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California Supreme Court Survey - A Review of Decisions: January 1984- July 1984

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

I. ATTORNEY'S FEES

Court rejects an exception to the American Rule which would allow recovery of attorney's fees by plaintiffs who successfully sue a fiduciary for fraud: **Gray v. Don Miller & Associates, Inc.**

In *Gray v. Don Miller & Associates, Inc.*, 35 Cal. 3d 498, 674 P.2d 253, 198 Cal. Rptr. 551 (1984), the supreme court held, among other things, that a party who successfully sues a fiduciary for fraud is not entitled to recover attorney's fees. The plaintiff was, however, entitled to a portion of his attorney's fees under the "tort of another" exception.

The plaintiff made an offer through the defendant, the seller's

real estate agent, to buy a piece of property. The defendant represented to the plaintiff that the seller had accepted the offer. In reliance on this representation, the plaintiff incurred expenses in preparing to move to the property. Subsequently, the defendant informed the plaintiff that the seller had decided not to sell the property.

The plaintiff brought suit against the defendant and the seller. The trial court determined that the seller had never accepted the offer and therefore had not breached a contract, but that the defendant had violated its fiduciary duty to the plaintiff. The plaintiff was awarded damages against the broker, including attorney's fees.

Under the American rule, codified in California Code of Civil Procedure section 1021 (West 1980), each party pays his own attorney's fees unless a statute or agreement between the parties provides otherwise. The courts have adopted several exceptions to the general rule. *See, e.g., Serrano v. Priest,* 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (awarding of attorney's fees when benefit of litigation is conferred on others). In this case, the trial court followed an exception adopted by the court of appeal in *Walters v. Marler,* 83 Cal. App. 3d 1, 147 Cal. Rptr. 655 (1978), which granted attorney's fees to plaintiffs who successfully sue a fiduciary for fraud. The supreme court disapproved *Walters,* finding no justification for creating such an exception.

The court went on, however, to award the plaintiff part of his attorney's fees based on the generally accepted "tort of another" exception to the general rule. This exception grants attorney's fees to plaintiffs who must prosecute or defend an action against a third party as a result of the defendant's tort. In this case, the plaintiff's suit against the seller was necessary due to the defendant's misrepresentation. Thus, the plaintiff was entitled to recover the portion of his attorney's fees attributable to his suit against the seller.

II. CIVIL PROCEDURE

A. *An offer of compromise made pursuant to Civil Procedure Code section 998 may be revoked:* T.M. Cobb Co. v. Superior Court.

In *T.M. Cobb Co. v. Superior Court,* 36 Cal. 3d 273, 682 P.2d 338, 204 Cal. Rptr. 143 (1984), the supreme court decided in the affirmative whether an offer of compromise made pursuant to Civil Procedure Code section 998 may be revoked prior to its acceptance by the offeree. In order to decide the issue, the court looked to the words of the statute in an effort to ascertain the legislature's

intent. Nothing in the language of the statute resolved the question as to whether an offer made pursuant thereto is revocable or irrevocable. However, general contract principles hold that an offer may be revoked by the offeror at any time prior to acceptance. Consequently, the court determined that, had the legislature intended section 998 offers to be irrevocable, it would have expressly and unequivocally said so. Because the legislature did not do so, the court applied general contract law and held section 998 offers to be revocable.

The court found further support for its holding by determining that it supported the underlying policy of section 998, specifically, the policy of encouraging settlements. The court logically reasoned that a party would be more likely to make a settlement offer pursuant to section 998 if he knew the offer could be revised should new circumstances develop. Thus, more revocable offers than irrevocable offers would be made, thereby increasing the chance that settlements would result. In addition, the court believed its holding also supported the policy of compensating injured parties due to the fact that newly discovered information might indicate greater culpability or greater damages. If an injured party had previously made an irrevocable offer which had originally seemed just, he would then be locked into the offer which would subsequently have become unjust. A holding that section 998 offers were revocable would rectify the problem.

Section 998 also provides that a party who does not accept an offer and later fails to obtain a more favorable judgment cannot recover costs, and may, in the court's discretion, be required to pay certain costs of the offeror. In order to prevent a party from invoking the cost benefits of the statute, the court determined that an offer revoked prior to acceptance no longer functions as an "offer" for purposes of the cost benefit provisions of the statute.

Finally, the court rejected the petitioner's argument that an irrevocable option is created when an offer is made pursuant to section 998. The court determined that mutual consent was a prerequisite to the existence of an irrevocable option contract. Viewing the offer objectively, the court found no consensual agreement that the offer would be irrevocable since neither section 998 nor the offeror indicated that the offer would be irrevocable.

B. *Defendants in class action brought by end-users of their products failed to justify compulsive joinder of others in the chain of distribution; fraudulent concealment may be pled without showing that the cause of action is barred by the statute of limitations:* **Union Carbide Corp. v. Superior Court.**

On January 23, 1981, a class action was initiated on behalf of all California indirect purchasers of industrial gas from the petitioners. The complaint, filed pursuant to California Business & Professional Code section 16750 (West 1978), alleged that the petitioners had conspired to fix prices, and that the respondents, as end-users, were indirectly injured when the illegal overcharges were passed on to them through the chain of distribution. The petitioners demurred, claiming a defect of parties, and sought to dismiss the action for the absence of indispensible parties. They also moved to strike the allegations of fraudulent concealment of the conspiracy on the grounds of uncertainty. When the motions were denied and the demurrer was overruled, the petitioners sought a writ of mandate requiring the joinder of all intermediate purchasers in the petitioners' chains of distribution.

In *Union Carbide Corp. v. Superior Court,* 36 Cal. 3d 15, 679 P.2d 14, 201 Cal. Rptr. 580 (1984), the supreme court was presented with two principal issues. First, were the petitioner-defendants entitled to joinder of persons in their chain of distribution at the pleadings stage? The court held that in order to compel joinder at the pleadings stage, the petitioners must demonstrate that there was a "substantial risk" of "multiple liability." Having failed to show more than a "theoretical possibility" that an absent party might assert a claim, the petitioners were not entitled to compel joinder.

The petitioners maintained that the pendency of a related federal antitrust class action in Illinois provided the necessary exposure to a substantial risk of multiple liability. The court rejected this argument by distinguishing the classes involved in the two actions. The federal class action was limited to the direct purchasers in the petitioners' chains of distribution. Pursuant to section 16750, indirect-purchasers in California were also allowed to bring a state antitrust claim. Questions of whether illegal overcharges were passed on to the respondents were wholly separate and irrelevant to the federal cause of action. Consequently, the practical effect of adjudication on absent parties had not been sufficiently proven to compel joinder at such an early stage in the litigation. However, the court did not foreclose the possibility that joinder may be required at a later point.

The second issue dealt with by the court was: where the complaint did not allege that it is barred by the statute of limitations, must an allegation of fraudulent concealment be struck? The court viewed this claim as mere "surplusage." Thus, the trial court was not required to strike this claim or grant a demurrer on this ground. Since the respondent could not fix the date when the conspiracy began, but had alleged that injurious consequences continued to the date the complaint was filed, the statute of limitations did not bar the complaint. At most, the damages could be limited to the preceding four years—the applicable statutory limit. Consequently, the writ was denied on both grounds.

III. CLASS ACTIONS

Plaintiff allowed to bring a class action suit despite having already obtained individual relief: **Kagan v. Gibraltar Savings & Loan Association.**

In *Kagan v. Gibraltar Savings & Loan Association,*[1] the following issue was presented: "[m]ay a consumer who notifies a prospective defendant of class grievances under the Consumers Legal Remedies Act and informally obtains individual relief, subsequently bring a class action for damages on behalf of herself and as a representative of the class against the prospective defendant?"[2]

I. FACTS

Appellant, Eleanor M. Kagan, opened an Individual Retirement Account (IRA) with Gibraltar Savings and Loan Association (Gibraltar) based on the representation that no management fees would be charged.[3] However, six months later, appellant received a letter from Gibraltar informing her that a trustee fee would be deducted from all IRA's.[4] After repeated inquiries by appellant

1. 35 Cal. 3d 582, 676 P.2d 1060, 200 Cal. Rptr. 38 (1984). Opinion by Reynoso, J., with Bird, C.J., Mosk, Broussard and Grodin, JJ., concurring. Separate dissenting opinion by Kaus, J., with Richardson, J., concurring. Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

2. *Id.* at 587, 676 P.2d at 1061, 200 Cal. Rptr. at 39.

3. Gibraltar's promotional brochure stated: "No commissions. No establishment fees. No management fees." *Id.* While opening the account, appellant questioned the existence of an annual $7.50 combined trustee and sponsorship fee. She was assured that it was Gibraltar's practice not to charge the customers the fee.

4. The fee was broken down into two parts: a $7.00 administration fee to be

and her husband,[5] a Gibraltar vice-president replied that "[t]he decision as to whether or not Gibraltar would pay the Trustee Fee has always been made from year to year, with no guarantee that this benefit would be offered for longer than one year at a time."[6] Appellant's husband was subsequently charged the trustee fee in 1979 and 1980.

Pursuant to section 1770[7] of the Consumers Legal Remedies Act (Act),[8] the appellant and her husband sent Gibraltar a demand letter notifying it that a suit would be brought under the Act if the requested relief was not granted within 30 days.[9] Within the prescribed time period, Gibraltar returned the $15 in trustee fees charged to appellant's husband, advised them that no such charges had been made to appellant's account, and promised to remove all the disputed brochures from their various branches. Approximately one month later, the appellant brought the present class action seeking actual damages of all fees actually de-

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paid to Union Bank and a 50 cent fee to the California Savings and Loan League for sponsoring the program.

5. Not only did the appellant telephone to state the proposed action was inconsistent with Gibraltar's promotional material, but the appellant's husband also wrote the savings and loan's president. He alleged that the announced trustee fee was inconsistent with Gibraltar's "representations made to myself, my wife and other I.R.A. depositors." 35 Cal. 3d at 588, 676 P.2d at 1061, 200 Cal. Rptr. at 39.

6. *Id.* at 588, 676 P.2d at 1062, 200 Cal. Rptr. at 40. The letter also stated that all IRA participants were to be treated equally; therefore, the charges would be deducted from their account.

7. CAL. CIV. CODE § 1770 (West Supp. 1984) provides in pertinent part:

> The following unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful:
>
> . . .
>
> (i) Advertising goods or services with intent not to sell them as advertised.
>
> . . .
>
> (q) Representing that the consumer will receive a rebate, discount, or other economic benefit, if the earning of the benefit is contingent on an event to occur subsequent to the consummation of the transaction.

8. 1970 CAL. STATS. ch. 1550. Considered one of the most significant pieces of consumer legislation in California:

> It provides damages and injunctive relief to consumers damaged by specified deceptive practices on the part of merchants and sets forth the procedures to secure such relief. For the first time since 1872, the legislature has recognized the class action concept, and for the first time in California history it has allowed class actions as a procedural device in connection with a specific statute.

Reed, *Legislating for the Consumer: An Insider's Analysis of the Consumers Legal Remedies Act,* 2 PAC. L.J. 1, 2 (1971) (footnotes omitted).

9. CAL. CIV. CODE § 1780 (West 1973). Under this section, the consumer may obtain actual damages, injunctive relief, punitive damages, or such other or inclusive relief as the court may deem proper. *See* CAL. CIV. CODE § 1782 (West 1973) (requirement of at least 30 days notice prior to commencement of an action under section 1780).

ducted, declaratory and injunctive relief to prevent any future fees being charged, punitive damages in the amount of $5 million, and reasonable attorneys' fees and costs.[10]

Gibraltar moved for a determination that the action lacked merit[11] on the grounds that no damage had been done to the appellant pursuant to the Act; thus she was not a member of the class she purported to represent. The trial court granted Gibraltar's motion "on the ground that [appellant] 'ha[d] not suffered any injury or sustained any damage cognizable under the Consumers Legal Remedies Act.' "[12] Appellant Kagan then appealed.

II. STANDING

An individual action may be brought by any consumer suffering an injury from a practice declared unlawful under section 1770.[13] A class action may be brought on exactly the same grounds provided "the unlawful method, act, or practice has caused damage to other consumers similarly situated. . . ."[14] Therefore, the threshold question was which type of action did appellant initiate?

Gibraltar contended that it had been notified of an individual grievance. Consequently, since the association had provided the consumer with an appropriate remedy within thirty days, the suit could not be maintained.[15] Since Gibraltar had refunded the trustee fees charged appellant's husband, agreed not to charge either of them said fees in the future, and agreed to remove the challenged brochure, Gibraltar contended that appellant had not suffered any damages under the Act.[16]

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10. 35 Cal. 3d at 589, 676 P.2d at 1062, 200 Cal. Rptr. at 40.

11. CAL. CIV. CODE § 1781(c)(3) (West 1973). Gibraltar had originally moved for summary judgment pursuant to Code of Civil Procedure section 437(c). However, the court viewed this as a section 1781(c)(3) motion since the Act expressly excludes summary judgment motions in class actions. 35 Cal. 3d at 589 n.2, 676 P.2d at 1062 n.2, 200 Cal. Rptr. at 40 n.2.

12. *Id.* at 589, 676 P.2d at 1063, 200 Cal. Rptr. at 41.

13. CAL. CIV. CODE § 1780(a) (West 1973) provides that "[a]ny consumer who suffers any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by Section 1770 may bring an action against such person. . . ."

14. CAL. CIV. CODE § 1781(a) (West 1973).

15. CAL. CIV. CODE § 1782(b) (West 1973) states that "[e]xcept as provided in subdivision (c)" which addresses class actions, where an appropriate remedy is given within 30 days or agreed to be given within a reasonable time thereafter, the individual consumer cannot continue his cause of action.

16. *See supra* notes 8-10 and accompanying text.

However, the fact that appellant had received individual relief did not necessarily disqualify her from representing the class. To avoid a class action under the Act, the prospective defendant must make reasonable efforts to contact every member of the class, notify these similarly situated customers of the appropriate relief, provide such relief, and cease the challenged conduct.[17]

> Thus, unlike the relatively simple resolution of individual grievances under section 1782, subdivision (b), subdivision (c) places extensive affirmative obligations on prospective defendants to identify and make whole the entire class of similarly situated consumers. This clear distinction . . . and the legislative preference for effecting informal class relief pursuant to subdivision (c), guide our following analysis.[18]

Therefore, whether Gibraltar's remedial actions were sufficient turned on the scope of the notice received.

The majority found that the appellant's notice was sufficient to establish a class action.[19] The appellant's demand letter explicitly stated that the alleged violations extended to "other IRA depositors."[20] Thus, Gibraltar's ameliorative responsibilities extended to the entire class of similarly situated consumers.

Having established a class action, the fact that the class representative has received an individual remedy is not in itself sufficient to disqualify the plaintiff.[21] The legislative history of the Act demonstrates a clear intention to avoid such "picking off" of prospective class plaintiffs.[22] Thus, the appellant's cause of action is not defeated simply because of her prior settlement.

III. Standard for Class Representation

Before a class action will be allowed, it must be shown that it is impracticable to join all class members, the predominant questions of law and fact are substantially similar for the entire class,

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17. Cal. Civ. Code § 1782(c) (West 1973).

18. 35 Cal. 3d at 591, 676 P.2d at 1063-64, 200 Cal. Rptr. at 41-42.

19. Justices Mosk and Richardson dissented because they believed that Kagan's demand letter only requested individual relief. Since such relief was obtained, she could not instigate a class action. *Id.* at 597-98, 676 P.2d at 1068, 200 Cal. Rptr. at 46 (Mosk, J., dissenting).

20. *See supra* note 5 and accompanying text.

21. Gibraltar maintained that the individual settlement with the appellant removed her from the class she purported to represent. *See* La Sala v. American Sav. & Loan Ass'n, 5 Cal. 3d 864, 875, 489 P.2d 1113, 1119, 97 Cal. Rptr. 849, 855 (1971) ("The requirement that the representative be a member of the class derives from the principle that joinder of plaintiffs in a class action should consist of those sharing 'a well-defined "community of interest" in the questions of law and fact involved.' ")

22. Section 1782(c) precludes class actions only where all the listed conditions are met. "The intent was to make certain that a person can commence a class action 30 days after he has made a demand on behalf of the class even if the merchant has offered to settle his particular claim in accordance with section 1782(b)." Reed, *supra* note 8, at 19.

the representative plaintiff's claim is typical of the class, and the plaintiff will fairly and adequately protect the interests of the class.[23] The sufficiency of all these conditions is within the sound discretion of the trial judge.[24] The supreme court noted that should the trial court conclude that appellant will not fairly represent the interests of the class, it should provide appellant with the opportunity to amend her complaint to establish a suitable representative.[25] Following these procedures, if a suitable representative has still not been provided, the trial court should notify all the members of the class before dismissing the action.[26]

Consequently, the case was remanded for proceedings consistent with the opinion.

IV. COMMERCIAL LAW

Voluntary sale of goods by owner at auction following repossession from lessee not a "forced sale" entitling owner to secretly bid at the auction: **Nevada National Leasing Co. v. Hereford.**

In *Nevada National Leasing Co. v. Hereford,* 36 Cal. 3d 146, 680 P.2d 1077, 203 Cal. Rptr. 118 (1984), the supreme court faced the issue of whether the voluntary sale by the owner-seller of repossessed leased goods constitutes a "forced sale" by the seller within the meaning of California Commercial Code section 2328(4). The term "forced sale" is not otherwise defined in the code.

The case arose after Nevada National leased three items of construction equipment and later repossessed them upon default by the lessee. Rather than re-lease or sell the equipment outright, Nevada National arranged to have it auctioned. In addition, Nevada National made a secret agreement with the auctioneer to have its own employee bid on the equipment without the other bidders' knowledge in an effort to raise the bidding prices. The plan succeeded. Hereford bought all of the equipment and paid the auctioneer. A dispute between the auctioneer and Nevada National arose, however, and Nevada National did not receive

23. CAL. CIV. CODE § 1781(b) (West 1973).

24. Rosack v. Volvo of Am. Corp., 131 Cal. App. 3d 741, 750, 182 Cal. Rptr. 800, 805 (1982), *cert. denied,* 460 U.S. 1012 (1983). *See generally* 5 B. WITKIN, CALIFORNIA PROCEDURE-EXTRAORDINARY WRITS § 106 (2d ed. Supp. 1981).

25. *La Sala,* 5 Cal. 3d at 872, 489 P.2d at 1117, 97 Cal. Rptr. at 853.

26. *Id.*

payment. They brought suit and Hereford cross-complained claiming an illegal auction. Hereford was awarded reformation of the contract price pursuant to section 2328(4) as well as punitive damages. The supreme court affirmed.

Under section 2328, the buyer at an auction for the sale of goods is protected from undisclosed, competitive bidding by the owner and seller of the auctioned goods. Unless the seller publicly reserves the right to bid, he may not do so. Under section 2328(4), a breach by the seller permits the buyer to either: (1) avoid the sale, or (2) take the goods at the last good faith bid. The only exception to the rule is for a "forced sale," the rationale being that otherwise sellers would all too often receive unfairly undervalued prices. Consequently, Nevada National argued they were within the "forced sale" exception.

The unanimous court, however, felt that the inapplicability of the exception was "manifest." Nevada National's sale was clearly voluntary and several other commercially reasonable alternatives were available. Thus, whatever the definition of a "forced sale," Nevada National did not fall within it. In addition, because Nevada National had conspired to fraudulently raise the prices with an intent to injure the successful bidder, the court ruled that malice was sufficiently established to justify an award of punitive damages.

V. CONSTITUTIONAL LAW

Environmental group permitted to encourage a boycott of a newspaper's advertisers for the purpose of changing the newspaper's editorial policies: **Environmental Planning & Information Council v. Superior Court.**

I. INTRODUCTION

In *Environmental Planning & Information Council v. Superior Court,*[1] the supreme court ruled that a politically motivated boycott designed to force governmental and economic change is constitutionally protected free speech. The case arose when the Environmental Planning & Information Council (EPIC),[2] in its

1. 36 Cal. 3d 188, 680 P.2d 1086, 203 Cal. Rptr. 127 (1984). Opinion by Grodin, J., with Bird, C.J., Mosk, Kaus, Broussard, and Reynoso, JJ., concurring.

2. EPIC is a nonprofit corporation with a purpose of promoting "citizen participation in public affairs and, according to its articles of incorporation, 'conservation and preservation of, and general public appreciation for, the unique historical and natural resources' of western El Dorado County." Its county-wide membership totals approximately 100. 36 Cal. 3d at 190-91, 680 P.2d at 1088, 203 Cal. Rptr. at 129.

newsletter, criticized a local newspaper's editorial policies and suggested that its readers not patronize the businesses which advertised in the newspaper. The supreme court held in favor of EPIC.

II. FACTUAL BACKGROUND

In April of 1982, an EPIC newsletter to its members criticized the editorial policies of the Foothill Times, an El Dorado County newspaper published by Detmold Publishing Company. Specifically, the newsletter complained that the Foothill Times backed the election of pro-development directors to the El Dorado Irrigation District, printed inaccuracies, and editorialized in "news" articles. The newsletter suggested four ways[3] to combat "this outrageous situation."[4] The first method was to become informed by careful reading, discussion of environmental issues with others, and attendance at Irrigation District meetings.[5] The second method involved readers voicing their opinions in letters to the editor.[6] The third method was for readers to contact advertisers of the Times and request they discontinue advertising in the paper.[7] A final suggestion was that the readers refrain from patronizing businesses who advertised in the Times.[8]

Two weeks after the newsletter was distributed, Detmold filed an action against EPIC alleging intentional interference with economic relationship and libel. Detmold sought damages and an in-

3. The newsletter concluded with a proposal that the four present directors of the El Dorado Irrigation District be recalled. *Id.* at 191, 680 P.2d at 1088, 203 Cal. Rptr. at 129.

4. *Id.*

5. The newsletter stated: " 'The most important step is for *you to be informed.* An adequately informed citizenry is the only hope for curing bad government. . . . If you read newspaper articles thoughtfully, talk to people, and attend EID meetings, you'll develop a fair grasp of what's going on.' " *Id.* (emphasis in original).

6. "The newsletter suggested: 'Whenever something puzzles you or infuriates you, *write a letter to the editor.* Small letters are big tools. Encourage other concerned people to do the same.' " *Id.* (emphasis in original).

7. The newsletter continued: " 'What about *contacting businesses advertising in the Foothill Times* and requesting that they discontinue that advertising? Freedom of speech is one thing; vicious, irresponsible journalism is another. . . .' " *Id.* (emphasis in original).

8. The statement read: "[P]erhaps you would prefer not to patronize businesses that advertise in such a publication." *Id.* Attached to the newsletter was a list of 80 advertisers that had been compiled from two issues of the weekly Foothill Times. The list cautioned: "This is not a black list! No condemnation of these businesses is implied! This list is merely for your convenience should you wish to contact *Foothill Times* advertisers." *Id.*

junction restraining EPIC from further making or publishing similar statements. The trial court issued an order to show cause. Meanwhile, EPIC demurred to the complaint, which the court sustained as to the libel cause of action only. EPIC also moved for summary judgment. Before the hearing on that motion, the court granted Detmold a preliminary injunction, then later dissolved the same.[9] Ultimately, the trial court denied EPIC's motion for summary judgment.

EPIC then sought a writ of mandate and/or prohibition commanding the court to grant its motion for summary judgment. The court of appeals denied the petition. The supreme court, which normally does not intervene at the pleading stage of a pending action,[10] stepped in and issued an alternative writ. The court believed intervention was necessary to prevent the infringement of EPIC's constitutional free speech rights.[11] The supreme court determined that no *material* triable issues of fact existed and therefore ordered that EPIC's motion for summary judgment be granted.[12]

III. ANALYSIS

The court assumed, for purposes of analysis, that triable issues of fact existed as to whether EPIC intended a boycott and whether the newsletter resulted in a boycott. Thus, the court's inquiry focused on whether the issues were material and looked to substantive law.

Under the common law, an unjustified intentional interference with the prospective economic advantage of another may subject the actor to tort liability.[13] Justification depends upon a balancing of the interests between the parties.[14] The court acknowledged that meager authority existed concerning situations similar to

9. The preliminary injunction barred EPIC from "interfering or inducing others to interfere" with Detmold's contractual relationships with its customers and advertisers. The court dissolved the injunction one and a half months later after EPIC had sought reconsideration and clarification. *Id.* at 192, 680 P.2d at 1089, 203 Cal. Rptr. at 130.

10. Babb v. Superior Court, 3 Cal. 3d 841, 851, 479 P.2d 379, 385, 92 Cal. Rptr. 179, 185 (1971).

11. *See* Good Gov't Group of Seal Beach, Inc. v. Superior Court, 22 Cal. 3d 672, 685, 586 P.2d 572, 578, 150 Cal. Rptr. 258, 264 (1978) (unnecessarily protracted litigation has a chilling effect on the exercise of first amendment rights), *cert. denied,* 441 U.S. 961 (1979).

12. 36 Cal. 3d at 190, 198, 680 P.2d at 1088, 1093, 203 Cal. Rptr. at 129, 134.

13. Buckaloo v. Johnson, 14 Cal. 3d 815, 822-23, 537 P.2d 865, 868-69, 122 Cal. Rptr. 745, 748-49 (1975). *See* B. WITKIN, SUMMARY OF CALIFORNIA LAW §§ 392-397 (8th ed. 1974 & Supp. 1984).

14. Herron v. State Farm Mut. Ins. Co., 56 Cal. 2d 202, 206, 363 P.2d 310, 312, 14 Cal. Rptr. 294, 296 (1961).

EPIC's. The court recognized, however, that under common law, EPIC's actions—attempting to change a newspaper's editorial policies on public issues by means of a peaceful secondary boycott—were lawful.[15]

The inquiry, according to the court, did not end with common law doctrine. The nature of the case called for a constitutional analysis as well. For guidance, the court looked to the United States Supreme Court decision in *NAACP v. Claiborne Hardware Co.*,[16] which involved first amendment limitations upon the power of a state to regulate secondary consumer boycotts directed at political objectives. The *Claiborne Hardware* Court held that states have no right to completely prohibit an organized attempt to force governmental and economic change by means of a nonviolent, politically motivated boycott.[17] In addition, *Claiborne Hardware* recognized a distinction between solely economic boycotts and political boycotts which the *EPIC* court found to be crucial in its own decision: economic activities may be regulated whereas "expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values.' "[18]

The court refused to distinguish *Claiborne Hardware* as Detmold suggested.[19] The objective of the *Claiborne Hardware* boycott was to vindicate fourteenth amendment rights of equality whereas the EPIC boycott sought only to address environmental issues. The court, however, believed that in both cases the boycotts were politically motivated and designed to force governmental change. The court found it irrelevant that the two groups sought to change different political situations. Moreover, the court believed first amendment "content" rules forbade it from distinguishing between the degree of protection afforded various

15. Fortenbury v. Superior Court, 16 Cal. 2d 405, 409, 106 P.2d 411, 413 (1940). Detmold had relied upon a court of appeal decision, Holt v. Superior Court, 100 Cal. App. 2d 403, 223 P.2d 881 (1950), to support a contrary view. The court found nothing in the *Holt* opinion which even supported its own holding let alone supporting Detmold's position. Consequently, the court disapproved *Holt*. 36 Cal. 3d at 194-95 n.6, 680 P.2d at 1090 n.6, 203 Cal. Rptr. at 131 n.6.

16. 458 U.S. 886 (1982).

17. *Id.* at 914-15.

18. *Id.* at 913 (quoting Carey v. Brown, 447 U.S. 455, 467 (1980)). *See* 36 Cal. 3d at 196, 680 P.2d at 1091, 203 Cal. Rptr. at 132.

19. Detmold sought to distinguish the cases on the basis of the objective sought by each of the boycotts. 36 Cal. 3d at 196-97, 680 P.2d at 1092, 203 Cal. Rptr. at 133.

ideas.[20] Finally, the fact that the boycott was aimed against the editorial policies of a newspaper rather than a government did not dictate a different result. The court noted that *Claiborne Hardware* upheld a boycott which sought to influence private citizens by means of political expression.[21] In addition, Detmold could not claim infringement of its own constitutional rights since no governmental action was implicated.[22]

IV. CONCLUSION

In this case, an environmental group sought to change the editorial policies of a local newspaper which supported pro-development governmental office candidates by means of a boycott against businesses that advertised in the newspaper. A unanimous court upheld the use of nonviolent, politically motivated boycotts and thereby assured special interest groups of the freedom to exercise their first amendment rights of free speech.

VI. CONTRACT LAW

Hospital's malpractice insurance contract interpreted to exclude doctors hired by patients; parol evidence admissible to aid in interpretation: **Garcia v. Truck Insurance Exchange.**

In *Garcia v. Truck Insurance Exchange,* 36 Cal. 3d 426, 682 P.2d 1100, 204 Cal. Rptr. 435 (1984), the supreme court was required to interpret an insurance contract made between an association of hospitals and a medical malpractice insurance carrier. It also had to decide whether parol evidence was properly admitted to assist in interpreting the contract.

The plaintiffs brought a medical malpractice action for wrongful death against a Dr. Lewis, who negligently treated the deceased, and the hospital where the treatment was given. The hospital was insured by the defendant insurance company through a contract specifically excluding coverage of doctors privately hired by

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20. The court stated:

> As in *Claiborne Hardware,* however, [EPIC's] activities constitute a "politically motivated boycott designed to force governmental and economic change" and the fact that the change which they seek bears upon environmental quality rather than racial equality, can hardly support a different result. On the contrary, we are precluded by the First Amendment itself from gauging the degree of constitutional protection by the content or subject matter or the speech: "[T]here is an 'equality of status in the field of ideas.' "

36 Cal. 3d at 197, 680 P.2d at 1092, 203 Cal. Rptr. at 133 (quoting Police Dep't v. Mosley, 408 U.S. 92 (1972)) (citations omitted).

21. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911-12 (1982).

22. 36 Cal. 3d at 197, 680 P.2d at 1092, 203 Cal. Rptr. at 133.

patients. Because Dr. Lewis was privately employed by the plaintiffs, the defendant denied coverage, relying on the exclusion. Dr. Lewis, who had no insurance of his own, permitted a judgment to be entered against him, and assigned his rights against the insurer to the plaintiffs.

The trial court permitted extrinsic evidence, in the form of testimony by the general counsel of the hospital association, concerning the key policy exclusion. The attorney testified that the intent of the contract was to specifically exclude privately hired physicians from coverage. The trial court ruled that Dr. Lewis was not covered by the contract.

The supreme court affirmed, holding that the parol evidence was properly admitted by the trial court "to prove a meaning to which the language of the instrument is reasonably susceptible."

The court also held that the trial court correctly interpreted the contract's intent. Contrary to the plaintiff's argument, Lewis was not a third party beneficiary to the contract because he neither knew of the contract or relied on it to his detriment. Furthermore, even if Dr. Lewis was an intended beneficiary, the court would not apply the rule that insurance contract ambiguities should be resolved against the insurer because the evidence indicated equal bargaining positions between the parties.

VII. CRIMINAL LAW

A. *Repeal of mentally disordered sex offender program did not affect persons previously committed pursuant to the program:* **Baker v. Superior Court.**

In *Baker v. Superior Court,* 35 Cal. 3d 663, 677 P.2d 219, 200 Cal. Rptr. 293 (1984), the supreme court held that the trial court had jurisdiction to extend the commitments of three mentally disordered sex offenders ("MDSO") under former California Welfare and Institutions Code sections 6300-6330 despite the fact those provisions were repealed in 1981. The petitioners argued that if the legislature had intended to permit extended commitments under the program, it would have provided an express savings clause. After reviewing the legislative history of the program and the language of the repealed statute, the court determined that the legislature did not intend to preclude extensions of commit-

ments after the date of repeal for those persons who were in the program on that date.

Further, the petitioners contended that extension of their commitments was a denial of their right to equal protection of the laws. However, the court found that prospective repeal of the MDSO laws provided no significant constitutional problem. As the petitioners were already subject to the program, their commitment became no more onerous because the MDSO program had been repealed. Indeed, the legislature's concern for public safety and adequate treatment of these offenders is preserved by prospective repeal of the program. Accordingly, while it was determined that the MDSO program did not warrant continuation, its repeal did not affect any person under commitment prior to the effective date of repeal.

B. *To be convicted of a criminal offense as an aider and abettor the defendant must be shown to have acted with knowledge of the criminal purpose of the perpetrator and with intent or purpose of either committing, encouraging, or facilitating commission of the offense:* **People v. Beeman.***

I. INTRODUCTION TO THE CASE

In *People v. Beeman*,[1] the California Supreme Court held that the standard California jury instructions (CALJIC Nos. 3.00 and 3.01)[2] did not adequately apprise a jury of the criminal intent required to convict a defendant as an aider and abettor of a crime.[3] Specifically, the court was of the opinion that CALJIC No. 3.01 was ambiguous with respect to the necessary mental state concerning the aider and abettor's own acts.[4]

In the case itself, the defendant, Beeman, was alleged to have been extensively involved in the planning of a robbery. The actual perpetrators of the robbery, two friends of Beeman, testified that he had provided them with the address of "rich relatives" as well as descriptions of the automobiles driven by members of the family and of a diamond ring owned by the victim worth $50,000.

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* Article contributed by John R. Crews, Note & Comment Editor.

1. 35 Cal. 3d 547, 674 P.2d 1318, 199 Cal. Rptr. 60 (1984). Opinion by Reynoso, J., with Bird, C.J., Mosk, Kaus, Broussard, JJ., and Sater, J. (assigned by the Chairperson of the Judicial Council) concurring. Separate concurring and dissenting opinion by Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

2. 1 CAL. JURY INST. CRIM. §§ 3.00, 3.01 (4th ed. 1979). See *infra* note 8 and text accompanying note 10 for content of the jury instructions.

3. 35 Cal. 3d at 560-61, 674 P.2d at 1326, 199 Cal. Rptr. at 68.

4. *Id.* at 560, 674 P.2d at 1326, 199 Cal. Rptr. at 68.

Beeman was also said to have provided the perpetrators with a floor plan of the victim's house and to have agreed to sell the jewelry for twenty percent of the proceeds.

Defendant Beeman's own testimony contradicted that of the perpetrators of the crime "as to nearly every material element of his own involvement."[5] Nevertheless, Beeman was convicted of robbery, burglary, false imprisonment, destruction of telephone equipment, and assault with intent to commit a felony.[6]

II. THE JURY INSTRUCTIONS

Prior to the rendering of the verdict, the defendant had requested that the jury be instructed that "aiding and abetting liability requires proof of intent to aid [the perpetrator in committing the crime]."[7] This request was denied by the trial court. After the jury submitted questions regarding the nature of liability, they were instructed in accord with the standard instructions contained in CALJIC Nos. 3.00 and 3.01.[8] Beeman again requested that these instructions be modified. This request was

5. *Id.* at 552, 674 P.2d at 1320, 199 Cal. Rptr. at 62. For example, Beeman testified that the floor plan he had provided of the victim's house was solely for the purpose of comparing it to his brother's house. *Id.* at 553, 674 P.2d at 1321, 199 Cal. Rptr. at 63. He also stated that he did not expect the perpetrators to go through with the robbery and that he had informed them that he did not want to be involved. *Id.* One of the perpetrators testified that Beeman did in fact become angry when he discovered how much jewelry had been taken but then demanded that "his cut be increased from 20 percent to one-third." *Id.* at 552, 674 P.2d at 1320, 199 Cal. Rptr. at 62.

6. Although Beeman was not present during commission of the robbery, under California law accessories before the fact are treated as principals to the crime itself. *See* CAL. PENAL CODE § 971 (West 1970). California Penal Code section 971 provides that:

> The distinction between an accessory before the fact and a principal, and between principals in the first and second degree is abrogated; and all persons concerned in the commission of a crime, who by the operation of other provisions of this code are principals therein, shall hereafter be prosecuted, tried and punished as principals and no other facts need be alleged in any accusatory pleading against any such person than are required in an accusatory pleading against a principal.

CAL. PENAL CODE § 971 (West 1970).

This becomes important in the court's conclusion that aiders and abettors must possess a criminal "intent" beyond having mere knowledge of the perpetrator's criminal purpose and acting in a manner that aids the perpetrator. *See infra* notes 17-25 and accompanying text.

7. 35 Cal. 3d at 554, 674 P.2d at 1321, 199 Cal. Rptr. at 63. As authority for the propriety of this instruction the defendant cited People v. Yarber, 90 Cal. App. 3d 895, 153 Cal. Rptr. 875 (1979).

8. CALJIC provides:

denied on the basis that a "slightly different instruction at this point would further complicate matters."[9]

The standard jury instruction given, CALJIC No. 3.01, provides that: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime."[10] Beeman objected to this instruction on the ground that it has the effect of substituting the "element of knowledge of the perpetrator's intent for the element of criminal intent of the accomplice, in controvention of common law principles and California case law."[11] This, it was argued, would allow a finding of guilt where the accomplice harbored neither the same criminal intent as the perpetrators of the crime, nor a specific intent to assist them.[12]

The People, on the other hand, argued that CALJIC No. 3.01 was in fact consistent with California law.[13] However, the court

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> The persons concerned in the commission or attempted commission of a crime who are regarded by law as principals in the crime thus committed or attempted and equally guilty thereof include:
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> 1. Those who directly and actively commit or attempt to commit the act constituting the crime, or
>
> 2. Those who, with knowledge of the unlawful purpose of the one who does directly and actively commit or attempt to commit the crime, aid and abet in its commission or attempted commission, or
>
> 3. Those who, whether present or not at the commission or attempted commission of the crime, advise and encourage its commission or attempted commission.
>
> [One who aids and abets is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but he is also liable for the natural and reasonable or probable consequences of any act that he knowingly aided or encouraged.]

1 CAL. JURY INST. CRIM. § 3.00 (4th ed. 1979). *See infra* text accompanying note 10 for text of CALJIC 3.01.

9. 35 Cal. 3d at 554, 674 P.2d at 1321, 199 Cal. Rptr. at 63.

10. 1 CAL. JURY INST. CRIM. § 3.01 (4th ed. 1979). That instruction also includes the following optional language: "Mere presence at the scene of a crime and failure to take steps to prevent a crime do not in themselves establish aiding and abetting." *Id.*

11. 35 Cal. 3d at 555, 674 P.2d at 1322, 199 Cal. Rptr. at 64.

12. The defendant argued that this error deprived him of his constitutional right to due process and equal protection of the law. Although the court ultimately concluded that the instruction constituted reversible error, it declined to decide whether the error was of constitutional dimension. 35 Cal. 3d at 562-63, 674 P.2d at 1328, 199 Cal. Rptr. at 70. *See infra* notes 28-29 and accompanying text.

13. The prosecution actually offered three lines of argument supporting the propriety of the jury instruction given. First, the prosecution argued that California requires nothing more than that an aider and abettor "have knowledge of the perpetrator's criminal purpose and do a voluntary act which in fact aids the perpetrator." Second, the prosecutor contended that defendants would not be liable for acts committed under duress or acts which inadvertently aid perpetrators because of the limitation that the aider and abettor must knowingly aid and is responsible only for the natural and reasonable consequences of their actions. Finally, the prosecution argued that the proposed modification was unnecessary because proof

rejected the prosecution's argument, utilizing the opportunity both to clarify the required mens rea for aiders and abettors and to propose jury instructions that would adequately reflect that mental element.

III. ANALYSIS

The court's essential task in *Beeman* was to resolve a conflict between two lines of appellate decisions. The first line of cases, exemplified by *People v. Yarber*,[14] supports the proposition that an aider or abettor must have an *intent* or purpose to *assist* in the commission of the criminal offense in order to be convicted.[15] The second line of decisions, however, suggested that the aider and abettor need only *act with knowledge* of the perpetrator's criminal purpose.[16]

The problem the court encountered with this second line of decisions revolved around the well established principle that an aider and abettor must have criminal *intent* in order to be guilty of a criminal offense.[17] Such intent, of course, must be proved by the prosecution.[18] However, cases suggesting that knowledge of

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of intent can usually be inferred from aid with knowledge of the perpetrator's purpose. 35 Cal. 3d at 555-56, 674 P.2d at 1322-23, 199 Cal. Rptr. at 64-65.

14. 90 Cal. App. 3d 895, 153 Cal. Rptr. 875 (1979).

In *Yarber*, the defendant was alleged to have asked a minor to orally copulate her husband and was later convicted under Penal Code § 288a(c). The jury was given the standard instruction embodied in CALJIC No. 3.01. The court reversed the conviction holding that the jury should have been instructed that "a person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator, he *intentionally* aids, promotes, encourages or instigates by act or advice the commission of such crime." 90 Cal. App. 3d at 916, 153 Cal. Rptr. at 887 (footnote omitted).

15. *Id. See also* People v. Petty, 127 Cal. App. 3d 255, 179 Cal. Rptr. 413 (1981); People v. Terry, 2 Cal. 3d 362, 466 P.2d 961, 85 Cal. Rptr. 409 (1970), *cert. dismissed*, 406 U.S. 912 (1972); People v. Vasquez, 29 Cal. App. 3d 81, 105 Cal. Rptr. 181 (1972); People v. King, 30 Cal. App. 2d 185, 85 P.2d 928 (1938).

16. People v. Ott, 84 Cal. App. 3d 118, 148 Cal. Rptr. 479 (1978); People v. Standifer, 38 Cal. App. 3d 733, 113 Cal. Rptr. 653 (1974); People v. Tambini, 275 Cal. App. 2d 757, 80 Cal. Rptr. 179 (1969); People v. Belenger, 222 Cal. App. 2d 159, 34 Cal. Rptr. 918 (1963); People v. Masters, 219 Cal. App. 2d 672, 33 Cal. Rptr. 383 (1963); People v. Ellhamer, 199 Cal. App. 2d 777, 18 Cal. Rptr. 905 (1962). These decisions were apparently responsible for the language used in CALJIC No. 3.01 along with a misinterpretation of *Terry*, 2 Cal. 3d at 362, 466 P.2d at 961, 85 Cal. Rptr. at 409.

17. *See* CAL. PENAL CODE § 20 (West 1970); *see also* People v. Tewksbury, 15 Cal. 3d 953, 960, 544 P.2d 1335, 1340, 127 Cal. Rptr. 135, 140 (1976).

18. California Penal Code section 1096 provides, in pertinent part, that:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in the case of a reasonable doubt whether his guilt

the perpetrator's criminal purpose is sufficient were grounded upon a *presumption* of criminal intent that arose from such knowledge.[19] This, according to the court, effectively removed the element of criminal intent from the prosecution's burden of proof in cases involving aiders and abettors.[20]

As suggested by *Yarber*,[21] the facts from which a mental state can be inferred should not be confused with the mental element that the prosecution must prove.[22] In other words, although knowledge of the perpetrator's criminal purpose combined with a voluntary act furthering that purpose may create an inference of criminal intent on the part of an accomplice, such facts may not give rise to a presumption affecting the prosecution's burden of proof. Indeed, as the court noted, direct evidence of a defendant's mental state is rarely available and inferrences of intent must often be drawn from the conduct of the accused.[23] However, the defendant's actions may arise from "some other purpose which precludes criminal liability."[24] In failing to recognize this distinction, the standard California jury instruction (CALJIC No. 3.01) could " 'technically allow a conviction if the defendant knowing of the perpetrator's unlawful purpose, negligently or accidentally aided the commission of the crime.' "[25]

The result of the court's analysis is that CALJIC No. 3.01 is ambiguous enough to permit a conviction where a voluntary intentional act aids in a criminal offense but not where there is no finding of intent to encourage or facilitate that offense.[26] To alle-

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is satisfactorily shown, he is entitled to an acquittal, but the effect of this presumption is only to place upon the state the burden of proving him guilty beyond a reasonable doubt.

CAL. PENAL CODE § 1096 (West 1970); *see also* B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 339-341 (1963).

19. *See supra* note 16.

20. 35 Cal. 3d at 557-58, 674 P.2d at 1325, 199 Cal. Rptr. at 67.

21. 90 Cal. App. 3d at 895, 153 Cal. Rptr. at 875.

22. 35 Cal. 3d at 558-59, 674 P.2d at 1325, 199 Cal. Rptr. at 67.

23. *Id.* The apparently erroneous instruction contained in CALJIC may generally be said to have the effect of creating a *presumption* of intent and thus removing that element from the state's burden of proof. The California Evidence Code provides:

(a) A presumption is an assumption of fact that *the law requires* to be made from another fact or group of facts found or otherwise established in the action. A presumption is not evidence.

(b) An inference is a deduction of fact that *may* logically and reasonably be drawn from another fact or group of facts found or otherwise established in the action.

CAL. EVID. CODE § 600 (West 1966) (emphasis added).

24. 35 Cal. 3d at 559, 674 P.2d at 1325, 199 Cal. Rptr. at 67.

25. *Id.* at 560, 674 P.2d at 1326, 199 Cal. Rptr. at 68 (quoting People v. Patrick, 126 Cal. App. 3d 952, 967 n.10, 179 Cal. Rptr. 276, 286 n.10 (1981)).

26. 35 Cal. 3d at 561, 674 P.2d at 1326, 199 Cal. Rptr. at 68.

viate this problem the court set forth the following suggested instruction:

> [A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.[27]

In effect then, the jury must find that the accomplice acted with knowledge of the perpetrator's criminal purpose *and* with intent to aid or facilitate that purpose.

IV. THE REVERSAL

Although Beeman had argued that the erroneous jury instruction violated his rights to due process and to equal protection of the law, the court avoided determination of whether the instruction amounted to constitutional error. It was determined that under the facts of this case it was "reasonably probable that the jury would have reached a result more favorable to the appellant had it been correctly instructed upon the mental element of aiding and abetting."[28] Thus, the court found that reversal was required under the "normal" harmless error standard enunciated in *People v. Watson*.[29] However, the possibility was left open that use of CALJIC No. 3.01 amounted to constitutional error and thus requires application of the stricter harmless error standard enunciated in *Chapman v. California*.[30] Justice Richardson was of the opinion that, under these facts, the error was harmless under the *Watson* standard and therefore the conviction should be affirmed.[31]

C. *Felony practice of medicine without a license not inherently dangerous and therefore will not support conviction for second degree felony murder:* **People v. Burroughs.**

In *People v. Burroughs*,[1] it was plainly evident that the felony

27. *Id.*
28. *Id.* at 563, 674 P.2d at 1328, 199 Cal. Rptr. at 70.
29. 46 Cal. 2d 818, 299 P.2d 243 (1956) (error is harmless unless it is reasonably probable that a judgment more favorable to the appellant would have been reached).
30. 386 U.S. 18 (1967) (where error is of constitutional dimension reversal is required unless harmless beyond a reasonable doubt).
31. 35 Cal. 3d at 563, 674 P.2d at 1328, 199 Cal. Rptr. at 70.
1. 35 Cal. 3d 824, 678 P.2d 894, 201 Cal. Rptr. 319 (1984). Opinion by Grodin, J.,

murder rule is strongly disfavored. The supreme court will take whatever liberties are necessary in order to avoid applying it.

Lee Swatsenbarg was diagnosed by his family physician as suffering from terminal leukemia. After reading Burroughs' book[2] and being told of his unorthodox treatment of cancer, which included vigorous abdominal massages,[3] he agreed to undergo treatment by the defendant, an unlicensed practitioner of healing arts. Swatsenbarg died three and a half weeks into the treatment. During the treatment, Swatsenbarg experienced severe pain, vomited frequently, and suffered from convulsions.[4] The evidence suggested that Swatsenbarg died of massive hemorrhaging resulting from the abdominal massages. Burroughs was convicted of unlawfully selling drugs, compounds or devices for alleviation or cure of cancer,[5] felony practicing medicine without a license,[6] and second degree felony murder.[7]

In order to sustain a second degree felony murder conviction it is necessary that the felony committed—in this case the unlicensed practice of medicine—be judged "inherently dangerous to human life."[8] After setting forth the judicial disfavor of the felony

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with Mosk, Kaus, Broussard, and Reynoso, JJ., concurring. Separate concurring opinion by Bird, C.J. Separate dissenting opinion by Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

2. Burroughs was the author of *Healing for the Age of Enlightenment.*

3. The defendant said that he had cured thousands of people of cancer. The treatment also included consumption of a unique "lemonade" and exposure to colored lights. 35 Cal. 3d at 827, 678 P.2d at 896, 201 Cal. Rptr. at 321.

4. The defendant also told Swatsenbarg not to undergo the treatment suggested by his physician. Throughout his suffering, the defendant told Swatsenbarg that he would improve and that things were going along as planned. *Id.*

5. CAL. HEALTH & SAFETY CODE § 1707.1 (West 1979).

6. CAL. BUS. & PROF. CODE § 2053 (West Supp. 1984). The statute provides:

> Any person who willfully, under circumstances or conditions which cause or create risk of great bodily harm, serious physical or mental illness, or death, practices or attempts to practice, or advertises or holds himself or herself out as practicing, any system or mode of treating the sick or afflicted in this state, or diagnoses, treats, operates for, or prescribes for any ailment, blemish, deformity, disease, disfigurement, disorder, injury, or other physical or mental condition of any person, without having at the time of so doing a valid, unrevoked or suspended certificate as provided in this chapter, or without being authorized to perform such act pursuant to a certificate obtained in accordance with some other provision of law, is punishable by imprisonment in the county jail for not exceeding one year or in the state prison.

7. CAL. PENAL CODE § 187 (West Supp. 1984).

8. People v. Ford, 60 Cal. 2d 772, 795, 388 P.2d 892, 907, 36 Cal. Rptr. 620, 635 (1964). The standard was adopted because it most nearly fit the policy of the felony murder rule—that one who intends to commit a felony will be deterred if he or she knows that any death resulting from the commission of the crime will invoke the rule. If the felony is not inherently dangerous, the actor cannot anticipate that a death will occur due to committing the felony, and he or she will not be

murder rule,[9] the court proceeded in a roundabout manner to hold that the felony committed is not inherently dangerous and could not support the felony murder conviction.[10]

The court followed the accepted test[11] in determining that the felony of practicing medicine without a license is not inherently dangerous to human life. The court applied the two-step approach of first looking to the primary elements of the offense and then looking to the factors raising the offense to a felony. At each level, the court had to decide whether the felony is inherently dangerous to human life. In so doing, the court was able to concentrate on the elements of the felony in the abstract, disregarding the specific facts of the case.[12] In its restrictive application the court sought to show how the felony could be committed in ways that are not inherently dangerous, thereby concluding that the offense, in the abstract, is not inherently dangerous.

The primary element of the subject felony—the practice of medicine without a license—was easily determined not to be inherently dangerous. The court noted that simple medical procedures are practiced every day by laymen which are absolutely free from danger.

Factors raising the offense to a felony—"circumstances or con-

deterred. People v. Williams, 63 Cal. 2d 452, 458 n.4, 406 P.2d 647, 650 n.4, 47 Cal. Rptr. 7, 10 n.4 (1965).

9. "This court has long held the felony-murder rule in disfavor. 'We have repeatedly stated that felony-murder is a "highly artificial concept" which "deserves no extension beyond its required application."' " 35 Cal. 3d at 829, 678 P.2d at 897, 201 Cal. Rptr. at 322 (quoting People v. Dillon, 34 Cal. 3d 441, 462-63, 668 P.2d 697, 709, 194 Cal. Rptr. 390, 402 (1983) (quoting People v. Phillips, 64 Cal. 2d 574, 582, 414 P.2d 353, 360, 51 Cal. Rptr. 225, 232 (1966))). *See also* People v. Henderson, 19 Cal. 3d 86, 92-93, 560 P.2d 1180, 1183, 137 Cal. Rptr. 1, 4 (1977); People v. Washington, 62 Cal. 2d 777, 783, 402 P.2d 130, 134, 44 Cal. Rptr. 442, 446 (1965).

The court has previously found felonies which are seemingly more violent and dangerous than the subject offense as not being inherently dangerous to human life. *See Henderson*, 19 Cal. 3d at 86, 560 P.2d at 1180, 137 Cal. Rptr. at 1 (felony false imprisonment); People v. Lopez, 6 Cal. 3d 45, 489 P.2d 1372, 98 Cal. Rptr. 44 (1971) (escape from penal institution); People v. Satchell, 6 Cal. 3d 28, 489 P.2d 1361, 98 Cal. Rptr. 33 (1971) (possession of a concealable firearm by an ex-felon).

10. It is important to note that Burroughs' conviction was for *second degree* felony murder. In California, this is a judicially created doctrine. 35 Cal. 3d at 829 n.3, 678 P.2d at 897 n.3, 201 Cal. Rptr. at 322 n.3. In *Dillon*, the court held that first degree felony murder is statutory, and could not be judicially abrogated. 34 Cal. 3d at 463, 668 P.2d at 709, 194 Cal. Rptr. at 402.

11. The test was first articulated by the court in *Henderson*, 19 Cal. 3d at 93-94, 560 P.2d at 1184, 137 Cal. Rptr. at 5.

12. *Williams*, 63 Cal. 2d at 458 n.5, 406 P.2d at 650 n.5, 47 Cal. Rptr. at 10 n.5; *Henderson*, 19 Cal. 3d at 93, 560 P.2d at 1184, 137 Cal. Rptr. at 5.

ditions which cause or create a risk of great bodily harm, serious mental or physical illness, or death"[13]—required greater analysis. The court first dealt with the "or death" component by noting that the statute was worded in the disjunctive, indicating that it could be violated without creating risk of death. The court then concluded that the "risk of great bodily harm" element did not make commission of the felony inherently dangerous. For support, the court compared statutes similar to the one defendant was charged with violating.[14] Cases decided under those statutes held that one could be guilty of inflicting "significant or substantial physical injury" by causing relatively minor injuries.[15] Therefore, the court concluded, one could conceivably be convicted of the subject felony for causing a relatively minor injury, and therefore the felony of practicing medicine without a license is not inherently dangerous to human life.

Although the court reversed the conviction based on the trial court's erroneous second degree felony murder instruction, it felt compelled to advise the trial court on involuntary manslaughter instructions which the defendant had requested. The court's conclusion concerning the felony of practicing medicine without a license created a peculiar situation concerning an involuntary manslaughter instruction. Involuntary manslaughter, as described in Penal Code section 192,[16] punishes one for a killing committed during an unlawful act which is not a felony. It also punishes one for a killing occurring during the "commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."[17] The problem for the court was that the killing of Swatsenbarg did not fall into either category since it occurred during the commission of an unlawful act which is a felony. The court came to the rational conclusion that a homicide committed in the course of a non-inherently dangerous felony could support an involuntary manslaughter conviction if the felony was committed without due caution and circumspection.[18] This conclusion best fits the definition of man-

13. CAL. BUS. & PROF. CODE § 2053 (West Supp. 1984). *See supra* note 6.

14. California Penal Code section 243(5) defines "serious bodily injury" in part by listing injuries considered to be serious. CAL. PENAL CODE § 243(5) (West Supp. 1984). They include such things as fracture and concussion. California Penal Code section 12022.7 defines "great bodily injury" as "significant or substantial bodily injury" for sentence enhancement purposes. CAL. PENAL CODE § 12022.7 (West 1982).

15. People v. Johnson, 104 Cal. App. 3d 598, 609, 164 Cal. Rptr. 69, 75 (1980) (broken jaw); People v. Kent, 96 Cal. App. 3d 130, 136, 158 Cal. Rptr. 35, 38 (1979) (broken hand).

16. CAL. PENAL CODE § 192 (West Supp. 1984).

17. *Id.*

18. 35 Cal. 3d at 835, 678 P.2d at 901, 201 Cal. Rptr. at 326.

slaughter: "the unlawful killing of a human being without malice."[19]

In a lengthy concurring opinion, Chief Justice Bird argued that California should judicially reject the doctrine of second degree felony murder.[20] The Chief Justice chronicled the history of the felony murder doctrine, and noted that it has met substantial disfavor among commentators.[21] Additionally, she noted that second degree felony murder has been rejected by statute in some states[22] and judicially in another.[23] The rule was also rejected in England by act of Parliament in 1957.[24] Above all, the Chief Justice felt that the second degree felony murder rule does not recognize "the important relationship between criminal liability and the accused's mental state."[25] A defendant's liability for murder, Chief Justice Bird noted, is based more on the fortuitous events as they unfold than on his or her moral culpability.

Justice Richardson was alone in dissenting. In his opinion, the elements of the offense which made it a felony supported application of the felony murder rule. Specifically, Justice Richardson pointed out that, unlike the cases on which the majority relied in rejecting application of the felony murder rule,[26] the statute violated by Burroughs specifically required a risk of actual harm or injury. Additionally, Justice Richardson noted that the purpose and policy behind the felony murder rule is to deter those involved in committing felonies from killing negligently or accidentally.[27] He felt that application of the rule to the statute in question would further the goal of deterring illegal conduct.

Given the general disfavor of the second degree felony murder rule, it was not surprising that the court concluded as it did. The

19. CAL. PENAL CODE § 192 (West Supp. 1984).

20. 35 Cal. 3d at 836, 678 P.2d at 902, 201 Cal. Rptr. at 327 (Bird, C.J., concurring).

21. *Id.* at 838, 678 P.2d at 903, 201 Cal. Rptr. at 328.

22. The felony murder rule has been rejected by statute in Hawaii, HAWAII REV. STAT. §§ 707-710 (1976), and Kentucky, KY. REV. STAT. ANN. § 507.020 (Bobb-Merrill Supp. 1982). It was abolished in Ohio as early as 1857. Robbins v. State, 8 Ohio St. 131, 188-90 (1857).

23. Chief Justice Bird noted with approval the ruling of the Michigan Supreme Court in People v. Aaron, 409 Mich. 672, 299 N.W.2d 304 (1980), which rejected the second degree felony murder rule.

24. Homicide Act of 1957, ch. 11, pt. 1.

25. 35 Cal. 3d at 850, 678 P.2d at 912, 201 Cal. Rptr. at 337 (Bird, C.J., concurring).

26. *See supra* note 9.

27. *Henderson*, 19 Cal. 3d at 93, 560 P.2d at 1183, 137 Cal. Rptr. at 4.

immediate impact of the court's holding—that felony practicing of medicine without a license will not trigger the felony murder rule—is not substantial. However, given the Chief Justice's in-depth concurring opinion, and a footnote in the majority opinion indicating a reluctance to question the overall worth of the rule for the present time only, the second degree felony murder rule may be on the brink of collapse.[28]

The court's discussion of involuntary manslaughter, standing alone, is of little practical significance except to apply a common sense approach to problems of statutory construction. However, if the court later abolishes second degree felony murder, the court's holding may indicate a willingness to accept involuntary manslaughter charges where applicable.

D. *Court upholds the defendant's murder conviction arising from death of a co-felon which occurred when police fired in response to malicious conduct by the defendant:* **People v. Caldwell.**

In *People v. Caldwell,* 36 Cal. 3d 210, 681 P.2d 274, 203 Cal. Rptr. 433 (1984), the supreme court declined to alter the law concerning felons' liability for an accomplice's death occurring at the hand of a police officer. Under *People v. Washington,* 62 Cal. 2d 777, 402 P.2d 130, 44 Cal. Rptr. 442 (1965), the felony murder rule cannot be invoked unless a felon commits the killing. However, under the rule of *People v. Gilbert,* 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965), *vacated,* 388 U.S. 263 (1967), defendants can be guilty of their accomplice's death, entirely apart from the felony murder rule, if the conduct of any co-felon (except the deceased) was intentional, evincing a high probability that death would result, or manifesting malice or a conscious disregard for life.

The court affirmed the convictions of Caldwell and his accomplice for the murder of a co-felon following an armed robbery of a fast food restaurant and subsequent shoot-out with police. The court determined that the accomplice's pointing a shotgun at police officers during a chase, and Caldwell's apparent possession of a gun in a possibly aggressive position just after the high-speed chase, in which he had been the driver, constituted malicious conduct. The court held that the evidence was sufficient for the jury to reasonably find that the defendants' conduct was a substantial

28. The court made clear that "the time may be ripe to reconsider [the second degree felony murder rule's] continued vitality." However, the court chose not to address the overall application of the doctrine inasmuch as the issue had not been briefed or argued. 35 Cal. 3d at 829 n.3, 678 P.2d at 897 n.3, 201 Cal. Rptr. at 322 n.3.

factor in leading the police to shoot the deceased co-felon, and was therefore a proximate cause of the deceased's demise.

The defendants' suggestion that the *Gilbert* test be set aside because it rid the prosecution of having to prove the defendants' culpable state of mind was rejected. The court maintained its position that the necessary culpable mental state can be shown where one or more co-felons engage in conduct in which it is "highly probable" that death would result, thereby evincing a "conscious disregard" for human life.

E. *Court's refusal to instruct jury on a lesser uncharged but related offense violated due process:* **People v. Geiger.**

In *People v. Geiger*,[1] the court ruled that, under certain circumstances, the refusal of a court to instruct the jury on a lesser offense not charged but related to the charged offense constituted a denial of due process.

The case against the defendant centered around a broken window at Jack's restaurant in Santa Cruz. Shortly after 3 a.m. on October 26, 1981, the police responded to a call reporting sounds of broken glass. They found a sliding glass service window broken, with blood on some jagged glass which remained in the window. An unopened envelope, addressed to Jack's, was found on a counter outside the window.[2] Nothing else had been damaged or taken.

Geiger emerged from behind a dumpster and approached the officers. They observed that his hand was bleeding. When questioned about his presence at the scene, the defendant claimed to be on his way home from the Dragon Moon Disco, even though Jack's restaurant was not on a direct route between the disco and the defendant's residence. No other persons were observed in the area. Later tests revealed that defendant's fingerprints were on several of the broken pieces of glass.

Geiger was charged with burglary and attempted burglary. His attorney hypothesized that the defendant had broken the window out of anger and frustration, and that he lacked any intent to steal

1. 35 Cal. 3d 510, 674 P.2d 1303, 199 Cal. Rptr. 45 (1984). Opinion by Grodin, J., with Bird, C.J., Mosk, Kaus, Broussard, and Reynoso, JJ., concurring. Separate dissenting opinion by Richardson, J.

2. It was the practice to push mail under the window when the restaurant was closed, but not to leave any mail on the outside counter.

or to commit any other offense within the restaurant. It was established that the owner of the Dragon Moon Disco, whom the defendant had previously approached for work, had asked the defendant to "help out" at the disco that evening. After the defendant had stayed after closing to help stock the bar, he was informed that he would not be paid for his work. It was also established that the cash register at Jack's was regularly left open and empty and was in full view of the service window. In accordance with her theory, the defendant's attorney requested that the jury be instructed on the offense of vandalism. The court refused.[3] The defendant was convicted of burglary.

The court first touched briefly on the federal due process issue, noting that the United States Supreme Court has not explicitly held that a defendant in a non-capital case has a right to jury instructions on a lesser included offense.[4] The court's ruling, however, was grounded on the due process requirements of the California Constitution.

The premise from which the court began is that, "[p]rocedures necessary to ensure reliabilty in the fact finding process when the state participates in the deprivation of personal liberty are required by due process."[5] In considering whether instructions on lesser offenses might be "necessary to ensure reliability in the fact finding process," the court stressed the possibility that a jury might convict a defendant of a charged offense, even if the prosecution failed to prove each element beyond a reasonable doubt, because the jury was convinced that the defendant had committed some offense. The possibility that a jury's actual practice will diverge from theory creates a risk that the jury will bypass the reasonable doubt standard, a risk which impermissibly undermines the fact finding process by which the state undertakes to deprive a defendant of his personal liberty. The court noted that the "all or nothing" approach adopted by the trial court in refusing to instruct on the lesser offense could not be rationally justified. Neither the state nor the defendant has any legitimate interest in obtaining an acquittal when the defendant is in fact

3. The jury was instructed only on burglary and attempted burglary. Vandalism was not a "lesser included offense" of the burglary charge. An offense is a necessarily included offense if the charged offense cannot be committed without committing the lesser offense, or if the accusatory pleading describes the charged offense in such a way that the lesser offense would necessarily have been committed if the charging allegations are true. Vandalism is not a necessarily included offense of burglary, as defined by statute or as charged in the instant case. 35 Cal. 3d at 517 n.4, 674 P.2d at 1306 n.4, 199 Cal. Rptr. at 48 n.4.

4. The court cited Beck v. Alabama, 447 U.S. 625 (1979), in which the United States Supreme Court held that such instructions must be given in capital cases.

5. 35 Cal. 3d at 520, 674 P.2d at 1307, 199 Cal. Rptr. at 49.

guilty of some uncharged offense, or in obtaining a conviction where all necessary elements of a crime have not been proven beyond a reasonable doubt. "Our courts are not gambling halls but forums for the discovery of truth."[6]

The court thus expanded the requirement that instructions be given on lesser included offenses, holding that, upon the request of a defendant, a court must instruct the jury on any "related" offenses, rather than only those lesser offenses considered to be included offenses under the statutory elements approach.[7] The requirement that the defendant consent to the giving of such instruction avoids the constitutional dilemma which might arise if the defendant faced conviction of an offense neither charged nor necessarily included in a charged offense.[8] However, the court ruled that a defendant is not entitled to "have the jury presented with a shopping list of alternatives to the crimes charged. . . ."[9] The defendant requesting such an instruction must fulfill three burdens. First, it must be shown that there is some reasonable basis upon which the jury could find that the defendant is guilty of the lesser offense rather than the offense charged. Second, the lesser offense must be "related" to the charged offense. Such will be the case where the evidence offered on the original charge is also relevant to the question of whether the defendant might instead be guilty of the lesser offense. Finally, such an instruction need only be given where the defense theory would be consistent with conviction for the related offense. The court noted that such an instruction would not be required where the defense theory amounts to a complete denial of culpability. The court held that these requirements were met by Geiger, and reversed the judgment.[10]

6. *Id.* (citing People v. St. Martin, 1 Cal. 3d 524, 533, 463 P.2d 390, 394, 83 Cal. Rptr. 166, 170 (1970)).

7. *See supra* note 3.

8. The court noted that "[d]ue process of law requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." 35 Cal. 3d at 526, 674 P.2d at 1312, 199 Cal. Rptr. at 54 (citing People v. Lohbauer, 29 Cal. 3d 364, 367-68, 627 P.2d at 183, 184, 123 Cal. Rptr. at 453, 454 (1981)).

9. 35 Cal. 3d at 514, 674 P.2d at 1304, 199 Cal. Rptr. at 46.

10. Justice Richardson dissented, arguing that the court's ruling constituted an unwarranted interference with the discretion of the prosecutor to determine the appropriate charges.

F. *Defendant deprived of fair jury by use of voter registration list; limitations placed on use of multiple special circumstances in capital cases:* **People v. Harris.**

In *People v. Harris,*[1] the California Supreme Court was forced to confront the question of whether a criminal defendant is deprived of a jury drawn from a representative cross-section of the community when the exclusive source for drawing jurors is a voter registration list. The court was also asked to determine the propriety of using multiple special circumstances arising from the same course of conduct both to trigger the penalty phase of the trial and to be used by the jury in determining the penalty.

Harris and another man were convicted of murdering a married couple who managed a Long Beach apartment complex. They had intended to rob the couple of the monthly rent receipts which were due on the day of the crime. However, before the defendant and his companions arrived, the money had been deposited in the bank.[2]

I. EXCLUSIVE USE OF VOTER REGISTRATION LISTS TO DRAW THE JURY VENIRE

The defendant argued that the exclusive use of voter registration lists to draw the jury venire violated his right to an impartial jury drawn from a representative cross-section of the community.[3] Specifically, he contended that the method for drawing juries systematically excluded Blacks and Hispanics who, compared to Whites, register to vote in proportionally lower numbers, regardless of their eligibility. At the motion to quash the jury venire, the defendant presented evidence that the ethnic composition of the venire at the Long Beach court was not repre-

1. 36 Cal. 3d 36, 679 P.2d 433, 201 Cal. Rptr. 782 (1984). Opinion by Broussard, J., with Bird, C.J., and Reynoso, J., concurring. Separate concurring opinion by Grodin, J. Separate dissenting opinion by Mosk, J., with Richardson, J., concurring. Separate dissenting opinion by Kaus, J. Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

2. *Id.* at 43-44, 679 P.2d at 435-36, 201 Cal. Rptr. at 784-85. In addition to the murders, the defendant and one companion were convicted of two counts of robbery and one count of burglary. Another companion was granted immunity from prosecution in exchange for her testimony.

3. The sixth amendment to the federal Constitution guarantees a defendant selection of a petit jury from a representative cross-section of the community. Taylor v. Louisiana, 419 U.S. 522, 528 (1975) (jury selection system disproportionately excluded women from jury service). Article I, section 16 of the California Constitution makes the same guarantee. People v. Wheeler, 22 Cal. 3d 258, 272, 583 P.2d 748, 758, 148 Cal. Rptr. 890, 899-900 (1978) (prosecution used peremptory challenges to improperly exclude Blacks from juries).

sentative of the general population.[4]

In its analysis, the court was required to determine whether the defendant established a prima facie violation of the fair cross-section requirement as set forth by the United States Supreme Court in *Duren v. Missouri*.[5] In order to establish a prima facie violation, the defendant was required to show three things: (1) that a "distinctive" community group had been excluded; (2) that the group's representation on the venire was not fair and reasonable in relation to its numbers in the community; and (3) that the group's underrepresentation was a product of systematic exclusion from the jury process.[6] The Attorney General conceded that the first prong of the *Duren* test was met.[7]

The second prong of the *Duren* test required the greatest amount of analysis. The court had to respond to the Attorney General's contention that the statistical evidence presented by the appellant was flawed in that it improperly counted the ethnic make-up of the *total* population when comparing it to the venire. The Attorney General argued that in order to fairly determine whether the subject group in the venire was a fair representation of the community, the venire had to be examined vis-a-vis eligible voters (those also eligible for jury duty), not the total population.[8]

4. The defendant's evidence consisted of a study conducted by a sociology professor. The study's results indicated that over a three month period 5.5% of those arriving for jury duty at Long Beach were Black and 3.4% were Hispanic. (Ninety-eight percent of those arriving at the Long Beach court for jury duty participated in the survey.) However, 1980 census figures showed that the Los Angeles county population was 12.6% Black and 27.6% Hispanic. 36 Cal. 3d at 47-48, 679 P.2d at 438, 201 Cal. Rptr. at 787. No special provision was made in the analysis for any disparity that may exist between population percentages for Los Angeles County and those of the Long Beach area specifically. Section 203 of the Code of Civil Procedure provides that no juror be required to serve more than 20 miles from his or her residence, CAL. CIV. PROC. CODE § 203 (West 1982), so chances are that the jury venire surveyed at the courthouse consisted of residents of the Long Beach vicinity, and did not include many, if any, people living 20 or more miles away.

5. 439 U.S. 357 (1979).

6. *Id.* at 364.

7. 36 Cal. 3d at 50, 679 P.2d at 440, 201 Cal. Rptr. at 789. It was agreed that both Blacks and Hispanics form cognizable groups because each "share[s] with other members of their groups a common perspective arising from their respective experiences as a group, and no other members of the community are capable of adequately representing their perspectives." *Id.* at 50-51, 679 P.2d at 441, 201 Cal. Rptr. at 790.

8. If it is true that Blacks and Hispanics have more children than do Whites, then a greater proportion of those groups will be made up of persons not eligible to vote because of their age. Additionally, the possibility exists that disproportion-

The court, although not directly countering the Attorney General's argument, cited the defendant's statistical evidence that Blacks and Hispanics fail to register to vote in much greater numbers than the population as a whole,[9] simply suggesting that the lower registration rates naturally lead to disproportionately lower representation on jury venires.[10] The court therefore determined that a proper showing could be made that there was unfair representation of the distinctive group on the venire by comparing it to the group's representation in the total population. The court's determination was supported by considerable authority.[11]

The court found little difficulty in determining that the third *Duren* prong was met—that there was a systematic exclusion of the distinctive group. In matters involving lack of fair representation of juries it is not required that an intent to discriminate be proven.[12] All that need be shown is that there was some system by which the distinctive group was not fairly represented. And all that is required to show systematic exclusion is "that the disparity 'is inherent in the particular jury selection process utilized.' "[13]

Given the *Duren* test to show a prima facie violation of the fair cross-section requirement, the court had to determine how to allo-

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ately more Hispanics than Whites are old enough to register to vote but may not register to vote for some other reason, such as non-citizenship.

9. In 1978, 37.4% of Americans eligible to vote were not registered. 36 Cal. 3d at 52, 679 P.2d at 441, 201 Cal. Rptr. at 790. The same year, 42.9% of Blacks and 67.1% of Hispanics were unregistered. *Id.* at 52 n.6, 679 P.2d at 441 n.6, 201 Cal. Rptr. at 790 n.6. Although the statistics presented tend to show disproportionately low registration among some minorities, they are not, for some reason, taken exclusively from the Los Angeles area. The court's conclusion though is clear: if Blacks and Hispanics do not register to vote as frequently as Whites, they will be underrepresented on jury venires.

10. The Attorney General also argued that the defendant's statistical evidence was possibly skewed because it only surveyed those people who actually showed up at the courthouse for jury duty, not the "original contact pool." The original contact pool consists of all people contacted by the jury commissioner, using voter registration lists. People who were contacted by the jury commissioner, but eventually did not serve on jury duty, for whatever reason, were therefore not included in the survey conducted to determine the ethnic composition of the venire. The court rejected this argument in summary fashion, determining that the representative character of the panel that tried the defendant was the proper survey group, not the original contact pool. 36 Cal. 3d at 53, 679 P.2d at 442, 201 Cal. Rptr. at 791.

11. The court's analysis was supported by the United States Supreme Court's holdings in *Duren*, 439 U.S. at 364-65 (use of census figures to determine proportionate representation of women) and Castaneda v. Partida, 430 U.S. 482, 495-96 (1977) (use of census figures to show disproportionate representation of Mexican-Americans on grand juries).

12. "It is also clear from the cases dealing with racial discrimination in the selection of juries that the systematic exclusion of Negroes is itself such an 'unequal application of the law . . . as to show intentional discrimination.' " *Castaneda*, 430 U.S. at 493 (quoting Washington v. Davis, 426 U.S. 299, 241 (1976)).

13. 36 Cal. 3d at 58, 679 P.2d at 446, 201 Cal. Rptr. at 795 (quoting *Duren*, 439 U.S. at 366).

cate the burden of proof. The court determined that the initial burden is upon a defendant to show that there is a prima facie violation. If that can be done (as here) "[t]he burden then shifts to the state to demonstrate either that with more refined statistics, the underrepresentation would be reduced to a constitutionally insignificant disparity, or that there exists a compelling justification for the procedure which results in the underrepresentation."[14] In using "more refined statistics" the state can show that there is no disparity of constitutional significance or that even by using multiple sources to draw juries that some level of disparity is unavoidable.[15]

In *Harris,* the state made no attempt to present "more refined statistics" or show that there was a significant state interest behind the exclusive use of the voter registration list as the source for drawing jurors. Therefore, since a prima facie violation of the defendant's right to a jury from a representative cross-section of the community was made, the court held that the violation was prejudicial per se[16] and demanded reversal.[17]

II. SPECIAL CIRCUMSTANCES FINDINGS

The court was also forced to rule on the propriety of the trial court's use of multiple special circumstances.[18] The defendant

14. 36 Cal. 3d at 45-46, 679 P.2d at 437, 201 Cal. Rptr. at 786. The court's opinion is disappointingly void of rationale or authority for its conclusion. However, similar conclusions were reached in *Duren,* 439 U.S. at 368-69, and *Castaneda,* 430 U.S. at 497-98.

15. 36 Cal. 3d at 59, 679 P.2d at 446, 201 Cal. Rptr. at 795.

16. *Id.* at 59, 679 P.2d at 446-47, 201 Cal. Rptr. at 795-96.

17. *Id.* at 59, 679 P.2d at 447, 201 Cal. Rptr. at 796. No determination was made as to the retroactive effect of the court's holding. However, in light of the 1981 amendment to section 204.7 of the California Code of Civil Procedure which mandates the use of drivers license and state identification card lists in addition to voter registration lists for selecting jurors, the court's decision may not have a substantial impact in practice.

18. Special circumstances, generally speaking, are used to justify a more severe penalty because they tend to indicate the heinous nature of a defendant's conduct. In a case where the penalty may be death, the jury determines whether the defendant is guilty of the crime and whether any special circumstances charged by the state are true. CAL. PENAL CODE § 190.1 (West Supp. 1984). Special circumstances are enumerated in section 190.2 of the Penal Code. *Id.* § 190.2. They can be charged based on who the victim was (e.g., police officer), what the instrumentality of death was (e.g., bomb), or what other crime was committed in conjunction with the murder (e.g., robbery). If the special circumstances are found to be true, a special hearing is held where the trier of fact determines whether the penalty should be death or life imprisonment without possiblity of parole. Special

was convicted of two murders, and special circumstances were charged for commission of a burglary,[19] commission of a robbery[20] and being personally present during, and having the intent to commit, a multiple murder.[21] Each of the special circumstances was found to be true in the guilt phase of the trial, thus triggering the penalty phase where special circumstances were again considered.[22]

The court found that in appropriate cases multiple special circumstances can be charged. The defendant had argued first that charging multiple special circumstances prejudiced the jury against him since only one special circumstance is necessary to trigger the penalty phase. He also contended that designating, through legislation, factors to be considered by a jury in determining the penalty violated his eighth amendment right to have the death sentence determined by the trier of fact. The court easily rejected these arguments. The defendant's first argument was countered by the statute's plain language which permits charging multiple special circumstances.[23] The court responded to the second contention merely by referring to previously accepted standards permitting some legislative guidance for juries in determining a possible death sentence.[24]

However, even though the court approved of charging multiple special circumstances, it concluded that the *cumulative* use of special circumstances was improper. The court agreed that "particular special circumstances found to be true in the guilt phase become aggravating factors in the penalty phase."[25] Where, as

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circumstances may also be considered in the penalty phase. *Id.* § 190.4. Although each of the sections pertinent to this case has been amended in some form, all are sufficiently similar to their previous form so as to make the court's holding important.

19. *Id.* § 190.2(c)(3)(v).

20. *Id.* § 190.2(c)(3)(i).

21. *Id.* § 190.2(c)(5).

22. *See supra* note 18.

23. The former section 190.2 of the Penal Code specifically permitted imposing a penalty of death or life in prison without possibility of parole "in any case in which *one or more* of the following special circumstances has been charged and specially found. . . ." CAL. PENAL CODE § 190.2. Included in the list that followed was each of the special circumstances with which the defendant was charged.

24. In People v. Frierson, 25 Cal. 3d 142, 172-84, 599 P.2d 587, 604-12, 158 Cal. Rptr. 281, 298-306 (1979), the court analyzed and upheld the California death penalty legislation. Particular attention was paid to the holding of the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), which had upheld Florida's sentencing law. That legislation permitted the jury to consider several mitigating and aggravating circumstances in recommending the penalty. The *Frierson* court found that the California statute was sufficiently similar to the Florida statute so as to pass constitutional muster. 25 Cal. 3d at 179-80, 599 P.2d at 607-08, 158 Cal. Rptr. at 302-03.

25. 36 Cal. 3d at 62, 679 P.2d at 449, 201 Cal. Rptr. at 798.

here, the defendant was charged with more than one special circumstance (burglary and robbery) emanating from "an indivisible course of conduct having one principle criminal purpose,"[26] "the defendant's conduct is artificially inflated . . . ."[27] The result, urged the defendant, was a contradiction of the policy of using special circumstances to focus only on the defendant's particular conduct at the time of the crime. Additionally, the court concluded that the cumulative use of special circumstances was inconsistent with the dictates of Penal Code section 654,[28] which prohibits double punishment.[29]

The court fortunately cured the problem presented when multiple special circumstances are charged, by restricting their use to a non-cumulative nature. It determined that the prosecution could charge and prove any special circumstances supported by the evidence, whereupon the jury determines in the guilt phase which of the special circumstances were committed. However, to avoid the possibility that the jury will give multiple special circumstances too much weight in the penalty phase, "in those cases involving a single act or an indivisible course of conduct with one principal criminal objective, . . . the multiple special circumstances should be considered [by the jury] as one."[30] The prosecution will also be barred from referring to the individual special circumstances found to be true during the guilt phase but merged during the penalty phase.[31]

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26. *Id.* at 62, 679 P.2d at 449, 201 Cal. Rptr. at 798.

27. *Id.*

28. CAL. PENAL CODE § 654 (West Supp. 1984) provides:

> An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other.

29. People v. Beamon, 8 Cal. 3d 625, 639, 504 P.2d 905, 914, 105 Cal. Rptr. 681, 690 (1973) (Penal Code section 654 limits multiple convictions in "those instances wherein the accused entertained a principal objective to which other objectives, if any, were merely incidental.").

30. 36 Cal. 3d at 66, 679 P.2d at 451-52, 201 Cal. Rptr. at 800-01.

31. *Id.* at 66, 679 P.2d at 452, 201 Cal. Rptr. at 801. In addressing a similar problem the court held that multiple murders permit the charging of only one special circumstance. Without such a rule, a defendant who killed two victims could be charged for the murder of each victim and a special circumstance for multiple murder could be charged separately for *each* murder.

The court was also faced in the case with an evidentiary problem. The defendant argued that the trial court improperly refused to admit into evidence poetry that the defendant wrote while he was in custody. The court agreed, holding that

III. CONCURRING OPINION

Justice Grodin registered a concurring opinion because he felt additional evidentiary proceedings were needed to accurately determine whether the state could show that there was no disparity of constitutional significance in using only voter registration lists to draw the jury venires. The state, due to a lack of appellate guidance, was unaware of what it must show once the defendant proved a prima facie violation.[32] However, Justice Grodin preferred a judicial resolution of the case over a stalemate, and because his view more closely aligned with that of the majority, he concurred.

IV. DISSENTING OPINIONS

Justice Mosk (with whom Justice Richardson concurred) and Justice Kaus registered dissents. Justice Mosk argued that the statistics presented by the defendant were insufficient because they reflected the make-up of the total Los Angeles County area, not, as they should have, the area around the Long Beach court. Additionally, Justice Mosk argued that class distinctions are found in virtually any method of selecting jury panels. Be it property tax rolls, drivers license records, or even telephone books, there will be a class of people left out due to an inability to afford that which is necessary to get on the list.

Justice Kaus also felt that the defendant did not show a prima facie violation because the statistics used represented all of Los Angeles County, and not Long Beach specifically. He also disapproved of allowing the prospective juror survey to concentrate on those actually showing up for jury duty. He felt that the survey should include those contacted for jury duty, i.e., those who did not serve as well as those who did. Justice Kaus' view is that the majority, in effect, disregarded the original contact pool as being irrelevant.

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in a penalty phase of a capital case that a defendant should be granted broad powers to introduce evidence relevant to his character. The court determined that the poetry fit within the mental state exception to the hearsay rule, CAL. EVID. CODE § 1250 (West Supp. 1984), and additionally carried its own indicia of trustworthiness in that it was written to the defendant's daughter, and not in contemplation of litigation.

32. Justice Grodin expressed some displeasure with the statistics presented by the defendant. Although not fatal to the prima facie case, he felt that population statistics should be refined to reflect only those over age 18. He also thought that the population of the Long Beach area would be more appropriate than that of Los Angeles County as a whole.

V. CONCLUSION

It is doubtful that there will be substantial practical impact on jury selection as a result of *Harris.* Statutory changes made since Harris' trial require that jury venires be drawn from multiple sources.[33] However, if the current system is constitutionally challenged as creating an unrepresentative cross-section of the community, future courts will have guidance for applying the proper test and the state will understand what showing will be necessary to overcome a defendant's prima facie case.

The court's ruling with respect to charges of multiple special circumstances should have some practical impact. By eliminating the cumulative use of multiple special circumstances, the court has properly rejected a fundamentally unfair system. Analysis will now focus on the defendant's actions at the time of the crime, not on how many special circumstances can be drawn from a single course of conduct.

G. *Jury may consider sympathy for the defendant when determining sentence in a capital case:* **People v. Lanphear.**

People v. Lanphear, 36 Cal. 3d 163, 680 P.2d 1081, 203 Cal. Rptr. 122 (1984), was an automatic appeal from a judgment in which the death penalty was imposed. The supreme court had previously heard the case and reversed the original judgment as to the penalty only. *People v. Lanphear,* 26 Cal. 3d 814, 608 P.2d 689, 163 Cal. Rptr. 601 (1980). On remand, the defendant was again given the death penalty. On this appeal, the defendant argued that the trial court erred by instructing the jury not to consider sympathy factors in imposing the penalty. The supreme court again reversed as to the penalty, holding that the trial court's instruction was erroneous and directly contrary to principles set forth in *People v. Easley,* 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983). The court ruled that the jury is obliged to weigh both mitigating and aggravating evidence in determining the defendant's penalty. Where mitigating evidence raises the sympathies of the jury, the jury is free to act in response to those sympathies.

33. *See supra* note 17.

H. *Trial court abused its discretion in not referring a minor defendant to the Youth Authority for a pre-sentencing report:* **People v. Marsh.**

In *People v. Marsh,* 36 Cal. 3d 134, 679 P.2d 1033, 202 Cal. Rptr. 92 (1984), a sixteen-year-old was sentenced to life in prison without possibility of parole after pleading nolo contendere to several felonies, including kidnapping for ransom with bodily harm. The defendant moved the trial court, unsuccessfully, for an order striking the ransom with bodily harm allegations pursuant to section 1385 of the Penal Code. Only with those allegations as part of the charge could the defendant's life sentence be imposed without possibility of parole. Without the allegations, the defendant could have been eligible for commitment to the California Youth Authority. The trial court's decision not to strike the ransom with bodily harm allegation was made after reviewing the probation report and psychological reports and evaluations.

The defendant urged reversal on three grounds. First, the trial court failed to refer him to the Youth Authority for evaluation pursuant to section 707.2 of the Welfare and Institutions Code. Next, he also argued that the trial court abused its discretion in denying his motion to strike the ransom with bodily harm allegations. Finally, he argued that sentencing a minor to life in prison without possibility of parole constituted cruel and unusual punishment.

The court held that the trial court erred by not referring the defendant to the Youth Authority for a pre-sentencing report and evaluation. It determined that the trial court should have such a report in re-evaluating the defendant's sentence. Upon re-evaluation, the trial court would have authority under Penal Code section 1385 to strike the ransom with bodily harm allegations based on the rationale of *People v. Williams,* 30 Cal. 3d 470, 637 P.2d 1029, 179 Cal. Rptr. 443 (1981), which permits the trial court to strike findings of special circumstances which could subject a defendant to life in prison without possibility of parole. It made no difference that the defendant sought to have an allegation struck rather than a special circumstance.

The court specifically declined to consider whether sentencing a minor to life in prison without possibility of parole is cruel and unusual punishment. Language of the court, however, suggested that it would be open to consideration of the issue.

I. *The defendant's conviction for second degree felony murder reversed because the underlying felony of child abuse was an integral part of the homicide:* **People v. Smith.**

In *People v. Smith,* 35 Cal. 3d 798, 678 P.2d 886, 201 Cal. Rptr. 311 (1984), the supreme court held that the defendant could not be convicted of second degree felony murder for the accidental death of her child which occurred as a result of a beating delivered by the defendant.

The defendant's daughter died of head injuries sustained while the defendant was beating the child. The defendant was tried on charges of second degree murder, felony child abuse, and child beating. The second degree murder charge was based on the common law felony-murder rule which makes any homicide second degree murder if it occurs during the course of an inherently dangerous felony. The trial court instructed the jury that felony child abuse was an inherently dangerous felony. Based upon this instruction, the defendant was convicted of second degree murder, as well as of the child abuse charges.

The supreme court reversed the murder conviction based on the rule established in *People v. Ireland,* 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969). In *Ireland,* the court held that the felony murder rule does not apply when the underlying felony is an integral part of the homicide. This rule was modified in *People v. Burton,* 6 Cal. 3d 375, 491 P.2d 793, 99 Cal. Rptr. 1 (1971), to allow application of the felony murder rule when the underlying felony, although integral to the homicide, was committed with an "independent felonious purpose." The court stated that the child abuse in this case was integral to the homicide since the beating was the "very assault which resulted in death." Furthermore, there was no independent purpose for the abuse. Thus, the trial court erred under *Ireland* and *Burton* in instructing the jury on felony murder, and the defendant's conviction for murder had to be reversed.

J. *No error for court to impose sentence of life imprisonment without possibility of parole when jury cannot decide on penalty; no prejudice in prosecution's use of peremptory challenges against jurors who are opposed to the death penalty:* **People v. Zimmerman.**

In *People v. Zimmerman*, 36 Cal. 3d 154, 680 P.2d 776, 202 Cal. Rptr. 826 (1984), the supreme court held that a sentence of life in prison without possibility of parole, when imposed by the court after a jury cannot decide on the proper penalty, does not violate the United States Constitution's eighth amendment ban on cruel and unusual punishment. It also determined that the prosecution's use of peremptory challenges and challenges for cause against jurors with strong feelings against the death penalty is not prejudicial to a defendant at the guilt phase of a trial.

Following Zimmerman's conviction for two counts of burglary, rape, and two counts of first degree murder with special circumstances, the jury could not reach a unanimous decision concerning punishment. The trial court, as required by California Penal Code section 190.4(b), imposed a penalty of life in prison without possibility of parole.

The court noted the distinction made by the United States Supreme Court between capital cases requiring individualized sentencing and imprisonment and those not requiring individualized action. The defendant's argument that such a system does not permit the sentencing authority to consider the mitigating circumstances that it would consider for a capital sentence was found to have no merit. The court noted that even sentences of life imprisonment without possibility of parole may be altered by the court, CAL. PENAL CODE § 1385 (West 1982), or commuted by the governor, CAL. CONST., art. V, § 8.

The prosecution used peremptory challenges against jurors who expressed reservations about voting for the death penalty, and against persons who would automatically vote against the death penalty. The court ruled that neither class of persons is "constitutionally cognizable" so as to deny the defendant of a representative jury; at least as to the guilt phase of the trial. Since the penalty was set by the court, it was unnecessary to reach the question of whether such action would constitute reversible error as to the penalty phase.

VIII. CRIMINAL PROCEDURE

A. *Effective assistance of counsel includes reasonably necessary ancillary defense services and court may order a county to pay for the services:* Corenevsky v. Superior Court.

I. INTRODUCTION

According to the United States Supreme Court, an indigent criminal defendant has a constitutional right to effective assistance of counsel.[1] In California, the legislature has expanded that right so as to include ancillary defense services.[2] However, the parameters of precisely what constitutes "effective assistance of counsel" and how the right may be enforced remain uncertain. In *Corenevsky v. Superior Court*,[3] the California Supreme Court further defined the concept, including its partial composition, funding, and enforceability. Effective assistance of counsel includes reasonably necessary ancillary defense services such as jury selection experts and law clerks. Moreover, the court proclaimed that these rights must be enforced, and a court order directing payment for such services at county expense must be obeyed, even if a county has not specifically appropriated funds for defense services. In the latter instance, a court may issue an order, enforceable by the power of contempt, that a county auditor make payment for the services out of any funds and do so without prior approval from the county board of supervisors.

II. FACTUAL BACKGROUND[4]

Corenevsky involved three consolidated cases, all of which arose from various parts of the same factual situation. Corenev-

1. United States v. Cronic, 104 S. Ct. 2039, 2044 (1984); McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970).

2. *See, e.g.*, CAL. EVID. CODE § 730 (West 1966) (providing court-appointed expert witnesses); CAL. PENAL CODE § 987(a) (West Supp. 1984) (providing court-appointed counsel in noncapital cases); CAL. PENAL CODE § 987.8(f)(1) (West Supp. 1984) (providing "legal counsel and supportive services").

3. 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984). Opinion by Mosk, J., with Kaus, Broussard, Reynoso, Grodin, Lucas, JJ., concurring. Separate dissenting opinion by Bird, C.J. Lucas, J., assigned by the Chairperson of the Judicial Council.

4. During the course of this case, Corenevsky was represented by eight different attorneys, including three public defenders who later became district attorneys. Due to the resulting conflict, the district attorney excused himself. The Attorney General replaced him. In addition, the public defender was excused

sky was charged with both murder and robbery. The district attorney sought the death penalty. A public defender was appointed because Corenevsky was indigent. In the first case, defendant sought mandamus review of superior court orders denying him state-funded ancillary defense services and the assistance of a second appointed counsel. In the second case, mandamus was sought to compel the dismissal of all charges against the defendant because the county refused to disburse funds for court-ordered ancillary defense services. The final case concerned a writ of habeas corpus sought by the Imperial County Auditor-Controller to review a superior court order holding him in contempt for failure to disburse county funds.

A. Section 987.9 State Funding

Corenevsky filed a motion under Penal Code section 987.9[5] to procure state funds in order to secure a second, more experienced trial counsel. The motion was denied without a hearing. On appeal,[6] however, the court of appeal ordered the trial court to conduct a hearing. At the section 987.9 hearing, a second counsel was appointed under state funding. Shortly thereafter, the supreme court ruled in *Keenan v. Superior Court*[7] that appointments of second counsel did not fall within the state funding provision of section 987.9, but rather came within the county funding provisions of Penal Code sections 987(b)[8] and 987.2.[9] The trial court granted the second attorney's motion to be relieved after the County Board of Supervisors refused payment for services. The court also denied a motion by Corenevsky seeking dismissal due to the lack of a second attorney; instead, the court forbade the

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after abandoning the case and new trial counsel and appellate counsel were appointed to represent Corenevsky.

5. CAL. PENAL CODE § 987.9 (West Supp. 1984) provides in pertinent part:

> In the trial of a capital case the indigent defendant, through his counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. . . . The fact that an application has been made shall be confidential and the contents of the application shall be confidential. . . . The ruling on the reasonableness of the request shall be made at an in camera hearing.

Corenevsky waived his right to keep confidential the fact that a section 987.9 application had been made. The waiver was for the limited purpose of allowing the court to hear public oral argument and publish an opinion. 36 Cal. 3d at 314 n.2, 682 P.2d at 363 n.2, 204 Cal. Rptr. at 168 n.2.

6. The proceeding had already been to the supreme court. The court granted a hearing then retransferred to the court of appeal with directions to issue an alternative writ of mandate. *Id.* at 314, 682 P.2d at 363, 204 Cal. Rptr. at 168.

7. 31 Cal. 3d 424, 640 P.2d 108, 180 Cal. Rptr. 489 (1982).

8. This section provides for the court appointment of counsel in capital cases. CAL. PENAL CODE § 987(b) (West Supp. 1984).

9. This statute provides for the court appointment of counsel in noncapital cases. CAL. PENAL CODE § 987.2 (West Supp. 1984).

prosecutor from seeking the death penalty. This ruling was not challenged.[10]

The defendant's remaining counsel filed a second section 987.9 motion for funds to employ defense investigators and to hire experts which the court denied because the matter was no longer "capital." Therefore, relief under section 987.9 was inappropriate.[11] Corenevsky sought writ review in the court of appeal maintaining that equal protection and effective assistance of counsel would be denied unless the court construed the case to be "capital" within the meaning of section 987.9. The court of appeal denied the petition. The supreme court granted a hearing.

B. County Funded Ancillary Defense Services

During the pendency of the foregoing proceeding in the court of appeal, Corenevsky moved the trial court for county funds for investigators, law clerks, and four expert witnesses, including a jury selection expert. The court granted the motions and ordered funds for the witnesses and investigators,[12] but denied funding for law clerks.[13]

Corenevsky again filed for writ review in the court of appeal. He argued he was constitutionally entitled to publicly funded ancillary defense services and that the partial denial of funding was a denial of equal protection, due process, and effective assistance of counsel. The court of appeal denied the petition. On the same day, the county refused to pay for the court-ordered witnesses and investigators. Once again, the supreme court granted a hearing.

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10. In fact, by letter to the trial court and opposing counsel, one of Corenevsky's former counsel deliberately chose not to challenge these three court rulings as a tactical maneuver. 36 Cal. 3d at 317-18, 682 P.2d at 365, 204 Cal. Rptr. at 170.

11. Section 987.9 applied only to "capital cases." *See supra* note 5.

12. Originally, the trial court had denied funds for investigators. However, sometime prior to the case reaching the supreme court, the trial court reversed itself and ordered funding. Consequently, the supreme court declined to decide the propriety of that part of the court order. 36 Cal. 3d at 320-21, 682 P.2d at 367, 204 Cal. Rptr. at 172.

13. The motions had been made pursuant to a number of statutes: CAL. EVID. CODE § 730 (West Supp. 1984) (appointment of experts); CAL. EVID. CODE § 731 (West 1966) (payment of court-appointed experts); CAL. PENAL CODE § 987.6 (West Supp. 1984) (partial reimbursement by state for cost of court-appointed counsel); and CAL. PENAL CODE § 987.8 (West Supp. 1984) (reimbursement by defendant for legal assistance). The court ordered a total of $13,314 for defense services in this order alone. 36 Cal. 3d at 315, 682 P.2d at 364, 204 Cal. Rptr. at 169.

C. *Order of Contempt*

Corenevsky filed a third writ of mandate in the court of appeal, naming the People and the Imperial County Superior Court as respondents. The defendant argued that he was denied a fair trial because of the continual refusals of the county to disburse funds for the court-ordered defense services; therefore, he urged dismissal of all charges. The People countered that dismissal was inappropriate and that the proper remedy was enforcement of the court order. The appellate court agreed and issued an order commanding the county auditor to pay for the court-ordered defense services or show cause why he should not be held in contempt. The court rejected the auditor's contention that because he was a nonparty the court lacked jurisdiction.[14] Nevertheless, the auditor refused to disburse funds. Thereafter, the auditor was cited for contempt, fined, and ordered to jail until he completed disbursement of the funds.

While execution was stayed, the auditor filed a petition for habeas corpus and application for a stay in the court of appeal. The trial court stay expired and the auditor was placed in jail. Subsequently, the court of appeal denied the petition and the stay. The auditor filed a second petition and request for stay in the supreme court, both of which were granted.

III. ANALYSIS

A. *Section 987.9 State Funding*

In *Sand v. Superior Court,*[15] the supreme court unequivocally stated: "In those murder cases . . . in which the death penalty will not be sought, even though the offense charged is statutorily punishable by death, section 987.9 is inapplicable." Inasmuch as Corenevsky failed to challenge the trial court's order relieving the second attorney and forbidding the prosecutor from seeking the death penalty, he intentionally waived those claims as well as the claim that the case should be considered "capital."[16] Moreover, only a case in which the death penalty may be imposed can be called a "capital case."[17] Therefore, because section 987.9 applies only to death penalty cases, all of Corenevsky's claims under the writ of mandate seeking dismissal of charges were rejected and the writ denied. However, the court noted, both statutory and constitutional law may offer indigent defendants access to county

14. The court of appeal ordered the auditor to comply with Government Code section 29122.

15. 34 Cal. 3d 567, 572, 668 P.2d 787, 790, 194 Cal. Rptr. 480, 483 (1984).

16. *See supra* note 10 and accompanying text.

17. *Sand,* 34 Cal. 3d at 572, 668 P.2d at 790, 194 Cal. Rptr. at 483.

funds for "equivalent relief."[18]

B. Propriety of the Orders

Evidence Code section 730 expressly provides for court-appointed expert witnesses.[19] Evidence Code section 731(a)[20] and Government Code section 29603[21] require the county to pay for those expenses. Those sections do not, however, provide for law clerks or experts other than those enumerated. Nonetheless, the court believed that the right to those services could be inferred from Penal Code sections 987(a) and 987.8(f)(1),[22] and more importantly, could be required by the constitutional right to effective assistance of counsel.[23] The latter right is guaranteed by both the federal and state constitutions.[24] Moreover, in California, that right also includes the right to reasonably necessary ancillary defense services.[25]

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18. 36 Cal. 3d at 318, 682 P.2d at 365, 204 Cal. Rptr. at 170 (citing *Sand,* 34 Cal. 3d at 575 & nn.3 & 4, 668 P.2d at 792 & nn.3 & 4, 194 Cal. Rptr. at 486 & nn.3 & 4).

19. Evidence Code section 730 provides in pertinent part: "When it appears to the court, at any time . . . that expert evidence is or may be required by the court or by any party . . . the court . . . may appoint one or more experts. . . . The court may fix the compensation for such services . . . at such amount as seems reasonable to the court." CAL. EVID. CODE § 730 (West Supp. 1984).

20. Evidence Code section 731(a) provides in relevant part: "In all criminal actions . . . the compensation fixed under section 730 shall be a charge against the county in which such action . . . is pending and shall be paid out of the treasury of such county on order of the court." CAL. EVID. CODE § 731(a) (West Supp. 1984).

21. Government Code section 29603 provides in pertinent part: "The sums required by law to be paid to . . . witnesses in criminal cases tried in a superior court . . . are county charges." CAL. GOV'T CODE § 29603 (West 1968).

22. According to the court in *Sand:*

> Section 987, subdivision (a), provides for court appointment of counsel in noncapital cases; section 987.8, subdivision (f)(1), provides that, based on a defendant's present ability to pay, he may be required to reimburse the court for "legal assistance" provided, and further defines "legal assistance provided" to include: "legal counsel and supportive services including, but not limited to, medical and psychiatric examinations, *investigative services, expert testimony,* and *any other form of services provided to assist the defendant in the preparation and presentation of defendant's case.*"

Sand, 34 Cal. 3d at 575 n.3, 668 P.2d at 792-93 n.3, 194 Cal. Rptr. at 486 n.3 (emphasis added).

23. 36 Cal. 3d at 319, 682 P.2d at 366, 204 Cal. Rptr. at 171.

24. U.S. CONST., amend. VI; CAL. CONST. art. I, § 15.

25. *Keenan,* 31 Cal. 3d at 428, 640 P.2d at 110, 180 Cal. Rptr. at 491; *In re* Ketchel, 68 Cal. 2d 397, 438 P.2d 625, 66 Cal. Rptr. 881 (1968) (includes the right to counsel and to expert assistance); Puett v. Superior Court, 96 Cal. App. 3d 936, 938-39, 158 Cal. Rptr. 266, 267 (1979) (includes the right to an investigator); People v. Faxal, 91 Cal. App. 3d 327, 330, 154 Cal. Rptr. 132, 134 (1979) (includes the right to ancillary services).

The issue thus became whether Corenevsky had established that the requested defense services were reasonably necessary in reference to " 'the general lines of inquiry he wishes to pursue, being as specific as possible.' "[26] Because of the difficulty of meeting this requirement at such an early stage in the proceedings, a court should " 'view with considerable liberality a motion for such pretrial assistance.' "[27]

At the People's urging, the court reviewed the trial court's granting of funds for a jury selection expert. Although the court expressly disclaimed general approval of public funds for such experts,[28] the court upheld the order as being within the lower court's sound discretion.[29]

The order denying the requested law clerks posed a different question. Corenevsky had sufficiently demonstrated to the trial court that the law clerks were reasonably necessary rather than a mere convenience.[30] Although an appellate court typically will not second-guess such a trial court determination,[31] the court felt this case differed from the norm. The lower court had not based its ruling on a determination of necessity. Instead, the trial court believed the request related to "staffing problems" and issued its ruling under the mistaken view it was without authority to authorize such services.[32] Under these circumstances, the court determined that the denial of law clerks was error.

The auditor argued that sufficient funds had not been appropriated to cover the court-ordered expenses. Further, under Government Code sections 29120[33] and 29121,[34] the auditor would have

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26. *Faxel*, 91 Cal. App. 3d at 330, 154 Cal. Rptr. at 134 (1979).

27. Mason v. Arizona, 504 F.2d 1345, 1352 (9th Cir. 1974).

28. 36 Cal. 3d at 321, 682 P.2d at 368, 204 Cal. Rptr. at 173.

29. A trial court order is presumed correct. Therefore, it will be set aside only upon an affirmative showing of manifest abuse. Denham v. Superior Court, 2 Cal. 3d 557, 564, 468 P.2d 193, 197, 86 Cal. Rptr. 65, 69 (1970).

30. 36 Cal. 3d at 321-23, 682 P.2d at 368-69, 204 Cal. Rptr. at 173-74.

31. An order denying a motion will be reversed only when, "the circumstances shown compelled the [trial] court to exercise its discretion only in one way, namely, to grant the motion." *Puett*, 96 Cal. App. 3d at 941, 158 Cal. Rptr. at 269.

32. The trial court apparently believed that it had no authority to order public funds for ancillary services other than for expert witnesses under Evidence Code section 731. 36 Cal. 3d at 323, 682 P.2d at 369, 204 Cal. Rptr. at 174.

33. Government Code section 29120 provides:

> Except as otherwise provided by law, the board and every other county or special district official and person shall be limited in the making of expenditures or the incurring of liabilities to the amount of the appropriations allowed by the budget or as thereafter revised by addition, cancellation or transfer.

CAL. GOV'T CODE § 29120 (West 1968).

34. Government Code section 29121 provides:

> Except as otherwise provided by law, warrants issued, expenditures made, or liabilities incurred in excess of the budget appropriations are not a liability of the county or special district, but the official making or incur-

been subject to personal liability for any disbursements in excess of appropriated funds. Thus, under Government Code section 29130,[35] only the board of supervisors had authority to provide for the funds, and since they had refused to do so, the court order could not legally be paid.

In rejecting this argument, the court noted that certain statutes,[36] as well as the constitutional right to effective assistance of counsel, authorize courts to order defense services at county expense.[37] Those expenses are "county charges" which an auditor is required to pay without regard to specific appropriations.[38] Consequently, because the legislature placed a duty on the auditor and the board of supervisors to pay such charges, the court rejected the separation of powers argument asserted by the auditor.[39] Moreover, the court subsequently used the separation of powers doctrine as the basis for its ruling against the auditor, stating: "the trial court alone has authority to determine—*in camera*—whether reasonable need for defense services has been shown, and the county is powerless to review confidential defense

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ring the expenditure in an amount known by him to be in excess of the unencumbered balance of the appropriation against which it is drawn is liable therefor personally and upon his official bond.

CAL. GOV'T CODE § 29121 (West 1968).

35. Government Code section 29130 provides in relevant part:

Balances in appropriations for contingencies, including accretions from cancellation of specific appropriations, and revenues from any source . . . and charges for current services, which are either in excess of anticipated amounts or are not specifically set forth in the budget, may be made available for specific appropriation by a four-fifths vote of the board. . . .

CAL. GOV'T CODE § 29130 (West Supp. 1984).

36. *See, e.g., supra* note 2.

37. The court stated:

In all such cases the court-ordered services are "expenses necessarily incurred in the support of persons charged with or convicted of crime and committed to the county jail . . . *and for other services in relation to criminal proceedings for which no specific compensation is prescribed by law.* . . ."

36 Cal. 3d at 324, 682 P.2d at 370, 204 Cal. Rptr. at 175 (quoting CAL. GOV'T CODE § 29602) (emphasis added by the court).

38. Government Code section 29741(d) provides in relevant part:

The auditor shall audit and allow . . . claims in lieu of, and with the same effect as, allowance . . . by the board of supervisors in any of the following cases:

(d) Expenditures for charges incurred by the county pursuant to the provisions of Chapter 3 (commencing with Section 29600) of this division.

CAL. GOV'T CODE § 29741 (West Supp. 1984).

39. "The court transgresses no constitutional barrier when it orders a county auditor to proceed in accordance with those statutory provisions." 36 Cal. 3d at 325, 682 P.2d at 371, 204 Cal. Rptr. at 176.

requests or to modify or veto that determination."[40] A county may, however, challenge this type of court order within the court system.[41]

The court found further support for its ruling in Government Code section 29122.[42] That statute authorized the board of supervisors and the auditor to exceed appropriations and issue warrants against any budget when ordered to do so by the court. Compliance with this statute would sustain the doctrine of separation of powers.[43] In conclusion, the court denied Corenevsky's petition for mandate for dismissal of charges, believing that the auditor would no longer refuse to comply with the court order.

C. *Propriety of the Contempt Order*

Although prior case law required that an auditor be a party to a mandate proceeding before he could be subject to contempt,[44] the court believed the cases so holding to be outdated and inapplicable.[45] Today, it is enough that a person has a chance to appear before the court and defend his failure to comply with a court order.[46] Moreover, because there was sufficient evidence to sustain a judgment of contempt, the order was proper. As explained above, the auditor had no legal reason to refuse to comply with the court order;[47] thus, his noncompliance was sufficient for him to be held in contempt. The auditor's writ of habeas corpus was denied.

IV. CONCLUSION

The supreme court in *Corenevsky* has further defined the bounds of the statutory and constitutional right to effective assistance of counsel. Under both, an indigent defendant has the right to reasonably necessary ancillary defense services at county expense, including experts, investigators, law clerks, and quite pos-

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40. *Id.*

41. "Although the county is free to challenge court orders in the courts, it is impotent to review and reject such orders on its own." *Id.* (footnote omitted).

42. Government Code section 29122 provides in pertinent part:

> The board shall approve no claim and the auditor shall issue no warrant for any expenditure in excess of the budget appropriation therefor, *except upon an order of a court of competent jurisdiction,* for an emergency, or as otherwise provided by law.

CAL. GOV'T CODE § 29122 (West Supp. 1984) (emphasis added).

43. 36 Cal. 3d at 326, 682 P.2d at 372, 204 Cal. Rptr. at 177.

44. *Ex parte* Truman, 124 Cal. 387, 388, 57 P. 223, 224 (1899); *Ex parte* Widber, 91 Cal. 367, 370-71, 27 P. 733, 734-35 (1891); Sargent v. Cavis, 36 Cal. 552, 558 (1869).

45. 36 Cal. 3d at 327, 682 P.2d at 372, 204 Cal. Rptr. at 177.

46. *In re* Berry, 68 Cal. 2d 137, 148-49, 436 P.2d 273, 281, 65 Cal. Rptr. 273, 281 (1968).

47. *See supra* notes 33-43 and accompanying text.

sibly, a second, more experienced counsel. These rights must be enforced by court order. In turn, a duty devolves upon the county auditor to pay these court-ordered "county charges" regardless of whether specific funds have been appropriated for such services and regardless of whether the county board of supervisors is in agreement. Failure to pay these charges subjects the auditor to personal contempt—including a fine and jail time. Should the county disagree with the court-ordered expenses, its only remedy is to challenge the order in the courts.

B. *Constitutional right to an interpreter prohibits courts from "borrowing" defendant's interpreter to aid in examination of witnesses:* **People v. Aguilar.**

In *People v. Aguilar,* 35 Cal. 3d 785, 677 P.2d 1198, 200 Cal. Rptr. 908 (1984), the supreme court held that a non-English-speaking defendant has a state constitutional right to have his interpreter available throughout the criminal proceedings, and, unless the defendant personally waives the right, failure to provide the interpreter requires reversal.

An interpreter was appointed for the defendant at his trial for murder. During the trial the interpreter was "borrowed" by the court, with the consent of defense counsel, to interpret the testimony of two of the People's witnesses. The defendant was convicted and later appealed on the grounds that his constitutional right to an interpreter was violated.

Article I, section 14 of the California Constitution entitles non-English-speaking defendants to have an interpreter "throughout the proceedings." While the interpreter was interpreting for the People's witnesses, the defendant was deprived of the ability to communicate with his attorney or the court. The supreme court held that this denied the defendant his constitutional right.

The court went on to determine that the defendant had not waived his constitutional right by virtue of his attorney's consent. The court stated that a personal waiver by the defendant was necessary. Since no such waiver had been given, the defendant's conviction was reversed.

C. *Prosecution failed to justify a detention on grounds that defendant was in an area known for drug trafficking at night and that he attempted to avoid the police:* **People v. Aldridge.**

In *People v. Aldridge,* 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984), the supreme court held that evidence discovered during a patdown search of the defendant should have been excluded because the defendant had been unlawfully detained.

During a nighttime patrol, a police officer drove into a liquor store parking lot intending to conduct "field interviews" with everyone gathered in the lot. The officer conducted such interviews on a routine basis. The defendant and some other men left the scene and the officer called a nearby patrol car to have the men stopped and interviewed. After he was stopped, the defendant was subjected to a pat-down search in which a stolen handgun was discovered. When the defendant's motion to suppress evidence of the gun was denied, he pled guilty to receiving stolen property and then appealed on the grounds that he was unreasonably detained and therefore any evidence discovered was inadmissible.

The People presented three objective factors which they claimed justified the defendant's detention: (1) it was nighttime; (2) it was "an area of continuous drug transactions;" and (3) the defendant sought to avoid the police. The supreme court considered these factors and determined that, whether examined separately or together, they did not justify the detention. The court stated that there was nothing suspicious about being outside a liquor store at night and that persons may not be detained simply because they are in a high crime area. Finally, the court determined that, under the circumstances, the defendant was justified in leaving the area when he saw the police officer since the defendant was acquainted with the officer's routine practice of conducting field interviews of everyone in the parking lot. The court characterized the defendant's "flight" as an attempt to avoid harrassment by the police. Since the People were unable to show "objective, specific, and articulable facts" calling for detention, the defendant's motion to suppress was improperly denied.

D. *Police must obtain a warrant before acquiring a suspect's unlisted name and address from the telephone company:* **People v. Chapman.**

Has a police officer violated a constitutionally protected expectation of privacy by obtaining the unlisted name and address of a police suspect from the telephone company without a warrant?

This issue was presented to the supreme court in *People v. Chapman,* 36 Cal. 3d 98, 679 P.2d 62, 201 Cal. Rptr. 628 (1984).

In the prosecution of defendants for conspiracy to commit bookmaking, the defendants, McGee and Chapman, contended that a search warrant was issued pursuant to illegally obtained information. Consequently, the defendants moved to suppress all evidence resulting from that search. An informant had provided the police with the phone number she called in order to place bets, and the identity of the individual to whom she paid her gambling debts. The police then contacted the phone company and obtained the name and address of the first defendant, McGee, from the unlisted phone number without first obtaining a warrant. Relying on this information, the police swore out an affidavit and obtained a search warrant for defendant McGee's home and car. Based on the evidence seized, the police arrested both McGee and Chapman—the man identified by the informant as the person to whom she paid her gambling debts.

The entire case against defendant McGee was founded on the unlisted phone number and the subsequent search of her home made possible by information obtained from the telephone company. The court held that McGee had a reasonable expectation of privacy in the unlisted information which was protected under article 1, section 13 of the California Constitution and that a warrantless search to obtain that information was per se unreasonable. Consequently, the search warrant was held invalid and the trial court's order suppressing the evidence as to McGee was proper. Defendant McGee's motion to set aside the information was therefore granted.

However, granting McGee's motion did not necessarily require that her alleged co-conspirator's motion also be granted. Chapman argued that since McGee was acquitted, all remaining conspirators must also be acquitted. The court determined that granting McGee's motion could not be characterized as an acquittal. Since sufficient untainted evidence had been introduced to hold Chapman on the charge of conspiracy to commit bookmaking, the trial court's order granting his motion to set aside the information was improper.

E. *Defendant held to have been denied effective assistance of counsel at probation revocation hearing:* **People v. Shaw.**

In *People v. Shaw,* 35 Cal. 3d 535, 674 P.2d 759, 198 Cal. Rptr. 788 (1984), the supreme court granted the defendant's petition for habeas corpus on the grounds that he was denied the effective assistance of counsel. In addition, the court discussed the duties of a court interpreter.

The defendant's probation was revoked following his arrest for robbery. The robbery charge was later dismissed. The defendant appealed the revocation while also filing a writ of habeas corpus. He claimed that he was denied effective assistance of counsel, principally because of the attorney's failure to investigate the defendant's alibi defense.

An evidentiary hearing on the habeas corpus petition was conducted by a referee who concluded that the defendant's counsel had failed to act with reasonable competence, but that the failure did not deprive the defendant of a "potentially meritorious defense." *See People v. Pope,* 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979) (standards for measuring an attorney's performance).

The supreme court agreed with the referee that the defense counsel was not competent, but concluded, based on its own review of the record, that the defendant was deprived of a "potentially meritorious defense." For this reason, the defendant's petition was granted and the judgment revoking probation was vacated. Justice Broussard concurred in a separate opinion in which he criticized the practice of holding probation revocation hearings prior to trials.

The court added a cautionary note to counsel and courts to ensure that interpreters in court accurately translate verbatim all questions and answers. Counsel in this case had failed to object when an interpreter used the third person form in his translations, and although not prejudicial in this case, the court stressed that verbatim translations were important.

F. *Supreme court establishes appropriate appellate review when prosecution seeks to have criminal charges reinstated pursuant to Penal Code section 871.5 following dismissal by a magistrate:* **People v. Slaughter.**

In August of 1980, charges of murder[1] and possession of a con-

1. CAL. PENAL CODE § 187 (West Supp. 1984).

cealable firearm by an ex-felon[2] were filed against Terry L. Slaughter. At the conclusion of the preliminary hearing, the magistrate dismissed the murder charge against the defendant.[3] Arguing that "substantial evidence" had been presented, the prosecution unsuccessfully sought to have the charge reinstated pursuant to Penal Code section 871.5.[4] In *People v. Slaughter*,[5] the supreme court determined the applicable standard of review of a magistrate's ruling pursuant to section 871.5.[6]

I. FACTUAL BACKGROUND

On July 22, 1980, a uniformed security guard was killed while parked at a vacant gas station in Oakland.[7] A subsequent police investigation determined that the victim had been shot with a .22 caliber bullet and that his .38 caliber pistol and wallet were missing.[8] Twelve days later, the defendant, in possession of the sto-

2. CAL. PENAL CODE § 12021 (West Supp. 1984).

3. The charge was dismissed pursuant to Penal Code section 871, which provides in pertinent part: "If, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense, the magistrate shall order the complaint dismissed. . . ." CAL. PENAL CODE § 871 (West Supp. 1984).

4. CAL. PENAL CODE § 871.5 (West Supp. 1984) provides in pertinent part:

> (a) When an action is dismissed by a magistrate pursuant to Section 859b, 861, 871, 1008, 1381, 1381.5, 1385, 1387, or 1389, or a portion thereof is dismissed pursuant to those same sections which may not be charged by information under the provisions of Section 739, the prosecutor may make a motion in the superior court within 15 days to compel the magistrate to reinstate the complaint or a portion thereof and to reinstate the custodial status of the defendant under the same terms and conditions as when the defendant last appeared before the magistrate.
>
> (b) Notice of the motion shall be made to the defendant and the magistrate. The only ground for the motion shall be that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.
>
> (c) The superior court shall hear and determine the motion on the basis of the record of the proceedings before the magistrate. If the motion is litigated to decision by the prosecutor, the prosecution is prohibited from refiling the dismissed action, or portion thereof.

5. 35 Cal. 3d 629, 677 P.2d 854, 200 Cal. Rptr. 448 (1984). Opinion by Broussard, J., with Mosk, Kaus, Grodin, and Richardson, JJ., concurring. Separate dissenting opinion by Bird, C.J., with Reynoso, J., concurring. Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

6. The applicable standard for review was a question of first impression for the court. *Id.* at 633, 677 P.2d at 855, 200 Cal. Rptr. at 449.

7. He was shot through the passenger window in his car from the direction of a residence next door to the vacant gas station. *Id.* at 634, 677 P.2d at 855, 200 Cal. Rptr. at 449.

8. There was no evidence that either the gas station or the neighboring residence were burglarized.

len .38 caliber pistol, was arrested while driving a stolen car.[9]

In a recorded statement to the police, the defendant admitted that he and Edward Forward had committed a series of burglaries in the Oakland area.[10] On the morning in question, Forward had selected a home near the gas station to burglarize, while the defendant remained in the car as lookout.[11] A short time later, the defendant heard several gun shots. The defendant contended that Forward never mentioned the shots. He learned about the guard's death later that day from a news broadcast.

Although the defendant indicated he had participated in the scheme solely out of fear of Forward,[12] he continued the burglary operation until threatened by Forward on August 2nd. That night he stole Forward's car in order to return to Los Angeles. When the car broke down, he abandoned it and stole another car. In changing cars, the defendant took along his belongings and those of Forward, including several fur coats and a .38 caliber pistol.[13] Shortly thereafter, the defendant was stopped and arrested south of Santa Barbara.[14]

Based on the defendant's statement, the police obtained a search warrant for Forward's apartment. The search resulted in the recovery of a considerable amount of stolen property, a pistol, and the parts to a .22 caliber rifle.

At the preliminary hearing, the defendant's statement, the property seized pursuant to the search warrant, and the objects found in the defendant's stolen car were all introduced into evidence. Based on this evidence, the magistrate held the defendant to answer solely on the section 12021 weapons offense.[15] In refusing to bind him over on the murder charge, the magistrate stated: "I think any murder liability would be a vicarious liability as pointed out in [defense counsel's] memorandum, but even that is stretching too far. I do not see where there could be a holding or-

9. The defendant contended that he was not aware of the origins of the gun, only that "the gun was hot and that it came from a dead man." 35 Cal. 3d at 635, 677 P.2d at 856, 200 Cal. Rptr. at 450.

10. He stated that they were doing "four or five a night burglaries," for approximately two weeks before the killing. *Id.*

11. The defendant maintained that Forward selected and burglarized all the houses, leaving Slaughter in the car as a lookout.

12. The defendant alleged that he had come to Oakland to visit his cousin, and then met Forward, and that he cooperated in the burglaries only out of fear of Forward. *Id.* at 634, 677 P.2d at 856, 200 Cal. Rptr. at 450.

13. The .38 caliber pistol, discovered under the right front seat in the defendant's stolen car, was later found to have belonged to the slain security guard. *Id.*

14. The defendant was interrogated the next day and freely admitted to the series of burglaries. *Id.* at 635, 677 P.2d at 856, 200 Cal. Rptr. at 450.

15. *Id.*

der on the [murder] charge."[16]

Consequently, the prosecutor filed a "Motion to Compel Reinstatement of Complaint."[17] Relying on section 871.5, the prosecution could, under specific circumstances,[18] compel reinstatement of the complaint where the magistrate, "as a matter of law, . . . erroneously dismissed the action or a portion thereof."[19] The prosecutor argued that the standard of review applied to section 739[20] was applicable to section 871.5 motions. Therefore, reinstatement would be permitted "whenever there exists a reasonable interpretation of the evidence which would support the charge."[21] He maintained that the evidence reasonably supported the view that the security guard had been shot in the perpetration of an attempted burglary, in which case the defendant would be guilty of murder under the felony murder rule as an accomplice.[22] Nevertheless, the superior court denied the motion and the prosecutor

16. *Id.* *See supra* note 3.

17. *Id.* at 635, 677 P.2d at 856, 200 Cal. Rptr. at 450.

18. A motion pursuant to section 871.5 is only proper when (1) an action is dismissed pursuant to certain specified sections of the Penal Code, including section 871, *supra* note 3, and (2) the dismissed action may not be charged by information under section 739. *Supra* note 4. See *infra* note 20 for a discussion of Penal Code section 739.

19. CAL. PENAL CODE § 871.5(b).

20. CAL. PENAL CODE § 739 (West 1970) provides in pertinent part:

> When a defendant has been examined and committed . . . it shall be the duty of the district attorney . . . to file . . . an information against the defendant which may charge the defendant with either the offense or offenses named in the order of committment or any offense or offenses shown by the evidence taken before the magistrate to have been committed.

Section 739 allows the prosecution to include dismissed charges in the information, but only if they are transactionally related to the charges to which the defendant has been held to answer. Parks v. Superior Court, 38 Cal. 2d 609, 241 P.2d 521 (1952). The defendant may challenge the information under Penal Code section 995. The standard of review used by the court in acting on such a challenge is the section 739 standard of review. 35 Cal. 3d at 633, 677 P.2d at 855, 200 Cal. Rptr. at 449. This level of review is discussed *infra* in notes 24-32 and accompanying text.

In this case, the prosecutor could not include a charge of murder in the information against the defendant because the alleged murder was not transactionally related to the weapons offense for which the defendant was held to answer. Thus, the only way the prosecution could reinstate the murder charge was through an 871.5 motion. 35 Cal. 3d at 636 & n.4, 677 P.2d at 856-57 & n.4, 200 Cal. Rptr. at 450-51 & n.4.

21. 35 Cal. 3d at 636, 677 P.2d at 857, 200 Cal. Rptr. at 451.

22. The first degree felony murder rule is codified as CAL. PENAL CODE § 189 (West Supp. 1984). See People v. Medina, 41 Cal. App. 3d 438, 116 Cal. Rptr. 133 (1974), for a review of the common law origins of this rule.

appealed.[23]

II. Section 739 Standard of Review

Enacted in 1980, the California legislature intended section 871.5 to be an alternative to section 739 as a method for challenging a magistrate's preliminary ruling.[24] Since section 871.5 provides no express standard of review, the court began by analyzing the scope of judicial review under section 739.[25]

The primary role of the magistrate at a preliminary hearing is to determine if "it appears from the [preliminary] examination that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, [in which case] the magistrate must make or indorse on the complaint an order" holding the defendant over for trial.[26] Thus, the burden on the prosecution is to demonstrate that there was some rational ground to assume an offense had been committed and that the defendant was guilty of it.[27]

Clearly, the magistrate has no jurisdiction to make a decision on the merits of the case; his limited function is to weigh the evidence, resolve conflicts and determine the credibility of different witnesses.[28] His power to decide factual disputes is merely to facilitate his determination of sufficient cause.[29] However, the scope of judicial review under section 739 is dependent upon the magistrate's exercise of this power. If the magistrate makes findings of fact supported by substantial evidence, those findings are

23. 35 Cal. 3d at 636, 677 P.2d at 857, 200 Cal. Rptr. at 451.

24. *See* Vlick v. Superior Court, 128 Cal. App. 3d 992, 180 Cal. Rptr. 742 (1982). Section 871.5 "reflects legislative consideration of a comprehensive method of disposing of issues of law upon which a magistrate's dismissal of a felony complaint is based" and "a method by which [the People] could obtain speedy review by the superior court of a dismissal by the magistrate based upon a legal ruling." *Id.* at 998, 180 Cal. Rptr. at 746.

25. 35 Cal. 3d at 636, 677 P.2d at 857, 200 Cal. Rptr. at 451.

26. Cal. Penal Code § 872 (West Supp. 1984). "The term 'sufficient cause' is generally equivalent to 'reasonable and probable cause,' that is, such a state of facts as would lead a man of ordinary caution or prudence to believe and conscientiously entertain a strong suspicion of the guilt of the accused." People v. Uhlemann, 9 Cal. 3d 662, 667, 511 P.2d 609, 612, 108 Cal. Rptr. 657, 660 (1973). *See also* Williams v. Superior Court, 71 Cal. 2d 1144, 458 P.2d 987, 80 Cal. Rptr. 747 (1969); People v. Hampton, 116 Cal. App. 3d 193, 172 Cal. Rptr. 25 (1981) (court of appeal held defendant must challenge sufficiency of evidence on which magistrate bound him over to trial); Iungerich, *Reversing Perfect Trials, California Style: Time for a Re-evaluation of the Effect of Errors in Pretrial Commitment Proceedings,* 48 L.A. B. Bull. 88 (1973).

27. This was clearly distinguishable from the "beyond a reasonable doubt" standard required for conviction. Taylor v. Superior Court, 3 Cal. 3d 578, 582, 477 P.2d 131, 133, 91 Cal. Rptr. 275, 277 (1970).

28. *Uhlemann,* 9 Cal. 3d at 667, 511 P.2d at 612, 108 Cal. Rptr. at 660.

29. *Id.*

conclusive on appeal.[30] Where the magistrate does not render findings of fact, the dismissal should receive the independent scrutiny appropriate to questions of law.[31] "Absent controlling factual findings, if the magistrate dismisse[d] a charge when the evidence provide[d] a rational ground for believing that defendant is guilty of the offense, his ruling [was] erroneous *as a matter of law,* and will not be sustained by the reviewing court."[32]

III. The Standard Applied

The majority adopted the section 739 standard for reviewing motions made pursuant to section 871.5.[33] Applying the general principle that the legislature is presumed to have knowledge of existing judicial decisions and to have enacted subsequent legislation in accordance therewith,[34] the court concluded that "the Legislature, in referring to error 'as a matter of law,' did not intend to enact a new and different standard, but to incorporate the section 739 standard for review of dismissal orders."[35] Conse-

30. *See* Jones v. Superior Court, 4 Cal. 3d 660, 483 P.2d 1241, 94 Cal. Rptr. 289 (1971) (while a prosecutor may challenge a magistrate's finding that the evidence is legally insufficient, he may not ignore the magistrate's factual findings); People v. Salzman, 131 Cal. App. 3d 676, 684, 182 Cal. Rptr. 748, 753 (1982).

31. 35 Cal. 3d at 639, 677 P.2d at 859, 200 Cal. Rptr. at 453. In support of this contention, the court relied on Pizano v. Superior Court, 21 Cal. 3d 128, 577 P.2d 659, 145 Cal. Rptr. 524 (1978) (where the magistrate dismissed a charge of murder for absence of malice, the court termed the magistrate's finding a legal conclusion, instead of a finding of fact, and allowed reinstatement of the murder count); People v. Beagle (II), 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972) (since the magistrate in that case made no express finding of fact, the court was not required to examine the record for substantial evidence supporting the magistrate, but instead held the ruling erroneous as a matter of law); Jones v. Superior Court, 4 Cal. 3d at 666, 483 P.2d at 1244, 94 Cal. Rptr. at 292 (since the magistrate had made specific findings that the victim had consented to sexual intercourse and that no acts of sodomy or oral copulation had occurred, these charges should not have been included in the information).

32. 35 Cal. 3d at 639-40, 677 P.2d at 859, 200 Cal. Rptr. at 453.

33. The court found especially instructive the requirement that dismissed charges only be reinstated when they were "as a matter of law . . . erroneously dismissed." Cal. Penal Code § 871.5 (West Supp. 1984). This was because the very same language was used in section 739 review. *See, e.g.,* People v. Beagle (II), 6 Cal. 3d 441, 458, 492 P.2d 1, 11-12, 99 Cal. Rptr. 313, 323-24 (1972). The only case which has discussed the section 871.5 standard of review is People v. Salzman, 131 Cal. App. 3d 676, 182 Cal. Rptr. 748 (1982). This case involved a dismissal following a suppression hearing in which express findings of fact were made. The ruling was upheld based on the substantial evidence test.

34. *See* Buckley v. Chadwick, 45 Cal. 2d 183, 200, 288 P.2d 12, 22 (1955); Favalora v. County of Humboldt, 55 Cal. App. 3d 969, 973, 127 Cal. Rptr. 907, 911 (1976).

35. 35 Cal. 3d at 640, 677 P.2d at 860, 200 Cal. Rptr. at 454.

quently, the court viewed section 871.5 as a viable alternative to section 739, enacted to deal with situations where section 739's transactionally related requirement could not be met.[36]

In applying this standard to the defendant's case, the record presented no conflicting evidence, and no findings of fact were made. The sole issue raised by the magistrate's order was one of law: "whether the evidentiary record contained facts sufficient to show sufficient cause to hold defendant for murder."[37] Indisputably, the record showed that a conspiracy to commit burglary had existed, that the guard was robbed and killed near the site of the planned burglary, and that the guard's gun was in the defendant's possession. Thus, there was sufficient evidence to reasonably infer that Forward shot the security guard during commission of the burglary he and the defendant had planned.[38] On such a record, the court held it was an error "as a matter of law," not to hold the defendant to answer; therefore, the order denying the prosecutor's motion to reinstate the murder charge was reversed.[39]

IV. THE DISSENT

After reviewing the legislative history of sections 739 and 871.5,[40] the dissent reviewed the plain meaning of the statute.[41] The choice of the phrase "as a matter of law" was deemed to be significant because this language has been a well recognized standard of appellate review.[42] "Thus, a dismissed felony complaint (or portion thereof) may be reinstated under section 871.5 only if the magistrate erred in ruling on a material issue of law or if, as a factual matter, there [existed] no reasonable construction of the

36. *See supra* note 18. The defendant argued that the legislature considered but rejected the exact standard of review employed under section 739. However, the court determined that the "subsequent elimination of [such language did] not prove the Legislature intended to reject the section 739 standard of review; it may have simply eliminated an unnecessary detailed exposition of that standard." 35 Cal. 3d at 641-42 n.8, 677 P.2d at 861 n.8, 200 Cal. Rptr. at 455 n.8.

37. 35 Cal. 3d at 643, 677 P.2d at 862, 200 Cal. Rptr. at 456.

38. The court found these facts sufficient to provide a rational basis for believing the respondent was guilty as accused. *See supra* note 26.

39. 35 Cal. 3d at 643, 677 P.2d at 862, 200 Cal. Rptr. at 456.

40. *Id.* at 644-46, 677 P.2d at 862-64, 200 Cal. Rptr. at 456-58 (Bird, C.J., dissenting).

41. *Id.* at 647, 677 P.2d at 865, 200 Cal. Rptr. at 459 (Bird, C.J., dissenting). Chief Justice Bird contended that the statute had a clear and unambiguous meaning; therefore, there was no need to indulge in statutory construction. *See, e.g.,* Solberg v. Superior Court, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977).

42. *See generally* 6 B. WITKIN, CALIFORNIA PROCEDURE—APPEAL § 209 (2d ed. 1971). This argument rests on the fundamental rule of construction that once the courts have construed the meaning of a particular phrase, the legislature will incorporate that definition when subsequently using the same language. City of Long Beach v. Payne, 3 Cal. 2d 184, 44 P.2d 305 (1935).

evidence before the magistrate which [could have supported] the dismissal."[43]

The dissent found support for this reasoning in the legislative history of section 871.5. Since the legislature specifically considered and deleted language adopting the section 739 standard, this arguably indicated that the legislature did not intend to adopt that standard of review.[44] Moreover, this interpretation of legislative intent was not in conflict with current California case law.[45]

In addition, the prosecution of felony offenses is limited by article I, section 14 of the California Constitution.[46] The standard for prosecution of felonies is by indictment or "after examination and commitment by a magistrate."[47] The dissent viewed the commitment process as necessarily involving questions of fact within the sole discretion of the committing magistrate.[48] "A magistrate may not be compelled to issue an order of commitment that [was] inconsistent with his or her reasonable view of the evidence."[49] Contending that the legislature was fully aware of the constitutional principle involved, the dissent argued that the language of section 871.5 represented a deliberate choice to limit the authority of prosecutors to appeal dismissed offenses.[50]

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43. 35 Cal. 3d at 649, 677 P.2d at 866, 200 Cal. Rptr. at 460 (Bird, C.J., dissenting) (footnote omitted). This holding relied on the proposition that where more than one inference can be drawn from the facts, the appellate court could not substitute its deductions for the trial courts. Crawford v. Southern Pac. Co., 3 Cal. 2d 427, 45 P.2d 183 (1935).

44. 35 Cal. 3d at 650, 677 P.2d at 867, 200 Cal. Rptr. at 461. *But see supra* note 36 and accompanying text.

45. In People v. Salzman, 131 Cal. App. 3d 676, 684, 182 Cal. Rptr. 748, 753 (1982), the court stated that:

> [R]ules of appellate review also [applied] to motions to reinstate a complaint under section 871.5. Hence, the power to judge the credibility of witnesses, to resolve conflicts, to weigh the evidence, and to draw factual inferences was vested in the magistrate hearing the motion to suppress at the preliminary examination. On review under section 871.5, the superior court [was] bound by the magistrate's findings if they [were] supported by substantial evidence.

46. CAL. CONST. art. I, § 14.

47. *Id.*

48. The basic functions of the magistrate—weighing evidence, judging the credibility of witnesses, and drawing factual inferences—involve "a question of fact within the province of the committing magistrate to determine, and neither the superior court nor an appellate court may substitute its judgment as to such question for that of the magistrate." De Mond v. Superior Court, 57 Cal. 2d 340, 345, 368 P.2d 865, 867, 19 Cal. Rptr. 313, 315 (1962).

49. 35 Cal. 3d at 653, 677 P.2d at 869, 200 Cal. Rptr. at 463 (Bird, C.J., dissenting).

50. *Id.* at 653-54, 677 P.2d at 870, 200 Cal. Rptr. at 464.

Finally, the dissent considered whether there was "a reasonable view of the preliminary hearing evidence in the present case which justifi[ed] this magistrate's refusal to hold respondent to answer for murder. . . ."[51] The prosecution relied on the felony murder rule[52] and alternatively on an aiding-and-abetting theory[53] as the basis for criminal liability. The dissent viewed the evidence in support of these theories in the light most favorable to the magistrate's ruling because "a magistrate's dismissal may be overturned only if no substantial evidence supports it."[54] The dissent concluded that the magistrate's dismissal was supported by substantial evidence and therefore would affirm the denial of the prosecution's motion.

V. CONCLUSION

The distinction between the majority and the dissent turns on the proper role of the magistrate in the preliminary hearing. Clearly, section 871.5 provides an expeditious procedure for reviewing the magistrate's findings.[55] Absent an expressed finding of fact supporting dismissal, the majority affirmed the reinstatement of the charge where "sufficient cause" is present.[56] This holding is consistent with the basic purpose of a preliminary hearing, to present such facts "as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused."[57]

G. *Defendant has not been "brought to trial" unless the judge is available and prepared to try the case to its conclusion; absent exceptional circumstances, court congestion is not good cause for failing to bring defendant to trial within the required time limit:* **Rhinehart v. Municipal Court.**

In *Rhinehart v. Municipal Court,* 35 Cal. 3d 772, 677 P.2d 1206,

51. *Id.* at 654, 677 P.2d at 870, 200 Cal. Rptr. at 464.

52. CAL. PENAL CODE § 189 (West Supp. 1984) provides in pertinent part: "All murder which is . . . committed in the perpetration of, or attempt to perpetrate . . . burglary . . . is murder of the first degree. . . ."

53. An aider and abettor may be convicted of a crime he did not contemplate "to the extent (1) of his knowledge or (2) of the natural and reasonable consequences of the acts which he aided or encouraged." People v. Beltran, 94 Cal. App. 2d 197, 207, 210 P.2d 238, 243 (1949). *See* People v. Beeman, 35 Cal. 3d at 547, 560, 674 P.2d 118, 125, 199 Cal. Rptr. 60, 67 (1984).

54. 35 Cal. 3d at 662, 677 P.2d at 875, 200 Cal. Rptr. at 469 (Bird, C.J., dissenting).

55. *See supra* note 24 and accompanying text.

56. *See supra* note 26.

57. *Taylor,* 3 Cal. 3d at 582, 477 P.2d at 133, 91 Cal. Rptr. at 277.

200 Cal. Rptr. 916 (1984), the supreme court held that a defendant has not been "brought to trial" when a trial court impanels a jury but does not proceed with trial due to court congestion. Furthermore, court congestion was not good cause for postponing trial beyond the period required by statute.

California Penal Code section 1382 requires that, absent good cause, the charges against an accused must be dismissed if he is not "brought to trial" within a specified time period. The time period is based upon the charges, the court having jurisdiction, and the defendant's custodial status. A jury was impaneled in the defendant's trial for driving while under the influence of alcohol on the last day allowed by section 1382 for bringing the defendant to trial. The actual trial was then put off for several days due to congestion in the municipal court's calendar. The defendant moved for dismissal pursuant to section 1382, but the motion was denied by the municipal court. The superior court, however, issued a peremptory writ of prohibition which the prosecution appealed.

The supreme court looked to precedent from court of appeal decisions to fashion a definition of "brought to trial." The court concluded that, for purposes of section 1382, a defendant is not brought to trial unless the judge is available and prepared to try the case to its conclusion. Furthermore, the court must commit itself to the trial, the parties must be prepared to proceed, and the prospective jury panel must be summoned and sworn. Since the court in this case was not ready to proceed with the trial, the defendant was not properly brought to trial pursuant to section 1382.

The prosecution argued that the congestion in the court calendar constituted good cause for violating section 1382's time limits. The supreme court stated, however, that court congestion would not constitute good cause except when it results from "exceptional circumstances." *See People v. Johnson,* 26 Cal. 3d 557, 606 P.2d 738, 162 Cal. Rptr. 431 (1980). After reviewing the facts in this case, the court determined that there were no exceptional circumstances behind the congestion. Thus, the charges against the accused should have been dismissed.

H. *Trial court abused its discretion in refusing to sever separate murder counts:* **Williams v. Superior Court.**

In *Williams v. Superior Court,* 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984), the supreme court held that the trial court abused its discretion by denying the defendant's motion to sever

separate murder counts where the incidents giving rise to the charges occurred nine months apart.

Williams was charged with murder, two counts of attempted murder, and a related conspiracy count stemming from a June, 1981, shotgun shooting. He was also charged with the drive-by murder of a pedestrian in March, 1982. The only similarity between the incidents was that they were possibly gang related. In both cases there was considerable doubt as to the identity of the person doing the shooting.

The court determined that the trial court abused its discretion under section 954 of the California Penal Code in denying the defendant's motion to sever the murder counts. Because the charges were so marginally related, there would have been little cross-admissibility of evidence. Also, evidence introduced to prove one count would have the effect of acting as inadmissible character evidence in the other count. The crimes were too dissimilar to permit evidence of a common plan or scheme. CAL. EVID. CODE § 1101 (West 1966).

The supreme court decided that, although the trial court is given substantial discretion in deciding the joinder of charges, where the prejudice to the defendant outweighs the probative value of hearing the charges together, the matters should be severed. The potential prejudice to Williams was substantial; there was a strong chance that the jury would view the evidence of gang related killings cumulatively to the detriment of the defendant. Since both of the prosecution's cases were not strong, the jury could apply some of the evidence from a strong case to a weaker one, or simply aggregate the evidence. Finally, joinder would give rise to requiring the jury to decide if special circumstances were present, CAL. PENAL CODE § 190.2 (West Supp. 1984), thereby opening the door to a possible death penalty.

IX. DISCOVERY

Information contained in traffic accident reports required to be filed with the state may be obtained through discovery: **Davies v. Superior Court.**

The court was presented with the dichotomy of liberal discovery versus "privileged" information in *Davies v. Superior Court,* 36 Cal. 3d 291, 679 P.2d 35, 204 Cal. Rptr. 154 (1984). In a personal injury action against the State of California, the plaintiff, during discovery through interrogatories and a request for production of documents, sought information, collision diagrams, and traffic collision reports concerning prior and subsequent accidents occur-

ring at the same location as that involving the plaintiff's single-vehicle accident.

The state refused to provide the information sought, asserting that California Vehicle Code sections 20012 and 20014 made the information confidential and therefore privileged. Section 20012 provides that specified accident reports must be kept for the confidential use of state agencies except that the report must be disclosed to any person with "a proper interest therein." Section 20014 provides that all specified reports must be kept for the confidential use of certain state agencies only.

Looking to the language of the statutes, the court ruled that the use of the term "confidential" did not create a "privilege" as that term is used in the Evidence Code, CAL. EVID. CODE §§ 911-960 (West Supp. 1984), and in the discovery statutes. Instead, the Vehicle Code sections merely excluded from evidence at trial only those statutorily "required" accident reports, such as those to be made by a driver, passenger, or witness to an accident, and statements contained in those reports.

The court then determined that the legislative intent underlying the assurance of confidentiality extended to motorists under section 20012 in the context of a request for discovery. In so doing, the court ruled that the legislature intended to protect the privacy of reporting parties by keeping confidential only identifying information; other information contained in the reports is often available from other sources. Moreover, discovery of an accident report might lead to discovery of a highway defect and encourage remedial measures. Consequently, data generated from section 20012 reports in which indicia of identity have been excised is not confidential. Thus, a party in an action arising out of a highway accident at the same location may discover the information without a prior showing that the data sought indicates a common cause contributed to the other accidents.

X. DISSOLUTION OF MARRIAGE

A. *Judgment of dissolution of marriage which provided for termination of spousal support could be modified to extend support payments beyond the termination date:* ***In re*** **Marriage of Vomacka.**

Where an interlocutory judgment of dissolution of marriage provided a specific date when the supported spouse's right to re-

quest support would terminate, did the trial court have jurisdiction to extend support payments beyond that date? The case of *In re Marriage of Vomacka*[1] gave the California Supreme Court the opportunity to review this issue. In concluding that the trial court did indeed have jurisdiction, the court reviewed and applied the basic policies favoring flexibility in spousal support: assurance that the supported spouse will become self-supporting, resolving ambiguities in the way spousal support agreements and orders are interpreted in favor of support, and retention of fundamental jurisdiction to modify and extend support orders during the time frame provided by the decree.[2]

On August 24, 1979, William Vomacka, appellant, and Joyce Vomacka, respondent, stipulated to the provisions and entry of an interlocutory decree of dissolution of marriage. The order provided for a division of property, child custody and support, and awarded the respondent $275 a month in spousal support.[3] The spousal support provision was to remain effective until the death of either party, the respondent's remarriage, further order by the court, or August 1, 1982, whichever occurred first. The order also provided for the termination of the court's jurisdiction to modify spousal support.[4]

In 1982, the respondent sought and obtained an order increasing her spousal support to $600 per month. As modified, the support order was to continue until the death of either party, the respondent's remarriage, or further judicial order. Recognizing that the support order, as modified, required appellant to continue the payment of support beyond September 1, 1984, the trial court held that an agreement to terminate spousal support must contain explicit langage to that effect.[5] Since the clause merely terminated the respondent's right to ask for support, and did not "explicitly" address termination of support, the trial court held that the lan-

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1. 36 Cal. 3d 459, 683 P.2d 248, 204 Cal. Rptr. 568 (1984). Opinion by Reynoso, J., with Bird, C.J., Kaus, Grodin, and Agretelis, JJ., concurring. Separate dissenting opinion by Mosk, J., with Brossard, J., concurring. Agretelis, J., sitting under assignment by the Chairperson of the Judiciary Council.

2. *Id.* at 474, 683 P.2d at 258, 204 Cal. Rptr. at 578.

3. *Id.* at 461, 683 P.2d at 249, 204 Cal. Rptr. at 569.

4. "The Court shall retain jurisdiction regarding spousal support until September 1, 1984, at which time Joyce's right to request spousal support from William shall terminate forever." *Id.* at 462, 683 P.2d at 249, 204 Cal. Rptr. at 569 (court's emphasis omitted).

5. *Id.* The trial court relied on *In re* Marriage of Moore, 113 Cal. App. 3d 22, 169 Cal. Rptr. 619 (1980). "[N]o waiver of right can be inferred from a written stipulation except where an intentional relinquishment of the known right is explicit, the terms and scope of the waiver are spelled out and the express reason for the waiver set forth." *Id.* at 28, 169 Cal. Rptr. at 622 (citing City of Ukiah v. Fones, 64 Cal. 2d 104, 410 P.2d 369, 48 Cal. Rptr. 865 (1966)).

guage did not absolutely terminate her right to receive support on September 1, 1984.[6]

Relying on California Civil Code section 4811, subdivision (b),[7] the appellant contended that the parties had the right to, and did in fact agree to, the nonmodifiable termination of support on September 1, 1984. In support of this contention, the appellant cited California Civil Code section 4801, subdivision (d),[8] which recognizes the use of property settlement agreements to fix a date terminating support,[9] unless the court retains jurisdiction. The appellant maintained that the jurisdictional provision demonstrated the clear intent of the parties to terminate the respondent's right to request support and the court's jurisdiction; and therefore, the agreement of the parties should be upheld.[10]

The supreme court began its analysis by applying the unequivocal specific language test.[11] Since no independent evidence of an oral or written contract which prohibited modification was offered,

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6. 36 Cal. 3d at 462, 683 P.2d at 249, 204 Cal. Rptr. at 569.

7. CAL. CIV. CODE § 4811(b) (West Supp. 1984) provides:

> (b) The provisions of any agreement for the support of either party shall be deemed to be separate and severable from the provisions of the agreement relating to property. All orders for the support of either party based on the agreement shall be deemed law-imposed and shall be deemed made under the power of the court to make the orders. The provisions of any agreement or order for the support of either party shall be subject to subsequent modification or revocation by court order, except as to any amount that may have accrued prior to the date of filing of the notice of motion or order to show cause to modify or revoke, and except to the extent that any written agreement, or, if there is no written agreement, any oral agreement entered into in open court between the parties, specifically provides to the contrary.

See *Vomacka*, 36 Cal. 3d at 464 n.2, 683 P.2d at 251 n.2, 204 Cal. Rptr. at 571 n.2, for a detailed analysis of the legislative history leading up to § 4811(b).

8. CAL. CIV. CODE § 4801(d) (West Supp. 1984) provides: "An order for payment of an allowance for the support of one of the parties shall terminate at the end of the period specified in the order and shall not be extended unless the court in its original order retains jurisdiction."

9. Clearly, such agreements are favored to litigation in this state; therefore, they are binding on the court absent a showing of fraud or compulsion. Adams v. Adams, 29 Cal. 2d 621, 624, 177 P.2d 265, 267 (1947). *See* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, Husband and Wife §§ 189, 5057 (8th ed. 1974).

10. 36 Cal. 3d at 463, 683 P.2d at 250, 204 Cal. Rptr. at 571.

11. Whereas the earlier cases stressed the fact that no magic words were necessary and appeared willing to infer intent to make spousal support nonmodifiable from general language, the most recent cases have emphasized the need for specific unequivocal language directly on the issue of judicial modification.

In re Marriage of Hufford, 152 Cal. App. 3d 825, 834, 199 Cal. Rptr. 726, 731 (1984).

the court held that section 4811(b) was inapplicable.[12] In the absence of an agreement to the contrary, the court retains jurisdiction over the spousal support agreement at least until the end of the period specified in the agreement.[13]

The appellant contended that the trial court's jurisdiction ended absolutely on September 1, 1984.[14] This argument is based on section 4801, subdivision (d), which requires the court to provide in the original order for the retention of jurisdiction.[15] Since the trial court did not expressly reserve jurisdiction over spousal support, the appellant maintained that the trial court's jurisdiction should be controlled by the original stipulated interlocutory order providing for termination on September 1, 1984.

Acknowledging that the goals of section 4801, subdivision (d), are best served by an explicit statement of retention, the court held that several policy factors favor the view that jurisdiction may be retained by reasonable implication.[16] First, an order which absolutely terminates spousal support will be overturned absent a showing the spouse will be self-supporting on that date.[17] Moreover, the burden of proof is on the party seeking ter-

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12. 36 Cal. 3d at 465, 683 P.2d at 252, 204 Cal. Rptr. at 572. The court commented on the absence of trial court transcripts in the record on appeal; consequently, there was no foundation for the appellant's argument that the parties had entered an open agreement in court.

13. This view is consistent with the concern over judicial erosion of the statutory policy favoring modifiability of spousal support and the possibility of being misled by seemingly inocuous boiler plate provisions in inferring the intent of the parties. *See* CAL. FAM. L. REP. 1304 (1980). As a result of this concern, the courts have held that a specific provision is required to preclude modification by judicial action. Fukuzaki v. Superior Court, 120 Cal. App. 3d 454, 457-58, 174 Cal. Rptr. 536, 538 (1981); *In re* Marriage of Nielsen, 100 Cal. App. 3d 874, 877, 161 Cal. Rptr. 272, 274 (1980).

14. 36 Cal. 3d at 465, 683 P.2d at 251, 204 Cal. Rptr. at 571.

15. *See supra* note 8.

> The evident purposes of Civil Code section 4811 were to dispose of the abstruse and unprofitable jurisprudence which had grown up around the concepts of integration and severability and establish a legislatively declared social policy that contractual provisions for the support of a spouse be subject to modification by the court in the light of changed circumstances unless the parties explicitly agree to preclude such modification. The utility of this policy is obvious. Even in the absence of inflationary distortions, the parties to a marital settlement agreement can hardly anticipate and provide for unexpected changes of circumstance which may invalidate the expectations reflected in the agreement. Despite the public interest in reserving for judicial redetermination on the basis of changed circumstances contractual provisions for support, the Legislature left it open to marital partners to preclude judicial modification by inserting in the agreement a specific provision to that effect.

In re Marriage of Nielsen, 100 Cal. App. 3d 874, 877-78, 161 Cal. Rptr. 272, 274-75 (1980) (citation omitted).

16. 36 Cal. 3d at 467, 683 P.2d at 253, 204 Cal. Rptr. at 573.

17. *See In re* Marriage of Morrison, 20 Cal. 3d 437, 453, 573 P.2d 41, 52, 143 Cal. Rptr. 139, 150 (1978).

mination to demonstrate that the supported spouse is financially self-sufficient.[18] The court found that the appellant had not met that burden of proof.[19]

A second policy favoring the implied retention of jurisdiction to modify is that any ambiguity in a marital property agreement must be resolved in favor of the right to spousal support.[20] In reaching this conclusion, the trial court relied on *In re Marriage of Moore*.[21] In *Moore*, the parties had entered a stipulated separation agreement which made no statement reserving the court's jurisdiction to extend support. The court held that there could not be a waiver of wife's right to support absent an expressed reference in the agreement.[22] Further, the burden was on the party claiming a waiver to show that there was no ambiguity in the language.[23] Again, the court held that the appellant failed to meet his burden of proving that the respondent unambiguously waived her right to spousal support beyond September 1, 1984.[24]

A third policy also supported an interpretation of the agreement to allow modification. "[L]anguage in a spousal support order suggesting that modification of its terms will be permitted [is] routinely interpreted as a retention of the court's fundamental jurisdiction to modify and, upon a proper factual showing, to extend the spousal support provisions contained therein."[25] In *Vomacka*, the decree provided for modification by the court, but only until September 1, 1984.[26] It was pursuant to this clause that the re-

18. *See, e.g., In re* Marriage of Dennis, 35 Cal. App. 3d 279, 285, 110 Cal. Rptr. 619, 622 (1973); *In re* Marriage of Rosan, 24 Cal. App. 3d 885, 897, 101 Cal. Rptr. 295, 304 (1972). These cases held that the party seeking to terminate support payments has the burden of proof.

19. 36 Cal. 3d at 469, 683 P.2d at 254, 204 Cal. Rptr. at 574.

20. *In re* Marriage of Moore, 113 Cal. App. 3d 22, 28, 169 Cal. Rptr. 619, 622 (1980) (citing with approval the basic proposition set forth in Estate of Coffin, 22 Cal. App. 2d 469, 471, 71 P.2d 295, 296 (1937)).

21. 113 Cal. App. 3d 22, 169 Cal. Rptr. 619.

22. *Id.* at 28, 169 Cal. Rptr. 622.

23. The burden is on the party claiming a waiver to prove it by evidence that does not leave the matter doubtful or uncertain and the burden must be satisfied by clear and convincing evidence that does not leave the matter to speculation. This rule particularly applies to cases involving a right favored in law such as, in this case, the right to retain lawful property entitlements and support.

Id. at 27, 169 Cal. Rptr. at 621 (citations omitted).

24. 36 Cal. 3d at 470, 683 P.2d at 255, 204 Cal. Rptr. at 575.

25. *Id.*

26. *See supra* notes 3-4 and accompanying text.

spondent sought modification in 1982.[27] As the trial court expressly retained jurisdiction until 1984 to modify spousal support, it necessarily also retained its fundamental jurisdiction to extend spousal support beyond that date.[28] Thus, the trial court properly extended spousal support beyond September 1, 1984, and "until further order of the Court."[29]

As the trial court was found to have jurisdiction to modify the interlocutory judgment of dissolution, the trial court's 1982 modification order was affirmed.[30] Given the court's concern with judicial erosion of the statutory policy favoring modifiability of support orders,[31] the court places the burden of proof clearly on the parties' shoulders. Not only must the property settlement agreement explicitly terminate the court's jurisdiction, but the parties must also assure that the supported spouse can adequately meet his financial needs.[32]

B. *Marital settlement agreement releasing all rights and obligations of the parties held to prevent recovery of life insurance proceeds by ex-spouse who remained the named beneficiary of the policy.* **Life Insurance Co. of North America v. Cassidy.**

In *Life Insurance Co. of North America v. Cassidy,* 35 Cal. 3d

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27. *See supra* note 5 and accompanying text.

28. 36 Cal. 3d at 471, 683 P.2d at 256, 204 Cal. Rptr. at 576. This conclusion is supported by *In re* Marriage of Keeva, 66 Cal. App. 3d 512, 136 Cal. Rptr. 82 (1977), in which the trial court continued hearings on modification beyond the date spousal support was to terminate pursuant to the original decree. The continuation of the matter beyond the original termination date manifested the court's intent to deal further with the matter and "was inconsistent with an intent that support terminate [at that] time." *Id.* at 518, 136 Cal. Rptr. at 85. *See also In re* Maxfield, 142 Cal. App. 3d 755, 763, 191 Cal. Rptr. 267, 271 (1983). This case provided that where the court expressly reserved jurisdiction to modify support until a specific date, it retained the fundamental jurisdiction to extend spousal support beyond that date. "[The court] did not purport to limit the nature of the relief it could grant provided it acted within the jurisdictional period." Here, the appellant attempted to distinguish this case on two grounds: (1) that the *Maxfield* court's jurisdiction was based on the term "award," and (2) that the court must unambiguously indicate reservation of jurisdiction. However, the court termed the former argument "without merit," and held the latter contention to be "an example of preferable, not mandatory, draftsmanship." 36 Cal. 3d at 472-73, 683 P.2d at 257-58, 204 Cal. Rptr. at 577-78.

29. *See supra* note 6 and accompanying text. "If the court was without jurisdiction to award spousal support past September 1, 1984, its retention of jurisdiction until that date to [respondent's] requests for support would be meaningless." 36 Cal. 3d at 471, 683 P.2d at 256, 204 Cal. Rptr. at 576 (relying on Dahlstet v. Dahlstet, 272 Cal. App. 2d 174, 77 Cal. Rptr. 45 (1969), and Lassiter v. Lassiter, 256 Cal. App. 2d 81, 63 Cal. Rptr. 676 (1967)).

30. 36 Cal. 3d at 474, 683 P.2d at 258, 204 Cal. Rptr. at 578.

31. *See supra* note 13.

32. *See supra* notes 16-24 and accompanying text.

599, 676 P.2d 1050, 200 Cal. Rptr. 28 (1984), the supreme court concluded that the appellant's designation as beneficiary of her former spouse's life insurance policy was superceded by a marital settlement agreement which comprehensively disposed of all the rights and obligations of the marriage. In determining the scope of the settlement agreement, the court acknowledged the distinction between a spouse's community property interest in a life insurance policy and an expectancy interest in such a policy.

The California courts have not construed the general terms of a marital settlement agreement to constitute an assignment or renunciation of expectancies unless the language of the agreement clearly expresses such an intention. While there was no dispute that the appellant had released her community interest in the policy, she contended that the marital settlement agreement did not constitute a waiver of her right to receive the policy proceeds. This was because the agreement did not specifically mention the policy or expectancy interests in general.

In the case at bar, the various clauses of the agreement were read together to determine that the appellant's expectancy interest in life insurance policies was implicitly released. In reaching this conclusion, the court found both the sweeping nature of the agreement's language and the representation of both parties by counsel to be persuasive. The court also relied on testimony of the deceased's business manager. In an effort to show the state of mind of the deceased, the manager testified that he had been directed to remove the appellant's name as beneficiary from all life insurance policies. This testimony was relevant in that it established that the appellant remained the beneficiary on the policy only because of inadvertence and contrary to the express wishes of the deceased. Thus, appellant was not entitled to the proceeds of the insurance policies.

XI. EASEMENTS

Party who acquired a prescriptive easement not required to pay compensation or to bear costs of removing obstruction of easement erected during course of litigation over the easement: **Warsaw v. Chicago Metallic Ceilings, Inc.**

Warsaw v. Chicago Metallic Ceilings, Inc., 35 Cal. 3d 564, 676 P.2d 584, 199 Cal. Rptr. 773 (1984), provided the supreme court

with the opportunity to review whether one who acquires a valid prescriptive easement over neighboring property may be required to compensate the owner of that property.

This action for injunctive and declaratory relief was initiated when the defendant began construction of a warehouse on his property. For a number of years, the plaintiff had used part of the defendant's property to provide access to loading docks on the plaintiff's property. When the defendant began grading his property in anticipation of construction, access to the plaintiff's facility was effectively blocked. The trial court denied the plaintiff's request for a preliminary injunction. Consequently, the defendant proceeded with, and completed construction of, the warehouse during the course of litigation.

The trial court eventually found the elements necessary to establish a prescriptive easement to be present, and ordered the defendant to remove that portion of the building which interfered with the easement. On appeal, the defendant contended that equitable principles dictated that the plaintiff either compensate the defendant for the fair market value of the easement, or subsidize the defendant's costs of relocating the structure. After reviewing the historical basis of California Civil Code section 1007, the court found no basis for requiring the plaintiff to pay compensation: "plaintiffs herein have acquired a title by prescription which is 'sufficient against all,' including defendant." The basic policies behind prescriptive easements—reducing litigation, protecting possession, and preference for use over disuse of land—are promoted by such a finding.

In determining whether the plaintiff should help defer the costs of relocation, it was argued that a court of equity could make such an order in the case of an "innocent" encroachment. However, since construction took place while the suit was pending, the encroachment was deemed willful. Consequently, removal by the defendant was ordered without regard to the disproportionate hardship to the defendant.

XII. EDUCATION

A. *School districts may not charge fees for extracurricular education programs:* Hartzell v. Connell.

I. INTRODUCTION

In the unique[1] case of *Hartzell v. Connell*,[2] the California

1. *See infra* note 56 and accompanying text.
2. 35 Cal. 3d 899, 679 P.2d 35, 201 Cal. Rptr. 601 (1984). Majority opinion writ-

Supreme Court announced a significant interpretation of the California Constitution's "Free School" guarantee and shared an enlightening account of the constitutional role played by education. The issue facing the court was whether a public high school district could charge fees for participation in "extracurricular" educational programs. The court determined that school districts must offer all educational programs—whether curricular or extracurricular—free of charge to students. This unprecedented ruling, however, may have the unintended effect of forcing financially overburdened school districts to cancel extracurricular activities thereby depriving rather than enhancing student participation.

The court's opinion centered upon the fee policy of the Santa Barbara School District (hereinafter "District"). Due to budgeting problems,[3] the District implemented a plan whereby students were required to pay "participation" fees for certain athletic, theatrical, and musical extracurricular activities.[4] None of the affected activities netted students credit toward graduation.[5] The District, however, considered all of the activities to be "important educational experiences."[6]

Due to the importance of these activities to the students' educational development, the District provided a fee-waiver program in an effort to guarantee all students wishing to participate an opportunity to do so.[7] Although not all of the students who applied

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ten by Bird, C.J., with Broussard and Reynoso, JJ., concurring. Separate concurring opinions by Bird, C.J., Mosk, J., and Grodin, J. Separate dissenting opinion by Richardson, J. (Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council).

3. Proposition 13, which was passed in 1978, limited the power of local governments to increase tax rates or enact new taxes. Due to a decline in revenues, Santa Barbara found it necessary to cut its school budget.

4. Specifically, the District required students to pay $25 for each athletic team on which they participated and $25 per category for any activity falling within each of the following four categories: (1) dramatic productions (e.g., plays, dance performances, and musicals); (2) music-vocals (e.g., choir or madrigal); (3) music-instrumentals (e.g., orchestra, marching band, and drill team); and (4) cheerleading. Thus a student who participated in football, tennis, choir, and the orchestra was required to pay $100. 35 Cal. 3d at 902-03, 679 P.2d at 37, 201 Cal. Rptr. at 603.

5. Although the teachers of the credit courses often supervised the extracurricular activities, they were instructed to disregard students' performances when grading credit courses. The effectiveness of this prohibition was not discussed by the trial court. 35 Cal. 3d at 903 & n.3, 679 P.2d at 37-38 & n.3, 201 Cal. Rptr. at 603 & n.3.

6. *Id.*

7. The student would be granted a "scholarship" upon a showing of financial need. This program was supplemented by an "outreach" program in an effort to

for a fee-waiver received one, the imposition of the fees did not prevent any student from participating in the affected activities.[8]

Nevertheless, Barbara Hartzell, a mother of two school-aged children, joined forces with the Coalition Opposing Student Fees[9] in a taxpayers' action challenging the District's fee policy. As plaintiffs, the group sought declaratory and injunctive relief claiming the policy violated the California Constitution[10] and the California Adminstrative Code.[11] The trial court denied all relief.[12] On appeal, the supreme court reversed.

II. CASE ANALYSIS

A. Administrative Code Section 350

One of plaintiffs' contentions was that title 5, section 350 of the California Administrative Code (hereinafter "section 350") barred the District's fee policy. Section 350, promulgated by the State Board of Education, provides: "A pupil enrolled in a school shall not be required to pay any fee, deposit, or other charge not specifically authorized by law."[13] The District argued that section 350 would exceed its constitutional and statutory base if construed to bar the fee policy.

The court handily rejected this contention, citing California Education Code section 33031 as section 350's statutory basis.[14] Moreover, the Department of Education had previously interpreted section 350 as prohibiting participation fees in athletics

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ensure that no student was prevented by the fee from participation in the affected extracurricular activities. *Id.* at 904, 679 P.2d at 38, 201 Cal. Rptr. at 604.

8. Seventy-seven students were granted waivers; four were denied, but allowed to delay payment. *Id.*

9. The Coalition included the following groups: AfroAmerican Community Services, American Civil Liberties Union, Black Action Committee, Casa de la Raza, Community Action Commission, Gray Panthers, National Association for the Advancement of Colored People, Network, and the Social Concerns Committee of the Unitarian Church. *Id.* at 904 n.5, 679 P.2d at 38 n.5, 201 Cal. Rptr. at 604 n.5.

10. The group claimed the fee policy violated CAL. CONST. art. IX, § 5 [hereinafter "the free school guarantee"], and art. I, § 7, and art. IV, § 16 (equal protection guarantees).

11. The group claimed the fee policy violated title 5, section 350 of the California Administrative Code.

12. The trial court reasoned that none of the activities covered by the fee policy were "integral" to credit courses. 35 Cal. 3d at 904, 679 P.2d at 38, 201 Cal. Rptr. at 604.

13. CAL. ADMIN. CODE tit. 5, § 350 (1984).

14. CAL. EDUC. CODE § 33031 (West Supp. 1984) authorizes the State Board of Education to "adopt rules and regulations not inconsistent with the laws of this state . . . for the government of the . . . day and evening secondary schools. . . ."

In addition, a note to section 350 cited the free school guarantee as its constitutional authority. 35 Cal. 3d at 914, 679 P.2d at 45, 201 Cal. Rptr. at 611.

and other school-sponsored activities.[15] Therefore, the court determined, the issue was whether the Department's interpretation was reasonable.[16] Believing it was reasonable, the court held: "Section 350's ban on fees [clearly] falls well within the State Board's discretion."[17] The court concluded that the State Board had the "general power" to make such an interpretation.[18] Thus, the court found absurd the District's contention that section 350 would be valid only if fees were independently prohibited by a constitutional or statutory provision.[19]

The District's next argument claimed Education Code section 35160[20] nullified section 350 and permitted the fee policy. Section 35160, however, is limited in scope to those acts "which [are] not in conflict with . . . any law. . . ."[21] The District's fee policy clearly conflicted with section 350.[22] Nevertheless, the District contended section 350 was not a law and therefore its fee policy was a proper exercise of local authority permitted by section 35160. Chief Justice Bird found this claim without merit and recognized that if an administrative regulation was not a "law" under

15. The Department of Education believed that section 350 prohibited participation fees for athletic and school-sponsored activities. CAL. DEP'T OF EDUCATION, FEES, DEPOSIT, AND CHARGES IN THE PUBLIC SCHOOLS OF CALIFORNIA, GRADES K-12 AND ADULT SCHOOLS 1-2 (1979) [hereinafter cited as FEES]. The Legislative Counsel also believed section 350 barred participation fees for school-sponsored extracurricular activities. School Fees: Extracurricular Activities, Op. Cal. Legis. Counsel, No. 18293 (1982) [hereinafter cited as Extracurricular Activities]. *See also* School Fees, Op. Cal. Legis. Counsel, No. 17036 (1979) (section 350 prohibits fees for musical instruments and special uniforms used in extracurricular activities as well as fees required for athletic teams or club dues) [hereinafter cited as School Fees].

16. " 'The sole function of this court is to decide whether the department reasonably interpreted the legislative mandate.' " 35 Cal. 3d at 914, 679 P.2d at 45, 201 Cal. Rptr. at 611 (quoting Ralphs Grocery Co. v. Reimel, 69 Cal. 2d 172, 176, 444 P.2d 79, 82, 70 Cal. Rptr. 407, 410 (1968)).

17. 35 Cal. 3d at 915, 679 P.2d at 45, 201 Cal. Rptr. at 611. In addition, the court believed that the free school guarantee mandated a prohibition against fees for educational extracurricular activities. *See infra* notes 44-49 and accompanying text.

18. *See* San Francisco v. Hyatt, 163 Cal. 346, 352, 125 P. 751, 753 (1912).

19. "To hold, as defendants urge, . . . would be to eliminate any role for administrative discretion." 35 Cal. 3d at 915, 679 P.2d at 45, 201 Cal. Rptr. at 611.

20. California Education Code section 35160 provides as follows:

> [T]he governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

CAL. EDUC. CODE § 35160 (West 1978).

21. *Id.*

22. 35 Cal. 3d at 916, 679 P.2d at 46, 201 Cal. Rptr. at 612.

section 35160, local school districts could act in derogation of all regulations—even to the extent of repealing them.[23] The majority found no support for the District's position in the legislative history of section 35160. On the contrary, the court found support for its holding in opinions by the Legislative Counsel and the Department of Education.[24]

In conclusion, the court believed section 350 to be a valid exercise of authority delegated to the State Board by section 33031 and undiminished by section 35160.[25] Therefore, a public high school that imposes fees for participation in noncredit educational programs violates Administrative Code section 350.[26]

B. The California Constitution's "Free School" Guarantee

The majority opinion should have begun and ended with a discussion of section 350. The majority, however, pressed forward and decided the constitutional free school issue.[27] This portion of the opinion was unnecessary in light of the court's ruling that the fees were already barred by section 350.[28] Moreover, because it was unnecessary, the decision of the constitutional issue was contrary to long-established principles of constitutional construction.[29]

The issue facing the court was whether extracurricular activities fall within the free education guarantee.[30] This issue was one of first impression in California. Thus, the court looked to judicial interpretations in other United States jurisdictions with similar

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23. *Id.*

24. Extracurricular Activities, *supra* note 15, at 3-4; School Fees, *supra* note 15, at 3; FEES, *supra* note 15, at 6.

25. 35 Cal. 3d at 917, 679 P.2d at 47, 201 Cal. Rptr. at 613.

26. "The imposition of fees as a precondition for participation in educational programs offered by public high schools on a noncredit basis violates . . . the prohibition against school fees contained in title 5, section 350 of the California Administrative Code." *Id.*

27. The court actually discussed the constitutional issue prior to section 350. However, as the court conceded, the decision of the constitutional issue was completely unnecessary to the opinion: "[E]ven if article IX, section 5 is assumed not to bar the fees, it is clear that title 5, section 350's ban on fees falls well within the State Board's range of discretion." 35 Cal. 3d at 915, 679 P.2d at 45, 201 Cal. Rptr. at 611.

28. The court will not decide constitutional questions when other grounds are available and dispositive of the issues. Fullerton Union High School Dist. v. Riles, 139 Cal. App. 3d 369, 384, 188 Cal. Rptr. 897, 906 (1983). For the reason why decision of this issue was unnecessary, see *supra* note 27.

29. The court will not reach constitutional questions unless absolutely required to do so to dispose of the matter before it. People v. Williams, 16 Cal. 3d 663, 667, 547 P.2d 1000, 1003, 128 Cal. Rptr. 888, 891 (1976).

Federal law is in accord. *See* Bowen v. United States, 422 U.S. 916 (1975) (the Supreme Court is reluctant to decide constitutional questions unnecessarily).

30. 35 Cal. 3d at 905, 679 P.2d at 38, 201 Cal. Rptr. at 604.

constitutional provisions. The court distilled and considered two distinct approaches.

The first approach restricted the free school guarantee to programs which are "essential to the prescribed curriculum."[31] This approach did not extend the right to education to activities "outside of or in addition to the regular academic courses or curriculum of a school."[32] As a result, students had no right to participate in free extracurricular activities.[33]

The second approach extended the free school guarantee to all activities which constitute an "integral fundamental part of the elementary and secondary education," or which amount to " 'necessary elements of any school's activity.' "[34] Courts utilizing this approach included within the right to attend school the right to participate in extracurricular activities.[35] Therefore, participation fees for extracurricular activities in those jurisdictions were unconstitutional.[36]

After examining these approaches, the court undertook an examination of the role played by education in the overall constitutional scheme to determine if either approach was in accord with a reasonable interpretation of California's free school guarantee. Chief Justice Bird canvassed the theory and purpose of education from the birth of the United States to the California Constitutional Convention of 1878-1879 and on to the present. From this enlightening research the court gleaned that education bestows upon democracy extensive political,[37] economic,[38] and social

31. Smith v. Crim, 240 Ga. 390, 391, 240 S.E.2d 884, 885 (1977). *See also* Paulson v. Minidoka County School Dist. No. 331, 93 Idaho 469, 472, 463 P.2d 935, 938 (1970).

32. *Paulson*, 93 Idaho at 472, 463 P.2d at 938 (footnote omitted).

33. Smith v. Crim, 240 Ga. 390, 391, 240 S.E.2d 884, 885 (1977). *See also* Granger v. Cascade County School Dist., 159 Mont. 516, 499 P.2d 780 (1972).

34. Bond v. Ann Arbor School Dist., 383 Mich. 693, 702, 178 N.W.2d 484, 487 (1970). *See also* Moran v. School Dist. #7, 350 F. Supp. 1180 (D. Mont. 1972).

35. 350 F. Supp. at 1184.

36. *Bond*, 383 Mich. at 698, 178 N.W.2d at 486; Pacheco v. School Dist. No. 11, 183 Colo. 270, 516 P.2d 629 (1973).

37. "Indeed, education may well be 'the dominant factor in influencing political participation and awareness.' " 35 Cal. 3d at 908, 679 P.2d at 41, 201 Cal. Rptr. at 606.

38. "[E]ducation . . . also prepares individuals to participate in the institutional structures . . . that distribute economic opportunities and exercise economic power. Education holds out a 'bright hope' for the 'poor and oppressed' to participate fully in the economic life of American society." 35 Cal. 3d at 908, 679 P.2d at 41, 201 Cal. Rptr. at 607.

benefits.[39]

In view of the prominent role education thus plays in society, the court rejected the first approach.[40] That approach failed to properly assess the actual educational value of any given school program.[41] On the other hand, the second approach focused on the educational character of the activities in question.[42] Thus, the concept of education is not severed from its purposes.[43]

Again borrowing heavily from other jurisdictions, the court determined that extracurricular activities constitute an integral component of public education.[44] Consequently, the court held that all educational activities, curricular and extracurricular, fall within the free school guarantee.[45] Since the Santa Barbara programs were educational, the imposition of participation fees was unconstitutional.[46] In response, the District argued that its fee waiver program cured the constitutional defect.[47] In holding that no financial burden may be placed on the right to education,[48] the court declared: "Educational opportunities must be provided to all students without regard to their families' ability or willingness to pay fees or request special waivers."[49]

III. Separate Opinions

Although only three justices joined the lead opinion, a majority of the court concurred in both the holding concerning the free school guarantee and the holding concerning section 350. Those justices who subscribed to the majority view but did not join

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39. "[E]ducation serves as a 'unifying social force' among our varied population, promoting cohesion based upon democratic values." *Id.*

40. "[T]he first [approach] is insufficient to ensure compliance with California's free school guarantee." *Id.*

41. Instead, the approach deferred to the School Board's decision as to whether to offer any given program for formal academic credit. *Id.* at 908-09, 679 P.2d at 41, 201 Cal. Rptr. at 607.

42. *Id.* at 909, 679 P.2d at 41, 201 Cal. Rptr. at 607.

43. *Id.*

44. The court further indicated that extracurricular activities are " 'generally recognized as a fundamental ingredient of the educational process.' " *Id.* at 909, 679 P.2d at 42, 201 Cal. Rptr. at 607 (quoting Moran v. School Dist. #7, 350 F. Supp. 1180, 1184 (D. Mont. 1972)).

45. 35 Cal. 3d at 911, 679 P.2d at 43, 201 Cal. Rptr. at 609.

46. *Id.*

47. Specifically, the District contended that the free school guarantee amounted "merely to a right not to be financially prevented from enjoying educational opportunities." *Id.*

48. The court declared: "In guaranteeing 'free' public school, article IX, section 5 fixes the precise extent of the financial burden which may be imposed on the right to an education—none." *Id.* (citing as support Bond v. Ann Arbor School Dist., 383 Mich. 693, 700, 178 N.W.2d 484, 486-87 (1970); Granger v. Cascade County School Dist., 159 Mont. 516, 528-29, 499 P.2d 780, 785-86 (1972)).

49. 35 Cal. 3d at 913, 679 P.2d at 44, 201 Cal. Rptr. at 610.

Chief Justice Bird's lead opinion wrote separately merely to express their personal views concerning education.[50]

On the other hand, Justice Kaus wrote separately to indicate that he concurred only in the holding that the District's fee policy violated section 350. In view of this determination, Justice Kaus believed the decision of the constitutional question unnecessary.[51] The section 350 holding had already brought finality to the case. Moreover, "there are weighty reasons for not embarking on [this] constitutional journey."[52] The most significant reason cited was the difficulty of predicting the practical effect of the ruling.[53] The ruling would likely foreclose future legislative options and might de facto invalidate certain existing statutory provisions.[54] Justice Kaus advocated that the court exercise caution, limiting itself to the question before it, and considering the particular setting in which the fee was imposed.[55]

In an unusual deviation, Chief Justice Bird wrote separately to concur in the lead opinion which she had authored. In her concurrence, Chief Justice Bird reiterated many of her views concerning education. The point of the separate opinion, however, was to advance as additional support for the majority holding the view that the District's fee program violated the constitution's equal protection guarantee.[56] The argument had been raised by the plaintiffs and rejected by the trial court.[57]

Justice Richardson dissented. He analyzed California precedent construing the free school provision and determined that the first approach considered by the majority was applicable rather

50. Justices Mosk and Grodin both believed that education is most important to the individual. Justice Mosk disliked the lead opinion's "sugar-coating of inspirational quotations." 35 Cal. 3d at 917, 679 P.2d at 47, 201 Cal. Rptr. at 613 (Mosk, J., concurring). Justice Grodin defended the court's decision of the constitutional issue. *Id.* at 919 n.1, 679 P.2d at 48 n.1, 201 Cal. Rptr. at 614 n.1 (Grodin, J., concurring).

51. "[T]here is no need to reach the broad constitutional question." *Id.* at 920, 679 P.2d at 49, 201 Cal. Rptr. at 615 (Kaus, J., concurring).

52. *Id.*

53. *Id.*

54. Justice Kaus cited a number of California Educational Code sections as apparently being invalidated: sections 32220 to 32224 (insurance for athletic teams); 35330 (field trips); 35335 (school camps); 39804 (transportation costs); and 48909 (liability for willful pupil misconduct). 35 Cal. 3d at 920-21, 679 P.2d at 49-50, 201 Cal. Rptr. at 615-16 (Kaus, J., concurring).

55. *Id.* at 921, 679 P.2d at 50, 201 Cal. Rptr. at 616 (Kaus, J., concurring).

56. *Id.* at 921, 679 P.2d at 50, 201 Cal. Rptr. at 616 (Bird, C.J., concurring).

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

than the second approach.[58] Specifically, the free school guarantee applied only to activities falling "within the prescribed course of study."[59] By definition, extracurricular activities do not fall within the foregoing definition. Therefore, participation fees for extracurricular activities are constitutional.[60] Justice Richardson also believed section 350's absolute ban on *all* fees for school activities was neither consistent with, nor reasonably required to effectuate the purpose of the free school guarantee.[61]

IV. CONCLUSION

In *Hartzell*, the supreme court determined that extracurricular school activities are important educational experiences. Thus, the Santa Barbara School District's fee policy for participation in extracurricular activities violated section 350's ban on fees. The court went further, however, unnecessarily deciding a potentially far-reaching constitutional issue and thereby violating rules of constitutional construction.

The effects of this decision may be widespread and varied. The immediate effect may be a de facto repeal of certain educational statutes which authorize the imposition of fees on students. The more far-reaching effect, though, may be to foreclose legislative and school board options. As a result, some financially strapped school districts may end up cancelling certain extracurricular activities altogether. In those school districts which will be able to keep their programs, however, students will be able to enjoy the right of free participation in every educational activity.

B. *Temporary teacher under Education Code section 44920 entitled to preferential employment rights:* **Taylor v. Board of Trustees.**

The principle issue in *Taylor v. Board of Trustees,* 36 Cal. 3d 500, 683 P.2d 710, 204 Cal. Rptr. 711 (1984), was whether the preferential employment rights granted under California Education Code section 44918 to certain temporary and substitute teachers apply to temporary teachers hired under California Education Code sec-

58. 35 Cal. 3d at 928-30, 679 P.2d at 55, 201 Cal. Rptr. at 621-22 (Richardson, J., dissenting) (citing Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971)).

59. 35 Cal. 3d at 930, 679 P.2d at 56, 201 Cal. Rptr. at 622 (Richardson, J., dissenting).

60. "Thus, I see no impairment of the constitutional right to attend free schools by an activity fee program . . . limited to extracurricular activities." *Id.*

61. Consequently, Justice Richardson believed section 350 to be invalid. *Id.* at 934, 679 P.2d at 59, 201 Cal. Rptr. at 625 (Richardson, J., dissenting). Justice Richardson discussed the other arguments raised by the plaintiffs in the trial court and rejected all.

tion 44920. In October of 1980, a permanent employee of the respondent school district was granted a leave of absence and the appellant, Taylor, was hired under the provisions of section 44920. During that school year, the appellant served at least seventy-five percent of the regular school days required of a certified employee and thus came within the requirements of section 44918 for preferential employment rights. However, when the school district filled the seven vacant probationary positions for the following year, it gave no preferential hiring right to Taylor. The district hired those it felt most qualified for each position. The appellant contended that his employment in 1980-81 qualified him for preferential hiring rights and sought a writ of mandate to compel his employment as a probationary teacher and to pay him various back salary benefits.

Both the court of appeal and Justice Mosk's dissenting opinion viewed the two statutes as mutually exclusive. While section 44918 regulates those teachers who served for seventy-five percent of a year, section 44920 provides for a narrower and strictly defined group of temporary teachers—those hired to replace regular teachers granted a leave of absence. Since the regular teacher being replaced indicated an intention to return to his particular position, there was no preferential connection between the temporary teacher's assignment and the new job opening. To allow the temporary teacher in this situation special preference would defeat the best interests of the students. The dissent maintained that the school board should be allowed to select the best qualified applicant rather than be compelled to select an individual who possesses qualifying credentials merely because he held another temporary position with the district the prior year.

In rejecting this argument, the majority opinion focused on the plain meaning of the statute. "Any such [substitute or temporary] employee shall be reemployed for the following year to fill any vacant positions in the school district for which the employee is certified. . . ." CAL. EDUC. CODE § 44918 (West 1978). Since the appellant had met the seventy-five percent requirement, the only remaining question was whether the appellant was qualified for any or all of the district's vacant positions.

This holding was consistent with the court's view that the legislature intended to strictly limit the scope of the district's discretion in hiring. In order to deny an applicant who was otherwise qualified under section 44918, the district must demonstrate that

he does not hold the appropriate teaching credentials or that he lacks both the academic preparation and experience in the subject matter. Consequently, the trial court judgment was reversed and the case remanded to determine if Taylor was qualified for any or all of the available positions.

XIII. EMINENT DOMAIN

Loss of business goodwill flowing from condemnation includes losses attributable to the payment of higher rent: **People *ex rel.* Department of Transportation v. Muller.**

People ex rel. Department of Transportation v. Muller, 36 Cal. 3d 263, 681 P.2d 1340, 203 Cal. Rptr. 772 (1984), presented the court with its first opportunity to interpret the provisions of section 1263.510 of the Code of Civil Procedure, which authorizes compensation for lost business goodwill in eminent domain proceedings. The court held that goodwill includes losses attributable to payment of higher rent at the site of relocation.

The condemnee, a veterinarian, did not suffer from a loss in patronage as a result of his move, but was subject to higher rents. Section 1263.510, enacted during a time of rapidly increasing real estate prices, was designed to fully compensate business enterprises forced to relocate due to eminent domain actions. The statute defines goodwill as "benefits that accrue to a business as a result of its location." In so doing, the court determined, the legislature intended to compensate condemnees for having to pay higher rents as well as for losing patronage as a result of a forced relocation.

XIV. EMPLOYEE BENEFITS

Restrictions placed on police officers during their mealtimes entitled the officers to overtime wages: **Madera Police Officers Association v. City of Madera.**

Can the limitations placed upon police officers' mealtime breaks become so restrictive as to convert the mealtime into worktime? The court answered this question in the affirmative in *Madera Police Officers Association v. City of Madera,* 36 Cal. 3d 403, 682 P.2d 1087, 204 Cal. Rptr. 422 (1984). The Association brought a class action on behalf of all police officers, sergeants, and dispatchers in the City of Madera, seeking declaratory relief and payment for past overtime wages for mealtime.

A mealtime break in police jargon is called a Code 7. In the City of Madera, police officers have no right to a Code 7 at any

particular hour. Each day, the watch commander chooses the particular hour for a Code 7. As a result, officers may not schedule in advance or keep personal appointments during a Code 7. Moreover, officers are "on call" during Code 7 and must respond to emergencies as well as handle citizen complaints if interrupted while eating. While on Code 7, officers must leave a telephone number or address so they can be contacted whenever necessary. Finally, officers may not conduct personal business while in uniform; thus, as a practical matter, they are prevented from changing to street clothes because they must be ready to respond immediately to an emergency call, or else face the possibility of disciplinary action.

The court approached the issue with a two-step analysis. First, the court determined "whether the restrictions on off duty time are primarily directed toward the fulfillment of the employer's requirements and policies." In view of the many restrictions placed on Code 7 time, the court quickly determined that those restrictions were primarily for the benefit of the employer. Second, the court looked to "whether the employees' off duty time is so substantially restricted that they are unable to engage in private pursuits." Once again, the court recounted the restrictions. Officers were effectively prevented from conducting personal business. In some instances, officers who worked at the stationhouse were not even allowed to leave the building. In sum, the restrictions were so constraining that they converted mealtime into work time as a matter of law. Under local law, the officers were thus entitled to overtime compensation for Code 7 time.

XV. ENVIRONMENTAL LAW

Counties may restrict the use of certain pesticides within the county despite state approval of the pesticides: **People *ex rel.* Deukmejian v. County of Mendocino.**

In 1979, the voters of Mendocino County approved a ballot initiative measure prohibiting aerial spraying of phenoxy herbicides throughout the county.[1] The stated purpose of the ordinance was

1. The initiative was prompted by a 1977 event in which a company sprayed phenoxy herbicides over a 500 acre target area. The spray drifted three miles from the intended site, and school buses were accidentally sprayed. In Mendocino County, the primary use of phenoxy herbicides is in reforestation.

to preserve food and water supplies from contamination.

In a suit for declaratory and injunctive relief brought by the attorney general, the trial court determined that the Mendocino County ordinance, as approved, was invalid because it was preempted by state law. On appeal, the supreme court held in *People ex rel. Deukmejian v. County of Mendocino*[2] that neither state law nor federal law preempted the ordinance, and that the county could properly determine for itself whether or not a particular pesticide could be used in the county.

I. STATE PREEMPTION

The statutory authority for regulating pesticide spraying is embodied in the California Food and Agriculture Code.[3] Sections 11401-12121 concern pest control operations. Sections 14001-14098 deal with restricted materials. The Director of the Department of Food and Agriculture is empowered to establish a list of restricted materials for use in pesticide spraying.[4] The director is also charged with the duty of adopting regulations governing the business of pest control.[5] The agriculture commissioner of each county[6] "may adopt regulations applicable in his or her county which are supplemental to those of the director"[7] concerning pest control operations. However, each regulation made by county commissioners must be approved by the director before it can become operative.[8]

No person may use any material restricted by the director without first obtaining a permit from the county agriculture commissioner[9] who is charged with considering several locally relevant factors in deciding whether to issue a permit.[10] Given the level of state control over pesticide spraying, the court was forced to determine whether the legislature intended to "fully occupy" the

2. 36 Cal. 3d 476, 683 P.2d 1150, 204 Cal. Rptr. 897 (1984). Opinion by Broussard, J., with Bird, C.J., Mosk and Reynoso, JJ., concurring. Separate dissenting opinions by Kay, J., and Kaus, J., with Grodin, J., concurring in Part II of the dissent of Justice Kaus. Kay, J., was sitting under the assignment of the Chairperson of the Judicial Council.

3. Unless otherwise indicated, all statutory references are to the California Food and Agriculture Code.

4. CAL. FOOD & AGRIC. CODE § 14004.5 (West Supp. 1984).

5. CAL. FOOD & AGRIC. CODE § 11502 (West 1968).

6. Each county's agriculture commissioner is appointed by the county's board of supervisors. CAL. FOOD & AGRIC. CODE § 2121 (West 1968).

7. CAL. FOOD & AGRIC. CODE § 11503 (West Supp. 1984). Prior to the 1971 amendment of this section, the county commissioner's authority was to "adopt regulations in addition to those adopted by the director."

8. *Id.*

9. CAL. FOOD & AGRIC. CODE § 14006.5 (West Supp. 1984).

10. Among the local conditions the commissioner must consider are:

area, and hence preempt the Mendocino County ordinance.[11]

If state law fully occupies a regulated area, regardless of its degree of local concern,[12] either expressly or by implication, it cannot be supplemented by local legislation.[13] Inasmuch as the state had not expressly prohibited local governments from regulating the use of phenoxy herbicides, there was clearly no expressed preemption.[14]

To determine whether state law had fully occupied the area by implication, the court turned to the test established in *In re Hubbard*.[15] Under that test, an area of regulation is fully occupied if: (1) there is a clear indication of exclusive state concern; (2) partial coverage by general law indicates "that a paramount state concern will not tolerate further or additional local action;" or (3) the local regulation's detrimental effects on transient citizens of the state outweighs its benefits to the community.

The court turned to section 14007 of the code, which mandates that use of pesticides, even by permit, is conditioned upon compliance with the "law and regulations."[16] Armed with this statute,

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(a) Use in vicinity of schools, dwellings, hospitals, recreational areas and livestock enclosures.
(b) Problems related to heterogeneous planting of crops.
(c) Applications of materials known to create severe resurgence or secondary pest problems without compensating control of pest species.
(d) Meteorological conditions for use.
(e) Timing of applications in relation to bee activity.
(f) Provisions for proper storage of pesticides and disposal of containers.

Id.

11. The court had no difficulty in determining that, standing alone, the Mendocino County ordinance was a valid exercise of police powers. 36 Cal. 3d at 484, 683 P.2d at 1154-55, 204 Cal. Rptr. at 901-02. Counties are required to adopt measures designed to promote the health and safety of their residents. CAL. HEALTH & SAFETY CODE § 450 (West 1979).

12. *In re* Hubbard, 62 Cal. 2d 119, 125, 396 P.2d 809, 814-15, 41 Cal. Rptr. 393, 398-99 (1964) (overruled on other grounds in Bishop v. City of San Jose, 1 Cal. 3d 56, 63 n.6, 460 P.2d 137, 141 n.6, 81 Cal. Rptr. 465, 469 n.6 (1969)); Abbott v. City of Los Angeles, 53 Cal. 2d 674, 681, 349 P.2d 974, 979, 3 Cal. Rptr. 158, 163 (1960).

13. Lancaster v. Municipal Court, 6 Cal. 3d 805, 807-08, 494 P.2d 681, 682, 100 Cal. Rptr. 609, 610 (1972).

14. It is noteworthy, however, that the director is specifically required to adopt regulations governing the use of 2,4-D. CAL. FOOD & AGRIC. CODE § 14033 (West Supp. 1984). This was one of the pesticides banned from use by the county ordinance.

15. 62 Cal. 2d at 128, 396 P.2d at 814-15, 41 Cal. Rptr. at 398-99.

16. Section 14007 provides: "Every permit which is issued under the regulations adopted pursuant to this chapter is conditioned upon compliance with the law and regulations and upon such other specified conditions as may be required

which was apparently designed to guarantee the efficacy of all other forms of legislation, the court determined that the newly passed ordinance was such a "law" with which sprayers would be forced to comply. Therefore, only pesticides which were not on the list of restricted materials could be sprayed in Mendocino County.

To further support its position, the court noted that it was required that local concerns be addressed in determining spraying activities.[17] Additionally, noted the court, the language of section 14007 contemplated a need to harmonize relevant sections of the Food and Agriculture Code with laws and regulations contained in other codes—particularly those dealing with regulations of air pollution and water quality since they relate to the purpose of the subject ordinance.[18]

The court found it simple to conclude that, by encouraging that local concerns be considered, the legislature could not have felt that state concerns were so important as to fully occupy the area of pesticide spraying. Therefore, the first two portions of the *Hubbard* test failed. The third part failed as well. Regulation of spraying in Mendocino County had little, if any, effect on the state's transient citizens. There could be no problem with the law being detrimentally unpredictable.

II. FEDERAL PREEMPTION

An intervening party supporting the respondent[19] argued that the Mendocino County ordinance was invalid because it was preempted by federal legislation, specifically, the Federal Insecticide, Fungicide and Rodenticide Act[20] (FIFRA) as amended by the Federal Environmental Pesticide Control Act of 1972[21] (FEPCA). The court was forced to review FIFRA and the history of the 1972 amendment to determine if Congress intended that local entities are not to be involved in pesticide regulation.

Since there was nothing in FIFRA or FEPCA which expressly prohibited local involvement, the court examined the legislative history of FEPCA in order to determine congressional intent. The

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to accomplish the purposes of this chapter." CAL. FOOD & AGRIC. CODE § 14007 (West Supp. 1984).

17. *See supra* note 10.

18. The court noted that, generally, local regulation in the field of air pollution and water quality predominates. *See, e.g.,* CAL. HEALTH & SAFETY CODE §§ 39002, 40001 (West 1979).

19. The intervening party supporting the respondent was the California Forest Protective Association. Several groups and individuals intervened in support of the appellants.

20. Ch. 125, 61 Stat. 163 (1947) (codified as amended at 7 U.S.C. § 136 (1982)).

21. PUB. L. NO. 92-516, 86 Stat. 973 (1972) (codified at 7 U.S.C. § 136 (1982)).

only relevant language in the 1972 amendment permitted states to regulate, to some extent, federally registered pesticides.[22] The legislative history of FEPCA failed to reveal a consensus of clear intent on the part of Congress to permit or deny local intervention. The House Committee on Agriculture rejected the idea that political subdivisions of the states be permitted to regulate pesticides.[23] The Senate Committee on Agriculture and Forestry expressly commented in its report that local authorities should not be permitted any degree of control.[24] However, the bill then went to the Senate Committee on Commerce which expressly deemed that regulation be permitted.[25] The Senate Agriculture and Forestry Committee registered its objection to the Commerce Committee's stand.[26] Before the bill was passed, the Commerce Committee's language encouraging local regulation was specifically omitted.[27]

Based on the legislative history, the court was unwilling to suggest definite federal preemption over local regulation. Additionally, the court refused to accept the application of *expressio unius est exclusio alterius*[28] (i.e., since Congress allowed supplemental regulation by states, it excluded additional regulation by local jurisdictions). Therefore, because Congress expressly gave states power to regulate, and did not expressly deny it to local authorities, the court felt it should recognize "the ordinary view that states are free to distribute regulatory power between themselves and their political subdivisions."[29]

III. Dissenting Opinions

Justice Kay dissented from the court's opinion, arguing that

22. 7 U.S.C. § 136v (1982).

23. H.R. Rep. No. 511, 92d Cong., 1st Sess. 16 (1971).

24. S. Rep. No. 838, 92d Cong., 1st Sess. 16-17 (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4008.

25. S. Rep. No. 970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4128.

26. S. Rep. No. 838, 92d Cong., 1st Sess. pt. II (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News at 4066.

27. Description of Agriculture and Commerce Committee Staff, Substitute for Text of H.R. 10729, 92d Cong. 2d Sess. (1972), 118 Cong. Rec. 32257, 32258 (1972).

28. A rule of statutory construction indicating that where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. *See* Wildlife Alive v. Chickering, 18 Cal. 3d 190, 195, 553 P.2d 537, 539, 132 Cal. Rptr. 377, 379 (1976).

29. 36 Cal. 3d at 492, 683 P.2d at 1160, 204 Cal. Rptr. at 907.

state law had preempted the local ordinance. He relied primarily on the language of section 11503[30] which makes regulations adopted by county commissioners subject to the approval of the State Director of Food and Agriculture. Justice Kay noted that providing such statutory authority "is a clear expression of state supremacy."[31] He supplemented his opinion with a policy argument suggesting that permitting local regulation creates piecemeal legislation that might be detrimental to the overall regulation of the agriculture industry.

Justice Kaus disagreed with the majority on both the state and federal preemption issues.[32] Like Justice Kay, Justice Kaus felt that by making regulations imposed by county commissioners subject to the state director's approval, the broad authority for permitting or rejecting pesticide spraying was intended to rest with the state, not local entities. He felt that the practical effect of the decision would be to give local entities the power to reject in piecemeal fashion the broad policy dictates of the state.

Justice Kaus reviewed the same legislative history of the federal law as had the majority. He argued that the most explicit statements of whether local regulation should be allowed were made by those committees which objected to such regulation. Justice Kaus ultimately noted that the final form of the bill adopted was that which the Committee on Agriculture and Forestry had urged. Therefore, felt Justice Kaus, the committee report of the Committee on Agriculture and Forestry should carry the greatest weight in interpreting Congress' intent; that committee's report was the most adamant in its rejection of local regulation.

IV. Conclusion and Impact

The potential impact of the court's decision could be substantial. As Justice Kaus noted in his dissenting opinion, counties will have the power to reject for themselves pesticide use approved for statewide use. The decision seems to substantially dilute the authority of the Director of Food and Agriculture to set broad policy. Perhaps the primary issue that remains to be determined is whether counties will be able to regulate the use of certain pesticides by administrative edict. Based on the court's reasoning that a voter-passed initiative resulting in a county ordinance is a "law" under section 14007, with which sprayers must

30. Cal. Food & Agric. Code § 11503 (West Supp. 1984).

31. 36 Cal. 3d at 494, 683 P.2d at 1161, 204 Cal. Rptr. at 908 (Kay, J., dissenting).

32. Justice Grodin concurred in the portion of Justice Kaus' dissent dealing with federal preemption.

comply, agency-created rules may certainly be "regulations" requiring compliance under the same statutory authority.

XVI. EQUAL PROTECTION

Parents of a child placed in state facilities for public safety cannot be required to reimburse the government for the costs of caring for the child: ***In re*** **Jerald C.**

In re Jerald C.[1] presented the supreme court with the question of under what conditions relative responsibility statutes[2] could be enforced.

Pursuant to Welfare and Institutions Code section 602,[3] Jerald, a minor, was named a ward of the court and subsequently held at a series of state facilities. The County of Santa Clara brought suit against Jerald's father seeking reimbursement for the care and support of Jerald.[4] The father appealed from an order, based on Welfare and Institutions Code section 903.1,[5] requiring him to pay

1. 36 Cal. 3d 1, 678 P.2d 917, 201 Cal. Rptr. 342 (1984), *vacating* 33 Cal. 3d 1, 654 P.2d 745, 187 Cal. Rptr. 562 (1982). Opinion by Broussard, J., with Bird, C.J., and Mosk, J., concurring. Separate opinion by Kaus, J., with Reynoso, Grodin, and Richardson, JJ., concurring in the judgment.

2. CAL. WELF. & INST. CODE §§ 202, 903 (West 1984). These sections were amended after a rehearing was granted in this case; however, the new legislation has no effect on this case. 36 Cal. 3d at 5 n.3, 678 P.2d at 918 n.3, 201 Cal. Rptr. at 343 n.3.

3. CAL. WELF. & INST. CODE § 602 (West 1984) provides as follows:

> Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

4. The county was seeking "$265 per month for juvenile hall and boys ranch custody for periods prior to September 1980, . . . $33 per day for 33 days in juvenile hall in October and November 1980, and at the rate of $25 per month for . . . commitment to the California Youth Authority." 36 Cal. 3d at 4, 678 P.2d at 918, 201 Cal. Rptr. at 343.

5. Prior to its amendment in 1983, this section stated:

> The father, mother, spouse, or other person liable for the support of a minor person, the estates of such persons, and the estate of such minor person, shall be liable for the cost of his care, support, and maintenance in any county institution in which he is placed, detained, or committed pursuant to the order of the juvenile court, or for the cost to the county in which the juvenile court making the order is located, of his care, support, and maintenance in any other place in which he is placed, detained, or committed pursuant to the order of the juvenile court. The liability of such person (in this article called relatives) and estates shall be a joint and several liability.

for Jerald's care at the rate of $100 per month. The basis of the appeal was that relative responsibility statutes must be invalidated "when the government charges were not for support which the relative refused or failed to provide but for the cost of maintaining public institutions for public benefit."[6]

The underlying premise of the court's decision was that statutes requiring the responsible relative to make reimbursements have been sustained against equal protection challenges.[7] In support of this proposition, the court pointed to the parents' duty to provide for a minor's physical injuries,[8] to care for a mentally retarded minor,[9] to pay the costs of counsel in juvenile proceedings,[10] and even the duty of adult children to support needy or poor elderly parents.[11] In these cases, statutes requiring relative reimbursement were found to bear a rational relationship to relieving the general public of this burden and were not arbitrary.[12] In order to obtain reimbursement under these statutes, the government's expenditures must have been based on the parents' duty of support and not have been provided for the public's benefit.[13] Consequently, an examination of the county's purpose in placing Jerald in custody was germane.

When incarceration or commitment is for the protection of society, it is arbitrary and in violation of the basic constitutional guar-

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CAL. WELF. & INST. CODE § 903 (West 1972).

6. 36 Cal. 3d at 6, 678 P.2d at 919, 201 Cal. Rptr. at 344.

7. *Id.* at 5, 678 P.2d at 918, 201 Cal. Rptr. at 343.

8. Statutes providing that parents are liable for reimbursing government agencies which provide medical treatment to their minor children have been upheld. *In re* Dudley, 239 Cal. App. 2d 401, 414, 48 Cal. Rptr. 790, 798 (1966).

9. County of Alameda v. Kaiser, 238 Cal. App. 2d 815, 818, 48 Cal. Rptr. 343, 345 (1965).

10. Since legal assistance was essential to protecting the minor's rights, a statute requiring parental reimbursement was neither arbitrary nor a denial of equal protection. *See In re* Ricky H., 2 Cal. 3d 513, 522, 468 P.2d 204, 208, 86 Cal. Rptr. 76, 80 (1970).

11. In reviewing the duty imposed by relative responsibility statutes on adult children for their parents, the court stated: "Since these sections do not touch upon a fundamental interest and do not create any suspect classifications, their constitutionality is to be determined by the normal 'rational relationship' test. . . ." Swoap v. Superior Court, 10 Cal. 3d 490, 506, 516 P.2d 840, 851, 111 Cal. Rptr. 136, 147 (1973) (footnote omitted).

12. *See supra* notes 8-11.

13. The court relied on a long line of cases which stated that charging the costs of operating state institutions for public benefit to one particular class of persons denied those persons the equal protection of the law. *See* Myles Salt Co., v. Board of Comm'rs, 239 U.S. 478 (1916); Norwood v. Baker, 172 U.S. 269 (1898); Furey v. City of Sacramento, 24 Cal. 3d 862, 598 P.2d 844, 157 Cal. Rptr. 684, *cert. denied,* 444 U.S. 976 (1979); Dawson v. Town of Los Altos Hills, 16 Cal. 3d 676, 547 P.2d 1377, 129 Cal. Rptr. 97 (1976); Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 723, 388 P.2d 720, 724, 36 Cal. Rptr. 488, 492, *vacated and remanded,* 380 U.S. 194 (1965).

antee of equal protection to assess relatives for the expense.[14] "Whatever the basis for other commitments by the juvenile court . . . the purposes of the confinement and treatment in commitments pursuant to section 602 include 'the protection of society from the confined person.' "[15]

The county maintained that, regardless of the basis of the statutory obligation, there still exists a common law obligation of support.[16] However, the common law duty only applies to parents' "neglect" to provide support for their minor children.[17] Section 602 commitments are clearly based on the violation of laws, not the failure to provide support.[18] "Although parents of children committed under section 602 are thereby relieved of their ordinary burden of support, the reimbursement provision of section 903 is not based on such burden but upon the governmental cost of confinement."[19]

The court went even farther by saying there was absolutely no basis for the distinction between common law and statutory origin because the statutory origin of the duty to provide support for needy parents and adult children reaches back almost four centuries.[20] The costs of confinement may not be recovered for an adult or a child where the purpose of the confinement is the protection of society.[21]

Thus, the county may not recover even that portion of the cost attributable to the minor's support.[22] In so ruling, three court of appeal decisions allowing reimbursement from parents were over-

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14. The enactment and administration of laws providing for sequestration and treatment of persons in appropriate state institutions—subject of course, to the constitutional guarantees—who would endanger themselves or others if at large is a proper state function; being so, it follows that the expense of providing, operating and maintaining such institutions should (subject to reasonable exceptions *against the inmate or his estate*) be borne by the state.

Department of Mental Hygiene v. Kirchner, 60 Cal. 2d at 719-20, 388 P.2d at 722, 36 Cal. Rptr. at 490 (quoting Department of Mental Hygiene v. Hawley, 59 Cal. 2d 247, 255-56, 379 P.2d 22, 27-28, 28 Cal. Rptr. 718, 723-24 (1963)) (emphasis in original).

15. 36 Cal. 3d at 7, 678 P.2d at 920, 201 Cal. Rptr. at 345 (citation omitted).

16. *Id.* at 9, 678 P.2d at 921, 201 Cal. Rptr. at 346.

17. CAL. CIV. CODE § 207 (West 1982).

18. CAL. WELF. & INST. CODE § 602 (West 1984).

19. 36 Cal. 3d at 9, 678 P.2d at 921, 201 Cal. Rptr. at 346.

20. 43 Eliz. 1, ch. 2 § vi (1601); *see also* tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status, Part III,* 17 STAN. L. REV. 614 (1965).

21. 36 Cal. 3d at 10, 678 P.2d at 922, 201 Cal. Rptr. at 347.

22. Even if such a division is possible, section 903 reimbursement goes beyond

turned.[23] The purpose of such incarceration, and the benefits derived, are for society in general.

In his concurring opinion, Justice Kaus maintained that the parents still have a duty to reimburse the state for expenditures in support of a minor child; however, "the applicable statutory scheme does not lend itself to an efficient segregation between those costs which may legitimately be charged to the parent and those which are the responsibility of the general public."[24] In calling for a change in the present law, more consideration must be placed on the parents' ability to pay.[25] Also, some sort of statewide standard should be established for the level of reimbursement required.[26] Given the pluralities in this case, legislative review may indeed revive relative responsibility statutes under section 602 placements.

XVII. EVIDENCE

A. *Presumption that child born in wedlock is the issue of the mother's husband held not to violate due process:* Estate of Cornelious.

In *Estate of Cornelious,*[1] the court considered whether the conclusive presumption that a child born in wedlock is the issue of the mother's husband, a principle codified in Evidence Code section 621,[2] violated the appellant's due process rights.

The case arose out of a dispute as to the proper party to administer the estate of Willis Cornelious. Cornelious died intestate, leaving no surviving spouse or legitimate children. Cornelious' sisters nominated Hettie Taylor to act as administratrix of the estate. Appellant, Trudy Ann Hall, claimed to be the illegitimate

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the common law duty imposed under section 207, and the state's purpose in the confinement is still the protection of society—not the support of the minor. *Id.*

23. *In re* Steven S., 122 Cal. App. 3d 683, 176 Cal. Rptr. 195 (1981); *In re* Shaieb, 250 Cal. App. 2d 553, 58 Cal. Rptr. 631 (1967); County of Alameda v. Espinoza, 243 Cal. App. 2d 534, 52 Cal. Rptr. 480 (1966). These cases all rejected the equal protection challenge on the basis of the common law distinction and on the purpose of the confinement.

24. 36 Cal. 3d at 12, 678 P.2d at 923, 201 Cal. Rptr. at 348.

25. CAL. WELF. & INST. CODE §§ 903-905. These provisions limit orders of reimbursement to parents' ability to pay solely at the time of attempted collection—not at time of confinement. *See* 36 Cal. 3d at 13 n.3, 678 P.2d at 924 n.3, 201 Cal. Rptr. at 348 n.3.

26. *Id.*

1. 35 Cal. 3d 461, 674 P.2d 245, 198 Cal. Rptr. 543 (1984). Opinion by Kaus, J., with Mosk, Richardson, Broussard, Reynoso, and Grodin, JJ., concurring. Separate dissenting opinion by Bird, C.J.

2. CAL. EVID. CODE § 621 (West Supp. 1984) provides in relevant part that "the issue of a wife cohabitating with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage."

daughter of the deceased and applied for letters of administration.[3] Hall sought to establish that Willis was her biological father and that a parent-child relationship existed between Willis and herself prior to his death.[4] Hall was born, however, during the marriage of her mother, Arzina Fuller, to David Fuller. The Fullers were living together as husband and wife at the time of Hall's conception, and David Fuller was identified as the child's father on her birth certificate. David Fuller was neither sterile nor impotent. Arzina Fuller testified that she and her husband had not engaged in marital relations during the time of her daughter's conception, and that Willis Cornelious was Hall's biological father. Evidence established that David Fuller was not Trudy Hall's biological father.[5]

Hall maintained that she was informed by her mother that Cornelious was her father when she was fifteen years old. From that time until Willis' death, she visited him and was identified by

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3. CAL. PROB. CODE § 422 (West Supp. 1984) provides as follows:

(a) Administration of the estate of a person dying intestate must be granted to one or more of the following persons, who are entitled to letters in the following order:

(1) The surviving spouse, or some competent person whom he or she may request to have appointed.

(2) The children.

(3) The grandchildren.

(4) The parents.

(5) The brothers and sisters.

(6) The next of kin entitled to share in the estate.

(7) The relatives of a previously deceased spouse, when such relatives are entitled to succeed to some portion of the estate.

(8) The public administrator.

(9) The creditors.

(10) Any person legally competent.

(b) A relative of the decedent who is entitled to priority under subdivision (a) is entitled to priority only if either of the following facts exist:

(1) The relative is entitled to succeed to all or part of the estate.

(2) The relative is a parent, grandparent, child or grandchild of the decedent and either takes under the will of, or is entitled to succeed to all or part of the estate of, another deceased person who is entitled to succeed to all or part of the estate of the decedent.

4. CAL. PROB. CODE § 255(a) (West Supp. 1984) (repealed effective Jan. 1, 1985) and CAL. PROB. CODE § 6408 (West Supp. 1984) (effective Jan. 1, 1985) allow an illegitimate child to inherit from the natural father if there exists, prior to the death of the natural father, a parent and child relationship as defined by the statutes.

5. Trudy Hall possessed the genetic trait for sickle cell anemia, which was not carried by Arzina or David Fuller. This makes it biologically impossible for David Fuller to have been appellant's natural father. 35 Cal. 3d at 464, 674 P.2d at 247, 198 Cal. Rptr. at 545.

him as his daughter.[6]

Hettie Taylor successfully urged at the trial court level that the appellant was not the daughter of Willis Cornelious, under the conclusive presumption of Evidence Code section 621.[7] In upholding the order denying Hall's petition for appointment as administratrix of Cornelious' estate, the supreme court compared the importance of the conclusive presumption of legitimacy with the personal interest of Hall in inheriting Cornelious' estate.

The court noted that the ancient principle[8] that the law regards a child born in wedlock as an issue of the marriage "promotes important social policies: preservation of the integrity of the family, protection of the welfare of children by avoiding the stigma of illegitimacy and keeping them off the welfare rolls, and insurance of the stability of titles and inheritance."[9] The court further noted that the rule intentionally disregarded the biological accuracy of the presumption, thus making irrelevant the possibility that scientific testing could establish the identity of the biological father.[10]

The court then discussed the limited exceptions to the conclusive presumption,[11] distinguishing the circumstances encompassed by those exceptions from those of the appellant. The court adopted the reasoning forwarded in an article appearing in the Stanford Law Review[12] that the relationship of a father to a very young child is predominantly based on biological parentage, while the relationship of an older child to a man purporting to be the father is a more strongly developed social relationship. Such a relationship overshadows the biological origins of the child and creates a familial bond which should not lightly be dissolved by the court.

In contrast to the important social policies favoring the conclu-

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6. The court states that the appellant visited Willis, accompanied him on errands, and occasionally stayed overnight at his home, and that Willis identified the appellant to his friends as his daughter. *Id.*

7. *See supra* note 2.

8. The court notes that the principle embodied in Evidence Code § 621 was a maxim of the Roman law, which was copied by the common law. The court quotes from Shakespeare's *King John* to demonstrate that the rule was commonly accepted in the 16th century.

9. 35 Cal. 3d at 465, 674 P.2d at 247, 198 Cal. Rptr. at 545.

10. The court quotes Keaton v. Keaton, 7 Cal. App. 3d 214, 216, 86 Cal. Rptr. 562, 563 (1970), for the principle that "[t]he husband is deemed responsible for the wife's child if it is conceived while they are cohabitating; he is the *legal* father and the issue of biological paternity is irrelevant."

11. CAL. EVID. CODE § 621(b)-(g) (West Supp. 1984) provides that the issue of paternity may be questioned using blood tests, but only upon motion by the mother or her husband, noticed within two years of the child's birth.

12. Recent Developments, *California's Tangled Web: Blood Tests and The Conclusive Presumption of Legitimacy,* 20 STAN. L. REV. 754, 761-65 (1968).

sive presumption, the court characterized appellant's interest as a solely personal interest in the inheritance of an estate. The court ruled that this interest was "of a lower order," and was further diminished by the similar, counterbalancing interest of the sisters of the deceased in the inheritance.

The appellant based her legal arguments on two cases. In *Stanley v. Illinois*,[13] the undisputed biological father had lived with and supported the children until their mother's death. The United States Supreme Court held that the automatic removal of the children from the father's custody was a due process violation. The Court mandated a hearing on the father's fitness as a parent before his children could be made wards of the state.

In *In re Lisa R.*,[14] the claimed father, Victor, had lived with the child's mother before and after the child's birth and was named as the child's father on the birth certificate. The mother had subsequently returned to her husband with the child. After the death of both the mother and her husband, Victor sought to prove that he was Lisa's natural father. The California Supreme Court held that application of the conclusive presumption under those circumstances would violate due process.

The *Cornelious* court distinguished both *Lisa R.* and *Stanley*. The court noted that the decision in *Lisa R.* was based on the lack of competing societal interests, and that in both *Lisa R.* and *Stanley* the relationship between father and child "arose from more than the biological fact" of parentage.[15] In the *Cornelious* case, the court found that the interest of appellant was not as weighty as that of the fathers in *Stanley* and *Lisa R.* Further, the court emphasized the importance of the established father-daughter relationship between appellant and David Fuller, who was never informed that he was not Trudy's natural father.[16] The court concluded that "[i]n sum, Trudy has failed to advance a reason why the Constitution demands that the legislative judgment concerning her parentage should be voided."[17]

13. 405 U.S. 645 (1972).

14. 13 Cal. 3d 636, 532 P.2d 123, 119 Cal. Rptr. 475 (1975).

15. 35 Cal. 3d at 467, 674 P.2d at 249, 198 Cal. Rptr. at 547. Chief Justice Bird, in her dissenting opinion, maintained that the relationship between Willis and Hall also transcended the "mere biological fact" of Hall's true parentage. *Id.* at 472, 674 P.2d at 252, 198 Cal. Rptr. at 550 (Bird, C.J., dissenting).

16. David Fuller died at some time after the trial court hearing in this matter. 35 Cal. 3d at 464 n.3, 674 P.2d at 247 n.3, 198 Cal. Rptr. at 545 n.3.

17. *Id.* at 467, 674 P.2d at 249, 198 Cal. Rptr. at 547.

The Chief Justice dissented, stating that the assertion of substantial state interest favoring application of the Evidence Code section 621 was "completely without support, either in the majority's opinion or in the record."[18] She noted that the court had committed itself to weighing competing interests concerning application of the conclusive presumption on a case-by-case basis.[19] Examining several possible justifications for the application of section 621, she concluded that none of the policy reasons commonly asserted could justify its application against Trudy Hall.

The reasons forwarded by Chief Justice Bird as the "recognized interest of the state in maintaining the conclusive presumption of paternity" were to preserve the integrity of the family unit, to safeguard the welfare of minor children by protecting them from the stigma of illegitimacy and by ensuring that parents fulfill their support obligations, and to ensure that titles to property and rights of inheritance will not be disturbed on the basis of evidence which is scientifically unsubstantiated. Since David Fuller was dead at the time of the court's ruling, and Arzina Fuller supported the efforts of Trudy Hall in establishing her true heritage, there was no danger of injury to any existing family unit. Further, Chief Justice Bird reasoned that the goals of protecting minor children from the stigma of illegitimacy or ensuring their adequate support could not apply to the voluntary decision of an informed adult to challenge the presumption of paternity forwarded by section 621.

Regarding the possibility that a challenge to the conclusive presumption might threaten the stability of titles and inheritance, Chief Justice Bird questioned the majority's assertion that prior cases had justified the application of the conclusive presumption on those grounds.[20] She went on to state that the protections provided by the system of inheritance under the California Probate Code sufficiently protected the goal of orderly distribution of estates.

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18. *Id.* at 468, 674 P.2d at 250, 198 Cal. Rptr. at 548 (Bird, C.J., dissenting).

19. The court stated in *Lisa R.* that:

> [T]he reasonableness of a statutory limitation on the right to offer proof of parentage depends on circumstances prevailing in each particular case. Accordingly, a court, before receiving evidence thereof, must in each instance make a preliminary determination . . . that due process concepts would be offended if the particular claimant to parentage were denied an opportunity to prove his claim.

13 Cal. 3d at 651 n.17, 532 P.2d at 133 n.17, 119 Cal. Rptr. at 485 n.17.

20. The Chief Justice noted that County of San Diego v. Brown, 80 Cal. App. 3d 297, 145 Cal. Rptr. 483 (1978), and S.D.W. v. Holden, 275 Cal. App. 2d 313, 80 Cal. Rptr. 269 (1969), cited by the majority, were factually distinguishable cases, which actually involved attempted avoidance of support obligations by the presumed fathers.

Regarding the majority's characterization of Hall's interest in establishing her true paternity, the Chief Justice stressed the fact that Hall had established a social relationship with Cornelious prior to his death, and noted that the interest of Hall in establishing her paternity was no less legitimate because such action might provide the tangible benefit of an inheritance. Chief Justice Bird also noted that any competing interest of the deceased's sisters in inheriting the estate did not outweigh Hall's interest in establishing her paternity, citing the determination by the California Legislature that the inheritance rights of an illegitimate child who can fulfill the requirements of the Probate Code[21] outweigh those of the deceased's siblings.

In conclusion, Chief Justice Bird stated that Hall had demonstrated a legitimate interest in establishing that Cornelious was her natural father, and that her interest was not outweighed by the alleged state interests supporting application of the conclusive presumption. Accordingly, the Chief Justice would hold that to deny appellant the opportunity to rebut the presumption of paternity would be a violation of due process.

B. *Expert testimony regarding rape trauma syndrome inadmissible to prove that a rape has occurred:* **People v. Bledsoe.**

I. INTRODUCTION

A teenage girl was raped by a man twice her age. The defense was consent. Although the prosecution had ample evidence of the defendant's guilt, evidence that the victim suffered from "rape trauma syndrome" was introduced in an effort to prove that a rape had in fact occurred. A unanimous court in *People v. Bledsoe*[1] declared that evidence of the aftereffects of a rape was inadmissible to prove that a rape occurred, although the evidence may be admitted for a variety of other purposes. Nevertheless, the

21. Prior to January 1, 1985, the following code provisions are applicable: CAL. PROB. CODE §§ 221-222 (West 1956) (intestate succession rights of children); CAL. PROB. CODE § 255 (West Supp. 1984) (existence of parent-child relationship necessary for succession by child). After January 1, 1985, the following provisions apply: CAL. PROB. CODE § 6402(a) (West Supp. 1984) (intestate succession rights of children); CAL. PROB. CODE § 6408 (West Supp. 1984) (establishment of parent-child relationship).

1. 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984). Opinion by Kaus, J., with Bird, C.J., Mosk, Broussard, Reynoso, Grodin, and Puglia, JJ., concurring. Puglia, J., sitting under assignment by the Chairperson of the Judicial Council.

court determined that although admission of the rape trauma syndrome was error, it was not prejudicial in this case.

II. FACTUAL BACKGROUND

One night in November, 1981, fourteen year-old Melanie went to a friend's party in Huntington Beach. Twenty-eight year-old defendant Bledsoe also attended the party. Melanie drank some beer and used a small amount of cocaine. Bledsoe had drunk only beer. At approximately 11 p.m., Melanie asked Bledsoe to drive her home. He agreed, but instead drove her to his house. Melanie entered the house because she needed to use the bathroom. Bledsoe entered the bathroom and covered Melanie's mouth with a rag with a strong odor[2] and dragged her to the living room. Melanie attempted to escape but was caught and hit by the defendant. Melanie ceased to resist when the defendant threatened her with a knife.[3] Thereafter, she was raped. The defendant then dropped Melanie off back at the party at her request. She entered the house bruised and emotionally upset and announced that the defendant had raped her.[4]

The defense offered at trial was consent. The defendant testified that Melanie had been affectionate all night at the party and had asked him to take her to his house to smoke marijuana. While there they had begun kissing, which ultimately led to sexual intercourse. Bledsoe claimed no force was needed or used, but could not explain Melanie's bruises.

During the course of the trial, the prosecution presented expert testimony on rape trauma syndrome. The evidence was offered to prove that a rape occurred. The evidence was admitted over the defendant's objection.[5] The jury found the defendant guilty of forcible rape, but not guilty as to use of a weapon or assault with

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2. Although Melanie's mother and friends testified to smelling an ether-like odor on Melanie's person, neither the examining doctor nor the investigating officers detected any such odor. *Id.* at 240 n.1, 681 P.2d at 293 n.1, 203 Cal. Rptr. at 452 n.1.

3. According to Melanie, Bledsoe had also told her that "other guys" were present in the house and would join him if she did not cooperate. *Id.* at 239, 681 P.2d at 292-93, 203 Cal. Rptr. at 451-52.

4. Thereafter, many of Melanie's friends went to Bledsoe's home and attacked the defendant, beating him unconscious. *Id.* at 240, 681 P.2d at 293, 203 Cal. Rptr. at 452.

5. Defense counsel objected to the evidence as irrelevant and collateral. Counsel sought a hearing outside the presence of the jury pursuant to Evidence Code section 402(b), which allows the trial court, in its discretion, to conduct a hearing on admissibility of evidence outside of the jury's hearing. The court ultimately denied the request and the objection. *Id.* at 240-41, 681 P.2d at 293-94, 203 Cal. Rptr. at 452-53.

a deadly weapon.[6]

III. RAPE TRAUMA SYNDROME

In an effort to prove that a rape had in fact occurred, the prosecution presented evidence of rape trauma syndrome. This evidence was presented by means of expert testimony from Leslie Jacobson-Wigg, a rape counselor who had treated Melanie.[7] The counselor explained that rape trauma syndrome is the "umbrella terminology" that describes the parameters of a pattern of reactions and experiences which most rape victims undergo.[8] Often, she testified, a sexual assault victim is threatened with her life; thus, rape trauma syndrome is an acute stress reaction to the threat of being killed. The counselor then described three phases of the syndrome.[9]

The first phase is called disorientation or, the "immediate impact reaction." The phrase describes the victim's emotional experiences during the course of the rape and over a course of hours immediately thereafter. The victim may exhibit one of two style reactions in this phase: stress style and controlled style. In the stress style, the victim exhibits anxiety, fear, and agitation. In the controlled style, the victim appears "normal," i.e., her feelings are masked as though no rape had occurred. Both styles are normal responses.[10]

The counselor termed the second phase as the reorganization phase. The victim begins to learn how to deal with the assault and consequently focuses less on the attack and more so on eve-

6. The defendant had been charged with: (1) forcible rape; (2) use of weapon during the commission of a rape; (3) assault with a deadly weapon; and (4) false imprisonment. *Id.* at 240, 681 P.2d at 293, 203 Cal. Rptr. at 452. The jury failed to reach a verdict on the last charge, and the prosecution dismissed the count. *Id.* at 245, 681 P.2d at 296-97, 203 Cal. Rptr. at 455-56.

7. Jacobson-Wigg was a well-qualified counselor who worked as a technical reserve officer for the Huntington Beach Police Department, was a director of the "Rape Prevention and Education Program" at the University of California, Irvine, and conducted her own private practice. *Id.* at 241 n.3, 681 P.2d at 294 n.3, 203 Cal. Rptr. at 453 n.3.

8. *Id.* at 241, 681 P.2d at 294, 203 Cal. Rptr. at 453.

9. Some of the professional literature on the subject split the syndrome into three categories as did Jacobson-Wigg. *See* Fox & Scherl, *Crisis Intervention with Victims of Rape,* 17 SOCIAL WORK 36, 37-42 (1972). Other authors have referred only to two phases: "the acute phase: disorganization" and "the long-term process: reorganization." *See* A. BURGESS & L. HOLMSTROM, RAPE, VICTIMS OF CRISIS 37, 50 (1974).

10. 36 Cal. 3d at 242, 681 P.2d at 294-95, 203 Cal. Rptr. at 453-54.

ryday occurrences. The victim functions more "normally" both inwardly and outwardly. She is able to concentrate on tasks, and she experiences less flashbacks to the assault. The rape, however, still retains a powerful effect over her psyche.[11]

The final phase is the integration phase. At that point, a victim who had been coping well suddenly becomes depressed and relives the incident. The victim must then re-learn to cope. This phase can occur as late as one year after the actual rape.[12]

The counselor stated that some victims never pass the reorganization phase. Instead, they experience the "silent reaction" in which they deny to themselves and others that a rape has occurred. This phase could last a lifetime. In addition, the counselor indicated other general responses of rape victims, which include a fear of men and a phobia of being alone. According to the counselor, at the time of trial, Melanie was in the reorganization phase and feared both men and being alone.[13]

IV. ANALYSIS

The defendant argued that admission of the rape trauma syndrome evidence was error. First, the defendant claimed the evidence was precluded by two court of appeal decisions.[14] The court acknowledged that the two lower court opinions had held that some expert testimony by a rape counselor may be irrelevant and inadmissible. But, the court believed, it does not follow that all such testimony is inadmissible.[15] Instead, "the admissibility of expert testimony on a given subject must turn both on the nature of the particular evidence and its relation to a question actually at issue in the case."[16] Since the two appellate court cases concerned other issues, they had no bearing on Bledsoe's claim.

The heart of the defendant's claim of error was that evidence of rape trauma syndrome is not admissible under the *Frye* stan-

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11. *Id.*

12. *Id.* at 243, 681 P.2d at 295, 203 Cal. Rptr. at 454.

13. Specifically, the counselor described Melanie as becoming more her normal self, but still experiencing flashbacks, nightmares, difficulty with concentration, and fears of men, crowds, and being alone. The conselor's conclusion: Melanie suffered from rape trauma syndrome. *Id.* at 243-44, 681 P.2d at 295-96, 203 Cal. Rptr. at 454-55.

14. The two decisions were People v. Clark, 109 Cal. App. 3d 88, 167 Cal. Rptr. 51 (1980), and People v. Guthreau, 102 Cal. App. 3d 436, 162 Cal. Rptr. 376 (1980). In both cases, the appellate courts found expert testimony concerning the reasonableness of the degree of resistance displayed by the victim to be inadmissible. The courts in those cases felt the testimony to be irrelevant to the issue of consent in a rape prosecution.

15. *See infra* note 19.

16. 36 Cal. 3d at 246, 681 P.2d at 297, 203 Cal. Rptr. at 456.

dard.[17] The court agreed to review this contention even though the defendant failed to cite the case to the trial court.[18] The court recognized that rape trauma syndrome is a rather recent concept and that its use in a judicial setting has been the subject of only a few cases throughout the country. The court noted many instances in which evidence of rape trauma syndrome would be proper.[19] As to the use of evidence of the syndrome to prove the occurrence of rape, the court cited three jurisdictions which have previously determined the issue. In applying the *Frye* test, courts in two of the jurisdictions found the evidence inadmissible;[20] the other court came to the opposite conclusion.[21]

The supreme court also looked to the California cases upholding the admissibility of expert testimony on "battered child syndrome" under the *Frye* test.[22] A fundamental distinction exists between the latter syndrome and rape trauma syndrome. Rape trauma syndrome was developed as a therapeutic tool to help identify, predict, and treat emotional problems,[23] whereas bat-

17. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). *Frye* is a long-standing test of standards of reliability used to determine the admissibility of new scientific methods of proof. Specifically, where expert testimony rests on a scientific principle or process, then that principle must "be sufficiently established to have gained general acceptance in the particular field in which it belongs." *Id.* at 1014. California courts follow this rule. *See, e.g.,* People v. Kelly, 17 Cal. 3d 24, 30-32, 549 P.2d 1240, 1244-45, 130 Cal. Rptr. 144, 148-49 (1976).

18. The court noted that the defendant had objected to the testimony as irrelevant. *See supra* note 5. In addition, the court found that the issue of reliability of that testimony overlapped. In view of those factors and the fact that the court denied the defendant's request for a 402 hearing, the court determined it proper to consider the claim. 36 Cal. 3d at 247, 681 P.2d at 298, 203 Cal. Rptr. at 457.

19. *See, e.g.,* Delia S. v. Torres, 134 Cal. App. 3d 471, 184 Cal. Rptr. 787 (1982) (delay in reporting assault a common reaction of rape victims); Terrio v. McDonough, 16 Mass. App. 163, 450 N.E.2d 190 (1983) (victim briefly returned to scene of attack to retrieve belongings); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (inconsistent post-incident statements by 14-year-old incest victim).

In addition, the court noted that evidence of rape trauma syndrome would be proper to rebut a contention by the defendant that the victim's post-incident actions were inconsistent with a claim of rape. The evidence could also clarify for the jury myths and misconceptions concerning rape victims. 36 Cal. 3d at 247-48, 681 P.2d at 298, 203 Cal. Rptr. at 457.

20. State v. Saldana, 324 N.W.2d 227, 229-30 (Minn. 1982); State v. Taylor, 663 S.W.2d 235, 236-42 (Mo. 1984) (en banc).

21. State v. Marks, 231 Kan. 645, 653-54, 647 P.2d 1292, 1299 (1982).

22. *See, e.g.,* Landeros v. Flood, 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976); People v. Jackson, 18 Cal. App. 3d 504, 95 Cal. Rptr. 919 (1971). The court looked to these cases at the behest of the California Women Lawyers, amicus curiae for the state.

23. 36 Cal. 3d at 249-50, 681 P.2d at 300, 203 Cal. Rptr. at 459.

tered child syndrome[24] and other methods of proof that have withstood the *Frye* test were devised to determine the truth or accuracy of a particular past event.[25] Thus, the court concluded, "[b]ecause the literature does not even purport to claim that the syndrome is a scientifically reliable means of proving that a rape occurred, we conclude that it may not properly be used for that purpose in a criminal trial."[26] The court added that the evidence of rape trauma syndrome could be allowed for other relevant purposes.

Consequently, the court determined that the trial court was in error in admitting the expert testimony. The court quickly reviewed the evidence, believing the case against Bledsoe to be strong. Because it felt that the jury already had properly been provided with the information recounted in the expert's testimony, the court felt that the testimony had little effect on the verdict, and in any case, too little effect to make the error prejudicial.[27] The judgment was affirmed.

V. Conclusion

In a criminal rape prosecution, the court for the first time faced the issue of whether expert testimony concerning rape trauma syndrome, offered to prove the occurrence of a rape, was admissible evidence. The court answered the question in the negative, but added that such evidence could properly be admitted for other purposes. Moreover, the court in this case found the error to be nonprejudicial.

C. *Admission of evidence of rape trauma syndrome not error in this case because of defendant's failure to adequately object to the evidence:* **People v. Stanley.**

People v. Stanley, 36 Cal. 3d 253, 681 P.2d 1302, 203 Cal. Rptr. 461 (1984), concerned a criminal rape prosecution involving expert testimony on rape trauma syndrome similar to that discussed in *People v. Bledsoe,* 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984).

The prosecution presented a substantial amount of evidence indicating that the defendant was guilty of rape. The defense contended no sexual activity had occurred. In addition, the prosecution also presented an expert witness, the victim's rape

24. *See generally* McCoid, *The Battered Child and Other Assaults Upon the Family: Part One,* 50 Minn. L. Rev. 1, 3-19 (1965).

25. 36 Cal. 3d at 249, 681 P.2d at 299, 203 Cal. Rptr. at 458.

26. *Id.* at 251, 681 P.2d at 301, 203 Cal. Rptr. at 460.

27. *Id.* at 252, 681 P.2d at 301-02, 203 Cal. Rptr. at 460-61.

counselor, to testify as to rape trauma syndrome and the symptoms which the victim exhibited. The defense objected only to the expert's qualifications; that objection was overruled after the court conducted a hearing pursuant to Evidence Code section 402(b) concerning the witness' qualifications and testimony.

On appeal, Stanley claimed that the admission into evidence of the testimony concerning rape trauma syndrome was error because it failed the test of *Frye v. United States,* 293 F.2d 1013 (D.C. Cir. 1923). The defendant's sole objection to the evidence at trial concerned the qualifications of the witness; he did not object to the substance of the testimony. The court held that for any *Frye* issue to be decided on appeal, it must be preserved by defense counsel at the trial level. It is not sufficient to object only to the witness' qualifications at trial. Moreover, the court declared that even if the admission of the testimony into evidence were error, it was not prejudicial. In view of the strength of the prosecution's case, the outcome would not have been different. Thus, the conviction was affirmed.

D. *Admissibility of evidence of prior uncharged sex crimes determined the same way as evidence of non-sex crimes; prior convictions may only be used once to enhance sentences:* **People v. Tassell.**

In *People v. Tassell,*[1] the court determined when evidence of a defendant's prior uncharged crimes can be admitted in a sex-related offense. The case presented the court with the opportunity to finally clarify the limitations on admitting evidence of prior uncharged crimes[2] where the current charge and prior crimes were sex-related. Ultimately, the court eliminated any distinction thought to exist between evidence of sex-related and non-sex-related crimes for which the defendant was never convicted. Al-

1. 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984). Opinion by Kaus, J., with Bird, C.J., Mosk, Broussard, and Grodin, JJ., concurring. Separate concurring and dissenting opinion by Reynoso, J. Separate concurring and dissenting opinion by Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

2. For the sake of clarity, it should be noted that the prior offenses discussed here involve crimes or misdeeds which a witness in the case in question claims that the defendant committed. This should be distinguished from the admission of evidence for impeachment purposes of prior crimes committed by the defendant for which a conviction resulted. The latter is covered in CAL. EVID. CODE § 788 (West 1966).

though the trial court improperly admitted the prior crimes evidence, the error did not demand reversal.

The court was also left to interpret a portion of the sentence enhancement provisions of section 1170.1 of the Penal Code.[3] Specifically, could the trial court enhance individual portions (i.e., convictions of separate counts) of the sentence, or only the aggregate sentence, where the defendant's record included prior convictions. The court ruled that the same prior convictions could only be used to enhance the sentence once.

I. USE OF PRIOR CRIMES EVIDENCE, GENERALLY

As a general rule, evidence of prior uncharged crimes and other misdeeds is inadmissible for the purpose of proving that the defendant has a particular propensity or disposition to commit a crime.[4] This common law rule is codified in section 1101 of the Evidence Code,[5] and has been widely followed.[6] Subsection (b) of section 1101, however, permits evidence of prior crimes to prove such things as motive, intent, plan or identity. And subsection (c) allows such evidence for the purpose of supporting or attacking a witness' credibility. The court was forced to confront these exceptions to the general rule in *Tassell.*

A history of inconsistent treatment of past crimes evidence involving sex-related offenses plagued the court.[7] Where the defendant was charged with a sex-involved crime, courts granted greater leniency in admitting evidence of past sex crimes, both for the purpose of proving a common plan or scheme, and for supporting the credibility of the prosecuting witness.[8] The overriding issue for determination, then, was whether prior crimes evidence

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3. CAL. PENAL CODE § 1170.1 (West Supp. 1984).

4. People v. Thomas, 20 Cal. 3d 457, 465, 573 P.2d 433, 436, 143 Cal. Rptr. 215, 218 (1978); B. WITKIN, CALIFORNIA EVIDENCE § 340 (1966).

5. CAL. EVID. CODE § 1101 (West 1966). The comments of the California Law Revision Commission indicate that section 1101 is a codification of prior law.

6. People v. Guerrero, 16 Cal. 3d 719, 724, 548 P.2d 366, 368, 129 Cal. Rptr. 166, 168 (1976); People v. Kelley, 66 Cal. 2d 232, 238, 424 P.2d 947, 953, 57 Cal. Rptr. 363, 369 (1967).

7. 36 Cal. 3d at 83-84, 679 P.2d at 4, 201 Cal. Rptr. at 570.

8. *See, e.g.,* People v. Kelley, 66 Cal. 2d at 242-43, 424 P.2d at 956, 57 Cal. Rptr. at 372; People v. Ing, 65 Cal. 2d 603, 612, 422 P.2d 590, 595, 55 Cal. Rptr. 902, 907 (1967); People v. Creighton, 57 Cal. App. 3d 314, 323-26, 129 Cal. Rptr. 249, 254-56 (1976); People v. Kazee, 47 Cal. App. 3d 593, 595-96, 121 Cal. Rptr. 221, 222-23 (1975); People v. Covert, 249 Cal. App. 2d 81, 88, 57 Cal. Rptr. 220, 224-25 (1967).

The *Covert* court explained the different treatment depending upon the type of offense this way: where the offense is sex-related, quite often the alleged crime took place in private surroundings involving only the perpetrator and the victim. Perhaps the most important consideration in determining the involvement of the defendant is the credibility of the prosecuting witness. *See also Thomas,* 20 Cal. 3d at 468, 573 P.2d at 538-39, 143 Cal. Rptr. at 220-21.

should be treated differently in sex-related offenses than it is in other offenses. The court concluded that no distinction should be made. In so doing, the court relied on *People v. Thompson*[9] for determining under what conditions prior crimes evidence may be admitted in all cases.

II. FACTS

The evidence presented in the case strongly indicated that in 1980, Anne B., a Susanville waitress, was raped and forced to orally copulate the defendant. The assault included elements peculiar to the specific incident.[10] Miss B.'s testimony was substantiated by others who could tell that she had been forcibly abused.[11] The defendant denied abusing the victim; he said that she consented to the sexual acts.[12]

The prosecution was successful in admitting evidence of two prior uncharged sex offenses. One woman testified that she was raped by the defendant in Vista, California in 1976 in a manner factually similar to the present case.[13] Another woman testified that the defendant raped her in Redding, California in 1977.[14] Both witnesses, like Miss B., testified that the defendant had choked them.

The defendant was found guilty of kidnapping for which he was sentenced to seven years with execution stayed pursuant to Penal Code section 654.[15] He was also found guilty of rape and oral copulation, receiving eight year sentences for each. One year enhancements were added to each count for a prior Florida statutory rape conviction and five year enhancements were added

9. 27 Cal. 3d 303, 314-21, 611 P.2d 883, 887-92, 165 Cal. Rptr. 289, 293-98 (1980).

10. Miss B. had agreed to give the defendant a ride home. After he tried unsuccessfully to kiss her, the defendant choked Miss B., threw her in the back of her Volkswagen van, forced her to orally copulate him, and raped her. 36 Cal. 3d at 80-81, 679 P.2d at 2, 201 Cal. Rptr. at 568.

11. Miss B.'s former boss (whom she called after she got home), the responding police officers, and an examining physician all testified that Miss B. was very shaken by the incident and showed signs of experiencing forceful physical abuse. *Id.* at 81, 689 P.2d at 2-3, 201 Cal. Rptr. at 568-69.

12. *Id.* at 81-82, 679 P.2d at 3, 201 Cal. Rptr. at 569.

13. *Id.* at 82, 679 P.2d at 3, 201 Cal. Rptr. at 569.

14. *Id.* at 82-83, 679 P.2d at 3, 201 Cal. Rptr. at 569.

15. CAL. PENAL CODE § 654 (West Supp. 1984). This section provides that where acts are punishable in different ways by more than one provision, the defendant can only be punished under a single code provision.

to each count for a prior California rape conviction.[16]

II. TREATMENT

The court first considered the question of the admissibility of the testimony of the defendant's former victims. After acknowledging that "pronouncements in the area of 'other crimes' evidence [has] not been entirely consistent,"[17] the court proceeded to conduct a historical survey of leading decisions involving other crimes evidence.[18]

The court was most concerned with *People v. Covert*,[19] which provided both a reasonable discussion of the various contexts in which prior crimes evidence could be used to show a common plan or scheme,[20] and the adoption of the corroboration rationale in sex-related cases.[21] The court was in agreement with the *Covert* discussion with respect to the cautious use of a common plan or scheme justification for admitting prior crimes evidence. Common plan or scheme evidence has, at times, been admitted even though it does not go to prove any actual issues presented in the case.[22] Where common plan or scheme evidence does not go to prove an actual issue, admitting it places "a respectable label on a disreputable basis for admissibility—the defendant's disposition."[23]

Although the court concurred with *Covert's* common plan or scheme reasoning for prior crimes, it put the victim corroboration theory in the same class as an unwanted houseguest; you don't really like him, but you don't want to be rude and tell him to leave. The court suggests that the victim corroboration theory is improper and has not been accepted, but until this case no court has seen fit to officially reject it.

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16. 36 Cal. 3d at 89, 679 P.2d at 8, 201 Cal. Rptr. at 574.

17. *Id.* at 83, 679 P.2d at 4, 201 Cal. Rptr. at 570.

18. The prosecution introduced the other crimes evidence both to corroborate the prosecuting witness and to show the defendant's common plan or scheme. Although the court adequately disposed of both uses of the evidence, the historical discussion of the pertinent cases did not really deal with each issue individually.

19. 249 Cal. App. 2d 81, 57 Cal. Rptr. 220 (1967).

20. The *Covert* court provided a summary of the uses of common plan or scheme evidence. 36 Cal. 3d at 84 n.4, 679 P.2d at 5 n.4, 201 Cal. Rptr. at 571 n.4.

21. 249 Cal. App. 2d at 88, 57 Cal. Rptr. at 224-25.

22. Common plan or scheme evidence is helpful when it is introduced to show that the particular unusual circumstances of the crime in question are so similar that the defendant, in all probability, committed the present crime. In that instance the evidence is helpful in identifying the defendant from other possible culprits. The same is true where a concerted plot is suggested and the crime for which the defendant is charged is an element in the overall plot or scheme. However, when the identity of the party committing the crime is not in question (as in *Tassell)* such common plan or scheme evidence has questionable value.

23. 36 Cal. 3d at 84, 679 P.2d at 5, 201 Cal. Rptr. at 571.

The court's historical discussion continued with an examination of sex-related cases where prior crimes evidence was improperly admitted.[24] The evidence did not prove any disputed issue except the defendant's disposition.[25] Meanwhile, in non-sex-related cases, prior crimes evidence was properly admitted to show the defendant's modus operandi where identity was in issue[26] and excluded where there was no question as to identity.[27] Even though the prior crimes evidence rule was being properly applied in non-sex-related cases, the *Covert* corroboration theory would not go away, and was utilized in some sex-related cases.[28]

Finally, in *People v. Thomas,*[29] where the court had an opportunity to clarify the prior crimes evidence question in sex-related offenses, it did not do so "because its briefing went off on a tangent."[30] Nevertheless, although the *Thomas* court determined that the corroboration theory could not be employed where the alleged prior crime is too remote, it approved its use where the prior crime involved similar victims and the testimony showed a common design or plan as well as corroborated the victim's testimony.[31]

Left with no guiding light in sex-related cases involving prior crimes evidence, the court turned to *People v. Thompson.*[32] The *Thompson* court surveyed the principles of prior crimes evidence with a cautious eye.[33] It noted that "[e]ven if evidence of other crimes is relevant under a theory of admissibility that does not rely on proving disposition, it can be highly prejudicial."[34] Therefore, the overriding provisions of section 352 of the Evidence Code[35] requiring that the probative value outweigh the prejudicial effect must govern. Specifically with respect to evidence of prior crimes, prejudicial effect is inherent and such evidence is

24. People v. Cramer, 67 Cal. 2d 126, 429 P.2d at 582, 60 Cal. Rptr. 230 (1967); People v. Stanley, 67 Cal. 2d 812, 433 P.2d 913, 63 Cal. Rptr. 825 (1967).
25. 36 Cal. 3d at 86, 679 P.2d at 6, 201 Cal. Rptr. at 572.
26. People v. Haston, 69 Cal. 2d 233, 444 P.2d 91, 70 Cal. Rptr. 419 (1968).
27. People v. Sam, 71 Cal. 2d 194, 454 P.2d 700, 77 Cal. Rptr. 804 (1969).
28. People v. Creighton, 57 Cal. App. 3d 314, 129 Cal. Rptr. 249 (1976); People v. Kazee, 47 Cal. App. 3d 593, 121 Cal. Rptr. 221 (1975).
29. 20 Cal. 3d 457, 573 P.2d 433, 143 Cal. Rptr. 215 (1978).
30. 36 Cal. 3d at 87, 679 P.2d at 6, 201 Cal. Rptr. at 572.
31. *Thomas,* 20 Cal. 3d at 468-69, 573 P.2d at 439, 143 Cal. Rptr. at 221.
32. 27 Cal. 3d 303, 611 P.2d 883, 165 Cal. Rptr. 289 (1980).
33. *Id.* at 314-21, 611 P.2d at 887-92, 165 Cal. Rptr. at 293-98.
34. *Id.* at 318, 611 P.2d at 890, 165 Cal. Rptr. at 296.
35. CAL. EVID. CODE § 352 (West 1966).

"admissible only if [it has] *substantial* probative value."[36] Not only must the probative value be substantial, but the prior crimes evidence must be relevant to prove some disputed fact.[37]

In applying the *Thompson* rationale, the court determined that there was truly no need to determine the probative value of the prior crimes evidence because it did not go to any fact in question.[38] There was no dispute as to the identity of the perpetrator of the alleged crime, and according to the court, no ambiguity as to the defendant's intent. Therefore, the use of the common plan or scheme evidence "is merely a euphemism for 'disposition.' "[39]

Even though the evidence was improperly admitted, the court held that the error did not demand reversal.[40] As in many other rape cases, the victim's credibility must be tested against that of the defendant. Here, corroborating testimony of others would have been enough to support the victim's allegations when contrasted against the defendant's weak story.[41]

IV. SENTENCE ENHANCEMENTS

In addition to the prior crimes evidence, the court had to interpret sentence enhancement statutes which the trial court used to justify adding twelve years to the defendant's sentence beyond that which he would have served had he not had prior convictions. One year was added to each count of his sentence for a prior Florida statutory rape charge, and five years were added to each count for a prior California rape conviction.[42] The court was forced to determine whether the trial court properly applied section 1170.1 of the Penal Code.[43]

Section 1170.1 deals with enhancements for sex-related offenses like those in Penal Code section 667.6(a).[44] It provides that "the number of enhancements which may be imposed shall not be limited" and "shall be a full and separately served enhancement."[45]

The court determined that, although section 1170.1(i) was writ-

36. 27 Cal. 3d at 318, 611 P.2d at 890, 165 Cal. Rptr. at 296 (emphasis in original).
37. 36 Cal. 3d at 88, 679 P.2d at 7, 201 Cal. Rptr. at 573.
38. *Id.* at 88-89, 679 P.2d at 7-8, 201 Cal. Rptr. at 573-74.
39. *Id.* at 89, 679 P.2d at 8, 201 Cal. Rptr. at 574.
40. *Id.*
41. *Id.*
42. *Id.* California Penal Code section 667.5(b) requires the court to "impose a one-year term for each prior separate prison term served for any felony; . . .", CAL. PENAL CODE § 667.5(b) (West Supp. 1984), and section 667.6(a) requires the court to impose a five year enhancement for each prior sex offense conviction listed in the statute. *Id.* § 667.6(a).
43. CAL. PENAL CODE § 1170.1 (West Supp. 1984).
44. *See supra* note 42.
45. CAL. PENAL CODE § 1170.1(i) (West Supp. 1984).

ten to nullify limitations in sentence enhancement provisions in other parts of section 1170.1, the trial court read 1170.1(i) too broadly.[46] The enhancement provisions of 1170.1 concern enhancements based on the nature of the offender (i.e., defendant with prior convictions) and based on the nature of the offense (e.g., use of a gun). The latter enhancements add to the various counts of the sentence, while the former type of enhancements do not, and can only be added once to the aggregate sentence.[47]

The court reasoned that since sections 1170.1(i) and 667.6 were enacted as part of the same legislation to deal more harshly with sex offenders, the essential intent of the statutes was the same.[48] The court then compared section 667.6 (concerning sex-related offenses) to section 667.5 (concerning all offenses). Its conclusion was that the legislature did not contemplate any different treatment in the two provisions. Therefore, like section 667.5, sections 667.6 and 1170.1(i) could only be used to add enhancements to the aggregate sentence, not to each individual count of the sentence.

V. Concurring Opinions

Concurring opinions were lodged separately by Justices Reynoso and Richardson. Justice Reynoso presented an interesting argument that the prior crimes evidence was admissible. Justice Richardson disapproved of the court's disdain for *People v. Thomas.*

Justice Reynoso agreed that common plan or scheme evidence requires that there be some actual issue which can be proven by the evidence, such as identity or intent. Although he agreed that identity was not in question, he felt that the defendant's intent was an actual issue[49] because the defendant had claimed that Miss B. was a willing participant.[50]

The reasoning of Justice Reynoso is sound; rape, by definition, requires the intent to accomplish intercourse by the use of force or threat. Therefore, where the defendant claims that the victim is a willing participant, his intent to achieve his goal by threat or force must be determined and "a reasonable belief of consent will

46. 36 Cal. 3d at 90, 679 P.2d at 8-9, 201 Cal. Rptr. at 574-75.
47. *Id.* at 90, 679 P.2d at 9, 201 Cal. Rptr. at 575.
48. *Id.* at 91, 679 P.2d at 9-10, 201 Cal. Rptr. at 575-76.
49. *Id.* at 92-93, 679 P.2d at 10-11, 201 Cal. Rptr. at 576-77 (Reynoso, J., concurring and dissenting).
50. *Id.* at 81, 679 P.2d at 3, 201 Cal. Rptr. at 569.

negate intent."[51]

The majority dealt with the intent question in a rather simplistic manner. It suggested in a footnote[52] that the defendant's intent was simply to have intercourse and was not ambiguous. Being unambiguous, prior crimes evidence did not relate to an issue in dispute except the defendant's disposition to rape.

After Justice Reynoso's opening barrage of sound reasoning, the application of his comments to the present case fails. He first determined that the other offenses to which the witnesses testified were logically relevant to prove the defendant's intent apart from disposition.[53] He then went on to conclude that in applying *Thompson*, the evidence was of the required *substantial* probative value.[54] Even though the evidence may have been probative, it certainly was not of substantial probative value. Thus, it is almost inconceivable to think that it could be so substantially probative so as to outweigh its obvious prejudicial effect.

Justice Richardson's concurring opinion took exception to the majority's disapproval of *Thomas*.[55] He was of the opinion that the prior crimes evidence should have been allowed under the common plan or scheme exception.[56] His reasoning was that, where distinctive elements exist in prior crimes and in the present offense, the evidence does not go to prove disposition, but instead shows that since the defendant committed the other crimes he probably committed the present similar misdeed. As the majority would probably have responded, the evidence Justice Richardson would have admitted is of little or no value unless there truly was an issue of identity, or perhaps an overall design of which the present case was an element. No such issues were presented in this case.

VI. Impact and Conclusion

The importance of *Tassell* is that it finally brings sex-related crimes under the general rules which apply when the prosecution attempts to admit prior crimes evidence. Instead of finding peculiar sex crimes exceptions to the rule, courts can rely on the reasoning of *Thompson* in determining whether or not prior crimes evidence should be admitted. The evidence must be relevant to

51. *Id.* at 94, 679 P.2d at 11, 201 Cal. Rptr. at 577 (Reynoso, J., concurring).
52. *Id.* at 88 n.7, 679 P.2d at 7-8 n.7, 201 Cal. Rptr. at 573-74 n.7.
53. *Id.* at 94-95, 679 P.2d at 12, 201 Cal. Rptr. at 578 (Reynoso, J., concurring).
54. *Id.* at 95-96, 679 P.2d at 12-13, 201 Cal. Rptr. at 578-79 (Reynoso, J., concurring).
55. *Id.* at 96, 679 P.2d at 13, 201 Cal. Rptr. at 579 (Richardson, J., concurring and dissenting).
56. *Id.*

prove a fact actually in issue and the relevancy must be substantial so that the probative value will outweigh the prejudicial effect.

The interesting variable in *Tassell* is that it was a pre-Proposition 8[57] case. As such, the impact of Proposition 8 on prior crimes evidence is uncertain. Whereas the majority paid little attention to the possible impact of Proposition 8,[58] Justice Richardson's concurring opinion expressed little doubt that the rules with respect to prior crimes evidence would necessarily be relaxed.[59]

Upon examination, Justice Richardson was probably correct about the effect Proposition 8 will have on prior crimes evidence. The standard for admitting prior crimes and other evidence will be that the evidence is relevant and legally admissible under Evidence Code section 352.[60] In particular, the new standard is more open than that pronounced in *Thompson,* which demanded that prior crimes evidence be *substantially relevant* to some fact in issue. As yet, the California Supreme Court has not had the opportunity to address this question.

XVIII. FAMILY LAW

Father's ignorance of his rights invalidates agreement for entry of judgment ordering child support payments: **County of Los Angeles v. Soto.**

In *County of Los Angeles v. Soto,*[1] the court held that an Agreement for Entry of Judgment in which a non-custodial parent acknowledged the paternity of a child and stipulated to the entry of judgment ordering payment of child support,[2] could be set aside

57. Among other provisions, Proposition 8, "The Victims Bill of Rights," added section 28(d) to article 1 of the California Constitution. It provides that no relevant evidence can be excluded from a criminal action, Evidence Code section 352 and others notwithstanding. CAL. CONST. art. 1 § 28(d).

58. 36 Cal. 3d at 82 n.1, 679 P.2d at 3 n.1, 201 Cal. Rptr. at 569 n.1.

59. *Id.* at 96-97, 679 P.2d at 13, 201 Cal. Rptr. at 579 (Richardson, J., concurring and dissenting).

60. *See supra* note 57.

1. 35 Cal. 3d 483, 674 P.2d 750, 198 Cal. Rptr. 779 (1984). Opinion by Grodin, J., with Bird, C.J., Broussard and Reynoso, JJ., concurring. Separate concurring and dissenting opinion by Richardson, J., with Mosk and Kaus, JJ., concurring.

2. This agreement was executed pursuant to Welfare and Institutions Code section 11476.1, which at that time provided that:

> In any case where the district attorney has undertaken enforcement of support, the district attorney may enter into an agreement with the non-custodial parent, on behalf of the custodial parent, a minor child, or chil-

upon a showing that the non-custodial parent was unaware of his or her rights concerning the agreement and would not have executed that agreement had he or she been aware of those rights.

Ezequiel A. was born on April 25, 1977. In June of 1978, Enrique Soto executed an "Agreement for Entry of Judgment" which had been presented to him by a child support investigator of the Los Angeles County District Attorney's office. The Agreement recited that Soto was the father of Ezequiel A., and was able to pay child support of $120 per month. The Agreement also stipulated to the entry of judgment ordering such child support payments. Judgment was entered on September 15, 1978.

Two years later, when Soto faced an order to show cause why he should not be held in contempt for failure to make the required child support payments, he moved to vacate the September 15, 1978 judgment. Soto claimed that the manner in which the consent was obtained constituted a denial of due process, and that the agreement had not been executed voluntarily and knowingly. The trial court determined that the investigator had not advised Soto of his right to a judicial proceeding at which the state would have the burden of proving paternity and the amount of support to be paid. The court, relying on *County of Ventura v. Castro,*[3] granted defendant's motion to set aside the judgment.

The *Castro* holding had invalidated a similar agreement based on a finding that the agreement did not demonstrate, on its face,

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dren, for the entry of a judgment determining paternity, if applicable, and for periodic child support payments based on the noncustodial parent's reasonable ability to pay. Prior to entering into this agreement, the noncustodial parent shall be informed that a judgment will be entered based on the agreement. The clerk shall file the agreement without the payment of any fees or charges. The court shall enter judgment thereon without action. . . .

CAL. WELF. & INST. CODE § 11476.1 (West 1980).

This section was amended in 1980 to require that:

A judgment based on the agreement shall be entered only if one of the following requirements is satisfied:

(1) The noncustodial parent is represented by legal counsel and the attorney signs a certificate stating: "I have examined the proposed judgment and have advised my client concerning his or her rights in connection with this matter and the consequences of signing or not signing the agreement for the entry of the judgment and my client, after being so advised, has agreed to the entry of the judgment."

(2) A judge of the court in which the judgment is to be entered, after advising the noncustodial parent concerning his or her rights in connection with the matter and the consequences of agreeing or not agreeing to the entry of the judgment, makes a finding that the noncustodial parent has appeared before the judge and the judge has determined that under the circumstances of the particular case the noncustodial parent has willingly, knowingly and intelligently waived his or her due process rights in agreeing to the entry of the judgment.

CAL. WELF. & INST. CODE § 11476.1 (West Supp. 1984).

3. 93 Cal. App. 3d 462, 156 Cal. Rptr. 66 (1979).

that the defendant had knowingly, voluntarily, and intelligently waived his rights and that the statute[4] did not require a prejudgment judicial determination that a knowing, voluntary and intelligent waiver had been made.[5] The *Soto* court noted, however, that the issue to be determined was not the question of whether *Castro* should be retroactively applied,[6] but whether the requirements of due process had been complied with in the instant case.

The court first determined that freedom from an incorrect imposition of a parent-child relationship was a compelling, fundamental right, equivalent in importance to a parent's interest in maintaining such a relationship. The court noted that a determination of paternity was potentially disruptive of established family relationships and damaging to personal reputation. Further, such a finding carried with it an obligation to support and educate a child, an obligation which is not dischargeable in bankruptcy or by the child's attainment of majority, and which exposes a defendant to deprivation of property and possibly liberty.[7]

However, the court stopped short of holding that agreements executed under section 11476.1 were automatically void. The court noted that the defendant had been advised of the fact that the agreement would lead to the entry of default judgment against him. Further, had the defendant elected not to sign the stipulation, he would have been offered a meaningful opportunity to be heard on the issues prior to a judicial determination of his rights. The court did rule that a knowing waiver was essential to a valid judgment under section 11476.1, but stated that "[a] final judgment need not be invalidated solely because a defendant has not been advised of his rights, or because that advice does not appear on the record,"[8] noting that the defendant might in fact have been aware of the rights he was waiving and the consequences of the agreement. The court held that:

> [T]he defendant must establish that he was, in fact, unaware of the consequences of the agreement or of the fact that he waived his rights by exe-

4. CAL. WELF. & INST. CODE § 11476.1 (West 1980).

5. It was in response to the *Castro* decision that § 11476.1 was amended in 1980. *See supra* note 2.

6. Justice Richardson wrote a dissenting opinion, discussed *infra* at notes 10-11 and accompanying text.

7. *See* Salas v. Cortez, 24 Cal. 3d 22, 593 P.2d 226, 154 Cal. Rptr. 529 (1979), in which the California Supreme Court determined that these interests were sufficiently compelling to mandate appointment of counsel for indigent defendants in paternity actions.

8. 35 Cal. 3d at 491, 674 P.2d at 755, 198 Cal. Rptr. at 784.

> cuting the agreement, and that he would not have executed the agreement had he been aware of these matters. Only then must the judgment be set aside because the agreement on which it is based was not voluntary and intelligent. . . .[9]

The case was remanded to the superior court with orders to allow the defendant the opportunity to present evidence of his lack of knowledge of his rights at the time of the execution of the agreement, of the effect of that lack of knowledge on his decision to stipulate to entry of default judgment, and of his diligence in seeking to have the 1978 judgment set aside.

Justice Richardson, in an opinion in which Justices Mosk and Kaus concurred, dissented from the holding of the majority insofar as it allowed the defendant to "collaterally attack" the original judgment. This view was grounded on a determination that the *Castro* holding should be denied retroactive effect.[10] Justice Richardson noted that the wide use of such agreements and widespread reliance on their validity, as well as the ability of the writs to modify such judgments upon proper showing, compelled a holding that such judgments should not be voidable except through the statutory mechanisms which provide for methods of setting aside judgments.[11]

XIX. GOVERNMENT AID

A. *State must consider ineligible undocumented alien children in a household when determining the amount of AFDC benefits to award to eligible children in the household:* Darces v. Woods.

I. INTRODUCTION

In *Darces v. Woods*,[1] an undocumented alien and mother of six children received Aid to Families with Dependent Children (AFDC) for her three eligible native-born citizen children. The State Department of Social Services (DSS), administrators of the program, refused to take into account Mrs. Darces' three undocu-

9. *Id.* at 492, 674 P.2d at 755-56, 198 Cal. Rptr. at 784-85.

10. This was the holding of the California Court of Appeal in County of Los Angeles v. Superior Court, 123 Cal. App. 3d 988, 177 Cal. Rptr. 70 (1981), which was disapproved by the majority in the *Soto* case. 35 Cal. 3d at 492 n.4, 674 P.2d at 756 n.4, 198 Cal. Rptr. at 785 n.4.

11. Citing CAL. CIV. PROC. CODE § 473 (West Supp. 1984), which establishes a six-month limitation within which judgments may be set aside on the grounds of mistake, inadvertence, surprise, or excusable neglect.

1. 35 Cal. 3d 871, 679 P.2d 458, 201 Cal. Rptr. 807 (1984). Opinion by Reynoso, J., with Bird, C.J., Mosk, and Broussard, JJ., concurring. Separate concurring opinion by Kaus, J., with Grodin and Richardson, JJ., concurring. Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

mented alien children in its determination of the amount of benefits granted to the three citizen children. Darces brought an action based upon statutory and constitutional grounds in an attempt to force the DSS to account for all her children. The supreme court determined that Darces' right to equal protection had been violated and directed the DSS to take into account all six children.

II. FACTUAL BACKGROUND[2]

Prior to March, 1979, Darces had received a monthly AFDC grant for the benefit of her three eligible citizen children.[3] The amount of the grant had been calculated according to standards used for all AFDC recipients.[4] Under those standards, the amount of the grant was based upon the number of eligible persons living in the home.[5] This number is called the family budget unit (FBU).[6] All undocumented aliens are ineligible for AFDC and therefore excluded from the FBU.[7] The DSS, however, did allow a deduction for Mrs. Darces, even though she was also an undocumented alien.[8]

In early 1979, Darces' employment income increased. As a result, the DSS in March reduced the amount of her monthly grant.[9] Darces requested a fair hearing with the DSS to challenge the

2. The facts had been stipulated to by both parties. *Id.* at 879, 679 P.2d at 463, 201 Cal. Rptr. at 812.

3. Darces' monthly grant prior to the disputed reduction was $356 for the benefit of her three eligible children. *Id.* at 877, 679 P.2d at 461, 201 Cal. Rptr. at 810.

4. The method of calculation was set forth in the Manual of Eligibility and Assistance Standards (EAS). The EAS contains provisions defining eligibility for the AFDC program and calculating the amount of aid based on the number of eligible persons. This manual was promulgated by the defendant, Marion Woods, pursuant to his authority as director of the DSS. CAL. WELF. & INST. CODE § 10553 (West 1980). 35 Cal. 3d at 877-78, 679 P.2d at 461-62, 201 Cal. Rptr. at 810-11.

5. *See* 42 U.S.C. § 602 (1982).

6. 35 Cal. 3d at 877, 679 P.2d at 462, Cal. Rptr. at 811. *See* EAS, *supra* note 4.

7. 45 C.F.R. § 233.50 (1983). The section provides in pertinent part:

> A state plan under . . . title IV-A (AFDC) . . . shall provide that an otherwise eligible individual, dependent child, or a caretaker relative or any other person whose needs are considered in determining the need of the child or relative claiming aid, must be either:
>
> (a) A citizen, or
>
> (b) An alien lawfully admitted for permanent residence or otherwise permanently residing in the United States under color of law. . . .

Id.

8. 35 Cal. 3d at 878, 679 P.2d at 462, 201 Cal. Rptr. at 811. *See* EAS, *supra* note 4.

9. 35 Cal. 3d at 879, 679 P.2d at 462-63, 201 Cal. Rptr. at 811.

grant.[10] At the hearing, the DSS upheld the proposed reduction.[11] Thereafter, Darces brought an action for a writ of mandamus against the director of the DSS seeking an injunction to restrain application of the DSS policy. Each party moved for summary judgment. The trial court granted summary judgment in favor of the DSS, believing that to hold for Darces would allow her to effectively receive additional aid for ineligible persons.[12] The supreme court reversed, directing the trial court to grant Darces' motion for summary judgment.[13]

III. ANALYSIS

A. Darces' Statutory Contention

Darces first argued that the DSS policy of excluding undocumented aliens was inconsistent with the state and federal laws which governed the AFDC program. Darces contended that this exclusion of the undocumented children and the failure to consider their needs conflicted with the underlying and primary purpose of the AFDC program to protect needy children from economic deprivation.[14] The court rejected this contention, holding that the DSS policy of excluding undocumented aliens was properly based on the governing statutes.[15]

AFDC is a cooperative federal-state program financed with federal and state funds.[16] In order to receive federal funding, a state must fully comply with the governing federal law, including federal eligibility standards.[17] The court reviewed the mandate of the federal statutes and California's attempt at compliance there-

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10. *Id.*

11. The hearing officer concluded that the reduction was consistent with existing regulations. *Id.* at 879, 679 P.2d at 462-63, 201 Cal. Rptr. at 811-12.

12. *Id.* at 879-80, 679 P.2d at 463, 201 Cal. Rptr. at 812.

13. *Id.* at 895, 679 P.2d at 474, 201 Cal. Rptr. at 823.

14. Darces asserted that her citizen children had the right to have the amount of her income actually available to them calculated in a fair and realistic manner. 35 Cal. 3d at 876, 679 P.2d at 460, 201 Cal. Rptr. at 809.

15. The court did, however, sympathize with Darces' argument, believing it to "have considerable force as a matter of policy." *Id.* at 876, 679 P.2d at 460-61, 201 Cal. Rptr. at 809-10.

16. 42 U.S.C. §§ 601-676 (1982). The program is one of four categorical public assistance programs established by the Social Security Act of 1935. The other three programs are Old Age Assistance, 42 U.S.C. §§ 301-433 (1982); Aid to the Blind, 42 U.S.C. §§ 1201-1206 (1982); and Aid for the Permanently and Totally Disabled, 42 U.S.C. §§ 1351-1355 (1982).

17. Specifically, the plan must fulfill the requirements of 42 U.S.C. § 602(a) and meet the approval of the Secretary of Health and Human Services. See 45 C.F.R. §§ 233.10-233.145 (1983) for implementing regulations. For decisional authority concerning compliance with federal eligibility standards, see Conover v. Hall, 11 Cal. 3d 842, 847, 523 P.2d 682, 684-85, 114 Cal. Rptr. 642, 644-45 (1974).

with.[18] Federal law expressly limits AFDC grants to citizens and legally admitted aliens.[19] The court, therefore, found California in full compliance.

Although conceding that federal law excluded undocumented aliens, Darces nevertheless argued that the statutory policies and prior decisional authority compelled recognition of the amount of income actually available to the citizen children.[20] In view of the clear and express legislative intent to exclude any consideration of the needs of illegal aliens, the court quickly rejected this contention.[21]

B. Constitutional Challenge

In an alternative argument, Darces claimed that the DSS policy violated the equal protection guarantees of the fourteenth amendment of the United States Constitution and article I, section 7 of the California Constitution.[22] Those sections require "that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."[23]

The court's first task was to determine which standard of review to apply: rational basis test, strict scrutiny, or "middle level" review.[24] To do so, the court initially looked to the nature of the classification involved. The DSS policy created two classes of

18. *See* 35 Cal. 3d at 880-85, 679 P.2d at 463-67, 201 Cal. Rptr. at 812-16.

19. 42 U.S.C. § 602(a) (1982). *See also supra* note 7 for a federal regulation containing almost identical language. California statutes and regulations virtually mirror the federal laws. *See* CAL. WELF. & INST. CODE § 11104 (West 1980); EAS, *supra* note 4.

20. 35 Cal. 3d at 883, 679 P.2d at 466, 201 Cal. Rptr. at 815.

21. The court stated: "We find this argument unpersuasive in the face of a statutory scheme that evinces the clear intent to exclude any and all consideration of the needs of undocumented children." *Id.*

22. *Id.* at 876, 679 P.2d at 461, 201 Cal. Rptr. at 810. Darces contended that the regulations improperly singled out eligible children living with undocumented siblings from eligible children whose siblings were also eligible.

23. *Id.* at 885, 679 P.2d at 467, 201 Cal. Rptr. at 816 (quoting Purdy & Fitzpatrick v. State, 71 Cal. 2d 566, 578, 456 P.2d 645, 653, 79 Cal. Rptr. 77, 85 (1969)). *See* Reed v. Reed, 404 U.S. 71, 75-76 (1971).

24. The rational basis test requires that classifications bear a rational relationship to a legitimate public purpose. *In re* King, 3 Cal. 3d 226, 232, 474 P.2d 983, 987, 90 Cal. Rptr. 15, 19 (1971). The strict scrutiny test requires that classifications be necessary to further a compelling state interest. Westbrook v. Mihaly, 2 Cal. 3d 765, 784-85, 471 P.2d 487, 500-01, 87 Cal. Rptr. 839, 852-53 (1970), *cert. denied,* 403 U.S. 922, *vacated,* 403 U.S. 915 (1971). The middle level of review requires that a classification be precisely tailored to serve a compelling governmental interest. Plyler v. Doe, 457 U.S. 202 (1982).

AFDC-eligible children—"those who reside with ineligible persons, and those who do not."[25] Within the former classification, Darces fell into an even narrower subclass, specifically, AFDC-eligible children who reside with ineligible undocumented aliens. Members of this subclass were always excluded from the FBU, whereas other ineligible persons in the wider classification could be included within the FBU.[26] Consequently, the court determined that the subclassification discriminated against innocent children solely on the basis of their familial relationship and residency with undocumented aliens.[27]

In view of this determination, the court rejected the argument of the DSS that the rational basis test should apply because the case concerned regulations in the economic and social welfare area. The court distinguished the cases cited by the DSS[28] and instead relied upon the analysis and reasoning of *Plyler v. Doe*,[29] although acknowledging that the case was not squarely applicable. The court believed that in both *Plyler* and Darces' situation, the classifying trait was one over which children had no control in that they were placed in a disadvantaged position as the result of the undocumented status of a family member.[30]

The court, however, then diverted from the *Plyler* decision. Whereas in *Plyler* the United States Supreme Court held that an intermediate level of review should apply,[31] the court in *Darces* ruled that because the California Constitution provides stricter safeguards to citizens, the strict scrutiny test was required.[32] In order to survive this rigid test, the DSS had the burden of demonstrating a compelling state interest which was furthered by the classification.[33] The only interests which the DSS offered as support were fiscal concerns which the court quickly rejected as in-

25. 35 Cal. 2d at 886, 679 P.2d at 468, 201 Cal. Rptr. at 817.

26. *Id.* at 886-87, 679 P.2d at 468, 201 Cal. Rptr. at 817.

27. Moreover, the court declared: "We should be similarly hostile to legislative classifications which deprive eligible children of governmental beneficence simply because they are brothers or sisters of undocumented aliens." *Id.* at 887-88, 679 P.2d at 469, 201 Cal. Rptr. at 818.

28. The DSS had relied on Dandridge v. Williams, 397 U.S. 471 (1970), which had applied the rational basis test to legislation in the economic and social welfare area. The court distinguished *Dandridge* by noting that that case had not involved "a colorable claim of discrimination," as here.

29. 457 U.S. at 202 (1982).

30. The court stated: "The primary underpinning of *Plyler*—that innocent children cannot be explicitly disadvantaged on the basis of their status of birth—unquestionably applies to the instant case." 35 Cal. 3d at 891, 679 P.2d at 471, 201 Cal. Rptr. at 820.

31. 457 U.S. at 217.

32. 35 Cal. 3d at 892-93, 679 P.2d at 472, 201 Cal. Rptr. at 821.

33. *See supra* note 24.

sufficient.[34] Since the DSS had no compelling state interest, the policy of excluding illegal aliens failed the strict scrutiny test. Therefore, the court found the policy to be in violation of the California Constitution. Consequently, the trial court decision was reversed.[35]

Three justices concurred in the reversal. They did not believe, however, that the court should have determined the constitutional issue. Instead, these justices believed that, under federal law, AFDC benefits may not be reduced on the basis of income which is not actually available to a recipient.[36] Since a portion of Darces' income went to the three undocumented aliens, her total income was not "actually available" to the three eligible children. Thus, because the DSS regulation did not take this situation into account, these justices believed it violated federal law.[37]

IV. CONCLUSION

In *Darces,* the California Supreme Court held that the equal protection clause of the California Constitution forbids the state from infringing the rights of citizen children who are eligible for governmental assistance on the basis that they live with relatives who are undocumented aliens. The effect of the decision should not be widespread since the decision was narrowly limited to those AFDC-eligible children cohabiting with illegal aliens. However, the decision will cost the state additional tax dollars since, under existing federal law, California will have to bear the entire brunt of the additional cost of the state AFDC program.

B. *Income tax refunds are not income for purposes of determining the amount of aid available under AFDC:* **Vaessen v. Woods.**

In response to the federal Omnibus Budget Reconciliation Act of 1981,[1] the California Department of Social Services maintained that it was required to treat state and federal income tax refunds

34. The court flatly declared: "Preservation of the fisc is an insufficient justification." 35 Cal. 3d at 894, 679 P.2d at 473, 201 Cal. Rptr. at 822.

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

36. 35 Cal. 3d at 897-98, 679 P.2d at 475-76, 201 Cal. Rptr. at 824-25 (Kaus, J., concurring).

37. *Id.* at 897, 679 P.2d at 476, 201 Cal. Rptr. at 825 (Kaus, J., concurring).

1. Omnibus Budget Reconciliation Act of 1981, PUB. L. No. 97-35, 95 Stat. 357, 844 (1981).

as income[2] in the month received by participants in the Aid for Families With Dependent Children (AFDC) program.[3] As a result, some recipients of AFDC had their monthly benefits reduced or denied, and a class action was initiated.[4] At issue in *Vaessen v. Woods*[5] was whether the Department of Social Services'[6] policy of treating income tax refunds as income in determining the level of a recipient's aid comports with the state and federal laws controlling the AFDC program.[7]

Established in 1935,[8] AFDC has been characterized as a scheme of "cooperative federalism" which is financed on a matching fund basis by the federal government and is administered by the states.[9] The major goals of AFDC are to provide financial support to disadvantaged families with dependent children in order to maintain the family unit[10] and to promote economic independence for these families through employment.[11] In accomplishing these goals, the states are given broad discretion, including power to establish eligibility criteria and levels of assistance.[12]

In *Vaessen,* it was contended that the appellant had exceeded its authority in characterizing state and federal income tax returns as income. In determining the level of financial need, the

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2. The federal statute requires the California Department of Social Services to consider "any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual living in the same house as such child and relative whose needs the State determines should be considered in determining the need of the child or relative claiming such aid." 42 U.S.C. § 602(a)(7)(A) (1982).

3. Hereinafter referred to as AFDC.

4. The named plaintiffs in the suit included Janet Vaessen and Carol Esquibel. Both had been employed for a sufficient amount of time to accrue some withholdings, but were not self-sufficient within the meaning of California Welfare and Institutions Code section 11452.

5. 35 Cal. 3d 749, 677 P.2d 1183, 200 Cal. Rptr. 893 (1984). Opinion by Reynoso, J., with Bird, C.J., Mosk and Broussard, JJ., concurring. Separate dissenting opinion by Richardson, J., with Kaus and Grodin, JJ., concurring. Richardson, J., Retired Associate Justice of the supreme court sitting under assignment by the Chairperson of the Judicial Council.

6. Hereinafter referred to as appellant.

7. It was estimated that approximately 22,700 California AFDC recipients received federal refunds in 1976-77. *Id.* at 753, 677 P.2d at 1185, 200 Cal. Rptr. at 895.

8. This program was created by the passage of the Social Security Act of 1935. 42 U.S.C. §§ 601-676 (1982). *See* Wedemeyer & Moore, *The American Welfare System,* 54 CALIF. L. REV. 326 (1966).

9. King v. Smith, 392 U.S. 309, 316 (1968). However, federal funding is conditioned on compliance with all applicable federal regulations. *See* 45 C.F.R. §§ 233.10-233.145 (1983).

10. H.R. DOC. NO. 81, 74th Cong., 1st Sess. 29-30 (1935). *See* Note, *Eligibility of the Unborn for AFDC Benefits: The Statutory and Constitutional Issues,* 54 B.U.L. REV. 945, 955-58 (1974).

11. Shea v. Vialpando, 416 U.S. 251, 253 (1974).

12. *Id.* at 253; Jefferson v. Hackney, 406 U.S. 535, 541 (1972) (recognizing the state of Texas' right to select its own benefits formula).

federal statute[13] requires the state to distinguish between "income"[14] and "resources."[15] The crucial difference between these categories is that once the amount of assistance payments has been established,[16] any item characterized as additional nonexempt income is deducted from the family's assessed need for the following month.[17]

Appellant contended that the decision to treat income tax returns as income is within the discretion vested in the state to promulgate regulations;[18] and moreover, that since 1981, federal law has required that returns be treated as lump sum income.[19] In rejecting this position, the court focused on the policy behind AFDC. In order to encourage the care of dependent children in the family home, the federal provisions "indicate that only monies which are regularly and actually available to meet the current needs of AFDC recipients may be considered income to recipient families. Treating tax refunds as resources has the additional salutary effects of providing an incentive for employment and promoting administrative efficiency."[20]

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13. 42 U.S.C. §§ 602(a)(7)-(8) (1982).

14. Because of AFDC's goal of promoting self-supporting family units, certain work-related expenses receive special treatment and may be deducted from "income" so the family is not penalized. 42 U.S.C. § 602(a)(8) (1982).

15. The term "resources" allows a family to accumulate up to $1,000 in equity, a home—if owned by the family and occupied by the child—and a car valued at no more than $1,500. 42 U.S.C. § 602(a)(7)(B) (1982); 45 C.F.R. § 233.20(a)(3)(i)(b) (1983).

16. In California, a "flat grant" system is used. The maximum level of assistance available is determined by the number of people in the family unit. From this amount, a deduction is made for all nonexempt income received by members of the family. CAL. WELF. & INST. CODE § 11450 (West Supp. 1984); *see also* Conover v. Hall, 11 Cal. 3d 842, 523 P.2d 682, 114 Cal. Rptr. 642 (1974) (striking down a state provision which limited the amount of work-related expenses in contradiction with federal requirements).

17. The federal government requires all states to use this retrospective budgeting technique for purposes of calculating the amount of assistance available by reviewing the actual income or circumstances in the preceeding month. 42 U.S.C. § 602(a)(13) (1982), 45 C.F.R. §§ 233.31-233.37 (1983).

18. *See* CAL. WELF. & INST. CODE §§ 10600, 10604 (West 1980).

19. While neither Congress nor the California legislature has defined the terms "income" or "resources," the appellant maintained that 42 U.S.C. § 602(a)(17) (1982) was applicable. 35 Cal. 3d at 757, 677 P.2d at 1188, 200 Cal. Rptr. at 898.

20. 35 Cal. 3d at 757, 677 P.2d at 1188, 200 Cal. Rptr. at 898. Support for this position is found in several federal statutes and regulations. *See* 42 U.S.C. § 602(a)(22) (1982) (when the state seeks to recover overpayments, it shall not reduce the aid paid, when coupled with liquid resources and income, to less than 90% of the level given a family of the same composition with no other income); 45

It is on this point that Justice Richardson based his dissent. He argued that the function of the court is solely to assure that the department's regulations are not in conflict with the applicable federal statutes and regulations.[21] "In summary, in order to find a conflict, the majority must reject a straightforward reading of the applicable statutes and instead intuitively glean congressional and administrative intent from selected portions of the applicable statutes and regulations."[22] Contending that the conflict had been "manufactured,"[23] Justice Richardson maintained that employment generated withholdings are "income" set aside in anticipation of tax liability. Therefore, these withholdings must be classified as "net income" when refunded.[24] When returned to the taxpayer, these funds are again "actually and currently available."[25]

Other cases which have specifically addressed the problem of characterizing income tax returns refute this view.[26] These cases relied on a federal regulation which limited "income" to "only such net income as is actually available for current use on a regular basis. . . ."[27] Given that refunds are made and received only once a year and that relatively small amounts are involved, the court was unwilling to consider these funds as regularly received.[28]

C.F.R. § 233.20(a)(3)(iii) (1983) (permits states to prorate lump sum income from employment contracts); 45 C.F.R. § 233.20(a)(3)(ii)(d) (1983) (only currently available net income and resources need be considered).

21. CAL. WELF. & INST. CODE §§ 10600, 10604 (West 1980). *See* Allen v. Bergland, 661 F.2d 1001, 1005 (4th Cir. 1981) (in reviewing South Carolina's lump sum provision under the federal food-stamp program, "the relevant inquiry is whether the department's interpretation is *inconsistent* with the regulations and not whether some other interpretation is consistent with those same regulations." (emphasis in original)).

22. 35 Cal. 3d at 770, 677 P.2d at 1198, 200 Cal. Rptr. at 907 (Richardson, J., dissenting).

23. *Id.*

24. 45 C.F.R. § 233.20(a)(11)(i) (1983). This is because such measures do not fall into any of the recognized exceptions.

25. 35 Cal. 3d at 765, 677 P.2d at 1194, 200 Cal. Rptr. at 904 (Richardson, J., dissenting).

26. *See, e.g.,* Kaisa v. Chang, 396 F. Supp. 375 (D. Hawaii 1975); Anderson v. Morris, 87 Wash. 2d 706, 558 P.2d 155 (1976). *But cf.* Steere v. State Dep't of Pub. Welfare, 308 Minn. 390, 243 N.W.2d 112 (1976); Walker v. Juras, 16 Or. App. 295, 518 P.2d 663 (1974).

27. 45 C.F.R. § 233.20(a)(3)(ii)(c) (1973). The court stated that the fact that this specific language does not appear in the current version of the Code of Federal Regulations does not change the import of the overall scheme, which is to insure that minimally adequate care is being given needy children. 35 Cal. 3d at 760, 677 P.2d at 1190, 200 Cal. Rptr. at 900.

28. *Id.* at 757, 677 P.2d at 1188, 200 Cal. Rptr. at 898. While the department estimated that the average refund to an AFDC participant in 1976 was $131, it also estimated that only 5% of AFDC recipients actually receive refunds. *Id.* at 753, 677 P.2d at 1185, 200 Cal. Rptr. at 895.

Until 1971, this was the policy of the appellant department. In *County of Alameda v. Carleson*,[29] several California counties sought review of the department's exclusion of involuntary deductions from earned income, while treating tax refunds as resources when they were received. The court approved the department's policy, finding that this procedure clearly complied with the federal requirement that only "*net* income available for current use" be considered.[30] However, in 1971, the department reversed its policy and began treating tax refunds as income.

Offering no persuasive reason for this change in policy, the department maintained that the 1981 revisions of federal laws[31] require the department to consider tax refunds as lump sum income to AFDC recipients.[32] The department gave the statute a broad reading, requiring it to consider any amount of lump sum income not exempted, which, taken together with all other income, reduces the family's eligibility.[33] The court, however, considered this interpretation to be in conflict with the statute's legislative history.[34] Consequently, it affirmed the trial court's preliminary injunction prohibiting the appellant from treating tax refunds as income.[35] Thus, the appellant, California Department of Social Services, is accountable for promoting the basic goals of AFDC, as well as avoiding conflict with applicable federal statutes and regulations.

29. 5 Cal. 3d 730, 488 P.2d 953, 97 Cal. Rptr. 385 (1971).
30. *Id.* at 749, 488 P.2d at 966, 97 Cal. Rptr. at 398.
31. *See supra* note 1.
32. 42 U.S.C. § 602 (a)(17) (1982).
33. *Id.*
34. *See* S. REP. No. 139, 97th Cong., 1st Sess., *reprinted in* 1981 U.S. CODE CONG. & AD. NEWS 771. This report implies that the section was intended to apply to payments which normally would be received monthly, but were for some reason delayed—i.e., social security payments.
35. 35 Cal. 3d at 764, 677 P.2d at 1193, 200 Cal. Rptr. at 903. We believe that not only does this holding further the fundamental statutory purpose of providing economic stability and security to families with dependent children who are in need of and eligible for governmental assistance, but in the long run it also will further the legislative desire that California's public assistance system function in the most efficient and effective manner.

XX. GOVERNMENTAL TORT IMMUNITY

A. *City immune from liability for damages caused by motorist fleeing from police officers attempting to make a traffic stop:* **Kisbey v. State of California.**

Kisbey v. State of California, 36 Cal. 3d 415, 682 P.2d 1093, 204 Cal. Rptr. 428 (1984), determined the liability of a city to third persons injured by the negligent driving of a motorist fleeing from the city's police officers who had stopped, but not detained, the driver. Two San Francisco police officers had responded to a dispatch concerning a possible felony disturbance. Upon arrival, the officers saw a vehicle which had been "involved" in the disturbance leave the scene without its lights on. After following for a short distance, the officers stopped the car in order to question the occupants and cite the driver for traffic violations. When the officers had exited their vehicle, the motorist sped off and collided broadside into plaintiff Kisbey's vehicle.

Kisbey brought a personal injury action against the City of San Francisco, among others. The trial court granted the city's motion for nonsuit. The supreme court affirmed.

The first issue with which the court was faced was whether the officers owed a duty of care to Kisbey. Although the court acknowledged that the issue should have been decided prior to the issue of governmental immunity, the court believed the latter issue to be easier to resolve. Consequently, the court based its affirmation solely upon the issue of immunity without deciding whether the officers were negligent. The court suggested, "[t]hat the life of the law is not logic, but expedience [sic]."

Kisbey argued that the police officers' actions were negligent ministerial acts. The city claimed the officers' acts were discretionary and not negligent. The court, however, ignored these arguments, believing that the discretionary immunity provision on which the parties' arguments had been based was inapplicable. Instead, the court applied Government Code section 845.8 which bars liability for injuries caused by persons resisting or escaping from arrest. The court construed this section as a specific immunity statute applicable to both ministerial and discretionary acts. In addition, the court refused to read technically the words "arrest" and "resisting" contained in the statute, believing that to do so would violate the legislative intent by allowing cracks in the governmental immunity where, for example, the police had not intended a full arrest. As a result, the court held that the nonsuit was proper because the City was immune from any liability under section 845.8.

B. *No liability for failure to implement regulations regarding firearms instruction courses due to governmental immunity:* Nunn v. State of California.

In *Nunn v. State of California,* 35 Cal. 3d 616, 677 P.2d 846, 200 Cal. Rptr. 440 (1984), the appellant was the administratrix of the estate of her husband, a private security guard who was killed while on duty. He had been unarmed because he had not completed a firearms instruction course. This was because the respondent district had refused to give the decedent an opportunity to complete his first test—a prerequisite to obtaining a firearm license. Consequently, the appellant brought, inter alia, a wrongful death action. She alleged that the respondents negligently delayed promulgating regulations to govern a firearms instruction course for employees of licensed private security agencies pursuant to former California Business & Professions Code section 7514.1(a).

The court began its discussion by stating that the government's actions fell within the doctrine of governmental immunity governed by California Government Code sections 818.2 and 821. Since such immunity attaches only to discretionary functions, it was necessary to determine whether the governmental action contemplated by the statutes was purely ministerial in nature. Such a finding would have meant the respondents were not immune from liability. However, the court determined that the implementation of regulations pursuant to section 7514.1 involved discretionary policy or "planning" decisions as opposed to operational decisions. Throughout a series of public hearings and administrative review, the respondent balanced expediency with sufficiency in attaining the statutory purpose: "protecting the public from the danger of incompetent armed private security guards."

Nevertheless, the appellant maintained that section 7514.1(c) imposed a mandatory duty on the respondents to establish the regulation in time to allow private security guards the opportunity to complete firearms training by January 1, 1976. She argued that if the statute imposed a mandatory duty to promulgate regulations, then regardless of the discretionary character of the provisions, violation of the duty was outside the bounds of governmental immunity. The court stated that whether such a mandatory duty was intended was a matter of judicial interpreta-

tion. In light of the procedures followed in promulgating the regulations, it was determined that the legislature intended to give the respondents sufficient flexibility to insure adequate regulations and did not intend to impose a mandatory duty.

Because the respondent District had offered a firearms instruction course and refused to give decedent the examination required to obtain a firearm license before December 31, 1975, appellant contended they were also liable for having "negligently conducted, planned[,] inspected, implemented and administered the testing procedures." The respondent District maintained that the examination was an "integral part of the process" leading to obtaining a license; consequently, the manner and timing of the test were discretionary decisions protected by section 818 immunity. Since the court found that there was no mandatory duty to offer the course, decisions of the respondent on offering the firearms test were also immunized from liability. Hence, the government's actions fell within the doctrine of governmental immunity.

XXI. LABOR RELATIONS

Employer's unilateral policy changes in Arizona violated California requirements to bargain with the employees' union since California workers were affected by the change; unlawfully discharged employees entitled to back pay for days they would actually have worked for the employer: **Nish Noroian Farms v. Agricultural Labor Relations Board.**

In *Nish Noroian Farms v. Agricultural Labor Relations Board,* 35 Cal. 3d 726, 677 P.2d 1170, 201 Cal. Rptr. 1 (1984), the California Supreme Court reviewed a decision and order of the Agricultural Labor Relations Board ("Board") concerning the consequences within California of an agricultural employer's decision concerning work and hiring policies in Arizona. The administrative complaint had alleged that the new policy restricted California residents from doing irrigation work on the company's Arizona properties, that California employees were not rehired because of this policy, and that the company's failure to bargain with the employees' union about this change in policy constituted a violation of California Labor Code section 1153. The court affirmed the Board's order in full and directed the petitioner, Nish Noroian Farms, to reimburse the employees, Becerril and Baca, for back pay owed due to unlawful discharge.

The threshold question was whether the Board had jurisdiction over the dispute. Since the employees' union and the appellant had entered into a written settlement agreement waiving all un-

fair labor practice charges, Noroian maintained that the scope of the Board's order exceeded the specific exception in the agreement concerning the two irrigation workers. However, the language of the agreement was determined to be much broader; it reserved "the alleged layoff and failure . . . to rehire . . . Becerril" for "further investigation" and "independent resolution" by the Board. This charge invoked the Board's jurisdiction and resulted in a full investigation of the policy decisions resulting in the discharge of the irrigation workers.

The appellant contended that it was improper for the Board to assert jurisdiction over the terms and conditions the company placed on employment in Arizona. However, the court focused on the effect discontinuing the dual state irrigator policy had on work allocations within California. They held that Noroian had a mandatory duty to bargain with the union, under section 1153, before making unilateral policy decisions which decreased employees. Since the Board limited its order to the adverse impact on employment suffered in California, territorial jurisdiction and due process requirements were satisfied.

The court also determined that the unlawfully discharged employees were entitled to back pay. The primary goal of a back pay award is to restore the status quo. Recognizing the sporadic nature of agricultural employment, the Board imposed a "daily" formula for calculating back pay which required that interim employment wages be deducted only for those days when the employee would actually have worked for the petitioner. However, the petitioner would be allowed to introduce evidence of the irrigation workers' employment histories to determine how the formula should equitably be applied.

In addition, the appellant-employer was required to post a notice of the Board's action, allow its reading on company time, and send copies of it to present and certain past employees. The court viewed these remedies as appropriate in light of the relatively small cost involved and the intimidating manner in which the company had handled the matter.

No exemption from subsequently enacted rent controls was obtained because amounts expended in reliance on approved subdivision map were insubstantial: **Santa Monica Pines, Ltd. v. Rent Control Board.**

Santa Monica Pines, Ltd. v. Rent Control Board, 35 Cal. 3d 858, 679 P.2d 27, 201 Cal. Rptr. 593 (1984), gave the supreme court the opportunity to review the question of when a property owner obtains a vested right to complete a condominium conversion without having to comply with subsequently enacted municipal rent control procedures.

The appellants' primary argument was that they had acquired a vested right to complete their planned condominium conversion without regard to rent control provisions by the submission of a tentative subdivision map and the commitment to spend over $40,000 prior to the adoption of Santa Monica's rent control scheme. However, before the court will apply the doctrine of equitable estoppel to exempt a land use from subsequently imposed regulations, a party must demonstrate: "(1) a promise such as that implied by a building permit that the proposed use will not be prohibited by a class of restrictions that includes the regulation in question and (2) reasonable reliance on the promise by the promisee to the promisee's detriment." Absent a showing of both elements, a party has not established a vested right.

Regardless of whether tentative map approval may be equated with the promise implied in a building permit for construction, the court held that the amount of money expended in this case was inadequate to confer a vested right. While the appellants claimed to have spent "over $40,000," that figure included $42,000 in licensing fees that were in fact not paid until after the rent control measure was adopted. Although the appellants had committed to pay this sum when the maps were submitted for tentative approval, the court determined that the appellants were aware of the possible impact of the rent control laws on their property. Therefore, all expenditures by the appellants after April 10, 1979—the date the rent control laws were adopted—were characterized by the court as a "calculated risk." Only $1,709 was expended prior to this date. Finding that $1,709 did not comprise a "substantial" percentage of the total investment anticipated (over $60,000), the court held that the appellants had not demonstrated reasonable reliance. Consequently, their claim of a vested right failed.

It was also alleged that the state Subdivision Map Act pre-

empted regulation of condominium conversion through rent control laws. However, the court affirmed the view that rent control was properly within the municipality's police powers. None of Santa Monica's requirements for condominium conversion permits were in conflict with the state act. Furthermore, the respondents maintained that such provisions were essential to the success of the rent control laws. The court agreed and held that the local licensing requirements were not preempted by the Subdivision Map Act.

XXIII. MEDICAL MALPRACTICE

Code of Civil Procedure section 667.7 providing for the periodic payment of judgments in medical malpractice suits held constitutional: **American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.**

In *American Bank & Trust Co. v. Community Hospital of Los Gatos-Saratoga, Inc.*,[1] the court ruled that section 667.7 of the Code of Civil Procedure[2] does not violate due process or equal protection principles, and does not detrimentally impact on a litigant's constitutional right to a jury trial. Section 667.7 permits health care providers who incur judgments of $50,000 or more due to professional negligence to pay the judgment through a court determined plan of periodic payments.[3] The statute was adopted

1. 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984). Opinion by Kaus, J., with Broussard, Grodin and Feinberg, JJ., concurring. Separate dissenting opinion by Mosk, J., with Rattigan, J., concurring. Separate dissenting opinion by Bird, C.J., with Rattigan, J., concurring. Feinberg and Rattigan, JJ., sitting under assignment by the Chairperson of the Judicial Council.

This case was previously heard and decided by the supreme court. *See* American Bank and Trust Co. v. Community Hosp., 33 Cal. 3d 664, 660 P.2d 829, 190 Cal. Rptr. 371 (1983). A rehearing was granted, however, after the court's membership changed in 1983. The original opinion for the court was authored by Justice Mosk who repeated much of the reasoning he used there in his dissent in the present case. Justice Mosk's earlier opinion was joined by Chief Justice Bird and Justices Rattigan and Racanelli. Justices Broussard and Feinberg joined in the dissent authored by Justice Kaus.

2. CAL. CIV. PROC. CODE § 667.7 (West 1980). Unless otherwise specified, all statutory references are to the Code of Civil Procedure.

3. Relevant portions of section 667.7 are:

(a) In any action for injury or damages against a provider of health care services, a superior court shall, at the request of either party, enter a judgment ordering that money damages or its equivalent for future damages of the judgment creditor be paid in whole or in part by periodic payments rather than by a lump-sum payment if the award equals or exceeds fifty

during the medical malpractice insurance crisis in the mid-1970's as part of the Medical Injury Compensation Reform Act of 1975[4] (MICRA). In addition to setting provisions for tighter government control of health care providers[5] and permitting alternative methods of insurance coverage for health care providers,[6] the bill established new rules for medical malpractice litigation.[7] The apparent purpose of the medical malpractice litigation measures was to reduce the size and number of judgments against health care providers in hopes of keeping malpractice insurance costs down.[8]

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thousand dollars ($50,000) in future damages. In entering a judgment ordering the payment of future damages by periodic payments, the court shall make a specific finding as to the dollar amount of periodic payments which will compensate the judgment creditor for such future damages.

. . .

(b)(1) The judgment ordering the payment of future damages by periodic payments shall specify the recipient or recipients of the payments, the dollar amount of the payments, the interval between payments, and the number of payments or the period of time over which payments shall be made. Such payments shall only be subject to modification in the event of the death of the judgment creditor.

. . . .

(c) However, money damages awarded for loss of future earnings shall not be reduced or payments terminated by reason of the death of the judgment creditor, but shall be paid to persons to whom the judgment creditor owed a duty of support, as provided by law, immediately prior to his death. . .

. . . .

(f) It is the intent of the Legislature in enacting this section to authorize the entry of judgments in malpractice actions against health care providers which provide for the payment of future damages through periodic payments rather than lump-sum payments. By authorizing periodic payment judgments, it is the further intent of the Legislature that the courts will utilize such judgments to provide compensation sufficient to meet the needs of an injured plaintiff and those persons who are dependent on the plaintiff for whatever period is necessary while eliminating the potential windfall from a lump-sum recovery which was intended to provide for the care of an injured plaintiff over an extended period who then dies shortly after the judgment is paid, leaving the balance of the judgment award to persons and purposes for which it was not intended. . . .

CAL. CIV. PROC. CODE § 667.7 (West 1980).

4. 1975 CAL. STATS. 3949-4007.

5. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 2320-2335 (West Supp. 1984).

6. CAL. INS. CODE §§ 11587, 11588 (West Supp. 1984).

7. Malpractice litigation measures included establishing a 90-day notice of intention to file suit, enforceable by attorney discipline proceedings, CAL. CIV. PROC. CODE §§ 364, 365 (West 1982), a limitation of $250,000 on recovery for "noneconomic losses," CAL. CIV. CODE § 3333.2(b) (West Supp. 1984), the permitting of collateral source evidence, CAL. CIV. CODE § 3333.1 (West Supp. 1984), and limitations imposed on attorney's contingency fee arrangements, CAL. BUS. & PROF. CODE § 6146 (West Supp. 1984).

8. The governor convened a special session of the legislature for the express purpose of dealing with the malpractice insurance crisis. In his order calling for a special session, the governor declared:

The cost of medical malpractice insurance has risen to levels which many physicians and surgeons find intolerable. The inability of doctors to obtain such insurance at reasonable rates is endangering the health of the

Mary English[9] was admitted to the defendant hospital for surgery on a brain tumor. The night before her scheduled surgery, she fainted or fell in a shower stall and sustained severe burns from the overheated water. Her injuries required substantial treatment, including plastic surgery. Testimony at trial indicated that she could suffer periods of total and partial disability due to the burns.

The jury returned a general verdict in favor of the plaintiff for $190,069.88. The defendant moved for an order setting periodic payment of the judgment under section 667.7, but the motion was denied. The trial court ruled that section 667.7 violated both due process and equal protection principles, and was therefore unconstitutional. On appeal, the due process and equal protection issues were raised, as was the plaintiff's assertion that because the court has the power to fix the amount of future damages subject to periodic payments, the plaintiff was denied her constitutional right to a jury trial.[10]

I. MAJORITY OPINION

A. Due Process

The plaintiff argued that her due process rights were violated by section 667.7 because the effect of the periodic payment was to diminish the value of her action[11] without a quid pro quo. The court declined to weigh the benefits and detriments of the legisla-

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people of this State, and threatens the closing of many hospitals. The longer term consequences of such closings could seriously limit the health care provided to hundreds of thousands of our citizens.

In my judgment, no lasting solution is possible without sacrifice and fundamental reform. It is critical that the Legislature enact laws which will change the relationship between the people and the medical profession, the legal profession and the insurance industry, and thereby reduce the costs which underlie these high insurance premiums.

Proclamation by the Governor Convening the Legislature in Second Extraordinary Session, *reprinted in* 1975 CAL. STAT. 3947. The governor's proclamation went on to list several issues which he wished the legislature to address, including the institution of a periodic payments system. *Id.*

9. Mary English died while the appeal was pending. American Bank and Trust Co., special administrator of her estate, was substituted as plaintiff. 36 Cal. 3d at 364 n.3, 683 P.2d at 673 n.3, 204 Cal. Rptr. at 674 n.3.

10. CAL. CONST. art. I, § 16.

11. By paying a judgment by means of periodic payments instead of a lump sum, the judgment debtor receives the benefit of the use of the funds throughout the duration of the period—assuming, for the purposes of this statute, that the plaintiff survives the duration of the intended period. If, under this statute, the plaintiff dies before the end of the duration of the payments, losses for future

tion, noting that such was the job of the legislature. It was not necessary that the plaintiff receive an adequate quid pro quo inasmuch as plaintiffs possess no vested property rights in particular measures of damages.[12] Therefore, the legislation only had to meet the "rational relationship" test: as long as the legislation is rationally related to some legitimate state interest, it will not be declared invalid. Since the legislature had specifically spelled out its intent in passing the measure,[13] legitimate state interests were simple to find: assurance that funds would be available for an injured plaintiff throughout the period of anticipated need; and elimination of a windfall to the plaintiff's heirs who may collect many years worth of damages not actually incurred because of the plaintiff's earlier than anticipated death.[14]

B. Equal Protection

As a result of section 667.7—and most of the other malpractice litigation legislation in MICRA—victims of medical malpractice are classified differently than are other plaintiffs. Those who commit malpractice are treated differently than other tortfeasors. As it did with the plaintiff's due process claim, the court held that the equal protection argument could not be sustained. As long as the provisions of section 667.7 were rationally related to a legitimate objective, the measure withstood the constitutional challenge.

The legitimate objective of the legislature was to reduce medical malpractice insurance costs. In the face of a crisis which included soaring malpractice insurance rates, insurance companies refusing to insure health care providers, and doctors opting to "go bare"[15] (choosing to not even purchase malpractice insurance), the objective of the legislature to reduce malpractice insurance rates was a proper one. The court refused to accept the argument that the inverse relationship between malpractice insurance premiums and overall health care costs suggests a failure of section 667.7 to meet the legislature's objective. It felt that the legislation had not been fully implemented in light of the trial court's determination of unconstitutionality.[16] Moreover, the court properly

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damages are effectively forfeited to the judgment debtor. CAL. CIV. PROC. CODE § 667.7(b)(1) (West 1980). *But see infra* note 18.

12. Feckenscher v. Gamble, 12 Cal. 2d 482, 499-500, 85 P.2d 885, 893 (1938).

13. CAL. CIV. PROC. CODE § 667.7(f) (West 1980).

14. The plaintiff also argued that the due process rights of the deceased party's spouse are violated by § 667.7. The court summarily dismissed this contention, noting that if the victim has no vested property right in a particular measure of damages, then neither could a spouse. 36 Cal. 3d at 369-70, 683 P.2d at 676, 204 Cal. Rptr. at 677.

15. *Id.* at 371, 683 P.2d at 677-78, 204 Cal. Rptr. at 678-79.

16. Apparently, after the trial court's ruling, many courts and litigants were re-

noted that there is no requirement that the legislation actually meet the stated objective.[17] The only requirement is that the objective be legitimate, and that the legislation rationally relate to it.

C. Right to Jury Trial

The final argument with which the court was forced to deal concerned plaintiff's claim that the judicial determination of future damages denied her the constitutional right to jury trial.[18] The plaintiff contended that the right to jury trial requires that the jury fix the amount of future damages as well as determine subsidiary issues, such as the structure of periodic payments. Any interference by the court with such a determination, argued the plaintiff, constituted an "impairment of the substantial features of a jury trial."[19]

The language of the pertinent section made the court's conclusion somewhat awkward. Because section 667.7(b)(1)[20] does not specifically designate who determines the future damages portion of the award vis-a-vis other elements of damages, the court reviewed the legislative history and concluded that the statute was ambiguous on the point.[21] The court was therefore left to determine the way in which the ambiguous portion should be interpreted since, noted the court, "a statute should be construed to avoid all doubts as to its constitutionality."[22] The court decided that the statute should be interpreted to require a determination by the jury of the amount of damages assigned to compensate for

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luctant to utilize the periodic payment method. *Id.* at 373-74, 683 P.2d at 679, 204 Cal. Rptr. at 680.

17. *Id.* at 374, 683 P.2d at 679, 204 Cal. Rptr. at 680.

18. The determination of future damages is important because, under section 667.7(b)(1), the periodic payments can be modified or terminated when the plaintiff dies. Hypothetically, a jury could award $100,000 to a plaintiff, intending $50,000 of it to go for future damages. But if the trial court structured the award so that $75,000 was designated as future damages, the plaintiff might never see a substantial portion of the award if she died early.

In this context, it is important to distinguish future damages (e.g., future medical and living expenses) from future earnings which are lost due to the plaintiff's incapacity. Under the statute, future earnings continue to be awarded after the death of the plaintiff to those persons to whom the plaintiff "owed a duty of support." CAL. CIV. PROC. CODE § 667.7(c) (West 1980).

19. Jehl v. Southern Pac. Co., 66 Cal. 2d 821, 829, 427 P.2d 988, 993, 59 Cal. Rptr. 276, 281 (1967).

20. *See supra* note 3.

21. 36 Cal. 3d at 375 n.13, 683 P.2d at 680 n.13, 204 Cal. Rptr. at 681 n.13.

22. *Id.* at 376, 683 P.2d at 681, 204 Cal. Rptr. at 682.

future damages. Once the jury has assessed the amount that is intended to compensate the plaintiff for future damages, the court does not invade the province of the jury by structuring the details of the periodic payment plan.[23]

II. Dissenting Opinions

Dissenting opinions were registered by Justice Mosk and Chief Justice Bird. Justice Mosk dissented on the grounds that the equal protection analysis of the majority improperly stated the purpose of the questioned legislation, and failed to consider certain statistical information which was required in the equal protection decision.[24] Justice Mosk's premise was that the purpose of the legislation (MICRA) was to lower medical costs to the public; that lowering the costs of malpractice insurance was only a means to a more inclusive end.

Armed with statistics introduced in amicus curiae briefs, the dissent emphasized that even though the cost of malpractice insurance decreased, the cost of hospital care increased following the passage of MICRA. Instead of adopting the majority view that actual success or failure does not affect equal protection analysis, Justice Mosk argued that later facts may be considered where "the assumption on which the legislation was premised has ceased to exist."[25] For support, he cited California's judicial rejection of the guest statute as being contrary to equal protection[26] and scattered lower court opinions from other states suggesting that information learned after legislation is enacted may be considered in reviewing that legislation.

Regardless of the persuasiveness of Justice Mosk's legal argument, his factual premise—that MICRA was passed for the purpose of reducing medical costs to the public—is flawed. The concern of the legislation was insurance costs.[27] The statistical

23. The court suggested that the use of the special verdict, *see* CAL. CIV. PROC. CODE § 625 (West Supp. 1984), would be the best method of determining that amount of the verdict intended to compensate the plaintiff for future damages. 36 Cal. 3d at 377, 683 P.2d at 682, 204 Cal. Rptr. at 683.

24. Justice Mosk also contended that the majority opinion should have considered the impact of the legislation on the class of people which it affects—victims of medical malpractice. Although he argues that the effect of the statute is to burden the plaintiff with any loss incurred where the court miscalculates how the periodic payments are to be made, Justice Mosk suggested that in trying to avoid a windfall which unfairly benefits the heirs of a plaintiff, the legislature has provided the real windfall to the tortfeasor and his insurer. 36 Cal. 3d at 379-80, 683 P.2d at 683-84, 204 Cal. Rptr. at 684-85 (Mosk, J., dissenting).

25. *Id.* at 383, 683 P.2d at 686, 204 Cal. Rptr. at 687.

26. Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

27. *See supra* note 8.

evidence pointed out in the dissent itself[28] indicated that MICRA led to a reduction in malpractice insurance premiums. Inasmuch as the Justice's factual premise is incorrect, his legal conclusion also loses its efficacy.

Justice Mosk concluded by reviewing provisions of malpractice crisis statutes of other states which have been struck down. However, a review of cases discussed in the dissent,[29] vis-a-vis those noted by the majority,[30] illustrating malpractice legislation which has withstood constitutional challenge, indicates little more than a numbers contest which supports the majority.

Chief Justice Bird dissented because, she believed, section 667.7 violated the plaintiff's right to a jury trial as well as equal protection principles. She argued that the potential effect of section 667.7 is to allow the trial judge to amend the jury's award to the plaintiff by misconstruing or misapplying it.[31] By giving the trial court the power to set the duration and amount of the periodic payments, the statute has made the court a key fact-finding entity, and has taken that responsibility away from the jury. Additionally, argued the Chief Justice, the statute gives the defendant a second chance in the litigation to minimize the damages it will actually have to pay. Regardless of the size of the verdict, a defendant making periodic payments may save considerable amounts of money if the plaintiff dies earlier than expected. The trial court's power to infringe on a function of the jury recognized at common law—the award of damages—violates the right to jury trial.[32]

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28. Justice Mosk pointed out that "malpractice premiums for most of the state's hospitals declined by 25 percent in the years following enactment of MICRA." 36 Cal. 3d at 383, 683 P.2d at 685, 204 Cal. Rptr. at 686 (Mosk, J., dissenting).

29. *Id.* at 385-87, 683 P.2d at 687-88, 204 Cal. Rptr. at 688-89.

30. *Id.* at 370-71 n.10, 683 P.2d at 677 n.10, 204 Cal. Rptr. at 678 n.10.

31. An improper assessment by the trial court of the amount of future damages, and the period of time for which they are needed could be very costly. *See supra* note 18.

32. The Chief Justice convincingly refuted the majority's argument that analogous procedures existed for permitting trial courts to have some control over jury verdicts and the payment of funds. The majority suggested that the procedure of additur, Jehl v. Southern Pac. Co., 66 Cal. 2d 821, 427 P.2d 988, 59 Cal. Rptr. 276 (1967), court administration of awards to minors, CAL. PROB. CODE §§ 3601-3603 (West 1981), and court apportionment of wrongful death recoveries among heirs, CAL. CIV. PROC. CODE § 377 (West Supp. 1984), illustrate such permissible judicial control. But as the Chief Justice indicated, none of the analogous situations cited by the majority substantially infringe on rights guaranteed at common law.

The Chief Justice also refuted the majority's determination that section 667.7(b)(1) is ambiguous in stating who should make the determination of the amount of future damages. She argued that the legislature clearly intended to give the power to the court. Had the majority read the legislative history in the same way, it could not have validated the law under the premise that statutes should be construed to avoid doubts as to lack of constitutionality.

The majority's equal protection argument, urged the Chief Justice, "reduce[d] the rational relationship test to a rubber stamp."[33] Although the court properly chose to apply the rational relationship test, it should have considered the vulnerable nature of the affected group—malpractice victims—and the burden imposed on it. Where laws place severe burdens on defenseless groups, Chief Justice Bird argued, the rational relationship test has been and should be used to invalidate the laws.[34]

XXIV. STATE REGULATION

Federal law preempts the state regulation of off-reservation sale or possession of fish caught by an Indian on his reservation: **People v. McCovey.**

In *People v. McCovey,* 36 Cal. 3d 517, 685 P.2d 687, 205 Cal. Rptr. 643 (1984), a unanimous court held that federal law preempts the state from regulating the off-reservation sale, or possession for sale, of fish caught by Hoopa Valley Reservation Indians on the reservation. In 1980, McCovey, a Yurok Indian from the Hoopa Valley Reservation, gill netted a large quantity of salmon on the reservation which he attempted to commercially sell off the reservation. He was arrested by California Fish and Game Department officers and later convicted of violating a California state law prohibiting the sale of gill netted salmon. The supreme court reversed.

The court looked to federal statutory and decisional law to determine the preemption issue. In cases involving Indians, the preemption doctrine is applied in a "special sense" due to " 'Congress' overriding goals of encouraging "tribal self-sufficiency and economic development.' " Accordingly, such cases focus on the scope and nature of federal regulation in the area. "Where

33. 36 Cal. 3d at 398, 683 P.2d at 696, 204 Cal. Rptr. at 697 (Bird, C.J., dissenting).

34. The most noteworthy example of such a law failing the rational relationship test is Brown v. Merlo, 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973), where California's automobile guest statute was declared to be in violation of equal protection principles.

there exists a 'persuasive' or 'comprehensive' federal regulatory scheme, state laws are preempted if they appear to 'disturb and disarrange' that scheme."

The court reviewed federal legislation and discovered a number of statutes and regulations governing Indian fishing rights, many of which were specifically targeted to the Hoopa Valley Reservation. Thus, the court easily determined that the state's exercise of criminal sanctions disturbed and disarranged the federal scheme, supplanting it with "an inconsistent dual system."

The remaining issue was whether the state interests at stake were sufficient to justify the assertion of state authority and thereby fall within an exception to the preemption doctrine. "A State's regulatory interest will be particularly substantial if the state can point to off-reservation effects that necessitate State intervention." *New Mexico v. Mescalero Apache Tribe,* 103 S. Ct. 2378, 2387 (1983). The only asserted state interest was that of conservation. The court, however, found this interest to be sufficiently safeguarded by federal legislation. Consequently, the court determined that federal law preempted the state from the regulation of Indian fishing rights. The court narrowly construed the statute, however, and upheld the conviction of McCovey's codefendant who was a member of a different Indian tribe not covered by the federal statute.

XXV. TAXATION

An otherwise tax exempt "occasional sale" is not taxable because the seller is a "unitary business": **Ontario Community Foundation, Inc. v. State Board of Equalization.**

In *Ontario Community Foundation, Inc. v. State Board of Equalization,* 35 Cal. 3d 811, 678 P.2d 378, 201 Cal. Rptr. 165 (1984), the supreme court invalidated an administrative regulation under which the State Board of Equalization ("Board") sought to impose a sales tax on tax exempt "occasional sales" made by "unitary businesses."

California Revenue & Tax Code section 6367 exempts "occasional sales" from the state sales tax. *See* CAL. REV. & TAX CODE § 6006.5(a) (West 1970) (definition of occasional sale). The plaintiffs were hospitals who sold their total assets and were assessed sales tax by the Board. Although the majority of the property

sold by the plaintiff came under the "occasional sales" exception, the Board claimed that its regulations permitted the sales tax on all of the property sold. *See* CAL. ADMIN. CODE tit. 18, R. 1595(a)(3) (1984). Regulation 1595 provides that an otherwise tax exempt "occasional sale" can be taxed if the seller is a "unitary business" which has other non-exempt sales. The Board determined that this regulation applied to the hospitals because of regularly made non-exempt sales in their cafeterias and pharmacies. The plaintiffs argued that regulation 1595 was invalid since it contradicted the statutory exemption.

The supreme court agreed with the hospitals. The court thus rejected the Board's attempt to reconcile its regulation with section 6006.5, holding that the regulation was invalid since it deprived the plaintiffs of a tax exemption for which they qualified under the statute.

XXVI. TORTS

A. *No error in jury instructions which spoke of the exercise of reasonable care when plaintiff's theory at trial against a drug manufacturer was not based on strict liability:* **Finn v. G.D. Searle & Co.**

In *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 677 P.2d 1147, 200 Cal. Rptr. 870 (1984), the supreme court held that a modified jury instruction which discussed a drug manufacturer's duty to exercise reasonable care in warning of a drug's side effects was proper in light of the plaintiff's theory at trial and proposed jury instructions.

The plaintiff became blind after using a drug manufactured by one of the defendants. He sued the manufacturer and the doctor who prescribed the medicine. The claim against the manufacturer was based on an alleged failure to give adequate warnings of possible side effects of the drug. The jury found in favor of both defendants and the plaintiff appealed.

The plaintiff's principal argument on appeal was that the trial court impaired the plaintiff's strict liability claims against the manufacturer by modifying the proposed jury instructions to include negligence principles, i.e., the exercise of reasonable care. The supreme court concluded that the plaintiff's theory of the case and his proposed jury instructions premised liability on failure to warn of "known or knowable" side effects of the drug. In the court's view, this was not truly a strict liability standard and thus the modified jury instructions were reasonable. In addition, the court expressly declined the opportunity to decide if drug

manufacturers could be held strictly liable for the injurious side effects of their prescription drugs.

The court resolved the plaintiff's additional arguments in favor of the defendants and affirmed the judgment. Chief Justice Bird wrote a lengthy dissenting opinion summarizing strict liability in California, arguing that it should be applied to drug manufacturers when their prescription drugs cause injury, including injuries caused by inadequate warnings.

B. *Owner of stolen vehicle may be liable for damages caused to third persons by the thief if the theft was foreseeable under the circumstances; party seeking a peremptory writ must notify opposing party:* **Palma v. U.S. Industrial Fasteners, Inc.**

In *Palma v. U.S. Industrial Fasteners, Inc.*, 36 Cal. 3d 171, 681 P.2d 893, 203 Cal. Rptr. 626 (1984), the supreme court decided an issue of substantive tort law and defined a rule of appellate procedure. On the substantive issue, the court determined under what circumstances the owner of a stolen vehicle may be liable to an unsuspecting third party who is struck and injured by the vehicle. Generally, owners are not liable for harm done when their vehicles are stolen and used to injure a third party—even when the car is unlocked and the keys are left inside. However, where sufficient special circumstances are found, a question of foreseeability is raised. Palma was struck by the defendant's large commercial truck, which, according to some accounts, was left unlocked with the keys inside. The truck was parked in an open lot in a commercial area known to be plagued by crime. The court ruled that such conditions presented a question of foreseeability which required a jury trial concerning liability. Therefore, the trial court erred in granting the defendant's motion for summary judgment.

In addressing the procedural issue, the court held that a petitioner seeking a peremptory writ of mandate or prohibition in the first instance (i.e., in lieu of seeking an alternative writ) is required to notify adversely affected parties that such an action is being considered. By imposing such a requirement, the court sought to eliminate the inequity existing in the writ application and notification system. Previously, a party seeking an alternative writ of mandate or prohibition effectively provided his opponent with greater notice than if he sought a peremptory writ in the first instance. The court concluded that an appellate court

should not issue a peremptory writ in the first instance without receiving, or at least soliciting, opposition from the party which would be adversely affected.

C. *Evidence of post-accident warnings admissible in a strict liability suit; inappropriate for trial court to use remittitur to reapportion liability among parties:* **Schelbauer v. Butler Manufacturing Co.**

In *Schelbauer v. Butler Manufacturing Co.*, 35 Cal. 3d 442, 673 P.2d 743, 198 Cal. Rptr. 155 (1984), the supreme court held that evidence of post-accident warnings to consumers was admissible in a strict liability action against a manufacturer. The court also stated that a trial court may not use remittitur to reapportion liability among the parties when the court feels the damage award is excessive only because the jury's apportionment is not supported by the evidence.

The plaintiff was injured in a fall that occurred while he was laying roofing panels manufactured by the defendant. The plaintiff filed suit claiming that an oil coating on the panels was the cause of the accident. The jury found that the defendant was strictly and negligently liable for the plaintiff's injuries and that the plaintiff and his employer were not contributorily negligent. The defendant's motion for a new trial was granted, subject to the condition that it would be denied if the plaintiff accepted a fifteen percent reduction in the amount of the judgment. The trial court indicated that the reduction was intended to reflect its finding of contributory negligence by the plaintiff and his employer. The plaintiff accepted the remittitur and the defendant then appealed both the judgment and the denial of its motion for a new trial.

The defendant argued on appeal that the trial court erred in admitting evidence of the warnings which the defendant began including with the roofing panels following the plaintiff's accident. The supreme court ruled in *Ault v. International Harvester Co.*, 13 Cal. 3d 113, 528 P.2d 1148, 117 Cal. Rptr. 812 (1974), that evidence of a change in a product following an accident was admissible in strict liability cases. The instant defendant argued that the addition of a warning is not a change in the product and therefore the evidence of the warning was inadmissible under California Evidence Code section 1151. The supreme court disagreed, holding that the rationale of *Ault* applied to evidence of post-accident warnings in strict liability actions and that the evidence was therefore properly admitted.

The defendant's second argument was that the trial court abused its discretion in using remittitur to reapportion liability

among the parties. The supreme court agreed, stating that remittiturs may only be used when a new trial could be granted solely on the grounds of excessive damages. CAL. CIV. PROC. CODE § 662.5 (West 1976). Since the trial court did not find the damages to be excessive, but only misapportioned, it was error to condition its order granting a new trial on acceptance of the remittitur.

The supreme court concluded that the trial court's order should be modified to provide for a new trial limited to deciding how the damages should be apportioned. Such a modification was justified by the trial court's express determination that all other issues decided by the jury were supported by the evidence. A new trial on all issues would simply be a waste of time and money.

XXVII. UNEMPLOYMENT COMPENSATION

Worker terminated for good faith refusal to perform work assignment which she felt threatened safety of others held entitled to receive unemployment insurance benefits: **Amador v. Unemployment Insurance Appeals Board.**

When a worker reasonably and in good faith believes that performance of an assignment will endanger the health of others, can she be denied unemployment insurance benefits because she was discharged for refusing to perform the assigned work? This issue was presented to the California Supreme Court in *Amador v. Unemployment Insurance Appeals Board.*[1] The Unemployment Insurance Appeals Board had ruled that the appellant was ineligible for unemployment insurance benefits because of the "misconduct" which resulted in her discharge,[2] and the superior court rejected her writ of mandate to vacate that ruling.

The appellant was hired by the San Mateo County Community Hospital ("Chope") in 1976 as a histotechnician to prepare tissue samples for microscopic analysis so the medical staff could inter-

1. 35 Cal. 3d 671, 677 P.2d 224, 200 Cal. Rptr. 298 (1984). Opinion by Bird, C.J., with Kaus, Broussard, Reynoso, and Collins, JJ., concurring. Separate concurring opinion by Grodin, J. Separate dissenting opinion by Mosk, J. Collins, J., sitting under assignment by the Chairperson of the Judicial Council.

2. The Board's review of the appellant's conduct was pursuant to CAL. UNEMP. INS. CODE § 1256 (West Supp. 1984), which provides in pertinent part: "An individual is disqualified for unemployment compensation benefits if the director finds that he or she left his or her most recent work voluntarily without good cause or that he or she has been discharged for misconduct connected with his or her recent work."

pret and diagnose changes in tissues caused by disease.[3] After approximately six months at Chope, two of the doctors on the staff requested that the appellant perform a procedure known as "grosscutting."[4] While the appellant did not object to grosscutting on the organs of a cadaver, she declined to perform the procedure on tissue removed from live patients. She believed that such a procedure exceeded her capabilities as a histotechnician.[5]

Eventually, the appellant was warned that her continued refusal to perform the work could subject her to discipline. She maintained her position and was suspended for two days. A full adversary hearing was held on the matter before the county civil service commission, and the suspension was upheld.[6] Shortly after the commission's ruling, the appellant was discharged for continuing to refuse to do the work. When the appellant applied for unemployment benefits, Chope objected. It contended that pursuant to section 1256 of the California Unemployment Insurance Code, employees discharged for "misconduct" were disqualified from receiving benefits.[7]

While appellant's discharge was based on her continuing "misconduct,"[8] the court focused on whether she had "good cause" for

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3. The following job description was posted by Chope to announce the opening for a "tissue technician" at that facility:

> Under supervision, prepares surgical and autopsy tissue specimens by paraffin method, including imbedding, cutting, and staining sections; prepares frozen tissue sections; may photograph gross and microscopic preparations for use in teaching and for other purposes; prepares and stains cytology smears and millipore preparations; prepares and stains bone marrow smears; uses microtome, autotechnicon, and related equipment; maintains files of microscope slides and tissue blocks; assists in filing and coding tissue records; maintains laboratory tools, equipment and stocks of supplies; performs related duties as required.

35 Cal. 3d at 676 n.2, 677 P.2d at 226 n.2, 200 Cal. Rptr. at 300 n.2.

4. Grosscutting consists of the selection and removal of small tissue samples of approximately one centimeter in breadth from organs or other large (gross) specimens removed by a doctor from a patient. On the basis of a microscopic examination of these samples, a pathologist diagnoses the patient's condition.

Id. at 676, 677 P.2d at 226, 200 Cal. Rptr. at 300.

5. The appellant contended that a pathologist's diagnosis, and consequently the patient's life and health, depended on the quality of the selection and cutting of the tissue sample. The appellant supported her position by referring to her previous employment with hospitals operated by Stanford University and by Oxford University, where histotechnicians were not permitted to perform the procedure. *Id.*

6. The lower court determined that the appellant's suspension was proper because, under the county civil service rules, she had been insubordinate for failing to perform "reasonable" tasks assigned by Chope. *Id.* at 684, 677 P.2d at 232, 200 Cal. Rptr. at 306.

7. CAL. UNEMP. INS. CODE § 1256 (West Supp. 1984); see *supra* note 2 for pertinent text.

8. The case law definition of "misconduct" is limited to:

> conduct evincing such wilful or wanton disregard of an employer's inter-

her actions.[9] "The conduct may be harmful to the employer's interest and justify the employee's discharge; nevertheless, it evokes the disqualification for unemployment insurance benefits only if it is wilful, wanton or equally culpable."[10] Where the employee was not at fault,[11] due to a good faith error in judgment, she can not be denied benefits solely on that basis.[12] Thus, the court held that where a worker's discharge was based on the willful refusal to perform work which she "reasonably and in good faith believed" threatened the health of others,[13] she had not committed "misconduct."[14]

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ests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or *good faith errors* in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Maywood Glass Co. v. Stewart, 170 Cal. App. 2d 719, 724, 339 P.2d 947, 950-51 (1959) (emphasis added); *accord* Lacy v. California Unemployment Ins. Appeals Bd., 17 Cal. App. 3d 1128, 1132, 95 Cal. Rptr. 566, 570 (1971).

9. The court determined that if there was "good cause" sufficient to justify resignation, then there would be justification for refusing a particular work assignment. 35 Cal. 3d at 679, 677 P.2d at 228, 200 Cal. Rptr. at 302.

10. Jacobs v. California Unemployment Ins. Appeals Bd., 25 Cal. App. 3d 1035, 1037, 102 Cal. Rptr. 364, 366 (1972).

11. Fault has been held to be the basic element in considering cases under the unemployment compensation code. *See* Rowe v. Hansen, 41 Cal. App. 3d 512, 521, 116 Cal. Rptr. 16, 22 (1974); Sherman Bertram, Inc. v. California Dep't of Employment, 202 Cal. App. 2d 733, 736, 21 Cal. Rptr. 130, 132 (1962).

12. Delgado v. Unemployment Ins. Appeals Bd., 41 Cal. App. 3d 788, 792, 116 Cal. Rptr. 497, 499-500 (1974).

13. While California case law has allowed compensation where the employee quit his work due to concern for his personal health, Rabago v. Unemployment Ins. Appeals Bd., 84 Cal. App. 3d 200, 148 Cal. Rptr. 499 (1978), this was the first instance where concern for the health of others was the basis for the termination.

14. 35 Cal. 3d at 683, 677 P.2d at 231, 200 Cal. Rptr. at 305. This holding was reached by a review of other jurisdictions' standards of reasonableness and good faith concern for others. *See, e.g.,* Webster v. Potlatch Forests, Inc., 68 Idaho 1, 187 P.2d 527 (1947) (failure to express grievance through union did not disqualify employee from receiving unemployment compensation); Wilkes-Barre Transit Corp. v. Unemployment Compensation Bd., 215 Pa. Super. 353, 257 A.2d 275 (1969) (refusal to drive school bus out of concern for safety held to be good cause), *aff'd,* 438 Pa. 554, 265 A.2d 519 (1970); City of Dallas v. Texas Employment Comm'n, 626 S.W.2d 549 (Tex. Civ. App. 1981) (where the employee's actions were viewed from his standpoint and in light of the knowledge he possessed at the time); Kuhn v. Department of Employment Sec., 134 Vt. 292, 357 A.2d 534 (1976) (where employee's award of unemployment insurance benefits was upheld because of his

The court also faced the issue of whether the appellant's suit was blocked by the suspension hearing on the basis of collateral estoppel. In rejecting the argument, the court acknowledged that the issue of "insubordination," under the county rules, was substantially different from the "misconduct" contemplated by the code.[15] "In short, the commission's findings do not estop Amador from establishing that her refusal to perform grosscutting resulted from a reasonable and good faith concern for the health of patients."[16]

When the appellee had met the initial burden of proving misconduct, the burden shifted and the appellant should have been allowed to demonstrate good cause for her actions.[17] Since there was no dispute as to the essential facts, the court held that the appellant had met her burden and was entitled to benefits.[18]

XXVIII. WORKERS' COMPENSATION

Negligence of injured employee not imputed to employer when determining employer's credit for employee's recovery from a third party tortfeasor: **Rodgers v. Workers' Compensation Appeals Board.**

Although many law school professors may disagree, the true issues of most cases are who pays and how much. Workers' compensation cases are no exception. Workers' compensation statutes provide, for the most part, the answers to these two questions. Among other provisions, the statutes provide for an employees' recovery from his employer[1] and, when applicable, from a third party tortfeasor.[2] When a third party is partly liable for

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good faith belief he was not qualified to be a motor vehicle inspector and that his refusal to act as such promoted the best interests of society).

15. 35 Cal. 3d at 685, 677 P.2d at 232, 200 Cal. Rptr. at 306. It is on this point that Justice Mosk dissents. Because there was no challenge to the finding that the appellant had indeed been insubordinate and that the requested work was reasonably within her job description, he felt these findings should control on appeal. "In view of the foregoing record, reviewed over and over by five successive layers of administrative and judicial authority, I cannot allow sympathy for one who is denied unemployment benefits to outweigh the well established principle that misconduct and insubordination should not be rewarded." *Id.* at 689, 677 P.2d at 235, 200 Cal. Rptr. at 309 (Mosk, J., dissenting).

16. *Id.* at 685, 677 P.2d at 232, 200 Cal. Rptr. at 306.

17. *Id.* at 681 n.7, 677 P.2d at 229 n.7, 200 Cal. Rptr. at 303 n.7.

18. The court found the undisputed facts were not subject to opposing inferences, and that appellant had clearly demonstrated good cause. Consequently, there was no basis for upholding the superior court's finding. *Id.* at 685-86, 677 P.2d at 233, 200 Cal. Rptr. at 307.

1. CAL. LAB. CODE § 3600 (West Supp. 1984). The statute provides that an employee may recover workers' compensation benefits without regard to the negligence of either party.

2. CAL. LAB. CODE § 3852 (West Supp. 1984). This section preserves the right

the employee's injuries, an employer may be granted a credit against its future workers' compensation liabilities.[3] That credit is denied the employer, however, until the ratio of his contribution to the employee's damages corresponds to the employer's proportional share of fault.[4]

Be that as it may, what happens when an employee's injury is caused by his own negligence in addition to the negligence of his employer and a third party? The supreme court faced this question in *Rodgers v. Workers' Compensation Appeals Board.*[5] The court ruled that comparative negligence principles apply so that an employee must bear the responsibility and costs of his own negligence—that negligence may not be imputed to his employer.[6] Consequently, the formula for determining the applicability of the employer's credit remains the same, i.e., the threshold figure for determining at what point the credit is to be applied should be determined by reference to the employer's own degree of fault without regard to the employee's degree of fault.[7]

Transcon Lines, Inc. ("Transcon") was Rodgers' employer in 1974 when he fell and injured himself on the property of Melvin Sosnick Co. ("Sosnick"). Rodgers filed a civil action against Sosnick and a workers' compensation claim against Transcon. Transcon intervened in the civil action seeking reimbursement for temporary disability payments made to Rodgers. The workers' compensation proceeding was then suspended for the remainder of the civil action.

In the civil action, the jury found Sosnick 70 percent at fault, Rodgers 25 percent at fault, and Transcon 5 percent at fault. The

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of the employee to bring an ordinary civil action against a third party tortfeasor and still maintain a claim against the employer for compensation benefits.

3. CAL. LAB. CODE § 3861 (West 1971). This section provides in pertinent part:

> The (WCAB) . . . shall allow, as a credit to the employer to be applied against his liability for compensation, such amount of any recovery by the employee for his injury . . . as has not theretofore been applied to the payment of expenses or attorneys' fees, . . . or has not been applied to reimburse the employer.

Id.

4. Associated Constr. & Eng'g Co. v. Workers' Comp. Appeals Bd., 22 Cal. 3d 829, 843, 587 P.2d 684, 692, 150 Cal. Rptr. 888, 896 (1978).

5. 36 Cal. 3d 330, 682 P.2d 1068, 204 Cal. Rptr. 403 (1984). Opinion by Kaus, J., with Mosk, Broussard, Shaw and Mana, JJ., concurring. Separate dissenting opinion by Reynoso, J. Separate dissenting opinion by Bird, C.J. Shaw and Mana, JJ., sitting under assignment by the Chairperson of the Judicial Council.

6. *Id.* at 337, 682 P.2d at 1072, 204 Cal. Rptr. at 407.

7. *Id.* at 342, 682 P.2d at 1075-76, 204 Cal. Rptr. at 410.

jury determined the damages to be $25,000. The trial court then deducted the expenses designated in Labor Code section 3861[8] from the gross amount of Rodgers' recovery from Sosnick and certified $7,734.28 as Rodgers' "net recovery."

At the close of the civil action, the workers' compensation matter resumed. The parties stipulated that Rodgers suffered a 20.25 percent permanent disability, thereby entitling him to $5,022.50 in permanent disability benefits. Both parties also agreed that Transcon was entitled to the full statutory credit—$7,734.28. The parties disagreed, however, as to the application of the credit. Transcon contended it was eligible for the credit upon payment of benefits equal to the proportional share of the employer's fault.[9] Rodgers claimed the proportion should include "employment negligence,"[10] i.e., the employer's and the employee's fault combined.[11] The Workers' Compensation Appeals Board (WCAB) found no justification for imputing the employee's negligence to his employer and therefore determined that the ratio should account for the employer's fault only. An order was entered accordingly and Rodgers appealed.

The underlying maxim of the California workers' compensation program holds the employer liable for employee injuries regardless of fault.[12] In other words, the program is no-fault. The economic burden is placed upon the employer according to the fundamental premise that an on-the-job injury is merely a cost of doing business.[13] "In exchange for carrying the responsibility for injury compensation, the employer avoids the cost, delay and risk of greater liability of court proceedings. The employee receives guaranteed compensation in exchange for giving up the right to sue the employer."[14]

In tort actions, damages are an attempt to make whole the in-

8. CAL. LAB. CODE § 3861 (West 1971). The expenses deducted included attorneys' fees and expenses.

9. Under this calculation, Transcon would be eligible for the credit upon payment of $1,275—i.e., 5% (the percentage of fault placed on Transcon) of $25,500 (the amount of damages awarded to Rodgers). 36 Cal. 3d at 333, 682 P.2d at 1069, 204 Cal. Rptr. at 404.

10. *See* Comment, *Employer Subrogation: The Effect of Injured Employee Negligence in Workers' Compensation Third Party Actions,* 18 SAN DIEGO L. REV. 301, 313 (1981).

11. Under this calculation, Transcon would be eligible for the credit upon payment of $7,650—i.e., 30% (the 5 percent of fault placed on Transcon plus the 25 percent of fault placed on Rodgers) of $25,500 (the amount of damages awarded to Rodgers). 36 Cal. 3d at 334, 682 P.2d at 1069, 204 Cal. Rptr. at 404.

12. CAL. CONST. art. XIV, § 4.

13. *See* 1 S. HERLICK, CALIFORNIA WORKERS' COMPENSATION LAW HANDBOOK § 1.1 at 13 (2d ed. 1978).

14. 36 Cal. 3d at 352, 682 P.2d at 1083, 204 Cal. Rptr. at 417 (Bird, C.J., dissenting).

jured party—a form of indemnification.[15] The purpose of workers' compensation, in contrast, is to rehabilitate.[16] As a result, the benefits under workers' compensation differ from civil damages. An employee who receives benefits under the program may not also sue his employer.[17]

Where a third party tortfeasor is involved, however, the injured employee may also bring a civil action against the negligent third party for damages in addition to seeking workers' compensation from his employer.[18] When such a third party action is brought, the employer is entitled to claim a credit against future payment of benefits based upon the third party recovery by the injured employee.[19] This action also creates a unique tripartite relationship among the parties: (1) the employee/third party dispute is governed by comparative negligence principles;[20] (2) the employer reimbursement claim against the third party is governed by principles of comparative negligence and joint and several liability;[21] (3) the employer credit claim against the employee stands in relation to the workers' compensation no-fault concept.[22] This latter relationship was at issue in *Rodgers.*

The court began its analysis by reviewing its decision in *Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board,*[23] a case involving the relationship between an employee and a third party tortfeasor. In *Associated Construction,* the employer and a third party were negligent; the employee had not been negligent. The employer sought a credit against future benefit payments to the extent that the employee's settlement award from the third party exceeded the amount of damages attributed to the employer's negligence.[24] The employee argued that the negligent employer was barred from recovery of either credit or reimbursement. The court disagreed, holding for

15. *See* 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 842 (8th ed. 1974 & Supp. 1984); RESTATEMENT OF TORTS §§ 901, 903, 905.

16. Solari v. Atlas-Universal Serv., Inc., 215 Cal. App. 2d 587, 600, 30 Cal. Rptr. 407, 414 (1963). *See also* CAL. LAB. CODE § 139.5 (West Supp. 1984).

17. CAL. LAB. CODE § 3601 (West Supp. 1984).

18. *See supra* note 2.

19. *See supra* note 3.

20. Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1973).

21. 36 Cal. 3d at 343, 682 P.2d at 1076, 204 Cal. Rptr. at 411 (Reynoso, J., dissenting).

22. CAL. LAB. CODE § 3600 (West Supp. 1984).

23. 22 Cal. 3d 829, 587 P.2d 684, 150 Cal. Rptr. 888 (1978).

24. *Id.* at 835, 587 P.2d at 687, 150 Cal. Rptr. at 891.

the first time that the doctrine of comparative negligence could apply in workers' compensation proceedings. That court stated that "the concurrently negligent employer should receive either credit or reimbursement for the amount by which his compensation liability exceeds his proportional share of the injured employee's recovery."[25]

The *Associated Construction* court went on to discuss the credit procedure:

> When the issue of an employer's concurrent negligence arises in the context of his credit claim based upon a third party settlement, the board must determine the appropriate contribution of the employer since the employee's recovery does not represent a judicial determination of tort damages. Specifically, the board must determine (1) the degree of fault of the employer, and (2) the total damages to which the employee is entitled. The board must then deny the employer credit until the ratio of his contribution to the employee's damages corresponds to his proportional share of fault. Once the employer's workers' compensation contribution reaches this level, he should be granted a credit for the full amount available under section 3861. Only when such level of contribution has been reached, however, will grant of the statutory credit adequately accommodate the principle that a negligent employer should not profit from his own wrong.[26]

The court in *Associated Construction* then went on to state that the above reasoning furthers the objective "that the employer and third party should, to the extent consistent with the employee's statutory immunity from tort liability, share the burden of the employee's recovery as joint tortfeasors."[27] From this the court in *Rodgers* reasoned that those principles would not be furthered by

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25. *Id.* at 842, 587 P.2d at 692, 150 Cal. Rptr. at 895.

26. *Id.* at 843, 587 P.2d at 692, 150 Cal. Rptr. at 896.

The court also discussed the reimbursement procedure:

> When the issue of an employer's concurrent negligence arises in a judicial forum, application of comparative negligence principles is relatively straightforward. The third party tortfeasor should be allowed to plead the employer's negligence as a partial defense, in the manner of *Witt* [v. Jackson, 57 Cal. 2d 57, 366 P.2d 641, 17 Cal. Rptr. 369 (1961)]. Once this issue is injected into the trial, the trier of fact should determine the employer's degree of fault according to the principles of *American Motorcycle* [Ass'n v. Superior Court, 20 Cal. 3d 578, 578 P.2d 899, 146 Cal. Rptr. 182 (1978)]. The court should then deduct the employer's percentage share of the employee's total recovery from the third party's liability—up to the amount of the workers' compensation benefits assessed against the employer. Correspondingly, the employer should be denied any claim of reimbursement—or any lien under [Labor Code] section 3856, subdivision (b)—to the extent that his contribution would then fall short of his percentage share of responsibility for the employee's total recovery.

Associated Constr., 22 Cal. 3d at 842, 587 P.2d at 692, 150 Cal. Rptr. at 895 (footnote omitted). Although *Rodgers* was a credit case rather than reimbursement case, the court treated both as parallel remedies and implied that comparative negligence principles should be consistently applied in both contexts. Consequently, the court afforded great weight to reimbursement decisions subsequent to *Associated Constr.* *See infra* note 31 and accompanying text.

27. *Associated Constr.*, 22 Cal. 3d at 842, 587 P.2d at 692, 150 Cal. Rptr. at 895.

denying an employer a credit until it had made payments equal to the proportion of damages attributable to the employee's fault.[28] This is so because, under the comparative negligence theory, the employer would not be responsible for damages attributable to an employee's negligence.[29]

Moreover, the court continued, should the rule proposed by Rodgers be adopted, it would have "the anomalous effect of rewarding employee negligence by increasing an employee's recovery vis-a-vis his employer whenever the employee's fault increases."[30] The court found additional support for its holding in a number of reimbursement cases[31] which, although distinguishable in some regards, worked the same detrimental result upon the employer, i.e., greater liability.

In addition, the court summarily rejected three other argu-

28. 36 Cal. 3d at 335, 682 P.2d at 1070, 204 Cal. Rptr. at 405.

29. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1973).

30. 36 Cal. 3d at 338, 682 P.2d at 1073, 204 Cal. Rptr. at 408. The court stated:

> Assume that the employee has suffered $100,000 in tort damages, and that—as in this case—the employee's attorney's fees and expenses in the civil action consume 50 percent of the employee's recovery from the third party. If the third party were 100 percent at fault, the employee would receive a gross tort recovery of $100,000 and a net recovery—after deductions—of $50,000. Thus, the nonnegligent employee would receive a net tort recovery of $50,000, and—because in this hypothetical neither the employer nor employee were at all at fault and thus the employer would immediately claim its section 3861 credit—the employee would obtain no additional workers' compensation benefits unless such benefits exceeded $50,000.
>
> On Rodgers' theory, if instead of being totally free of fault, the employee in the above hypothetical were 4 percent at fault, he would receive a greater total recovery than the nonnegligent employee. His total tort damages would be reduced by 4 percent, and his gross tort damages would thus be $96,000. Assuming that attorney's fees and expenses would still consume 50 percent of the gross recovery, his net tort recovery would be $48,000. If the employee's fault were imputed to the employer in determining the section 3861 threshold, the employer would have to pay $4,000 in benefits—the percentage of tort damages attributable to employer and employee fault—before it could claim its $48,000 credit. Thus, the 4-percent-negligent employee would receive $52,000 total recovery as compared to the $50,000 obtained by the totally nonnegligent employee. Further, the disparity would generally increase as the percentage of the employee's fault increased.

Id. at 339 n.6, 682 P.2d at 1073 n.6, 204 Cal. Rptr. at 408 n.6.

31. Aceves v. Regal Pale Brewing Co., 24 Cal. 3d 502, 595 P.2d 619, 156 Cal. Rptr. 41 (1979); Jarvis v. Southern Pac. Trans. Co., 142 Cal. App. 3d 246, 191 Cal. Rptr. 29 (1983); Johnson v. Cayman Dev. Co., 108 Cal. App. 3d 977, 167 Cal. Rptr. 29 (1980); Kemerer v. Challenge Milk Co., 105 Cal. App. 3d 334, 164 Cal. Rptr. 397 (1980); Kramer v. Cedu Found., Inc., 93 Cal. App. 3d 1, 155 Cal. Rptr. 552 (1979).

ments which Rodgers posed in support of his position. Rodgers claimed that his "imputation" rule was directly supported by the decision in *Witt v. Jackson*.[32] The court, however, did not believe that *Witt* applied to the credit situation. Rodgers also claimed that the court's decision improperly injected the issue of employee negligence into workers' compensation cases. The court believed that only Rodgers' formula involved employee negligence as the court's rule concerned employer negligence. Finally, the court declared that Rodgers' proposal added complexity and burdensome litigation to workers' compensation matters. The end result was that the court ruled that an employee's negligence may not be imputed to the employer when determining the threshold figure at which the employer's credit becomes effective.

Chief Justice Bird[33] and Justice Reynoso dissented in separate opinions. Each, however, used similar reasoning to arrive at the same conclusion. The dissenters noted the triangular relationship involved when a third party is drawn by civil action into a workers' compensation proceeding. Each of those relationships must be treated separately because only in that manner may the workers' compensation proceedings between the employer and employee maintain its no-fault status. Since the no-fault employer/employee relationship is based on statutory law, the court may not inject into the relationship principles of comparative negligence. Moreover, *Associated Construction* was distinguishable in that it involved an employer/third party relationship, whereas *Rodgers* involved an employer/employee relationship.[34]

The dissenters agreed that the majority holding would often allow an employer to be absolved of much of his statutory workers' compensation liability.[35] The end result "is to give employers the benefit of the system while not insisting they shoulder the burden."[36] More importantly, the dissenters noted, "in the absence of a third party defendant, the employer would be obliged to pay workers' compensation up to the statutory limit, even if the employee were completely at fault."[37] Thus, there is no reason why

32. 57 Cal. 2d 57, 69, 366 P.2d 641, 647, 17 Cal. Rptr. 369, 375 (1961). At the time of *Witt*, however, the doctrine of contributory negligence applied; thus, the court paid scant attention to its holding. 36 Cal. 3d at 340, 682 P.2d at 1074, 204 Cal. Rptr. at 409.

33. Chief Justice Bird simply adopted the opinion of Justice John J. Miller of the court of appeal, with the concurrence of Justices Allison M. Rouse and Jerome A. Smith.

34. 36 Cal. 3d at 343, 682 P.2d at 1076, 204 Cal. Rptr. at 411 (Reynoso, J., dissenting).

35. *Id.* at 358, 682 P.2d at 1087, 204 Cal. Rptr. at 422 (Bird, C.J., dissenting).

36. *Id.* at 345, 682 P.2d at 1077-78, 204 Cal. Rptr. at 412-13 (Reynoso, J., dissenting).

37. *Id.*

an employer should be allowed to pay less than the full statutory amount of workers' compensation when third parties have contributed to the injury.

The effect of the court's decision is unclear. If a third party is not involved, the decision, of course, would be inapplicable since the credit provisions would not have reason to take effect. When a third party is involved, however, the variables in a workers' compensation proceeding are many: the number of parties who are negligent; which parties are negligent (if not all); the degree of negligence of each party; the amount of damages sustained by the injured employee; the statutory amount of the workers' compensation benefits. All of these variables could affect an employee's award, but to what degree is unknown. What is clear is that benefits paid by employers to employees will be affected, often with the result of reducing the amount paid by the employer. Such a result must of necessity occur with the injection of comparative negligence principles into the domain of "no-fault" workers' compensation proceedings.

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