fortunately, other grounds existed for remand and the court thereby avoided a decision on whether a failure to object would be a waiver of a defendant's right to remand over such an error.

The court also affirmed previous rulings that the "Briggs Instruction" was unconstitutional and that the § 190.2(a)(1) special circumstance must be narrowly construed. The court failed to fully clarify the law as to exceptions under the "intent to kill" required instruction. The court noted that if a defendant fails, through mistake or other legitimate grounds, to fully defend on the intent to kill issue, a new trial may be granted, even though an exception to the required instruction applies. The question remains under what specific circumstances such a new trial will be granted.

BRENDA L. THOMAS

### F. *The adoption of section 25, subdivision (b) of the Penal Code as part of Proposition 8, was intended to reinstate the M'Naghten test as the test for insanity in a California criminal trial:* **People v. Skinner.**

## I. INTRODUCTION

In *People v. Skinner*,[1] the supreme court considered the issue whether the use of the word "and" in section 25, subdivision (b) of

1. 39 Cal. 3d 765, 704 P.2d 752, 217 Cal. Rptr. 685 (1985). The majority opinion was written by Justice Grodin, with Justices Kaus, Broussard, Reynoso and Lucas concurring. A concurring opinion was delivered by Justice Mosk. Chief Justice Bird filed a dissenting opinion.

the Penal Code as opposed to the word "or" was intended to create a new test for insanity in a criminal trial.[2]

The defendant was found guilty of strangling his wife while on a day pass from the Camarillo State Hospital where he was a patient. At trial, the defendant pled nolo contendere and not guilty by reason of insanity.[3] A clinical and forensic psychologist offered his opinion that the defendant was suffering either from classical paranoic schizophrenia or schizo affective illness with significant paranoid features. The defendant believed that the marriage vow, "till death do us part", gave a spouse the God-given right to kill the other spouse who violates the marital vows. He also believed that because the vows reflect the direct wishes of God, no moral or legal wrong would attach to the act of killing. Simply stated, the defendant believed that killing his wife was not wrong because it was the will of God.[4]

The trial judge, sitting without a jury, found the defendant met one, but not both, prongs of the *M'Naghten* test.[5] The two pronged *M'Naghten* test was stated as follows:

> [T]o establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was labouring under such defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; *or*, if he did know it, that he did not know he was doing what was wrong.[6]

The trial court concluded that Penal Code section 25, subdivision (b) requires a defendant to meet both prongs of the *M'Naghten* test in order to establish legal insanity.[7] In this case, despite the defendant's cognizance of the act's homicidal nature, he was held incapable of "distinguish[ing] right from wrong" because of his delusion that the act was required by God.[8] Nevertheless, because the defendant met only one prong of the test, the trial court convicted the defendant of second degree murder and sentenced him to a term of fifteen

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2. Section 25, subdivision (b) of the California Penal Code states in pertinent part:

> [T]his defense shall be found by the trier of fact only when the accused proves by a preponderance of the evidence that he or she was incapable of knowing and understanding the nature and quality of his or her act *and* of distinguishing right from wrong at the time of the commission of the offense.

CAL. PENAL CODE § 25 (West Supp. 1986) (emphasis added).

3. *Skinner*, 39 Cal. 3d at 769, 704 P.2d at 754, 217 Cal. Rptr. at 687.

4. *Id.* at 770, 704 P.2d at 755, 217 Cal. Rptr. at 688.

5. The M'Naghten test is a two-pronged test for insanity adopted by the House of Lords after Daniel M'Naghten attempted to assasinate the British Prime Minister Sir Robert Peel in 1843. *See also* Comment, *Guilty But Mentally Ill*, 30 VILL. L. REV. 117, 119 (1985).

6. *Skinner*, 39 Cal. 3d at 768, 704 P.2d at 753, 217 Cal. Rptr. at 686 (quoting M'Naghten's case, 8 Eng. Rep. 718, 722 (H.L. 1843) (emphasis added)). *See also* 1 B. WITKIN, CALIFORNIA CRIMES, *Defenses* §§ 136, 139 (1963).

7. *Skinner*, 39 Cal. 3d at 770, 704 P.2d at 754, 217 Cal. Rptr. at 688.

8. *Id.*

years to life.[9]

## II. THE MAJORITY OPINION

The majority began its discussion by giving a synopsis of the insanity defense in California. The court pointed out that until 1978 the California courts relied upon the two-part *M'Naghten* test as the definition for the insanity defense in criminal cases.[10] In 1978, in *People v. Drew*,[11] the court abolished the *M'Naghten* test in favor of the test proposed by the American Law Institute.[12] In 1982, the California electorate adopted Proposition 8, which established Penal Code section 25 as the first statutory definition of insanity in California.[13] The test contained in section 25 was, according to the majority, "designed to eliminate the *Drew* test and reinstate the [two-pronged] . . . M'Naghten test."[14] However, the statute's use of the conjunctive "and" instead of the disjunctive "or" causes confusion as to whether the statute was intended to create a new test for insanity or a return to the *M'Naghten* test.[15]

### *A. Constitutionality of Section 25, Subdivision (b) of the Penal Code*

In scrutinizing section 25, subdivision (b) of the penal code, the court first pointed out that: "It is fundamental to our system of jurisprudence that a person cannot be convicted for acts performed while insane."[16] This general rule compliments the rule that *mens rea* or

9. *Id.* at 770, 704 P.2d at 754, 217 Cal. Rptr. at 688.

10. *Id.* at 768, 704 P.2d at 753, 217 Cal. Rptr. at 686. *See* People v. Coffman, 24 Cal. 230, 235 (1864). Prior to 1978, *Coffman* was the seminal California case which recognized the *M'Naghten* test as the test for insanity in a criminal trial. *Skinner*, 39 Cal. 3d at 773, 704 P.2d at 756, 217 Cal. Rptr. at 689.

11. 22 Cal. 3d 333, 583 P.2d 1318, 149 Cal. Rptr. 275 (1978).

12. Under the ALI and *Drew* test the following was required: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law." *Id.* at 768, 704 P.2d at 753, 217 Cal. Rptr. at 683 (quoting People v. Drew, 22 Cal. 3d 333, 345, 583 P.2d 1318, 1324, 149 Cal. Rptr. 275, 281 (1978)). *See* MODEL PENAL CODE § 4.01(1) (1962).

13. *Skinner*, 39 Cal. 3d at 768, 704 P.2d at 753, 217 Cal. Rptr. at 686. *See supra*, note 2.

14. *Skinner*, 39 Cal. 3d at 768, 704 P.2d at 754, 217 Cal. Rptr. at 687.

15. *Id.*

16. *Id.* at 771, 704 P.2d at 755, 217 Cal. Rptr. at 688 (quoting People v. Kelly, 10 Cal. 3d 565, 574, 516 P.2d 875, 881, 111 Cal. Rptr. 171, 177 (1973) (citation omitted)). *See generally* 20 CAL JUR 3d (Rev), *Criminal Law* §§ 2304-2312 (3d ed. 1985).

wrongful intent is an essential element of crime.[17] Therefore, an insane person, who lacks the required wrongful intent, is not capable of committing crimes.[18]

Next, the court considered the historical use of the *M'Naghten* test in California. The court stated that during the century subsequent to the adoption of the *M'Naghten* test in *People v. Coffman,*[19] the courts applied the test "so as to permit a finding of insanity if either prong of the test was satisfied."[20] However, in light of the historical interpretation of the *M'Naghten* test and the requirement of *mens rea* for criminal liability, the court determined that both prongs of the *M'Naghten* test should be satisfied in order to establish the insanity defense.

The requirement of *mens rea* to prove the commission of a crime suggests that the ability to raise the insanity defense may be necessary to satisfy due process under the constitution.[21] Further, punishing a person for his mental illness constitutes cruel and unusual punishment.[22] Therefore, the requirement that a person establish both prongs of the *M'Naghten* test could deprive an insane person, such as the defendant, of the insanity defense in violation of the constitution.[23] The court ultimately decided that section 25(b) only restates the *M'Naghten* test and does not establish a new test. Thus, it did not consider the constitutional problems further.

### *B. Interpretation of the Intent of Section 25, Subdivision (b) of the Penal Code*

In deciding whether the word "and" was used intentionally in section 25, subdivision (b) of the Penal Code, the court considered several factors. The court recognized the general principle that courts cannot rewrite unambiguous language of a statute.[24] However, it also noted that this rule does not apply if a word is erroneously used in drafting the statute.[25] The use of the word "and" in the test would return the law to the "wild beast test"[26] which preceded *M'Naghten.* The court found no language in Proposition 8 or any other source

17. *Skinner,* 39 Cal. 3d at 771, 704 P.2d at 755, 217 Cal. Rptr. at 688.
18. *Id.*
19. 24 Cal. 230 (1864). *See supra* note 10 and accompanying text.
20. *Skinner,* 39 Cal. 3d at 773, 704 P.2d at 756, 217 Cal. Rptr. at 689.
21. *Id.* at 774-75, 704 P.2d at 757-58, 217 Cal. Rptr. at 690-91. *See* Robitscher and Haynes, *In Defense of the Insanity Defense,* 31 EMORY L.J. 9 (1982). *See also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE, *Introduction* § 23 M (Supp. 1985).
22. *Skinner,* 39 Cal. 3d at 775, 704 P.2d at 758, 217 Cal. Rptr. at 691.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 766-77, 704 P.2d at 759, 217 Cal. Rptr. at 692. Under the "wild beast" test, insanity could be found only if the defendant was "totally deprived of his understanding and memory, and doth not know what he is doing, no more than an infant, than a

which would indicate that the initiative measure intended such a dramatic change in the *M'Naghten* test.[27] Therefore, the court held that the use of the word "and" instead of "or" constituted a draftsman's error and Proposition 8 was designed to return the court to the *M'Naghten* test, not to establish a new, stricter test.[28]

### *C. The M'Naghten Test; Similarity of the Two Prongs.*

The court next considered and rejected the people's contention that a reversal was not necessary because both prongs of the *M'Naghten* test are virtually the same.[29] The court acknowledged that a person unaware of the "nature and quality of his actions" cannot understand them as being wrong.[30] However, the court noted that the reverse is not necessarily true.[31] The trial court found that the defendant did intend to kill his wife by strangulation but was unable to comprehend the wrongfulness of killing his spouse because his mental illness led him to believe his actions were required by God.[32] Therefore, the court quickly rejected the people's contention that both prongs of the *M'Naghten* test are virtually the same.

### *D. Clarification of the Test's Meaning*

The people argued that the test stated in section 25, subdivision (b) of the Penal Code "was intended to 'clarify' the meaning of the right/wrong prong of the California *M'Naghten* test by establishing that the 'wrong' to be understood by the defendant is a legal, rather than a moral wrong."[33] Thus, the defendant's knowledge that his actions were unlawful prevents the use of his insanity as a defense even though he believed his actions were commanded by God.[34]

The court found no basis for the people's contention. The concept

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brute, or a wild beast . . . ." *Id.* (quoting Rex v. Arnold, 16 Howell St. Tr. 695, 765 (1724)).

27. *Skinner*, 39 Cal. 3d at 777, 704 P.2d at 759, 217 Cal. Rptr. at 692. *See* People v. Horn, 158 Cal. App. 3d 1014, 1032, 205 Cal. Rptr. 119, 131 (1984), in which the court of appeal held that the use of the word "and" was "too thin a reed to support such a massive doctrinal transformation."

28. *Skinner*, 39 Cal. 3d at 777, 704 P.2d at 759, 217 Cal. Rptr. at 692.

29. *Id. at* 777, 704 P.2d at 759-60, 217 Cal. Rptr. at 692-93.

30. *Id.* at 777-78, 704 P.2d at 760, 217 Cal. Rptr. at 693.

31. *Id.* at 778, 704 P.2d at 760, 217 Cal. Rptr. at 693.

32. *Id.*

33. *Id.*

34. *Id.*

of wrong was not limited to legal wrong[35] and California "cases repeatedly distinguish awareness that an act is 'wrong' from knowledge of its legal effect, i.e., that it is unlawful."[36] To satisfy the right/wrong prong of the *M'Naghten* test, the defendant must know that his acts were wrong in a broader sense and as a result, must understand "the nature and character of his action and its consequences."[37] The defendant must also be in a mentally unstable condition at the time of the act so as not to understand the wrongfulness of the act.[38] The court held that a defendant who does not understand that his actions were morally wrong will not be held criminally liable simply because he knew that his actions were unlawful.[39] The trial court found sufficient evidence to show that the defendant could not distinguish right from wrong with regard to his actions even though he knew his actions were illegal.[40] Therefore, the supreme court reversed the conviction and directed the superior court to enter a judgment of not guilty by reason of insanity.[41]

## III. THE CONCURRING AND DISSENTING OPINIONS

In his concurrence, Justice Mosk pointed out that the draftsman's error in using the word "and" instead of "or" was caused by allowing the popular vote to adopt rules of evidence.[42] Justice Mosk was convinced that the error "would have been discovered in the traditional legislative process."[43] However, in an initiative measure, revision is not possible and legislative intent is not available.[44]

Justice Mosk remains convinced that Proposition 8 is invalid in its entirety because it violates the prohibition against multiple subjects.[45] He noted that his colleagues failure to invalidate Proposition 8 as unconstitutional when they had the opportunity caused it to become the law, and Californians must live with it.[46] Therefore, Justice Mosk concurred with the majority opinion because it represents the most pragmatic approach under the circumstances.[47]

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35. *Id.* at 779, 704 P.2d at 761, 217 Cal. Rptr. at 694. *See* People v. Wolff, 61 Cal. 2d 795, 394 P.2d 959, 40 Cal. Rptr. 271 (1964).
36. *Skinner,* 39 Cal. 3d at 780, 704 P.2d at 761, 217 Cal. Rptr. at 694.
37. *Id.* at 779, 704 P.2d at 761, 217 Cal. Rptr. at 694 (quoting People v. Willard, 150 Cal. 543, 554, 89 P. 124, 129 (1907)).
38. *Skinner,* 39 Cal. 3d at 781-82, 704 P.2d at 762, 217 Cal. Rptr. at 695 (quoting *Willard,* 150 Cal. at 554, 89 P. at 129).
39. *Skinner,* 39 Cal. 3d at 783, 704 P.2d at 764, 217 Cal. Rptr. at 697.
40. *Id.* at 784, 704 P.2d at 764, 217 Cal. Rptr. at 697.
41. *Id.*
42. *Id.* at 785, 704 P.2d at 765, 217 Cal. Rptr. at 698.
43. *Id.*
44. *Id.*
45. *Id.* (citing CAL. CONST. art. II, § 8(d)).
46. *Skinner,* 39 Cal. 3d at 785, 704 P.2d at 765, 217 Cal. Rptr. at 698.
47. *Id.*

Chief Justice Bird dissented because section 25, subdivison (b) of the Penal Code is unambiguous.[48] It clearly used the word "and" and, therefore, the court has no power to rewrite the statute.[49] The defendant's failure to satisfy both prongs of the test induced Chief Justice Bird to dissent.[50]

## IV. CONCLUSION

The court in *Skinner* clarified that the *M'Naghten* test was in fact reinstated by section 25 of Proposition 8. Although there was dispute as to the conjunctive or disjunctive nature of the two prongs, the court held that the new statute adopted the old *M'Naghten* test for insanity defenses.

JOHN THOMAS MCDOWELL

### G. *"Killing of a witness" special circumstance inapplicable in juvenile proceedings:* **People v. Weidert.**

## I. INTRODUCTION

In *People v. Weidert*[1] the court held that the "killing of a witness" special circumstance for murder is not applicable to witnesses in juvenile proceedings.[2] The court held that the language of Penal Code section 190.2, subdivision (a)(10), applies only to criminal proceedings,[3] and the Welfare and Institutions Code section 203 clearly states that juvenile proceedings are not criminal proceedings.[4] Moreover,

48. *Id.* at 786, 704 P.2d at 765-66, 217 Cal. Rptr. at 698-99.

49. *Id.* at 786, 704 P.2d at 766, 217 Cal. Rptr. at 699.

50. *Id.*

1. 39 Cal. 3d 836, 705 P.2d 380, 218 Cal. Rptr. 57 (1985). Chief Justice Bird wrote for the majority, Justices Kaus, Broussard, and Reynoso concurred. Justice Grodin concurred in the result while Justice Lucas wrote a concurring and dissenting opinion with which Justice Mosk concurred.

2. *Id.* at 843, 705 P.2d at 383, 218 Cal. Rptr. at 60. This special circumstance provides that a defendant guilty of first degree murder shall be sentenced to death or to life imprisonment without parole if "[t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding . . . ." CAL. PENAL CODE § 190.2 (a)(10) (West Supp. 1986). The 1978 Briggs Initiative did not alter the phrase "in any criminal proceeding." *Weidert*, 39 Cal. 3d at 844, 705 P.2d at 384, 218 Cal. Rptr. at 61.

3. *Id.* at 843, 705 P.2d at 383, 218 Cal. Rptr. at 60. Hereinafter, this statute is referred to simply as subdivision (a)(10).

4. *Id.* at 844, 705 P.2d at 384, 218 Cal. Rptr. at 61. This section provides, "An order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose, nor shall a proceeding in the juvenile court be deemed a criminal proceeding." CAL. WELF. & INST. CODE § 203 (West 1984).

the court noted that due process would be violated if subsection (a)(10) of Penal Code section 190.2 was applied in this case.[5] The test for the "killing of a witness" special circumstance is whether the defendant believes he is exposed to criminal prosecution and kills the witness to prevent that person from testifying.[6]

## II. FACTUAL BACKGROUND

When Dr. David Edwards investigated the burglary of his office, Michael Morganti, an employee of the janitorial service, confessed to being involved in the burglary as a lookout for the defendant, who was then a seventeen year old fellow employee. Dr. Edwards confronted the defendant twice and on a third occasion told the defendant that Morganti had witnessed the crime. According to Edwards, the defendant then became very angry and said, "[N]obody is going to believe that idiot in court . . . I'll see to it that they don't."[7] The defendant also told a minor, named John A., that he wanted to kill Morganti so that Morganti could not testify against him on the burglary charge. The pair drove to Morganti's neighborhood and waited several hours until Morganti arrived. Insisting that John's sister wanted to meet Morganti, John tricked Morganti into leaving his apartment and walking to a parking lot, where the defendant was waiting with a knife. Morganti was forced into the defendant's truck and, after being driven about a mile, had his hands tied behind his back.[8]

The trio drove to a remote mountain area. Morganti was handed a shovel and ordered to dig. Then the defendant made Morganti lie in the trench and began to strike him in the head with a baseball bat. As the defendant took John's knife, John turned away and heard a scream.[9] Morganti was buried in a shallow grave, but as the defendant walked across the grave, a hand reached through the dirt and grasped the defendant's leg. The defendant proceeded to strangle the emerging head with a wire. Finally, Morganti ceased to struggle and did not respond when hit in the groin with the bat. Morganti was reburied and died of suffocation.[10]

At trial, the defendant was convicted of kidnapping and murder. The jury also found that two special circumstances existed: (1) that the murder occurred while the defendant was engaged in kidnapping,

5. *Weidert,* 39 Cal. 3d at 849, 705 P.2d at 388, 218 Cal. Rptr. at 65.

6. *Id.* at 853, 705 P.2d at 391, 218 Cal. Rptr. at 68.

7. *Id.* at 840-41, 705 P.2d at 382, 218 Cal. Rptr. at 59. Just after turning eighteen, the defendant said that he had hired someone to kill Morganti and that he intended to "get somebody" connected with the burglary. *Id.*

8. *Id.* at 841, 856-857, 705 P.2d at 382, 393, 218 Cal. Rptr. at 59, 70. g

9. *Id.* at 857, 705 P.2d at 393, 218 Cal. Rptr. at 70.

10. *Id.*

and (2) that the murder was committed to prevent Morganti from testifying in a criminal proceeding.[11] The defendant was sentenced to life imprisonment with no possibility of parole.[12]

## III. THE MAJORITY OPINION

### *A. The "Kidnapping-Murder" Special Circumstance*

The court reversed the "kidnapping-murder" special circumstance finding. In *People v. Green*[13] the court held that this special circumstance cannot be sustained where a defendant's primary goal was to kill, and the kidnapping was "merely incidental to the murder but not committed to advance an independent felonious purpose."[14] Here, the evidence established no felonious purpose except to kill, and double jeopardy barred further proceedings on this issue.[15]

### *B. The "Killing of a Witness" Special Circumstance*

The court first considered whether subdivision (a)(10) of Penal Code section 190.2 applies to a defendant who intentionally kills a witness to prevent his testimony in a *juvenile* proceeding.[16] Invoking the principle that clear, unambiguous statutory language needs no construction,[17] the court held that plain words of subdivision (a)(10) cover only witnesses in *criminal* proceedings.[18] Although public policy might have influenced the court to hold that the killing of any witness calls for capital punishment, the court strictly construed the

11. *Id.* at 841-42, 705 P.2d at 382-83, 218 Cal. Rptr. at 59-60. The kidnapping charge was brought under Penal Code section 207; the murder charge, under Penal Code section 187. *Id.* One who commits murder while engaged in kidnapping shall be sentenced to death or life imprisonment without parole. CAL. PENAL CODE § 190.2 (a)(17)(ii) (West Supp. 1986).

12. *Weidert*, 39 Cal. 3d at 842, 705 P.2d at 383, 218 Cal. Rptr. at 60. *See supra* notes 2 and 11.

13. 27 Cal. 3d 1, 609 P.2d 468, 164 Cal. Rptr. 1 (1980) (holding that a husband did not murder his wife during the commission of a robbery).

14. *Weidert*, 39 Cal. 3d at 843, 705 P.2d at 383, 218 Cal. Rptr. at 60. *See* People v. Thompson, 27 Cal. 3d 303, 321-22, 611 P.2d 883, 892-93, 165 Cal. Rptr. 289, 298-99 (1980) (holding that a robbery that was merely incidental to the murder). *See also* 17 CAL. JUR. 3d *Criminal Law* §§ 216-222 (1984); Comment, *Merger and the California Felony-Murder Rule*, 20 UCLA L. REV. 250 (1972).

15. *Weidert*, 39 Cal. 3d at 843, 705 P.2d at 383, 218 Cal. Rptr. at 60.

16. *See supra* note 2.

17. Solberg v. Superior Court, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977) (interpreting a statute concerning the disqualification of judges for prejudice). *See* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 67-70 (8th ed. 1974 & Supp. 1984).

18. *Weidert*, 39 Cal. 3d at 843, 705 P.2d at 383, 218 Cal. Rptr. at 60.

statute regardless of the "wisdom, expediency, or policy of the act."[19]

Looking beyond the statutory language did not lead the court to evidence that subdivision (a)(10) was intended to apply to juvenile proceedings. Whereas the Briggs Initiative had expanded the circumstances under which the death penalty or life without parole could be sought, the qualifying language "criminal proceeding" had not been changed.[20] The court also noted that an enacting body is deemed to know the existing laws and judicial constructions in effect when legislation is passed.[21] The Welfare and Institutions Code section 203 and several judicial decisions supported this holding.[22] Moreover, when a statute incorporates judicially construed terms, such terms are presumed to have their technical, judicial meanings.[23] The court held that subdivision (a)(10) would not be excluded from the umbrella of section 203, and thus subdivision (a)(10) did not apply to juvenile proceedings.[24]

The court stated that even if subdivision (a)(10) were ambiguous, the policy of construing penal statutes favorably to the defendant would dictate that subdivision (a)(10) not be applied to juvenile proceedings.[25] This policy was especially strong because subdivision (a)(10) determines eligibility for the death penalty.[26] Citing *McBoyle v. United States*[27] and *Keeler v. Superior Court*,[28] the court also stated that applying subdivision (a)(10) would violate the due process

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19. *Id.* at 843, 705 P.2d at 383-84, 218 Cal. Rptr. at 60-61.

20. *Id.* at 844, 705 P.2d at 384, 218 Cal. Rptr. at 61. The death penalty law was enacted in 1973 and revised in 1977. The Briggs Initiative "added several special circumstances to section 190.2 [subdivisions (a)(8),(9),(11)-(16), and (19)], expanded the list of felonies subject to the 'felony-murder' special circumstance, and deleted the requirement that felony murder be willful, deliberate, and premeditated." *Id.* Because the "criminal proceeding" language remained unaltered, the court inferred that the people had not intended to extend the statute to juvenile proceedings. *Id.*

21. *Id.* This proposition applies to legislation enacted by initiative. *In re* Lance W., 37 Cal. 3d 873, 891 n.11, 694 P.2d 744, 755 n.11, 210 Cal. Rptr. 631, 642 n.11 (1985).

22. *Weidert*, 39 Cal. 3d at 845, 705 P.2d at 384-85, 218 Cal. Rptr. at 61-62. *See supra* note 4.

23. *Weidert*, 39 Cal. 3d at 845-46, 705 P.2d at 385, 218 Cal. Rptr. at 62. *See also In re* Jeanice D., 28 Cal. 3d 210, 216, 617 P.2d 1087, 1090, 168 Cal. Rptr. 455, 458 (1980)(construing Penal Code section 190 as it relates to first degree murder).

24. *Weidert*, 39 Cal. 3d at 846, 705 P.2d at 385, 218 Cal. Rptr. at 62. The court asserted that Welfare and Institutions Code section 203 makes clear that juvenile proceedings are not criminal proceedings. *Id. See supra* note 4.

25. *Weidert*, 39 Cal. 3d at 848, 705 P.2d at 387, 218 Cal. Rptr. at 64. *See* 17 CAL. JUR. 3d *Criminal Law* § 14 (1984).

26. *Weidert*, 39 Cal. 3d at 848, 705 P.2d at 387, 218 Cal. Rptr. at 64. *See also* 3 C. SANDS, SUTHERLAND STATUTORY CONSTRUCTION § 59.03 (4th ed. 1974) (the more severe the penalty, the more strictly the penal statute should be construed).

27. 283 U.S. 25 (1931). In *McBoyle*, Justice Holmes concluded that a criminal statute should provide a fair warning that the common person can understand and thereby held that a federal statute defining "motor vehicle" in terms of automobiles and trucks did not apply to airplanes. *Id.* at 27.

28. 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970), holding a murder statute that applied only to killing a "human being" could not be extended to an unborn, via-

requirement of a fair warning.[29] Applying subdivison (a)(10) would be "an unforseeable judicial enlargement of a criminal statute, applied retroactively," and would operate "like an *ex post facto* law."[30] The enlargement would be unforeseeable since no reported decision could give the defendant notice that subdivision (a)(10) applies to juvenile proceedings.[31]

The jury could have found a special circumstance if it had found that the defendant believed that he was subject to *criminal* proceedings for the burglary, and that he killed Morganti to prevent his testimony in such a proceeding.[32] Subdivision (a)(10) focuses upon the defendant's subjective intent,[33] and it is irrelevant whether an actual criminal proceeding was pending.[34] The court reversed the special circumstance finding and remanded the issue to the trial court.[35]

## IV. THE CONCURRING AND DISSENTING OPINION

Justice Lucas dissented only to the reversal of the subdivision (a)(10) finding. Because the defendant could have faced criminal pro-

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ble fetus because there was no notice of this type of application of the statute and therefore its application violated due process.

29. *Weidert*, 39 Cal. 3d at 849, 705 P.2d at 388, 218 Cal. Rptr. at 65. *See also* Bouie v. City of Columbia, 378 U.S. 347 (1964) (the fair warning doctrine applies to a judicial enlargement of penal statutes).

30. *Weidert*, 39 Cal. 3d at 850, 705 P.2d at 388, 218 Cal. Rptr. at 65 (quoting *Bouie*, 378 U.S. at 353-54). An *ex post facto* law is one which "aggravates a crime, or makes it greater than it was, when committed." *Weidert*, 39 Cal. 3d at 850, 705 P.2d at 388, 218 Cal. Rptr. at 65. Although "*ex post facto* clauses apply only to legislative acts," the principle behind this prohibition is valid for due process clauses, and thus fair notice is lacking whenever an unforeseeable judicial enlargement of a statute makes an act punishable. *Id.*

31. *Id.* at 851, 705 P.2d at 389, 218 Cal. Rptr. at 66. Because the defendant faced a minimum prison sentence of 25 years, the court rejected the argument that excluding witnesses in juvenile proceedings from subdivision (a)(10) would " 'allow and encourage criminal offenders to literally get away with murder.' " *Id.*

32. *Id.* at 853, 705 P.2d at 390-91, 218 Cal. Rptr. at 67-8.

33. *Id.* Thus, the fact that the prosecutor had contemplated only a juvenile proceeding and that the defendant was not unfit for juvenile court were not controlling. *Id.* at 852-53, 705 P.2d at 390, 218 Cal. Rptr. at 67.

34. *Id.* at 853-54, 705 P.2d at 391, 218 Cal. Rptr. at 68. If the defendant had killed a possible witness for the purpose of preventing his testimony in a criminal proceeding, it would be no defense to subdivision (a)(10) that unknown to the defendant, the witness would not have been called at trial, or that the prosecution had dropped the case. *Id.*

35. *Id.* Because the trial court erroneously instructed the jury that subdivision (a)(10) included juvenile proceedings, the prosecution had no incentive to present evidence of the defendant's subjective intent. Thus, double jeopardy would not bar prosecution on subdivision (a)(10). *Id.*

ceedings had he been found unfit for juvenile court,[36] his "see to it" remark could have reasonably constituted substantial evidence of an intent to kill to prevent testimony in a criminal proceeding.[37] Moreover, Lucas asserted that juvenile proceedings are criminal proceedings.[38] Lucas argued that the policy of interpreting statutes favorably to the defendant should not override the principles of construing statutes to avoid absurd results and to uphold their constitutionality.[39] Finally, while due process requires fair notice that one's conduct is criminal, the defendant was not constitutionally entitled to know the exact degree of punishment for his crime.[40]

### V. CONCLUSION

In *Weidert* the court limited application of the "killing of a witness" special circumstance to adult criminal proceedings only and not juvenile proceedings. However, other special circumstances might not mandate such a strict reading of the statute at issue and this decision may serve as precedent for future ambiguous application of special circumstance findings to juveniles.

MARK S. BURTON

## VIII. FAMILY LAW

### A. *Legislation requiring written evidence of an agreement that property acquired during marriage in joint tenancy is the separate property of one spouse cannot constitutionally be applied to cases that are pending a final judgment on the statute's effective date: In re* Marriage of Buol.

### I. INTRODUCTION

In the case of *In re Marriage of Buol*,[1] the court determined the

36. *See* CAL. WELF. & INST. CODE §§ 603, 604, 707 (West 1984 & Supp. 1986).

37. *Weidert*, 39 Cal. 3d at 857-58, 705 P.2d at 393-394, 218 Cal. Rptr. at 70-71 (Lucas, J., concurring and dissenting). *See supra* note 7.

38. *Weidert*, 39 Cal. 3d at 858-59, 705 P.2d at 394, 218 Cal. Rptr. at 71 (Lucas, J., concurring and dissenting). Justice Lucas found the criminal-juvenile distinction artificial. He stated that the Briggs Initiative was intended to multiply the special circumstances which invoke the death penalty or life imprisonment without parole. *Id.*

39. *Id.* at 860, 705 P.2d at 395, 218 Cal. Rptr. at 72. The majority's holding was anomolous due to the fact that the question whether the death penalty is allowed depends merely on the anticipated testimonial forum and also the fact that the criminal-juvenile distinction might be an unconstitutional classification. *Id.* at 858, 705 P.2d at 394, 218 Cal. Rptr. at 71. *See* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 68-69 (8th ed. 1974 & Supp. 1984).

40. *Weidert*, 39 Cal. 3d at 860, 705 P.2d at 395, 218 Cal. Rptr. at 72 (Lucas, J., concurring and dissenting).

1. 39 Cal. 3d 751, 705 P.2d 354, 218 Cal. Rptr. 31 (1985). Justice Reynoso wrote for

retroactive application of Civil Code section 4800.1,[2] and altered previous requirements regarding the rebuttal of a community property presumption. Prior to the enactment of section 4800.1, evidence of an oral agreement was sufficient to establish that the parties to the agreement intended for property taken in joint tenancy to be the separate property of one spouse.[3] The court held that the requirement of written proof of the oral agreement in an action that had been filed, but was not final before the effective date of the statute, would be an unwarranted deprivation of a vested property right without due process of law.[4]

Esther and Robert Buol were married in 1943 and separated in 1977. Robert worked as a laborer until he was fired in 1970, partially due to alcoholism. He began receiving social security disability payments in 1973. Esther has continually earned wages since 1954. Esther put her earnings and child support money from her former spouse into a separate bank account with her husband's knowledge and consent. Funds from this account were used for family support and to purchase a house in 1963 for $17,500. The title was taken in joint tenancy at the advice of the realtor handling the sale. Esther made all payments on the house out of her separate account. Robert contributed nothing.

Esther and several family members testified at trial that Robert made numerous statements during the marriage that the separate account and the house belonged to Esther. Robert even admitted that he considered the account to be Esther's, and that he borrowed from her on several occasions. Additionally, Esther testified that she would never have gone to work without an agreement that the money she made was hers because she had no desire to supply Robert with more drinking and gambling money.

The trial court held that the oral agreement was sufficient to establish the house as Esther's separate property.[5] However, while the

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the majority. Chief Justice Bird and Justices Mosk, Kaus, Broussard, Grodin and Lucas concurred.

2. CAL. CIV. CODE § 4800.1 (West Supp. 1986).

3. This evidentiary rule was established in *In re* Marriage of Lucas, 27 Cal. 3d 808, 614 P.2d 285, 166 Cal. Rptr. 853 (1980).

4. *Buol*, 39 Cal. 3d at 757, 705 P.2d at 357, 218 Cal. Rptr. at 34.

5. At the time of the trial, section 5110 of the Civil Code provided that a single family residence acquired in joint tenancy during marriage is presumed to be community property in a dissolution proceeding. CAL. CIV. CODE § 5110 (West 1983). The *Lucas* court decided that evidence of an oral agreement would be sufficient to rebut this presumption. *See supra* note 3 and accompanying text. This rule was superceded by section 4800.1, effective on January 1, 1984.

appeal of the judgment was pending, the legislature enacted section 4800.1 of the Civil Code.[6] A clear statement in the section made it retroactive to all cases pending on January 1, 1984. Therefore, the appellate court reversed the trial court's holding because Esther had failed to produce any written evidence of an agreement that the house was her separate property.[7]

## II. THE MAJORITY OPINION

### *A. The Substantive Effect of 4800.1*

The court considered legislative intent only one factor in determining whether a statute should apply retroactively. Constitutional restraints may bar such retroactive application if it is an *ex post facto* law, it deprives a person of a vested property right without due process of law, or it impairs the obligation of a contract.[8] Retroactive application of a statute which is purely procedural or merely evidentiary is generally permissible. Even though the statute involved may appear on its face to be non-substantive, the practical effects of the law must be considered to show its actual impact if retroactively applied.[9]

A statute is substantive in effect if it imposes a new liability or substantially affects existing rights and obligations.[10] The court held that Esther Buol possessed a vested property right in the house. The effect of section 4800.1 was to impose upon her a statute of frauds, a requirement which never previously existed. Thus, the court held that section 4800.1 penalized the unwary for relying on the law in

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6. Civil Code section 4800.1 states:

> For the purpose of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint tenancy form is presumed to be community property. This presumption is a presumption affecting the burden of proof and may be rebutted by either of the following:
>
> (a) A clear statement in the deed or other documentary evidence of title by which the property is acquired that the property is separate property and not community property. (b) Proof that the parties have made a written agreement that the property is separate property.
>
> This act applies to the following proceedings:
>
> (a) Proceedings commenced on or after January 1, 1984.
>
> (b) Proceedings commenced before January 1, 1984, to the extent proceedings as to the division of property are not yet final on January 1, 1984.

CAL. CIV. CODE § 4800.1 (West Supp. 1986).

7. *In re* Marriage of Buol, 159 Cal. App. 3d 174, 205 Cal. Rptr. 543 (1984). This decision was from the first appellate district. A contrary ruling was made in *In re* Marriage of Milse, 159 Cal. App. 3d 471, 205 Cal. Rptr. 616 (1984), where the court held that the retroactive application of § 4800.1 was an unconstitutional deprivation of property.

8. *Buol*, 39 Cal. 3d at 756, 705 P.2d at 357, 218 Cal. Rptr. at 34.

9. *Id.* at 758, 705 P.2d at 358, 218 Cal. Rptr. at 35.

10. *Id.* at 758-59, 705 P.2d at 358, 218 Cal. Rptr. at 35 (citing Aetna Casualty & Surety Co. v. Industrial Accident Co., 30 Cal. 2d 388, 182 P.2d 159 (1947)).

existence at the time the property rights were created. Because oral agreements had been the only evidence required by the courts to establish and protect a vested property right under the provisions of the old law, the effect of the new law was to create an irrebuttable presumption which precluded recognition of the vested right. The new section effectively eliminated the means by which a spouse could prove the existence of a vested right. This affects the right itself, not just the standard of proof.[11]

The clear statement of the legislature notwithstanding, the court ruled that the effect of section 4800.1 is substantive in that it deprives one spouse of a vested property right without due process of law.[12] Section 4800.2 of the Civil Code[13] was passed simultaneously with section 4800.1. Its provision for reimbursing the amount of separate property funds traced to the purchase of the property was deemed to be insufficient to remedy the effect of the retroactive application of the section. Reimbursement neither accounts for taxes and interest paid on a loan, nor does anything to protect a spouse's separate interest in the appreciated value of the home.[14]

### *B. State Power to Impair Vested Rights*

The court initially noted that by exercising its police power, a state may impair vested rights when it is reasonably necessary to protect the health, safety, morals, and general welfare of the people.[15] In determining whether a state may impair a private property interest through retroactive application of a statute, private and state interests must be balanced. The significance of the state interest and the importance of retroactive application of the law which serves that interest are compared with the extent of private reliance on the former law, the legitimacy of that reliance, the extent of actions taken on the basis of reliance and the extent to which retroactive application would disrupt those actions. Where the balance shows that retroactive application is necessary to serve a sufficient state interest, there is no due process violation of law.[16]

In cases where state power has been used to abrogate marital prop-

11. *Buol*, 39 Cal. 3d at 761, 705 P.2d at 358-59, 218 Cal. Rptr. at 35-36.
12. *Id.* at 759, 705 P.2d at 359, 218 Cal. Rptr. at 36.
13. CAL. CIV. CODE § 4800.2 (West Supp. 1986).
14. *Buol*, 39 Cal. 3d at 760, 705 P.2d at 359-60, 218 Cal. Rptr. at 36-37.
15. *Id.* at 760-61, 705 P.2d at 360, 218 Cal. Rptr. at 37 (citing *In re* Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976)).
16. *Buol*, 39 Cal. 3d at 761, 705 P.2d at 360, 218 Cal. Rptr. at 37.

erty rights, the state's interest has been in the equitable dissolution of marriage. In those cases, retroactive application of the statute was necessary to remedy the rank injustice of a former law.[17] The court found that section 4800.1 cures no "rank injustice" in the law. Furthermore, the state interest of insuring equitable distribution of community property is not served by retroactively enforcing the writing requirement when the asset, as in the present case, is the separate property of one spouse.[18]

## III. CONCLUSION

The court noted a lack of uniformity in the treatment of marital property presumptions. For example, section 4800.1 does not change the sufficiency of an oral agreement to rebut the community property presumption when title is taken as "husband and wife." Non-title property, though also presumed community property, may be proven to be separate property by tracing the source of the property to separate funds.[19]

Moreover, the practice of married couples taking property in joint tenancy is in reality due to the advice of real estate brokers who prepare the deeds, not as a result of an informed legal decision. Given the lack of uniformity in the treatment of community property presumptions, it seemed manifestly unjust to the court to penalize an unwary party for her uninformed action when there was no compelling state interest to support retroactive application of the new law.[20] Furthermore, the policy of evidentiary convenience was not served by retroactively applying a statute after the trial had already taken place.[21] The court concluded that retroactively applying section 4800.1 to the present case would substantially impair Esther Buol's vested property right. Since no state interest was found to be served, retroactive application of the statute was struck down a as a depriva-

17. *Id.* The court cited two cases in which the state's interest was in correcting the rank injustice of the former law: *In re* Marriage of Bouquet, 16 Cal. 3d 583, 546 P.2d 1371, 128 Cal. Rptr. 427 (1976) (retroactively made postseparation earnings of both spouses, not just the wife, separate property), and Addison v. Addison, 62 Cal. 2d 558, 399 P.2d 897, 43 Cal. Rptr. 97 (1965) (upholding retroactive application of quasi-community property legislation).

18. *Buol,* 39 Cal. 3d at 761-62, 705 P.2d at 360-61, 218 Cal. Rptr. at 37-38.

19. *Id.* at 762, 705 P.2d at 361, 218 Cal. Rptr. at 38.

20. *Id.*

21. *Id.* at 763, 705 P.2d at 361-62, 218 Cal. Rptr. at 38-39. The court expressly overruled contrary holdings in the following cases: *In re* Marriage of Taylor, 160 Cal. App. 3d 471, 206 Cal. Rptr. 557 (1984); *In re* Marriage of Benart, 160 Cal. App. 3d 183, 206 Cal. Rptr. 495 (1984); *In re* Marriage of Martinez, 156 Cal. App. 3d 20, 202 Cal. Rptr. 646 (1984); *In re* Marriage of Anderson, 154 Cal. App. 3d 572, 201 Cal. Rptr. 498 (1984); *In re* Marriage of Neal, 153 Cal. App. 3d 117, 200 Cal. Rptr. 341 (1984).

tion of property without due process of law.[22]

JAMES B. BRISTOL

### B. *Trial court abused its discretion in awarding custody of child:* Michael U. v. Jamie B.

In *Michael U. v. Jamie B.*, 39 Cal. 3d 787, 705 P.2d 362, 218 Cal. Rptr. 39 (1985), the rights of the natural father were in conflict with the interests of the infant born out of wedlock when determining the custody of the infant. The ultimate issue was whether awarding custody to the father would have a detrimental effect on the child. The supreme court thus reviewed evidence submitted to the trial court to decide if the trial court had abused its discretion in awarding custody to the father.

Michael U. was sixteen and Jamie B. was twelve when they conceived Eric. Although Michael and his family wished to raise the infant, Jamie and her parents insisted that the baby be adopted by a married couple. Michael refused to consent to the adoption, but never obtained custody of the child for any period of time. After the adoption, Michael sought to gain custody of Eric. Relying on the fact that Michael was attempting to graduate from high school, had enrolled in community college courses, had always expressed a desire to keep the baby while Jamie was pregnant and had a large family and large home, the trial court ruled that it would not be detrimental to Eric to award custody to Michael.

The supreme court, however, noted other factors that were not disputed at trial. First, Michael had academic difficulties in school and

22. The total effect of *Buol* is not yet known. It is reasonable to believe that the case will be strictly construed, and retroactive application of § 4800.1 will be barred only in cases that are commenced, but not final, on January 1, 1984. The court's rationale in invalidating retroactive application rested on the basic unfairness of imposing an impossible burden of proof on Esther Buol after the trial had taken place. *Buol*, 39 Cal. 3d at 763, 705 P.2d at 362, 218 Cal. Rptr. at 39. From the tone of the opinion, it appears that Robert's habits of drinking and gambling threw the court's sympathies to Esther, who apparently was the stable provider for the children throughout the marriage.

Narrow application of this case would not affect the requirements of § 4800.1 in cases that are not initiated before January 1, 1984. This means that *Buol* may be of no help in a case where the property was acquired before the effective date of the statute and the spouse is lacking written proof that her property is separate. However, if the court's ruling is broadly construed it can be presumed that there will be two evidentiary burdens of proof to establish separate ownership for many years to come. Once it has been found that the property was acquired during marriage, the applicable standard would be determined by the date of the property's acquisition.

was only in the ninth grade at age sixteen. Second, he was dismissed from the high school football team because of frequent fighting. The dean in charge of school discipline, having become acquainted with Michael through his frequent visits to the discipline office, stated that Michael was always very defiant, immature, disruptive, and lacked respect for authority. Third, Michael displayed immaturity in having intercourse with a twelve year old girl which could have subjected him to criminal prosecution. *See* CAL. PENAL CODE § 261.5 (West Supp. 1986). Finally, a child psychologist testified that Eric had developed an emotional attachment to his adoptive parents. In his expert opinion, he believed that Eric would have many negative emotional reactions if placed in a different home.

Before analyzing these facts, the court found that Michael's consent to Eric's adoption was not necessary, as his status under the Uniform Parentage Act was only that of a natural father. CAL. CIV. CODE § 7004 (West 1983). This holding was based on the fact that Michael never received Eric into his home and openly held him out as his natural child. *Id.* § 7004 (a)(4).

Nonetheless, the court was restrained from deciding the custody issue solely on the basis of the best interest of the child and the wishes of the mother. Michael, as the biological father, was deemed to be entitled to parental preference in an award of custody. *See* CAL. CIV. CODE § 4600 (West Supp. 1986). *See also* Note, *In re Lisa R.*, 3 PEPPERDINE L. REV. 212 (1975) (California case after *Stanley v. Illinois*, 405 U.S. 645 (1972), which ruled that an unwed father has certain rights to custody).

The court ruled that the custody rights of the natural father shall be terminated upon a finding that removing the child from his adoptive parents and granting paternal custody would be detrimental to the child. *See In re Baby Girl M.*, 37 Cal. 3d 65, 688 P.2d 918, 207 Cal. Rptr. 309 (1984). Since the trial court correctly used this rule in making its determination, the supreme court could only decide if the trial court had erred by abusing its discretion. The great weight of uncontroverted evidence showed Michael to be immature and irresponsible, therefore the court held that there was a clear abuse of discretion at the trial stage. A key error committed by the trial court was relying on Michael's mother and family as adequate providers for Eric. Once Michael reaches majority age, the court reasoned, there would be no lawful means of forcing him to continue to rely on the nuclear family for the care of Eric.

JAMES B. BRISTOL

## IX. JURY MISCONDUCT

*Failure to rebut prejudicial effect of jury misconduct is grounds for reversal of murder conviction:* **In re Stankewitz.**

In the case of *In re Stankewitz,* 40 Cal. 3d 391, 708 P.2d 1260, 220 Cal. Rptr. 382 (1985), the court granted the petitioner's writ of habeas corpus, finding a denial of a fair trial due to jury misconduct. Even though Stankewitz waited almost eighteen months after obtaining juror statements to file the writ, the court did not find a waiver of rights since he justified the delay and the state failed to show prejudice from the delay. The jury's misconduct raised a presumption of prejudice which the state failed to rebut, leading to an impeachment of the verdict under Evidence Code section 1150(a). CAL. EVID. CODE § 1150 (West 1966).

Petitioner was a prison escapee hiding in a remote canyon cabin when he robbed two campers at gunpoint. Although he told them he was not going to take their money, he proceeded to shoot one and the other escaped. He was convicted of first degree murder and robbery, and sentenced to death on September 15, 1981.

In March of 1983 his appellate counsel obtained statements from two jurors that another juror, a longtime police officer, had told them that his interpretation of the law was correct. Stankewitz contended that the officer's view of the law, that robbery can be committed without the intent to steal, was incorrect and constituted prejudicial error in the guilt phase of his trial. Even though the writ was filed on November 2, 1984, more than three years after the conviction, the court did not find it barred by the doctrine of laches.

A defendant is denied a fair trial when extraneous law enters jury deliberations unless the state can prove that there was no prejudicial effect on the verdict. *See California Supreme Court Survey,* 10 PEPPERDINE L. REV. 870 (1983). This type of jury misconduct may be pled in a writ of habeas corpus. The main issue the court considered was whether the jurors themselves could offer evidence of jury misconduct. The California Evidence Code, section 1150(a), describes the conduct necessary to impeach a verdict. "[A]ny otherwise admissible evidence may be received as to statements made . . . either within or without the jury room . . . of such a character as is likely to have influenced the verdict improperly." CAL. EVID. CODE § 1150 (West 1966). While jurors may describe overt acts, evidence of the effect of statements on their reasoning is not allowed.

Jurors must follow the law as the court provides to them and statements made by a juror constitute evidence capable of impeaching a verdict. *Durr v. Cook,* 589 F.2d 891 (5th Cir. 1979). The court held that the juror, who repeatedly stated that the robbery was committed as soon as Stankewitz "took" the wallets whether or not he "intended" to keep them, committed juror misconduct. The element of intent was crucial to the state's charges of felony murder and robbery under special circumstances. A defendant is entitled to a new trial unless the state can prove that no prejudice actually resulted. In this case, since the jurors testified that their verdict included a decision on Stankewitz' intent to commit the robbery, the introduction of incorrect law was juror misconduct.

A conviction cannot stand if even one juror is improperly influenced. The state did not offer evidence that all of the jurors knew the correct law to be applied and the presumption of prejudice was not rebutted. The court therefore remanded for a new trial. The state also failed to offer evidence that it was prejudiced by the three year time delay between conviction and this proceeding. Stankewitz relied on previous law to justify his delay in filing the writ. The court warned that a petitioner seeking extraordinary relief should not rely on a narrow interpretation of case law and should use the circumstances of his case as the justification for the delay in seeking relief. Therefore, the writ was not barred by the doctrine of laches.

CYNTHIA M. WALKER

## X. LABOR LAW

### A. *Fraudulent concealment of the existence of employee's injury by silence of employer is sufficient statement of a cause of action for aggravation of those injuries:* Foster v. Xerox.

In *Foster v. Xerox,* 40 Cal. 3d 306, 707 P.2d 858, 219 Cal. Rptr. 485 (1985), the supreme court held that workers' compensation was not the exclusive remedy for an employee whose injuries were aggravated when his employer failed to tell him of his injury. The employee did not need to allege affirmative acts in order to show fraudulent concealment under Labor Code § 3602(b)(2). CAL. LAB. CODE § 3602(b)(2) (West Supp. 1986). Silence of the employer, who had a duty to warn, was sufficient to show fraud. The court also held that the plaintiff could state a cause of action for aggravated injuries that were caused by the employer's equipment which occurred after he terminated his employment.

Foster serviced Xerox equipment for eleven years, unaware that the drums of such machinery contained large amounts of arsenic.

Xerox neither safeguarded Foster nor informed him that his symptoms were due to arsenic poisoning. In 1982 Foster became too ill to continue working and was forced to terminate his employment. He then was diagnosed by a private physician as suffering from arsenic poisoning which had been aggravated by his continued exposure to the substance while on the job.

The main issue before the court was whether "fraudulent concealment" could occur by silence, or if it required some affirmative misrepresentation that a work-related injury existed. The court concluded that neither the language nor case law required an active misleading of the employee. Fraud occurs when the duty of disclosure is breached by someone having the duty. In a similar case, the court held that concealment by silence of the danger of asbestos to workers was sufficient to state a cause of action for aggravated injuries. *Johns-Manville Products Corp. v. Superior Court,* 27 Cal. 3d 465, 612 P.2d 948, 165 Cal. Rptr. 858 (1980).

Although workers' compensation has been the exclusive remedy for work-related injuries, legislative enactments now allow exceptions for three types of conduct. An additional cause of action can be brought if the employer: 1) engages in a willful physical assault; 2) fraudulently conceals a work-related injury leading to aggravation of that injury; or 3) has sold injury-causing defective equipment to a third party who provides it for the employee's use. *See* CAL. LAB. CODE § 3602(b)(1)-(3) (West Supp. 1986). In order to achieve justice, and because the plaintiff had alleged that Xerox had knowledge of the injuries, the court held that the case should proceed to trial on its merits under section 3602(b)(2). The court also allowed for a second cause of action since the allegations of injury after employment had terminated were outside the scope of the Code.

CYNTHIA M. WALKER

### B. *A valid contractor's license is required for any person performing any function or activity as a condition of having independent contractor's status pursuant to Labor Code § 2750.5:* State Compensation Insurance Fund v. Workers' Compensation Appeals Board.

#### I. INTRODUCTION

In *State Compensation Insurance Fund v. Workers' Compensation*

*Appeals Board*,[1] the court considered three issues. The first issue was whether Labor Code section 2750.5, which requires a "valid contractors' license as a condition of having independent contractor status" is applicable in workers' compensation cases. The second issue was whether 2750.5 is applicable if the worker is seeking employee status instead of independent contractor status. Finally, the court reviewed whether a person should be estopped from denying independent contractor status due to his failure to disclose his lack of contractor's license to a homeowner who hired him for a remodeling job.

## II. FACTUAL BACKGROUND

Chichester is the owner of a small ranch which he worked with his son. After discussing a remodeling project with Chichester, Meier submitted a bid and it was subsequently accepted.[2] The factors used to determine independent contractor status were mostly present in this case[3] except for the fact that Meier did not hold a contractor's license nor work under anyone else's license.[4] During the course of remodeling the ranch house, Meier was severely injured when he fell from a scaffold. As a result of a broken neck Meier was rendered a quadriplegic.

An insurance policy had been issued by State Compensation Insurance Fund (State Fund) to Chichester's son as an employee of the ranch business. State Fund paid premiums after the injury to Meier

1. 40 Cal. 3d 5, 706 P.2d 1146, 219 Cal. Rptr. 13 (1985). Justice Broussard wrote for the majority. Justices Kaus, Reynoso and Grodin, concurred. There was a separate concurring opinion by Justice Mosk, with Chief Justice Bird concurring. There was a separate dissenting opinion by Justice Mosk. Justice Kaus was sitting as a retired associate justice of the supreme court under assignment by the chairperson of the judicial council.

2. The bid was for $9,493 and was submitted on a sheet from a Pacific Structural Concrete scratch pad. *Id.* at 7, 706 P.2d at 1147, 219 Cal. Rptr. at 14.

3. California Labor Code, section 3353 provides: " 'Independent contractor' means any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." CAL. LAB. CODE § 3353 (West 1965). In the instant case, these factors all seem to be present. However, the court found Meier to be an employee and not an independent contractor because he lacked a contractor's license as required by the penultimate paragraph of section 2750.5. *See contra* Germann v. Workers' Compensation Appeals Bd., 123 Cal. App. 3d 776, 176 Cal. Rptr. 868 (1981) (evidence and facts that: 1) applicant was an experienced carpenter and member of carpenters union, 2) homeowner gave no instructions to applicant or the other people performing carpentry work, and 3) architect actually gave no instructions to applicant but only told homeowner what to do to help, did not support a finding that applicant was an employee of homeowner, and thus homeowner was not liable for payment to applicant, who had sustained injury to his right hand while working as a carpenter on the home, of workers' compensation benefits.)

4. Chichester did not ask Meier whether he was licensed and Meier did not say that he was not. Meier had previously had a contractor's license until 1969 when he went bankrupt. *State Compensation Ins. Fund*, 40 Cal. 3d at 8, 706 P.2d at 1148, 219 Cal. Rptr. at 14.

until it subsequently concluded that Meier was an independent contractor,[5] and discontinued all benefit payments. At the workers' compensation hearing the judge determined that because Meier did not have a valid contractor's license, pursuant to Labor Code section 2750.5, he therefore was not an independent contractor. Accordingly, the defense of being an independent contractor was not available to the insurance company.[6]

## III. THE MAJORITY OPINION

### A. *The Applicability of Section 2750.5 to Workers' Compensation Cases*

There have been three court of appeal cases that have considered whether the penultimate paragraph of section 2750.5[7] applies in

5. *See generally,* 65 CAL. JUR. 3D, *Work Injury Compensation,* § 39 (1976); 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workmens' Compensation* § 109 (8th ed. 1974 & Supp. 1984).

6. This decision was based on Labor Code section 2750.5 and the decision in Travelers Ins. Co. v. Workers' Compensation Appeals Bd., 147 Cal. App. 3d 1033, 95 Cal. Rptr. 564 (1983). The judge also determined that Meier was not estopped to deny he had a license. *State Compensation Ins. Fund,* 40 Cal. 3d at 8, 706 P.2d at 1148, 219 Cal. Rptr. at 14.

7. Labor Code section 2750.5 reads as follows:

> There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:
> (a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.
> (b) That the individual is customarily engaged in an independently established business.
> (c) That the individual's independent contractor status is a bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, *holding a license pursuant to the Business and Professions Code,* the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

workers' compensation cases. All three cases concluded that it is applicable.

The first case, *Foss v. Anthony Industries,*[8] involved a wrongful death action. The court held that section 2750.5 applies to both workers' compensation cases and tort cases.[9] The second case, *Fillmore v. Irvine,*[10] was a contract case where an unlicensed worker sued to recover for services rendered. The court stated by way of dictum that section 2750.5 was applicable to workers' compensation cases.[11] The third case, *Travelers Insurance Co. v. Workers' Compensation Appeals Board,*[12] was a workers' compensation case. The court held that the penultimate paragraph of section 2750.5, "means that no person who performs any work for which a contractor's license is required shall be found to be an independent contractor unless such person holds a valid contractor's license."[13] Here, based on the aforementioned cases, the court concluded that section 2750.5 must be interpreted to apply to workers' compensation cases.[14]

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> In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with section 7000) of Division 3 of the Business and Professions Code *shall hold a valid contractors' license as a condition of having independent contractor status.* For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of employees under Division 4 and Division 5.

CAL. LAB. CODE § 1750.5 (West Supp. 1986) (emphasis added).

8. 139 Cal. App. 3d 794, 189 Cal. Rptr. 31 (1983).

9. *Id.* at 797-99, 189 Cal. Rptr. at 32-34. Although the court held that section 2750.5 was applicable in tort cases, it could not be applied in this case because the paragraph made a substantive change in the law and was enacted between the accident and the trial. Notwithstanding this holding, the court noted that the licensing requirement of section 2750.5 added a new factor which must be shown to prove that a party was an independent contractor.

10. 146 Cal. App. 3d 649, 194 Cal. Rptr. 319 (1983).

11. Business and Professions Code section 7031 reads as follows:

> No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract, except that such prohibition shall not apply to contractors who are each individually licensed under this chapter but who fail to comply with section 7029.

CAL. BUS & PROF. CODE § 7031 (West 1975).

12. 147 Cal. App. 3d 1033, 195 Cal. Rptr. 564 (1983).

13. *Id.* at 1037, 195 Cal. Rptr. at 566. In the instant case, the court was influenced by the holding in the Travelers Insurance Company case even though the issue, whether section 2750.5 was applicable in workers' compensation cases, was not argued. *State Compensation Ins. Fund,* 40 Cal. 3d at 12, 706 P.2d at 1150, 219 Cal. Rptr. at 16.

14. *State Compensation Ins. Fund,* 40 Cal. 3d at 12, 706 P.2d at 1150, 219 Cal. Rptr. at 16.

### *B. The Legislative History of Section 2750.5*

As originally enacted in 1978, Labor Code section 2750.5 created a rebuttable presumption that a person is an employee instead of an independent contractor if a license is required for the work the person does.[15] Subdivisions (a), (b), and (c) of section 2750.5 list factors which must be proven to rebut this presumption.[16] The last two paragraphs were added by amendment in 1979. The penultimate paragraph establishes a fourth factor necessary to rebut the presumption, that is, a valid contractor's license. The last paragraph provides that "coverage" means workers' compensation coverage.[17] Thus, the court held the language of section 2750.5 makes it clear that the presumption of employee status was intended to apply in workers' compensation cases.[18]

### *C. The Effect of the Penultimate Paragraph of Section 2750.5*

In determining the second issue, whether the penultimate paragraph of section 2750.5 is applicable where the worker seeks employee status instead of independent contractor status, the court concluded that the legislature expressly stated that a valid contractors' license was a prerequisite to independent contractor status.[19] Therefore, section 2750.5 becomes significant because it determines the status of a person as either an independent contractor or employee by creating the prerequisite of a valid contractors' license to obtain independent contractor status. The court reasoned that there was no legislative intent that a person without a valid contractor's license would be an independent contractor at certain times and not at others.[20]

### *D. Estoppel*

The court rejected State Fund's contention that Meier should be estopped to deny his status as an independent contractor because he failed to disclose he was not licensed when he contracted for the

15. *See* CAL. BUS. & PROF. CODE § 7000-19 (West 1975).
16. CAL. LAB. CODE § 2750.5 (West Supp. 1986).
17. *State Compensation Ins. Fund*, 40 Cal. 3d at 13, 706 P.2d at 1151, 219 Cal. Rptr. at 17.
18. *Id.*, 706 P.2d at 1151, 219 Cal. Rptr. at 17.
19. *State Compensation Ins. Fund*, 40 Cal. 3d at 15, 706 P.2d at 1153, 219 Cal. Rptr. at 19.
20. *Id.* at 14, 706 P.2d at 1151, 219 Cal. Rptr. at 19.

job.[21] The court found that the compensation judge's finding was correct and that there was no reliance on any representation that Meier made to Chichester because he never held himself out as holding a valid contractor's license.[22]

## IV. THE CONCURRING OPINION

Justice Mosk wrote a separate opinion, with which Chief Justice Bird concurred, concluding that the majority's interpretation of section 2750.5 placed an unfair burden on a class of employers.[23] Justice Mosk claimed there was a dissimilar treatment of two classes of employers, both of which passed the rational basis test of being legitimately related to a reasonable state goal. Both groups fulfilled the test that they were related to the state goal of passing on the cost of paying for workers' injuries to the class of employers who can best bear the cost.[24] Justice Mosk felt it was unreasonably harsh to deny an employer the defense of showing the person's independent contractor status when a person who was required to have a contractors' license did not have one.

## V. THE DISSENT

Justice Lucas dissented from the majority's holding because he believed that the majority's opinion would misuse public funds by rewarding unlicensed contractors with compensation benefits which were otherwise available by law to only bona fide employees.[25] Justice Lucas stated that the correct analysis was set forth in Justice Kaufman's Court of Appeal's opinion, which was vacated when the case was appealed to the supreme court.[26]

## VI. CONCLUSION

The court affirmed the award of the compensation judge. The

21. *See* Evidence Code section 623, which provides: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it." CAL. EVID. CODE § 623 (West 1965).

22. *State Compensation Ins. Fund*, 40 Cal. 3d at 16, 706 P.2d at 1153, 219 Cal. Rptr. at 20. In *Travelers Ins. Co.* the court held that in the absence of a representation that he was licensed there was no basis to estop the worker from establishing that he was unlicensed and, under section 2750.5 an employee. *Travelers Ins. Co.*, 147 Cal. App. 3d at 1038, 195 Cal. Rptr. at 569.

23. *State Compensation Ins. Fund*, 40 Cal. 3d at 16-18, 706 P.2d at 1154, 219 Cal. Rptr. at 20 (Mosk, J., concurring).

24. *Id.* at 17, 706 P.2d at 1154, 219 Cal. Rptr. at 20.

25. *Id.* at 18, 706 P.2d at 1155, 219 Cal. Rptr. at 21 (Lucas, J., dissenting).

26. The entire vacated opinion is incorporated into the dissent. *Id.* at 18-24, 706 P.2d at 1154-58, 219 Cal. Rptr. at 21.

court concluded that Meier's lack of a valid contractor's license precluded the application of section 2750.5 and thereby a finding that he was an independent contractor. Therefore, the defense that Meier was an independent contractor was not available to State Fund.

MARIE P. HENWOOD

## XI. MUNICIPAL LAW

*Ordinance requiring escort service owners and employees to pay license fees and obtain a permit from the chief of police before undertaking any business is not preempted by state law:* **Cohen v. Board of Supervisors.**

In *Cohen v. Board of Supervisors,* 40 Cal. 3d 277, 707 P.2d 840, 219 Cal. Rptr. 467 (1985), the court determined that a San Francisco ordinance, which required escort service owners and employees to pay a yearly license fee and obtain a permit before undertaking any business, was not preempted by state law. *See* SAN FRANCISCO, CAL., MUN. POLICE CODE §§ 1074.1-1074.30 (1981). The court remanded the case because the court of appeal had failed to use the abuse of discretion analysis to determine whether the trial court had erroneously denied the application for the preliminary injunction. The validity of the ordinance was challenged by a taxpayer who was an attorney. He argued it violated the first, fourth, sixth and fourteenth amendments. The trial and appellate courts denied injunctive and declaratory relief. The court listed two factors trial courts should use to decide whether or not to issue a preliminary injunction. The first factor was the likelihood of success on the merits. The second was balancing the harm the plaintiff will incur if the injunction is denied against the harm the defendant will incur if the injunction is issued. *IT Corp. v. County of Imperial,* 35 Cal. 3d 63, 69-70, 672 P.2d 121, 125, 196 Cal. Rptr. 715, 719 (1983).

Initially, the court reviewed the process of obtaining injunctive relief. The trial court generally has discretion as to whether an injunction will be issued. This will not be questioned on appeal unless the trial court has abused its discretion. The court of appeal failed to determine whether the trial court had abused its discretion in its findings on the two factors, therefore, the court ordered it to do so. The court also instructed the court of appeal to determine the constitutionality of the ordinance.

As a result of the foregoing findings, the only issue the court con-

sidered on appeal was the preemption issue. The appellants asserted that the escort service ordinance was invalid because its regulation of sexual conduct was preempted by the state penal code. The court reasoned that under the California Constitution, local legislation is enforceable as long as there is no conflict with general laws. CAL. CONST. art. XI, § 7. First, the court determined that the San Francisco ordinance did not explicitly "conflict" with any provision of state law. Therefore, it found no preemption on this foundation. However, the court found that two provisions of the ordinance "duplicated" state law, and thus were preempted. Section 1047.22 of the ordinance "duplicated" state criminal law as it proscribes any type of criminal conduct with a customer of an escort service. Section 1074.23 also "duplicated" state criminal law, because it proscribes the aiding and abetting of a crime. The two defective provisions were not held to be fatal to the entire ordinance because of a severability clause in the ordinance.

Absent express preemption, the remainder of the ordinance which primarily concerned the licensing of escort services, was analyzed under implied preemption tests. The first test, whether the matter was so completely covered by state law that it was obviously a state concern, did not preempt the ordinance in this case. The rationale behind this determination was that the law does not seek to regulate the nature of the escort services, only the business of the services. The court reasoned that the licensing requirement for businesses, including the escort service, is a valid use of the police power. *See* CAL. BUS. & PROF. CODE § 16000 (West 1964). Counties and cities may collect license fees from businesses which wish to engage in lawful activities which relate to sex, despite the fact that state law preempts the criminal aspects of sexual activity. The court explained that a municipality still retains the power to enact licensing ordinances even though they have a direct impact on the general laws relating to the police power of the state.

The court held that preemption could not be found under the second test: whether the state has a "paramount concern" over the matter that prevents local regulation. Local regulation of escort services was held to be tolerated by the "paramount state concern," because of economic and geographic factors which require local regulation. Similarly, the court could find no preemption under the third test: whether the effect of the ordinance on "transient citizens" is greater than the benefit to the city. The court reasoned that the ordinance would have a positive effect on the transient citizens of the state providing help with the police control of criminal activities, such as theft, that were allegedly taking place by escort service employees.

Appellants also contended that the ordinance was preempted be-

cause it attempted to regulate two areas of exclusive state concern, employment agencies and the practice of law. The court held that this distinction was without merit. The court distinguished the Employment Agency Act, which strives to protect prospective employees and employers from the escort service ordinance, which regulates criminal conduct. In this light, the ordinance was not in conflict and therefore was not preempted by state law. In addition, the court found that the practice of law analogy was totally without merit because the regulation could not reasonably be construed to apply to practicing attorneys.

In sum, the ordinance was held to be preempted only as to the two provisions previously mentioned that duplicate state criminal law. The remainder of the escort service licensing ordinance was held not to be preempted by state law because the defective provisions are severable from the ordinance.

MARIE P. HENWOOD

## XII. PROPERTY LAW

*A public entity may be liable in inverse condemnation even though it lacks the power of eminent domain and a plaintiff may elect to treat commercial airport noise and vibrations as a continuing, rather than a permanent nuisance:* **Baker v. Burbank-Glendale-Pasadena Airport Authority.**

In *Baker v. Burbank-Glendale-Pasadena Airport Authority,* 39 Cal. 3d 862, 705 P.2d 866, 218 Cal. Rptr. 293 (1985), the court held that Burbank-Glendale-Pasadena Airport (hereinafter the Airport), lacked the power of eminent domain. The airport, which is a public entity may nonetheless be liable in inverse condemnation. The court also held that a plaintiff may elect to treat commercial airport noise and vibrations as a continuing, rather than a permanent nuisance.

Homeowners living adjacent to the Burbank-Glendale-Pasadena Airport filed suit for inverse condemnation and nuisance caused by noise, smoke, and vibrations from flights over their homes. The court's review of the condemnation issue stated that the inverse condemnation cause of action is not grounded on statutory condemnation power. Inverse condemnation is based on the fifth amendment prohibition of a taking without just compensation, as well as the California Constitution's prohibition of a taking or damaging of property for

public use without just compensation. U.S. CONST. amend. V; CAL. CONST. art. I, § 19. *See,* 29 CAL. JUR. 3d, *Eminent Domain,* §§ 300, 301 (1976). Therefore, the inverse condemnation cause of action could be maintained, based on these constitutional provisions.

In determining the nuisance issue, the court stated that the type of harm suffered determined the type of nuisance, not the defendant's interest in continuing the nuisance. *See,* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Equity* § 95 (8th ed. 1974). The question of continuing nuisance arose because a statute of limitations problem would have barred the action for a permanent nuisance.

The court defined a permanent nuisance as a nuisance which creates a permanent injury and stated that all damages could be assessed for that single injury. On the other hand, a continuing nuisance is an ongoing or repeated disturbance, such as the defendant airport, caused by noise, smoke and vibration from flights. The court noted that if any doubt as to the type of nuisance existed the plaintiff could elect to treat it as permanent or continuing. This doctrine of election was created to facilitate equitable and just relief. In this case, election was necessary for the plaintiffs to maintain their nuisance cause of action.

MARIE P. HENWOOD

## XIII. PUBLIC RESOURCES

*Section 25531 of the Public Resources Code which states that Energy Commission rulings are appealable only to the supreme court is constitutionally valid under article XII, section 5 of the California Constitution:* **County of Sonoma v. State Energy Resources Conservation and Development Commission.**

In interpreting article twelve, section five of the California Constitution, the court in *County of Sonoma v. State Energy Conservation and Development Commission,* 40 Cal. 3d 361, 708 P.2d 682, 220 Cal. Rptr. 114 (1985), held that provisions referring to the Public Utility Commission (PUC) are also applicable to the State Energy Resources Conservation and Development Commission (hereinafter "the Commission"). The Pacific Gas and Electric Company applied to the Energy Commission for certification of a geothermal power plant and was opposed by the County of Sonoma during the licensing process. The application was approved by the Commission and the county sought judicial review of that decision. This action was brought only to oppose the exclusive jurisdiction given the California Supreme Court to hear appeals.

Plenary power is given to the legislature "to confer . . . authority

. . . upon the [PUC and] to establish the manner and scope of review . . . ." CAL. CONST. art. XII, § 5. Pursuant to this grant of power, the legislature limited review of any certification decision by the Energy Commission to the exclusive jurisdiction of the supreme court. *See* CAL. PUB. RES. CODE § 25531 (West Supp. 1986); *see also* CAL. PUB. UTIL. CODE §§ 1756-60 (West 1975 & Supp. 1986). The county challenged the constitutionality of section 25531 because the Energy Commission is a separate and distinct entity from the PUC. Since there is no express authority for the legislature to limit jurisdiction over the decisions of the Energy Commission, the county contended that it had a constitutional right to first seek review in a superior court. *See* CAL. CONST. art. VI, § 10.

Applying the rule that statutes are presumed to be constitutional, the court held that all doubts as to the validity of section 25531 should be resolved in favor of the act. In order for a statute to be overturned, it must be in clear and unquestionable conflict with either the state or federal constitution. The court deemed the use of legislative power to limit review of the decisions of the Energy Commission to be reasonable and proper and consistent with the constitution.

In reaching this decision, the court analyzed the relationship between the PUC and the Energy Commission and found the functions of the Commission to be within the broad purposes of the PUC. Certification of thermoelectric powerplants by the Energy Commission are only a prerequisite to final approval by the PUC. Without section 25531 the authorization process for an energy facility could be substantially delayed in the lower courts before submission to the PUC. The result would be a great burden on public convenience. Given the close relationship between the two agencies, it can be fairly inferred that the legislature's authority over the PUC also extends to the Energy Commission.

Therefore, the court invalidated the rule that Energy Commission decisions could be reviewed only by the state supreme court. Based on this decision, the County of Sonoma did not dispute the merits of the ruling by the Commission. Additional information regarding presumptions of constitutionality can be found in 13 CAL. JUR. 3d *Constitutional Law* §§ 66-70 (1974 & Supp. 1985); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 43 (8th ed. 1974 & Supp. 1984).

JAMES B. BRISTOL

## XIV. TAXATION

### A. *Library tax found valid as exception to Proposition 13 limitation:* **Patton v. Alameda.**

In *Patton v. City of Alameda,* 40 Cal. 3d 41, 706 P.2d 1135, 219 Cal. Rptr. 1 (1985), the court held that a 1937 city charter created an indebtedness, which when viewed in context, fell under an exception to Proposition 13. CAL. CONST. art. XIIIA, § 1(a). Even though the taxpayers' intent in enacting Proposition 13 had been to limit taxes assessed to one percent of the value of the taxpayer's property, an exception to the article allowed for special taxes to pay previous commitments such as the one before the court. *See* Nauman, *Local Government Taxing Authority Under Proposition 13,* 10 Sw. U. L. Rev. 795 n.2 (1978).

Contending that a special library tax violated the one percent limitation imposed by Proposition 13, a taxpayer sued on his behalf and on behalf of all others similarly situated, for a refund of $7.26. The City of Alameda agreed that the tax exceeded the limit, but claimed authority under the exception clause which declared that the limitation would not apply to taxes or assessments used to pay indebtedness approved by voters before Proposition 13 became effective. *See* CAL. CONST. art. XIIIA, § 1(a). *See also* 51 CAL. JUR. 3d, *Property Taxes,* § 124 (1979 & Supp. 1985).

The only issue considered by the court was whether the city's obligation to pay a special library tax of seven cents per one hundred dollars of valuation was an "indebtedness" under the exception clause. The plaintiff contended that since the city's charter required funding for fire, police, and other departments, any municipal obligation could therefore meet the "indebtedness" test and escape the constitutional limitations. Furthermore, the city had ample tax money for general expenditures under the one percent limitation, and should not be allowed to collect the excess tax monies.

The court viewed "indebtedness" as a flexible term to be determined in context. It found that indebtedness occurred not only by contractual and past obligation, but also by statute and present obligation, as in the case at bar. Here a present obligation created the indebtedness. Finally, the court held that even though the city could meet its funding requirements under the one percent limitation, it was not required to do so.

The court relied on a prior ruling that *ad valorem* taxes or assessments constituted "indebtness" and therefore were exempt under the state constitution. *Carmen v. Alvord,* 31 Cal. 3d 318, 644 P.2d 192, 182 Cal. Rptr. 506 (1982). State water projects were also held to be exceptions because the voters had agreed to such indebtedness before

Proposition 13. *See, e.g., Kern County Water Agency v. Board of Supervisors,* 96 Cal. App. 3d 874, 158 Cal. Rptr. 430 (1979).

Even though the facts in the present case were dissimilar to those previously reviewed by the court, the same basic concept of voter approval prior to 1978 created the obligation and therefore the indebtedness and the exception to the state amendment. This ability to tax is now again restricted by new state law limiting such taxes to the base imposed during the 1982-83 fiscal year. *See* 1985 Cal. Stat., ch. 112, § 3(a)(5) & (b).

CYNTHIA M. WALKER

### B. *A wholesaler who purchases display racks with a resale certificate for use as a marketing aid must pay a "use" tax on those racks when it provides them to a retailer and does not receive consideration:* Wallace Berrie & Co. v. State Board of Equalization.

In *Wallace Berrie & Co. v. State Board of Equalization,* 40 Cal. 3d 60, 707 P.2d 204, 219 Cal. Rptr. 142 (1985), the petitioner unsuccessfully challenged the validity of a State Board of Equalization (hereinafter the Board) regulation. The regulation requires that a "sale" of a marketing aid must occur in order to avoid payment of a use tax. The wholesaler must receive consideration in an amount equal to at least fifty percent of the cost of the marketing aid, in the form of either an increase in the purchase price of the product or a separate charge. CAL. ADMIN. CODE tit. 18, R. 1670(c) (West 1978). The petitioner, a wholesaler, sold novelty items to retailers throughout the country. It offered a "free" cardboard display rack with a minimum purchase of its product. The product's cost was the same whether or not the retailer purchased the minimum amount necessary to receive the "free" display rack. No discount was ever given in lieu of the display rack. When the petitioner purchased the display racks, it used a resale certificate, thus avoiding any sales tax liability on the part of the manufacturer. The racks were stored in California.

For the years 1975 through 1977, the petitioner filed use and sales tax returns, but failed to account for the display racks on those returns. The Board, after an audit for that period, determined that the petitioner was liable for a use tax on those display racks. This was imposed because the petitioner failed to satisfy the requirements of section 1670(c). The petitioner neither charged for the racks separately, nor increased the purchase price of the product in the re-

quired amount of fifty percent of the cost of the product. The petitioner, under protest, paid the tax and sued for a refund. The trial court affirmed the Board's decision, and the petitioner appealed to the California Supreme Court.

The supreme court initially discussed the standard of review which should be applied. It held that if the Board had not adopted a formal regulation regarding a particular tax question, then its interpretation of the statute is subject to broad judicial review. However, in this case there was a regulation and the court limited its review. It determined that its judicial function was limited to the issues whether the regulation was within the scope of authority conferred upon the Board through Government Code Section 11373, and whether or not the regulation is reasonably necessary to fulfill the purpose of the statute. The court then determined whether the regulation was "arbitrary, capicious or without rational basis."

The tax imposed was a use and sales tax. *See* CAL. REV. & TAX. CODE §§ 6001-7176 (West 1970 & Supp. 1986). Use and sales taxes are mutually exclusive. A use tax ensures taxation on transactions which might otherwise inequitably escape tax. Whether a transaction is subject to a use tax or a sales tax depends upon whether the transfer is a sale. The court held that a sale occurs when there is a transfer of property for consideration. The court then examined whether or not requiring a minimum purchase before providing a "marketing aid" constitutes the consideration necessary for a "sale."

Under section 1670(c), a marketing aid is considered "sold" if a consideration of at least fifty percent of its cost is obtained from the customer. According to the regulation, this can be shown either by charging the customer separately or by increasing the original price of the product for which the marketing aid is given. The court held that limiting proof of a sale to these two tests is entirely reasonable because it provides objective evidence that consideration was given, thus preventing "sham" sales from escaping use taxation. The court went on to state that compliance with the regulation would not be unduly burdensome, and the Board's assumption that a marketing aid was not bargained for without a separate charge or increase in the purchase price of the product is not arbitrary, capricious, or without a rational basis. The court further held that it did not matter that the petitioner recouped the cost of the display racks in the form of profits from the minimum purchase amount because the "agreed" price dictates the appropriate sales and use taxes, and in this case, the agreed price was zero. Accordingly, the court concluded that the requirement of a minimum purchase prior to receiving a "marketing aid" did not constitute the consideration necessary for a "sale."

JAMES G. BOHM

# XV. TORTS

## A. *The State of California held liable for officer's failure to exercise due care while investigating an accident resulting in lost opportunity to sue for injuries:* Clemente v. State of California.

### I. INTRODUCTION

In *Clemente v. State of California*[1] the court held that a highway patrol officer investigating an accident owed a duty of care to the victim of the accident which included preserving plaintiff/victim's right to sue.[2] The government, through its agent, is held to the same standard of care as a private citizen when performing duties either imposed by law or assumed by the individual.[3] Due to the dependency created by the officers official conduct, there could be no governmental immunity applied.[4]

In *Clemente I* the court of appeals had held that the government, through the officer, had breached its duty by failing to obtain the identity of the tortfeasor thereby eliminating the victim's opportunity to obtain compensation for his injuries.[5] However, while *Clemente I* was pending review by the supreme court, it decided the case of *Williams v. State of California,* which partially disapproved *Clemente I* and held that an officer has a right, not a duty, to investigate accidents. Absent an assumption of protection by the officer, no duty could be breached.[6] The court of appeal, relying on the *Williams* decision, reversed its prior holding and held that the officer had no duty, thus no duty was breached.[7]

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1. 40 Cal. 3d 202, 707 P.2d 818, 219 Cal. Rptr. 445 (1985). Justice Broussard wrote for the majority. Chief Justice Bird and Justices Mosk and Reynoso concurred. Justice Kaus wrote a separate concurring opinion with Justice Grodin concurring. Justice Lucas filed a dissenting opinion.

2. *Id.* at 210, 707 P.2d at 822, 219 Cal. Rptr. at 449.

3. *Id.*

4. *Id.*

5. The court of appeal's original decision is referred to as *Clemente I* to distinguish it from the same court's second opinion wherein it reversed its prior holding. Clemente v. State of California, 101 Cal. App. 3d 374, 161 Cal. Rptr. 799 (1980).

6. Williams v. State of California, 34 Cal. 3d 18, 24, 664 P.2d 137, 140, 192 Cal. Rptr. 233, 236 (1983). The court held that one of four situations must be present to create a duty of care capable of being breached. The situations are: 1) creation of the peril; 2) action contributing, increasing or changing the risk; 3) voluntary assumption of preserving a civil recovery; or 4) creation of a special relationship leading to a worse situation. *Id.* at 27-28, 664 P.2d at 143, 192 Cal. Rptr. at 239.

7. Clemente v. State of California, 194 Cal. Rptr. 821, 823-24 (1983) [hereinafter cited as *Clemente II*]. Applying the Williams four factor test, the court concluded no

## II. FACTUAL BACKGROUND

In January, 1975, the plaintiff was struck by a motorcycle in the crosswalk of a Los Angeles intersection. An officer of the California Highway Patrol was called to the scene of the accident. He observed Clemente crawling on the sidewalk, and then being aided by bystanders. The officer called by radio for an ambulance and for the Los Angeles Police Department to send a traffic unit. Both the motorcyclist and a van driver approached the officer to explain the accident. The van driver stated that he had stopped to allow Clemente to cross the street but that the motorcyclist had hit him. The cyclist admitted that he hit Clemente and asked the officer what he should do with the cycle. The officer told him to place it near the curb and to wait for the traffic squad.[8] The officer then left, without ascertaining the condition of the victim, and before the ambulance or the squad car arrived. He did not obtain the name, license, or license plate number of either the van or motorcycle drivers. Both left the scene before the squad arrived.

By the time Clemente was taken to the hospital he had lapsed into a coma and was in critical condition. The coma lasted 72 days and he suffered severe brain damage. He remains paralyzed, unable to speak, and totally reliant on others to attend to his needs.[9]

## III. THE COURT'S ANALYSIS

The court was once again forced to decide if police officers, and therefore governmental entities are liable for the negligent exercise of their professional duties. The court was asked to reconcile its finding in *Mann v. State of California,*[10] which held the government to a duty of care, with its finding in *Williams,*[11] which found no duty of care. Even though the court impliedly reversed *Clemente I* through the *Williams*[12] decision, the court was to adopt both the duty rule and the doctrine of the law of the case in *Clemente I* and reconcile the two cases.[13]

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duty existed since the officer did not create or contribute to Clemente's peril, nor did he assume any responsibility for recovery by civil litigation. Since it could not be proven that Clemente detrimentally relied on the officer, no special relationship was found to exist. The court did not attempt to show how Clemente, who lapsed into a coma that lasted 72 days, could have had the state of mind necessary to rely on anyone at the scene of the accident.

8. *Clemente,* 40 Cal. 3d at 209-10, 707 P.2d at 821, 219 Cal. Rptr. at 448.
9. *Id.*
10. 70 Cal. App. 3d 773, 780, 139 Cal. Rptr. 82, 86 (1977).
11. *Williams,* 34 Cal. 3d at 28, 664 P.2d at 143, 192 Cal. Rptr. at 239.
12. *Id.* at 28 n.9, 664 P.2d at 143 n.9, 192 Cal. Rptr. at 239 n.9.
13. In *Clemente I* the court held the government to the same standard of care required of private citizens for duties imposed by law or assumed by the individual. *Clemente I,* 101 Cal. App. 3d at 379, 161 Cal. Rptr. at 802. This same rule was applied by

### *A. The Duty Rule*

In *Mann*, the court held that once a highway patrol officer attempts to assist motorists stranded in a freeway fast lane, a special relationship exists between them. The officer is then required to protect the individuals by reasonable means, and any subsequent injuries would be due to the officer's failure to exercise care.[14] Although in the *Williams* decision the court held that an officer has a duty not to increase the risk of injury, governmental immunity statutes had passed as a result of *Mann*, and these statutes allowed the officer discretion at the accident scene.[15] Faced with injuries and traffic conditions, an officer's duties do not include chasing fugitive tortfeasors or obtaining witnesses for a potential civil suit, unless the officer creates a special relationship upon which the injured party can rely.[16] Therefore, in *Williams*, the court held that the plaintiff, who had lacerations on her face which ultimately resulted in the loss of an eye, was not prevented from pursuing the driver or investigating the accident herself.[17] The *Clemente* court was able to reconcile its seemingly different conclusions in *Mann* and *Williams* by basing its holding in *Clemente* on one of the four factors in which a duty

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the supreme court which also held that the doctrine of the law of the case compelled it to use the appellate court's rule unless its application would be unjust. *Clemente*, 40 Cal. 3d at 213, 707 P.2d at 824, 219 Cal. Rptr. at 451. In this case, *Clemente I* established the duty. To require that this element be established again at the supreme court level would be costly and time consuming. *Id.* It would also be unfair to the respondent who assumed the doctrine would apply and had not pled it at any subsequent state of the case.

14. *Mann*, 70 Cal. App. 3d at 781, 139 Cal. Rptr. at 87.

15. *Williams*, 34 Cal. 3d at 25 n.5, 664 P.2d at 141 n.5, 192 Cal. Rptr. at 237 n.5. The court held that the 1979 legislation creating Government Code § 820.25, was passed to assure that the *Mann* type of liability would not again be imposed by a court. However, the court later held that neither immunity from the exercise of discretion (CAL. GOV'T CODE § 820.2 (West 1980)) nor specific immunity from failure to enforce a statute (CAL. GOV'T CODE §§ 821, 818.2 (West 1980)) insulated an officer from liability once a special relationship had been established. *Clemente*, 40 Cal. 3d at 211, 707 P.2d at 822, 219 Cal. Rptr. at 449. For a discussion of police officer immunity in governmental actions see VAN ALSTYNE, CALIFORNIA GOVERNMENT TORT LIABILITY § 2.65 (Supp. 1982).

16. *Williams*, 34 Cal. 3d at 30, 664 P.2d at 144, 192 Cal. Rptr. at 240.

17. *Id.* at 27, 664 P.2d at 142, 192 Cal. Rptr. at 238. Chief Justice Bird's dissent notes the absurdity of the victim being able to investigate due to her severe injuries. Since the officers undertook the duty to investigate the accident, this disabled victim was not only forced to rely on their conduct, but lulled into reliance by the creation of a special relationship. Based on the expanding nature of the special relationship doctrine, as well as the principle that victims of negligence should be compensated for the injuries, Justice Bird's view is consistent with that of the court in the present case. *Id.* at 33, 664 P.2d at 146, 192 Cal. Rptr. at 242.

could be created as stated in *Williams*. The court found a special relationship and resulting dependency factor because Clemente was completely disabled and incompetent following the accident.[18] The victim in *Williams* was able to investigate on her own.[19] In *Clemente I*, this relationship prevented others from giving assistance, an issue apparently not pleaded in *Williams*.[20] Therefore, the rule of duty remains clear: one who places another in a situation of dependency which prevents others from giving assistance is bound to exercise a reasonable duty of care in performing those duties.[21]

### *B. The Doctrine of the Law of the Case*

The second major reason the court reinstated *Clemente I* was the doctrine of the law of the case.[22] Unless there has been an intervening or simultaneous change in the law, or use of the rule from the underlying case would have an unjust result, the rule must be used to determine the rights of the same parties in any appeal of the underlying case.[23]

The state argued that a change in the law had occurred since *Clemente I*. The argument was based on the supreme court's holding in *Williams* that an officer does not have a duty to preserve evidence at a traffic accident for subsequent civil litigation.[24] The court held that its decision in *Williams* did not preclude the opposite result in *Clemente*, because *Williams* recognized that a duty could be created by the officer if a special relationship of dependency existed precluding others from offering assistance.[25] The court's rationale was based on the fact that the parties had gone to trial expecting *Clemente I* to govern, and the facts allowed a finding of duty. Moreover, the court's use of the law of the case would not result in an unjust decision.[26]

### *C. Error*

Issues examined by the court for the possibility of error included: 1) evidence of negligence per se; 2) contributory negligence; 3) the

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18. *Clemente*, 40 Cal. 3d at 214, 707 P.2d at 824, 219 Cal. Rptr. at 451.

19. Apparently there were other witnesses who could have assisted the officer; the situation was not totally under the control of the officer (as in *Clemente)* thereby leading to detrimental reliance. *Williams*, 34 Cal. 3d at 27 n.8, 664 P.2d at 142 n.8, 192 Cal. Rptr. at 238 n.8.

20. *See supra* note 17.

21. *Clemente*, 40 Cal. 3d at 214, 707 P.2d at 824, 219 Cal. Rptr. at 451.

22. *Id.* at 210, 707 P.2d at 821, 219 Cal. Rptr. at 448.

23. Di Genova v. State Bd. of Education, 57 Cal. 2d 167, 367 P.2d 865, 18 Cal. Rptr. 369 (1962); Riemer v. Hart, 73 Cal. App. 3d 293, 142 Cal. Rptr. 174 (1977).

24. *Clemente*, 40 Cal. 3d at 214, 707 P.2d at 824, 219 Cal. Rptr. at 451.

25. *Id.*

26. *Id. Williams* only "clarified" the duties of a highway patrol officer; under different circumstances the duty would be different.

necessity of proof that damages would have been collectible; 4) Clemente's alleged alien status; and 5) evidence of Clemente's total disability at the time of the accident.[27] The lower court, having found that procedures in the police manual were regulations,[28] instructed the jury that failure to comply with the procedures was negligence per se.[29] This instruction was not erroneous because the regulations were found to embody the full force of the law, and the jury was able to determine if the officer was obligated to use the procedures on city streets.[30]

The court also found that the trial court correctly refused to instruct the jury on both contributory negligence and on the admission of evidence that Clemente was not 100% disabled. At the time of the accident, Clemente was recovering from a work-related fall involving a head injury. He had been rated 100% disabled by the Worker's Compensation Board pending a cranioplasty.[31] His doctor had advised him to wear a helmet until a metal plate could be inserted because a blow to the previously injured side of his head could result in severe brain injury.[32] The court allowed expert testimony that described Clemente as ninety-nine percent recovered, and was satisfied that evidence regarding the protective value of the helmet was too speculative to allow for showing of contributory negligence.[33] The

27. *Id.* at 214-23, 707 P.2d at 824-30, 219 Cal. Rptr. at 451-57.

28. The court held that the officer's conduct while investigating accidents was governed by regulations, because the state patrol was a governmental entity empowered to enforce the law. CAL. GOV'T CODE § 811.6 (West 1980). Since the officer violated a regulation of a public entity and injured a person the regulation was designed to protect, there was a presumption of negligence. CAL. EVID. CODE § 669 (West Supp. 1986). The court held previously that this presumption of negligence also applied to a police manual. *See* Peterson v. City of Long Beach, 24 Cal. 3d 238, 594 P.2d 477, 155 Cal. Rptr. 360 (1979).

29. According to expert testimony, the officer in *Clemente* had broad power to act at the scene of plaintiff's accident, and should have followed these basic steps: 1) looked to the well-being of the victim; 2) investigated and recorded the names of witnesses; 3) secured the safety of the scene; and 4) located the drivers involved. *Clemente*, 40 Cal. 3d 202, 707 P.2d 818, 219 Cal. Rptr. 445 (1985). According to the California Highway Patrol Accident Investigation Manual, an officer should impartially record the facts so that a record is available for any subsequent civil litigation. *Id.*

30. *Id.* at 225-26, 707 P.2d at 824-26, 219 Cal. Rptr. at 451-53.

31. *Id.* at 221, 707 P.2d at 830, 219 Cal. Rptr. at 457. Following the accident in 1974, Clemente had undergone surgery removing a portion of his skull, but expert testimony indicated that his brain had not been damaged. By January of 1975, the date of the accident, he was able to care for his three small children while his wife was hospitalized for the birth of their fourth child.

32. *Clemente*, 40 Cal. 3d at 217, 707 P.2d at 827, 219 Cal. Rptr. at 454.

33. *Id.* at 218, 707 P.2d at 827, 219 Cal. Rptr. at 454. Evidence was lacking as to

trial court also correctly denied evidence on the possible liability or collection of damages from the cyclist[34] and on the status of Clemente's citizenship. Since it was the officer's negligence that prevented the plaintiff from proving that damages might have been collectible, the court could not require such proof.[35] While the defendants argued that Clemente's possible status as an illegal alien should be examined regarding loss of earnings, his employment history in the United States made such an inquiry marginally relevant and highly prejudicial.[36]

## IV. THE DISSENT

Justice Lucas would have reversed the decision due to both the erroneous jury instruction and the use of the duty rule.[37] He maintained that since there was a factual dispute as to whether the officer's manual applied to city streets as well as the highway patrol's normal scope, it was prejudicial to require the jury to find negligence per se if it found a violation of the operating procedures.[38] Justice Lucas' strong disapproval of the majority opinion[39] noted that *Williams* marked a clear intervening change in the law requiring *Clemente* to follow the *Williams* duty rule. Only when the officer promises to act or induces reliance preventing the victim from acting should duty be found. Since no express promise was pled in either case, there was no duty to act, and therefore no breach was possible.[40]

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what type of helmet was required, and whether it would have prevented injuries from a fall. Defendants also sought to show that Clemente was contributorily negligent by failing to keep an adequate lookout while crossing the street, but the court found no evidence that he actually saw the cyclist. *Id.*

34. *Id.* at 219, 707 P.2d at 828, 219 Cal. Rptr. at 455.

35. *Id.*

36. *Id.* at 220-21, 707 P.2d at 829, 219 Cal. Rptr. at 456. The standard for lost compensation is the wages earned in the country of citizenship. Defendants could have substantially limited damages paid if they could have proven that Clemente was an illegal alien. This standard was set in Metalworking Machinery, Inc. v. Superior Court, 69 Cal. App. 3d 791, 138 Cal. Rptr. 369 (1977).

37. *Clemente,* 40 Cal. 3d at 223-24, 707 P.2d at 831, 219 Cal. Rptr. at 458 (Lucas, J., dissenting).

38. Justice Lucas noted that although the jury was expected to decide if the manual applied to city streets, the instruction that a highway patrol officer's jurisdiction was everywhere would preclude any possibility of that occurring. *Id.* at 225, 707 P.2d at 832, 219 Cal. Rptr. at 459.

39. "What could be a clearer intervening change in the law than a Supreme Court decision expressly disapproving the prior Court of Appeal holding in the same case on the same issue?" *Id.* at 223, 707 P.2d at 831, 219 Cal. Rptr. at 458.

40. This view of Justice Lucas would insulate police officers from liability, but would not offer much protection to seriously injured potential plaintiffs. Since a fundamental principle of our judicial system is that victims be compensated for their injuries, *Williams,* 34 Cal. 3d at 35, 664 P.2d at 148, 192 Cal. Rptr. at 244 (Bird, C.J., dissenting), accident victims would be required to rely on bystanders to acquire the necessary information to maintain their right to sue. Drivers involved in accidents are

## V. CONCLUSION

The issue of whether an officer, and therefore a governmental unit, can be liable for failure to exercise reasonable care in investigating a traffic accident is still unclear after *Clemente.* Case law and governmental immunity provisions seem to limit liability to those situations in which an officer expressly agrees to investigate, thereby causing the victim to rely and not to act. However, in *Clemente,* where there was no express agreement on the part of the officer to act and no reliance due to the precomatose condition of the victim, the court found liability based on the officer's actions which prevented bystanders from acting.

In *Clemente* the court held that an officer may use discretion in his duty to preserve evidence. The officer may wait to gather evidence if victims are being treated and accident scenes monitored. But when an officer has the time and ability and undertakes to investigate an accident scene, his reasonable exercise of care includes checking for injuries, securing the scene, and preserving the victim's right to sue in civil litigation.

CYNTHIA M. WALKER

### B. *Civil Code § 49(c) does not allow an employer to recover expenses and lost profits incurred when its employee is injured by the negligence of a third party:* I.J. Weinrot & Son, Inc. v. Jackson.

In *I.J. Weinrot & Son, Inc. v. Jackson,* 40 Cal. 3d 327, 708 P.2d 682, 220 Cal. Rptr. 103 (1985), the supreme court held that no cause of action exists under Civil Code section 49(c) (hereinafter "section 49(c)") for an employer to recover lost profits, salary paid to an employee, or medical expenses paid on behalf of an employee when that employee is injured by a negligent third party. *See* CAL. CIV. CODE § 49(c) (West 1982). The court also held that the sixty day time period for filing a notice of appeal from a demurrer begins to run when the judgment sustaining the demurrer without leave to amend is entered and not when the minute order sustaining the demurrer is entered. *See* CAL. RULES OF CT. 2.

The appellant was a closely held California corporation with Edwin Weinrot as its president, employee and principal stockholder. On

required to provide such information only to police officers and removing this duty from police officers would effectively deny victims just compensation.

August 18, 1982, Weinrot was hit by a car while walking his dog. Approximately four months later, Mr. Weinrot, his wife, and the corporation filed suit against the driver and owner of the car. Included in the complaint was a cause of action seeking corporate recovery for salary paid to Weinrot, medical expenses paid by the corporation on behalf of Weinrot, and lost profits to the corporation incurred as a result of Weinrot's inability to perform his normal duties. Defendants demurred to this cause of action and a minute order was entered on April 8, 1983 sustaining the demurrer. On July 19, 1983, judgment was entered against the appellant, sustaining appellee's demurrer without leave to amend. On August 8, 1983, the appellant filed its notice of appeal.

The appellee's first contention was that notice of appeal was not timely filed because the sixty day time period for filing the notice began to run on April 4, 1983, when the minute order was entered. In rejecting this contention, the court said that the minute order was not appealable until a judgment was entered, therefore, the time period didn't begin to run until July 19, 1983. The notice of appeal was timely as it was filed on August 8, 1983.

In reaching the merits of the case, the supreme court had to determine whether section 49(c) provided recovery for a corporation under these circumstances. Section 49 provides, in pertinent part, that "[t]he rights of personal relations forbid: . . . (c) [a]ny injury to a servant which affect his ability to serve his master . . . ." CAL. CIV. CODE § 49 (West 1982). The court determined that section 49(c) was originally enacted in the Civil Code of 1872, as a codification of the then existing common law cause of action for loss of services. Therefore, it must be construed as a continuation of that common law. The court further stated that "the purpose of the Legislature in enacting those sections of the 1872 Civil Code declarative of the common law was 'to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation with a distinct view toward continuing judicial evolution.'" *Weinrot,* 40 Cal. 3d at 332, 708 P.2d at 685, 220 Cal. Rtpr. at 106 (quoting *Li v. Yellow Cab Co.,* 13 Cal. 3d 804, 814, 532 P.2d 1226, 1233, 119 Cal. Rptr. 858, 865 (1975)).

This theory of recovery was based on a property interest. England has limited recovery on this type of action to losses from interfering with menial household servants. This is because they were considered to be the master's property, and if they were taken away, a trespass had been committed. The supreme court determined that the United States limited recovery for this type of claim to injuries inflicted upon domestic servants.

Next, the court had to determine whether the statute had been

broadened through judicial interpretation. Acknowledging that there had been little litigation over section 49(c), the court held that the statute had not been expanded by the courts. It relied on dicta in *Earley v. Pacific Elec. Ry. Co.*, 176 Cal. 79, 167 P. 513 (1917) and *Boyson v. Thorn*, 98 Cal. 578, 33 P.492 (1893).

In *Darmour Prod. Corp. v. H.M. Baruch Corp.*, 135 Cal. App. 351, 27 P.2d 664 (1933), a suit brought by a motion picture production company against a negligent third party for injuries to one of its actresses, the court, in dicta, held that the master-servant relationship existed and that California recognized that type of a cause of action. The supreme court disapproved of this statement on the basis that the analysis was "brief and superficial." The court further criticized the *Darmour* opinion for failing to discuss common law, the law from other jurisdictions, or the impact on society that would result from allowing this type of recovery.

Section 49(c) was reenacted in 1939. Appellant contended that the reenactment was an adoption of the dicta in *Darmour*. The court rejected this argument as unlikely. The supreme court stated that the reenactment occurred to comply with the governor's request that the legislature not inadvertently limit actions permitted by prior law.

The court further held that allowing an employer recovery in this type of case would be contrary to public policy. The tortfeasor would be exposed to excessive liability that may result from an employee being injured. In addition the employer could insure against the risk. Finally, any legitimate objective of section 49(c) was already provided for under existing California law.

JAMES G. BOHM

## XVI. WORKERS' COMPENSATION

*Widow of community college instructor killed in automobile accident coming home from campus is not entitled to workers' compensation benefits:* **Santa Rosa Junior College v. Workers' Compensation Appeals Board.**

In *Santa Rosa Junior College v. Workers' Compensation Appeals Board*, 40 Cal. 3d 345, 708 P.2d 673, 220 Cal. Rptr. 94 (1985), the court held that a college instructor driving home from work was not acting in the course of his employment for purposes of awarding workers' compensation benefits. The court reaffirmed the "going and coming"

rule, which dictates that injuries suffered by an employee commuting to and from work occur outside of the course of employment.

Joseph Smyth was a mathematics professor at Santa Rosa Junior College. He was killed in an accident while driving home from work one evening. He habitually took one or two hours of work home with him every evening, and on the evening in question took papers with him which he intended to grade. A workers' compensation judge denied death benefits to his widow, finding that Smyth's death occurred outside of the course of employment because he voluntarily chose to work at home. The Workers' Compensation Appeals Board reversed, finding that Smyth was "essentially required" to work at home because of the nature of his job.

California law requires an employer to provide death benefits when an employee's death arises "out of and in the course of the employment . . . ." CAL. LAB. CODE § 3600 (West Supp. 1986). The supreme court fashioned the "going and coming" rule in *Ocean Accident and Guarantee Co. v. Industrial Accident Commission,* 173 Cal. 313, 159 P. 1041 (1916), as a means of determining whether an accident occurs within the course of employment. Because the rule is arbitrary and often works harsh results upon workers' compensation applicants, courts have developed numerous exceptions. *See* Bouret, *The California Going and Coming Rule: A Plea for Legislative Clarification,* 15 CAL. W. L. REV. 116, 132-45 (1979). The court found that the circumstances of Smyth's death did not come within any of the rule's exceptions. Relying on *Wilson v. Workers' Compensation Appeals Board,* 16 Cal. 3d 181, 545 P.2d 225, 127 Cal. Rptr. 313 (1976), the court found that Smyth worked at home for his own convenience, not because the college implicitly required him to do so. The court declined to broaden the rule and thereby create a "white collar" exception.

MICHAEL R. GRADISHER