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The California Supreme Court Survey: A Review of Decisions: December 1982-March 1983

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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 supply the reader with a basic understanding of the issues involved in the decisions, as well as to serve as a starting point for researching any of the topical areas. The scope and format of the survey has been modified to provide the reader with analysis of every decision rendered by the supreme court during the period which is covered by the survey.

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I. ADMINISTRATIVE LAW

A. *In an expulsion proceeding, a student, pursuant to the Education Code, must be allowed to confront or question adverse witnesses unless disclosure of the witnesses' identity would subject them to a significant risk of harm:* **John A. v. San Bernardino City Unified School District.**

I. INTRODUCTION

In *John A. v. San Bernardino City Unified School District,*[1] a high school student who was expelled after an administrative hearing claimed that his due process rights were violated during the hearing. This claim was based on the fact that he was not allowed to confront or question the witnesses testifying against him. The supreme court determined that this was a violation of

1. 33 Cal. 3d 301, 654 P.2d 242, 187 Cal. Rptr. 472 (1982), as corrected (Jan. 2, 1983).

Education Code[2] requirements and, therefore, did not address the alleged due process violations.

II. FACTUAL BACKGROUND

After a freshman football game at San Bernardino High School, John A. and a number of team members became involved in a fight. No school officials witnessed the fight; however, a vice-principal later investigated the incident.

Acting on the vice-principal's findings, the high school principal recommended that John A. be expelled. A hearing was scheduled to consider the matter. Appellant's mother received a hearing notice which stated that appellant would be allowed to participate in the hearing, could present evidence, and could bring an advisor or attorney to the proceedings.[3]

The hearing was conducted by a three-member panel "composed of certificated employees of the district who were not employed at the high school attended by [appellant]."[4] During the hearing, appellant was questioned about this incident as well as his attendance record and an incident in which appellant was reported to have hit another student in class.

Neither the witnesses to the fight nor the two boys allegedly injured by appellant testified at the hearing. Affidavits describing the incident were offered as evidence in place of the boys' testimony. The affidavits and appellant's testimony contained varying descriptions of the incident. The two injured boys and several witnesses claimed that appellant and several others chased the two boys (those allegedly injured) and that appellant and one other had struck and kicked them.

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2. CAL. EDUC. CODE § 48914 (West Supp. 1983).

3. The notice included information required by statute:

> [D]ate and place of the hearing; a statement of the specific facts and charges upon which the proposed expulsion is based, a copy of all the rules of the district which pertain to discipline adopted pursuant to Section 35291, and the opportunity of the pupil or the pupil's parent or guardian to appear in person or to employ and be represented by counsel, inspect and obtain copies of all documents to be used at the hearing, confront and question all witnesses who testify at the hearing, question all other evidence presented, and present oral and documentary evidence on the pupil's behalf, including witnesses.

CAL. EDUC. CODE § 48914(b) (West Supp. 1983).

4. 33 Cal. 3d at 305, 654 P.2d at 244, 187 Cal. Rptr. at 474. Section 48914(d) requires the three panel members to be certificated employees of the district who are not employed at the school attended by the pupil. CAL. EDUC. CODE § 48914(d) (West Supp. 1983).

The fight was stopped by other students and the police were called. Appellant admitted that he had held one of the boys but denied hitting him, claiming he was simply "play boxing." The vice-principal who interviewed the injured boys saw no apparent injuries but was convinced that they were "in pain at the time of the fight."[5]

The panel found that appellant and one other student attacked the two boys without provocation and recommended expulsion for the remaining six and one-half months of the school year.[6] These findings were adopted by the school board and appellant was expelled. The school board's decision was affirmed by the county board of education.

Appellant filed a petition for mandamus claiming violations of his procedural due process rights. The district countered by arguing that in the interest of student safety, schools should be allowed to discipline violent students without giving them an opportunity to face their accusers. The district claimed that to require such a confrontation would make students reluctant to cooperate for fear of retaliation.[7] The court found the panel's decision to be supported by the weight of the evidence and the petition was denied.

On appeal, appellant again claimed that he had a right to confront and cross-examine the witnesses against him and that the board's failure to honor this right renders his expulsion invalid.[8]

III. ANALYSIS

A. The Board's Compliance with Statutory Requirements

The statutory scheme prescribes the procedure by which a student may be expelled.[9] A principal may recommend expulsion, and a hearing on the matter should be held within twenty days of the recommendation.[10] The hearing is conducted by the school

5. 33 Cal. 3d at 306, 654 P.2d at 245, 187 Cal. Rptr. at 475.

6. The panel also recommended that plaintiff be readmitted if a licensed therapist wrote the board a letter "indicating satisfactory involvement in a counseling program." *Id.*

7. As evidence of this claim, administrators told of instances of harassment and of witnesses being forced to change schools for their safety. *Id.*

8. *Id.* at 306, 654 P.2d at 245, 187 Cal. Rptr. at 476. Appellee claimed that appellant's appeal was rendered moot by his readmission to school. The court stated, however, that the issue of process due an expelled student is an important issue of continuing public interest which will likely recur. As such, this case falls within the exception to the general mootness rule. *Id.* at 307, 654 P.2d at 246, 187 Cal. Rptr. at 476.

9. Each school district is free to establish its own rules, but they must include the statutory requirements. CAL. EDUC. CODE § 48914 (West Supp. 1983).

10. CAL. EDUC. CODE §§ 48904.5, 48914(a) (West Supp. 1983).

board, a hearing officer, or an "impartial administrative panel."[11] If expulsion is recommended, a hearing officer or administrative panel must submit findings of fact and recommendations to the board.[12]

The primary issue presented on appeal related to the statute's requirements regarding confrontation of witnesses and evidence presented at expulsion hearings. The statute provides a right to confront and cross-examine witnesses who testify at the hearing[13] and allows evidence to "be admitted and given probative effect only if it is the kind of evidence upon which reasonable persons are accustomed to rely in the conduct of serious affairs."[14] The board's decision must be supported by a preponderance of the evidence.[15]

The evidence presented in the vice principal's report, written affidavits and appellant's testimony, was in "sharp dispute."[16] In such cases of conflicting evidence, the reasonable person would not rely on written statements but would "demand that witnesses be produced so that their credibility may be tested and their testimony weighed."[17] Affiants should be required to testify when they are readily available and there is "no substantial reason why their testimony may not be produced."[18] Here, there was no apparent reason for the affiants' failure to testify.

The board unsuccessfully argued that the witnesses in this case were not present due to a risk of retaliation. The court stated that when the identification of a witness would expose him to a "significant and specific risk of harm," the board may properly rely on statements and reports.[19] However, there was no showing in this case that there was any risk of harm to the witnesses. The board, therefore, failed to establish cause for appellant's expulsion by the preponderance of evidence required by statute.[20]

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11. *Id.* at § 48914(d) (West Supp. 1983).
12. *Id.*
13. *Id.* at § 48914(b) (West Supp. 1983).
14. *Id.* at § 48914(f) (West Supp. 1983).
15. *Id.*
16. 33 Cal. 3d at 308, 654 P.2d at 246, 187 Cal. Rptr. at 476.
17. *Id.* at 307, 654 P.2d at 246, 187 Cal. Rptr. at 476.
18. *Id.* at 307-08, 654 P.2d at 246, 187 Cal. Rptr. at 476. The court also pointed out that administrative reports such as the vice-principal's report in this case were not to be relied upon in cases of conflicting evidence when witnesses are readily available. *Id.* at 308, 654 P.2d at 246, 187 Cal. Rptr. at 476.
19. *Id.* In such cases, witnesses are not readily available.
20. *Id.* at 308, 654 P.2d at 247, 187 Cal. Rptr. at 477.

B. *Impartiality of the Administrative Panel*

Appellant also questioned the impartiality of the administrative panel who heard his case. Although the composition of the panel followed the guidelines provided in the statute,[21] appellant claimed that "teachers have a built-in bias in disciplinary matters against students"[22] which prevents them from rendering a fair decision.

Although the appellant does have a right to an impartial trier of fact, this right is "not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him."[23] The court pointed out that teachers probably do have general disciplinary views which would be considered adverse to the student. This does not, however, present a ground for disqualification, nor does a teacher's participation on an administrative panel result in a denial of due process.[24]

C. *Other Arguments*

Appellant also argued that the questions asked by the panel evidenced bias against him. The court, however, found no bias evidenced in the panel's proceedings. He further argued that the hearing notice should have advised him of the availability of free legal aid. The court held that the notice of hearing sent to appellant was sufficient.[25]

IV. CONCLUSION

Appellant asserted that he had been denied due process in an administrative hearing in violation of the state and federal constitutions. The court did not address this issue, holding that appellant did not receive the level of process required by statute. A student recommended for expulsion is entitled, by statute, to confront and cross-examine witnesses who have presented testimony against him. This requirement is dispensed with only when the

21. The panel members were certificated employees of the district who were not employed at appellant's school. *Id.* at 305, 654 P.2d at 244, 187 Cal. Rptr. at 474. This complies with the statutory requirements. *See* CAL. EDUC. CODE § 48914(d) (West Supp. 1983).

22. 33 Cal. 3d at 308, 654 P.2d at 247, 187 Cal. Rptr. at 477.

23. This distinction was made in Andrews v. Agricultural Labor Relations Bd., 28 Cal. 3d 781, 623 P.2d 151, 171 Cal. Rptr. 590 (1981) (temporary administrative law officer properly refused to disqualify himself in unfair labor practice hearings against agricultural employers although his law firm regularly represented Spanish-surnamed persons against agricultural employers).

24. 33 Cal. 3d at 309, 654 P.2d at 247, 187 Cal. Rptr. at 477.

25. *Id.* at 309-10, 654 P.2d at 247-48, 187 Cal. Rptr. at 477-78.

witness' presence is not readily available or when there is a substantial reason for their testimony not being produced.

B. *Trial court's review of administrative agency decisions:* Berlinghieri v. Department of Motor Vehicles; Unterthiner v. Desert Hospital District; Tiernan v. Trustees of the California State University and Colleges.

The petitioner in *Berlinghieri v. Department of Motor Vehicles,*[1] a sales person, lost her driver's license after she was charged with driving while under the influence of alcohol and resisting, delaying, or obstructing an officer.[2] Petitioner plead guilty to one count of reckless driving[3] and received notice that her license would be suspended for six months.[4] Her license was revoked after a Department of Motor Vehicles (DMV) hearing.[5] She then petitioned the superior court for judicial review of the DMV decision alleging that its findings were unsupported by the evidence presented at the hearing.[6] In addition, plaintiff questioned the trial court's decision to apply the "substantial evidence" test instead of the "independent judgment" standard of review because she argued that the right to drive was "fundamental."[7]

Section 1094.5(c) of the California Civil Procedure Code[8] pro-

1. 33 Cal. 3d 392, 657 P.2d 383, 188 Cal. Rptr. 891 (1983).
2. *Id.* at 394, 657 P.2d at 384, 188 Cal. Rptr. at 893.
3. CAL. VEH. CODE § 23103 (West Supp. 1983).
4. 33 Cal. 3d at 394, 657 P.2d at 385, 188 Cal. Rptr. at 893.
5. The DMV's findings included the following: (1) the arresting officer had reasonable cause to believe plaintiff was driving under the influence of alcohol; (2) she was lawfully arrested; (3) plaintiff was properly advised that refusal to submit to a blood alcohol test would result in suspension of her driving privileges; and (4) she failed to submit to the tests. *Id.*
6. The trial court rejected petitioner's request that it use the "independent judgment" standard of review and found the administrative decision properly supported using the "substantial evidence" test. *Id.* at 395, 657 P.2d at 385, 188 Cal. Rptr. at 893.
7. If an administrative agency's decision does not affect a fundamentally vested right (such as the continued possession of a license, as opposed to the mere application for a license), the reviewing court must "exercise its independent judgment upon the evidence." *Id.* (citing Bixby v. Pierno, 4 Cal. 3d 130, 143, 481 P.2d 242, 251, 193 Cal. Rptr. 234, 243 (1971)). However, if a fundamental vested right is not involved, the court need merely "review the whole administrative record to determine whether the findings are supported by substantial evidence and whether the agency committed any errors of law." *Id.* (citing 4 Cal. 3d at 144, 481 P.2d at 251, 193 Cal. Rptr. 243).
8. California Civil Procedure Code section 1094.5(c) states:
Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent

vides the courts with a standard for evaluating administrative decisions. In *Bixby v. Pierno,*[9] the California Supreme Court "added [its] own judicial amplification to these statutory principles,"[10] by adding two criteria to the statutory standard.[11] First, if a "fundamental vested right" will be affected by the agency's decision, then the trial court must exercise independent judgment in its review of the administrative record.[12] Second, where there are no fundamental vested rights involved, the trial court must determine whether the findings are supported by substantial evidence by reviewing the entire administrative record.[13] *Bixby* was based on the latter standard.

The court began its analysis by deciding that driving is, at least, a "vested" right.[14] Even so, it is not a "fundamental" right in the constitutional sense requiring strict judicial scrutiny of the DMV's decision to revoke a license.[15] It does, however, amount to an interest of such importance that it warrants an independent judgment standard of review of a quasi-judicial adminstrative agency determination.[16] Thus, for the purpose of selecting the proper standard of judicial review of an administrative decision suspending of a driver's license, the "right to drive" is considered "fundamental."[17] The suspension of a driver's license may still be entirely appropriate, but it may only be done after an independent judgment review of the administrative record.[18]

Unterthiner v. Desert Hospital District[19] was also based on the

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judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence; and in all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.

CAL. CIV. PROC. CODE § 1094.5(c) (West Supp. 1983).

9. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971).

10. 33 Cal. 3d 392, 395, 657 P.2d 383, 385, 188 Cal. Rptr. 891, 893 (1983) (citing Bixby v. Pierno, 4 Cal. 3d at 143, 481 P.2d at 251, 193 Cal. Rptr. at 243).

11. 4 Cal. 3d at 143-44, 481 P.2d at 251, 93 Cal. Rptr. at 243.

12. Note that the administrative record is the *only* evidence examined. *Id.*

13. *Id.* at 144, 481 P.2d at 251, 93 Cal. Rptr. at 243.

14. *See* 33 Cal. 3d at 396, 657 P.2d at 386, 188 Cal. Rptr. at 894 and the cases cited therein.

15. *Id.* at 397, 657 P.2d at 386-87, 188 Cal. Rptr. at 894-95.

16. *Id.* at 398, 657 P.2d at 388, 188 Cal. Rptr. at 896. It is an important interest because of our "travel-oriented society." In this particular case, the fact that plaintiff used her car in her job, and was a single parent, illustrated the inconvenience she would suffer if she were denied the use of her car. *Id.* "[T]he revocation or suspension of that license, even for a six-month period, can and often does constitute a severe personal and economic hardship." *Id.* (citing Bell v. Burson, 402 U.S. 535, 539 (1971)).

17. 33 Cal. 3d at 397, 657 P.2d at 386-87, 188 Cal. Rptr. at 895.

18. *Id.* at 398, 657 P.2d at 388, 188 Cal. Rptr. at 896.

19. 33 Cal. 3d 285, 656 P.2d 554, 188 Cal. Rptr. 590 (1983).

principles expressed in *Bixby v. Pierno.*[20] It involved a plastic surgeon who was denied admission to a public hospital's medical staff.[21] Plaintiff petitioned for a writ of mandate, but the trial court found that the decision against Unterthiner was not based on false answers he had given on his application.[22] Instead, it found that the hospital's decision rested on letters from three doctors who argued against his admission. The court held that the applicant would not get a fair hearing from the hospital and, thereby, granted relief.[23] Again, the supreme court was faced with the issue of the applicable standard of review of an administrative agency decision. This time it involved a public hospital's decision denying surgical privileges.[24]

The court first inquired into the "vest" aspect of an initial application for hospital privileges and found its answer in *Anton v. San Antonio Community Hospital.*[25] There the court drew a distinction between those physicians already admitted to staff membership as having a vested fundamental right to continue practice in the hospital and those applying for staff membership who did not.[26] The court in *Unterthiner* upheld that distinction and followed the rule requiring only substantial evidence review of those initial applications for hospital privileges.[27] The court's use of the lesser standard of substantial evidence resulted in an affirmation of the findings of falsehood and failure to meet with ethical standards,[28] because they were undisputed and sufficiently supported by the evidence.[29] The judgment of the trial court allowing Unterthiner to have clinical privileges at the Desert Hospital was

20. *Id.* at 294, 656 P.2d at 559, 188 Cal. Rptr. at 595 (citing Bixby v. Pierno, 4 Cal. 3d at 144-45, 481 P.2d at 251, 93 Cal. Rptr. at 243).

21. 33 Cal. 3d at 287, 656 P.2d at 555, 188 Cal. Rptr. at 591.

22. *Id.* at 288, 656 P.2d at 555, 188 Cal. Rptr. at 591.

23. *Id.*

24. *Id.* at 293, 656 P.2d at 558, 188 Cal. Rptr. at 594. The applicant here, a plastic and reconstructive surgeon, did most of his work in his own office. Even so, access to the hospital was necessary for the performance of reconstructive surgery. This necessity led him to file his application. *Id.* at 287, 656 P.2d at 555, 188 Cal. Rptr. at 591.

25. 19 Cal. 3d 802, 567 P.2d 1162, 140 Cal. Rptr. 442 (1971).

26. *Id.* at 824, 567 P.2d at 1174, 140 Cal. Rptr. at 454.

27. 33 Cal. 3d at 298, 656 P.2d at 563, 188 Cal. Rptr. at 599.

28. These were the reasons the hospital gave for denying Unterthiner's application. *Id.* at 298-99, 656 P.2d at 563, 188 Cal. Rptr. at 599.

29. *Id.* at 299, 656 P.2d at 563, 188 Cal. Rptr. at 599. The supreme court also held the trial court's findings were without support in the record. *Id.* at 299-300, 656 P.2d at 594, 188 Cal. Rptr. at 600.

reversed.[30]

In *Tiernan v. Trustees of the California State University and Colleges,*[31] a decision cited by the court in *Bixby,* petitioner brought suit against defendants who denied her reappointment as an archivist.[32] The basis of her claim was that pursuant to Education Code section 89534(a),[33] the trustees of the University were required to adopt rules governing notice of the nonreappointment or termination of its employees.[34] Defendants argued, and the trial court agreed, that section 89534(a) applied only to probationary employees with a reasonable expectation of permanent employment,[35] and not to temporary employees such as the petitioner. The supreme court, however, reversed,[36] holding that the trustees were required to adopt rules and regulations governing the termination of temporary employees.[37] Nonetheless, this result did not benefit the petitioner as the court found she had not suffered any prejudice due to the lack of rules adopted by the trustees under section 89534(a).[38]

C. *Sufficiency of evidence:* Daniels v. Department of Motor Vehicles; Himelspach v. Department of Motor Vehicles

In the companion cases of *Daniels v. Department of Motor Vehicles,* 33 Cal. 3d 532, 658 P.2d 1313, 189 Cal. Rptr. 512 (1983) and *Himelspach v. Department of Motor Vehicles,* 33 Cal. 3d 542, 658 P.2d 1319, 189 Cal. Rptr. 519 (1983), the court held that an accident

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30. *Id.*

31. 33 Cal. 3d 211, 655 P.2d 317, 188 Cal. Rptr. 115, *modified*, 33 Cal. 3d 461a (1983).

32. *Id.*

33. California Education Code section 89534(a) states:

> The trustees shall adopt rules prescribing the form, time and method of notice of rejection at any time during the probationary period to any probationary nonacademic employee, or notice of intention not to recommend reappointment of an academic employee for the succeeding year to any such employee not having permanent status.

CAL. EDUC. CODE § 89534(a) (West Supp. 1983).

34. 33 Cal. 3d at 216, 655 P.2d at 320, 188 Cal. Rptr. at 118.

35. *Id.*

36. *Id.* at 222, 655 P.2d at 324, 188 Cal. Rptr. at 122.

37. The facts showed that the position offered to Tiernan was a temporary one. *Id.* at 214-15, 655 P.2d at 319, 188 Cal. Rptr. at 117. Her continued employment was based on various factors including funding and status of the archives center. This sharply contrasted with those positions considered probationary, as opposed to those of full permanent employment. The court, however, correctly applied the statute to "any such employee not having permanent status." *Id.* at 219-220, 655 P.2d at 322, 188 Cal. Rptr. at 121; *see supra* note 33.

38. Because defendants had made her fully aware of the conditions of her employment, and any subsequent reappointment, "[s]he cannot now reasonably claim that she was surprised by that decision or that the defendant's failure to adopt and follow regulations requiring proper notice prejudiced her in any way." *Id.* at 221, 655 P.2d at 324, 188 Cal. Rptr. at 122.

report filed by another driver is insufficient by itself to support an administrative decision upholding an order by the Department suspending a driver's license. Though the proceedings of the DMV raised obvious due process issues, the court resolved the matter exclusively on statutory grounds.

The Department first contended that the use of the reports fell within the statutory evidence hearsay records exception. *See* CAL. EVID. CODE § 1271 (West 1966). Noting that the accident reports were not made by either driver in their "regular course of business" and that the drivers were not present at the respective hearing to identify the records, the court rejected the Department's position.

The DMV also argued that even if the reports were hearsay as to a civil proceeding, they were admissible in an administrative proceeding because such use was expressly provided for by statute. *See* CAL. VEH. CODE § 14108 (West 1971). Although the court agreed that hearsay evidence may be considered at the hearing, the court concluded that the language of the statute cannot be construed so that such information is the *sole* basis for a detrimental decision. Rather, the statute provides that such evidence may only be used to supplement other admissible evidence. Both matters were remanded to the Department for hearings consistent with the court's opinion.

II. ATTORNEY DISCIPLINE

A. *Suspensions and disbarments:* **Davis v. State Bar; *In re* Cannan; *In re* Mudge; *In re* Gross; Newton v. State Bar; Shalant v. State Bar.**

In *Davis v. State Bar,* 33 Cal. 3d 231, 655 P.2d 1276, 188 Cal. Rptr. 441 (1983), the attorney involved was faced with one year of suspension and three years of probation for failure to represent a client. The facts showed the attorney had undertaken to prosecute his client's personal injury claim, but failed to file suit or settle the claim within the statute of limitations. Although the petitioner argued that the discipline was excessive, the supreme court disagreed, finding his negligence was fully supported by the evidence.

It may be difficult to predict the supreme court's reaction to charges of criminal participation by members of the state bar. In the case of *In re Cannan,* 33 Cal. 3d 417, 657 P.2d 827, 189 Cal.

Rptr. 49 (1983), the attorney had been convicted of four counts of grand theft under CAL. PENAL CODE § 484 (West 1970), and sentenced to two years on each count, with the terms to run concurrently. After serving sixteen months in a state prison, Cannan was placed on parole. The state bar recommended suspension for five years, with execution of the order stayed on the condition that Cannan be placed on probation for five years and actually suspended for two and one-half years. The supreme court, while stating it was adopting the state bar's recommendation, ordered Cannan suspended for five years, with the execution stayed on condition of a five year probation, and actual suspension of only one year.

While the supreme court may decrease the actual time of suspension in certain instances, other petitioners may not have the same luck. In the case of *In re Mudge,* 33 Cal. 3d 152, 654 P.2d 1307, 187 Cal. Rptr. 779 (1982), an attorney, convicted on one count of grand theft, pursuant to CAL. PENAL CODE § 487(1) (West Supp. 1983), served eight months in jail for the misappropriation of large sums of money from two estates to which he had acted as executor. In addition, the court found the attorney had filed a false statement in probate court, in an effort to conceal the misappropriations.

The review by the hearing panel of the state bar resulted in a recommendation of suspension for three years, with the order stayed and the attorney placed on probation with an actual suspension for two years. The review department increased the probation period to five years and required the attorney's compliance with numerous other conditions. However, the increase in the penalty did not stop there. Mudge was then notified that the supreme court was considering imposition of more substantial discipline. At that time, Mudge was prompted to seek review before the supreme court.

Because "[m]isappropriation of client's funds is extremely serious misconduct which warrants disbarment in the absence of mitigating circumstances," the supreme court felt compelled to increase the period of actual suspension to three years. Commenting that the discipline could have been even more severe, the supreme court instead gave some deference to the recommendation of the State Bar.

The Committee's ability to look to probable, but not actual, criminal convictions was illustrated by *In re Gross,* 33 Cal. 3d 561, 659 P.2d 1137, 189 Cal. Rptr. 848 (1983). There the court favorably reviewed the Committee's decision to discipline Gross after he plea bargained his way from an initial felony charge down to a

misdemeanor. Gross attempted to collaterally attack his guilty plea on the basis of the statute of limitations. The court rejected this argument, noting that misdemeanor convictions are not subject to such an attack; and that even if they were, the salient issue was Gross' actual conduct. As to that, the court found that there was ample evidence supporting the Committee's conclusion that Gross' conduct was outside acceptable bounds and that discipline was therefore warranted. Justice Richardson concluded that Gross' conduct was sufficient for disbarment.

In *Newton v. State Bar,* 33 Cal. 3d 480, 658 P.2d 735, 189 Cal. Rptr. 372 (1983), the court ordered the state bar to reopen proceedings to determine Newton's mental state pursuant to CAL. BUS. & PROF. CODE § 6007 (West Supp. 1983). The Bar had opened and closed such proceedings based upon a one hour interview of Newton by an attorney hearing examiner. Nothing but the interview was considered by the examining attorney in deciding that there was no probable cause to believe that Newton was mentally unfit.

The court looked to section 6007 of the Business and Professions Code and concluded that the examiner should have considered the facts gathered in the disciplinary proceeding that had been abated pending the mental fitness hearing in making his decision. The court examined the disciplinary proceeding record itself and concluded that there was probable cause to believe that Newton was mentally unfit or ill. The state bar was ordered to proceed with a fitness examination pursuant to section 6007. The disciplinary proceedings were abated pending the outcome of a thorough evaluation.

In *Shalant v. State Bar,* 33 Cal. 3d 485, 658 P.2d 737, 189 Cal. Rptr. 374 (1983), the court addressed a series of questions that one might expect to encounter on a Professional Responsibility Exam:

> C retains attorney A to represent her in some personal injury litigation commenced by attorney XA. A and XA agree that XA's fee will be mutually agreed upon and paid at the conclusion of the case before A withdraws any of the recovery from his trust fund.
>
> A settles C's case for $10,000 from which he deducts his fee forwarding the balance to C. A unilaterally determines XA's fair fee to be $200 which he tenders to XA. XA rejects the tender and brings a suit to recover $910 from A *and* C. Process is served on A who, though he remains in contact with C, never tells her of the suit. C is served a year later and calls to ask A about the matter. When A fails to respond, C retains new counsel NC to represent her in XA v. C et al. and to bring a cross claim against A. During this period of time, A also represents C's father, F, in various matters and knows that C has retained NC. After C sues A, A asks F to try and

persuade his daughter C to come in and talk about the crossclaim to see if it could be settled. F asks C and she declines.

A should be disciplined by the state bar for:

I. Withdrawing funds from a client trust account when the attorney's right to those funds is disputed by a client.
II. Failing to let C know that she had been sued.
III. Attempting to communicate directly with a represented opposing party.
IV. All of the above.
V. Only III.
VI. Only II and III.

The correct answer according to the court is VI. The dispute regarding the legal fee was between A and XA, not A and C; hence the disbursement was not improper. (There was no dispute about the funds between the attorney and a client).

The court wasted little ink in concluding that A's attempt to contact his client through her father amounted to an improper, although indirect, initiation of communication with a party represented by counsel. Likewise, the court held that A had a duty to inform his client that she had been sued.

Since petitioner Shalant had been privately reproved once before, the court concluded that his discipline should be public reprovement.

III. ATTORNEYS' FEES

A. *Application of statutory private attorney general doctrine:* **Pacific Legal Foundation v. California Coastal Commission; Westside Community for Independent Living, Inc. v. Obledo.**

Two recent cases, *Pacific Legal Foundation v. California Coastal Commission,* 33 Cal. 3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 (1982), and *Westside Community for Independent Living, Inc. v. Obledo,* 33 Cal. 3d 348, 657 P.2d 365, 188 Cal. Rptr. 873 (1983), illustrate the attempt to use Cal. Civ. Proc. Code § 1021.5 (West 1980), often referred to as the "private attorney general" doctrine, to recover attorneys' fees. Section 1021.5 provides that "a court may award attorney's fees to a successful party . . . in an action which has resulted in the enforcement of an important right affecting public interest." Although the two cases provide different factual situations, the supreme court denied the award of attorneys' fees in each.

Pacific Legal Foundation involved a challenge to the California Coastal Commission's public access requirements. Two beachfront property co-owners sought to improve an existing seawall in order to protect their property. The lower court had granted a writ of administrative mandamus, allowing construction of the

seawall improvements, and plaintiffs then sought reimbursement of attorneys' fees, claiming the result benefitted all other beachfront residents. The supreme court held that the plaintiffs did not fulfill the requirement of section 1021.5(a) that a "significant benefit, whether pecuniary or nonpecuniary, [be] conferred on the *general public or a large class of persons.*" (emphasis added).

In *Westside Community for Independent Living, Inc.*, plaintiffs sought attorneys' fees as reimbursement for initiating the issuance of final regulations in accordance with Cal. Gov't Code § 11139.5 (West Supp. 1983). This statute directs the Secretary of the Health and Welfare Agency to establish standards for determining who is protected by section 11135, which bars discrimination in publicly funded programs, and to create guidelines for determining what practices are discriminatory. Plaintiffs filed suit to compel the Secretary to finalize and issue the regulations and guidelines, which were already in the process of being drafted and approved. The supreme court, in denying the trial court's award of attorneys' fees under the private attorney general statute, found there was no causal connection between the plaintiffs' action and the relief obtained. The plaintiffs had failed to prove that the "issuance of [the] regulations occurred even a day earlier than it otherwise would have as a result of [their] lawsuit."

IV. COMMERCIAL PAPER

A. *Allocation of payments:* **Jessup Farms v. Baldwin.**

In *Jessup Farms v. Baldwin,* 33 Cal. 3d 639, 660 P.2d 831, 190 Cal. Rptr. 355 (1983), the court addressed a "narrow question of statutory construction." Hence, this factually complex case is given summary treatment. At issue was whether the trial court had properly apportioned payments among four obligations of varying origination dates, and whether a "subsequent instrument can renew the maturity date of an earlier note so that both obligations can be said to mature simultaneously."

The friction between the parties arose out of plaintiff's eventual acquisition of defendant's corporation. During the course of the acquisition (which occurred over a period of years), several loans were obtained by plaintiff for the corporation, the first of which defendant cosigned. Plaintiff made payments on the notes, but failed to specify to which note the payments applied. Plaintiff, as-

serting that the payments should have been applied equally to all four notes, sought equitable contribution from defendant for the first note. Defendant asserted that the payments should be applied in whole to the notes in the order of maturity, thus the note she cosigned was therefore paid in full. Defendant also asserted a claimed security interest in some of plaintiff's stock, arising out of a property settlement with her former husband. The trial court held that the payments should be distributed on a pro-rata basis, and that since defendant's security interest was unperfected, plaintiff's status as bona fide purchaser for value extinguished the security interest in the note.

The court, after examining the construction of Cal. Civ. Code § 1479 (West 1982), concluded that the trial court had incorrectly proportioned the payments and that the funds should be distributed so as to satisfy the oldest note (the one cosigned by the defendant) first:

> Thus, where the notes at issue have different maturity dates, section 1479 requires that payments be applied to the notes with the earlier maturity date, in order, irrespective of whether secured or unsecured. Where, however, two or more obligations have the same maturity date, section 1479 mandates a ratable allocation among them (assuming all such obligations are either secured or unsecured).

The court then determined, in a case of first impression, that Cal. Com. Code § 3802 (West 1964), provides for the renewal of an underlying obligation's maturity date only if the parties do not provide otherwise. Since the parties did so provide, the court found that the later notes did not renew the maturity date of the first note, that section 1479 therefore required allocation of the unspecified payments to the oldest note first, and that since the payments satisfied that note, there was no right of plaintiff to equitable contribution from defendant.

As to defendant's crossclaim asserting a security interest in the stock, the court found that the factual conclusions of the trial court were supported by substantial evidence and could not be disturbed on appeal. The judgment of the trial court requiring contribution was reversed; the judgment denying a security interest sustained.

V. CONSTITUTIONAL LAW

A. *Requiring successful malpractice litigants to accept term payment of their awards violates equal protection:* **American Bank and Trust Co. v. Community Hospital.**

That courts on occasion reverse themselves—or are reversed by others—is a constant reminder that the process of law is not infal-

lable. The court's decision in *American Bank & Trust Co. v. Community Hospital*[1] may eventually add grist to that mill. Three months after the court issued its opinion in the case, it announced that the decision would be reconsidered.[2] Additional argument was heard late in August of 1983. As this article proceeds through the publication process, the court has issued no opinion on the additional arguments.

In short, *American*[3] held that the provisions of the 1975 Medical Injury Compensation Reform Act (MICRA)[4] violated the equal protection clause of the state and federal constitutions to the extent that they require successful malpractice litigants to accept term payment of their awards.[5] This conclusion was premised primarily on two perceived facts: (1) that the Act was not serving the purpose for which it was designed and therefore bore no rational relationship to the legitimate goals of the legislature, and[6] (2) that the Act in no way amounted to a quid pro quo exchange of benefits for the forbearance of rights as between the malpractice litigants and the hospitals.[7]

The facts that gave rise to the malpractice claim are straightforward, and the defendant hospital's liability seems quite clear. In the latter part of 1976, plaintiff (American's predecessor in inter-

1. 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983). Justice Mosk wrote for the majority with Chief Justice Bird and Justices Rattigan and Raconelli concurring. Justice Kaus wrote a dissenting opinion in which Justices Broussard and Feinburg concurred. It is interesting to note that the deciding vote in the case was cast by a justice assigned by the Judicial Council.

The decision of the court of appeal in the case was ordered not reported in the official reports. *See* American Bank & Trust Co. v. Community Hospital, 104 Cal. App. 3d 219, 163 Cal. Rptr. 513 (1980).

2. 33 Cal. 3d 674, 660 P.2d 829, 190 Cal. Rptr. 371 (1983), *reh'g granted,* June 15, 1983 (LEXIS, States library, Cal. file).

3. Since the malpractice claimant died before the case reached the supreme court, the adminstrator of her estate was substituted in by stipulation of the parties. 33 Cal. 3d at 678, 660 P.2d at 831, 190 Cal. Rptr. at 373. That plaintiff died nearly two years after her injuries without ever seeing the proceeds of an apparently legitimate claim is in itself an interesting commentary on the fallibility of the legal process.

4. Codified at CAL. CIV. PROC. CODE § 667.7 (West 1980). The relevant statutory language is set forth *infra* at note 12.

5. The court expressly limited its holding to hospitals. 33 Cal. 3d at 688-89, 660 P.2d at 839, 190 Cal. Rptr. at 381.

6. 33 Cal. 3d at 685-92, 660 P.2d at 837-41, 190 Cal. Rptr. at 379-82.

7. That there was no quid pro quo was the premise to the court's application of equal protection analysis. *Id.* For the court's quid pro quo analysis see 33 Cal. 3d at 683-85, 660 P.2d at 835-37, 190 Cal. Rptr. at 377-79.

est)[8] was admitted to the hospital for brain surgery. On the day before the operation she suffered severe burns to her hip, thigh, and groin while taking a shower due to overheated water. Her burns were attended to so that the operation could proceed. After apparently successful brain surgery, plaintiff underwent care for her burn wounds. The services of a plastic surgeon were required and plaintiff continued to encounter problems from the burns for nearly two years. Some permanent cosmetic deformity resulted.[9]

Plaintiff brought a malpractice action against the hospital which went to trial resulting in a verdict for plaintiff for $198,069.88. The hospital brought all traditional post trial motions and also moved that the court provide for periodic payment of all future damage in excess of $50,000.00.[10] All of defendant's post trial motions were denied. Specifically, the motion for periodic payment was denied on the trial court's finding that the statute providing for such payment violated state and federal guarantees of equal protection and due process.[11]

The statute [hereinafter section 667.7] was part of a 1975 legislative effort to slow the then "skyrocketing" cost of medical malpractice insurance in order that health care would continue to be available (MIRCA).[12] In reviewing the legislation, the court ex-

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8. *See supra* note 3.

9. 33 Cal. 3d at 677-78, 660 P.2d at 831, 190 Cal. Rptr. at 373.

10. *Id.* at 678, 660 P.2d at 831, 190 Cal. Rptr. at 373. The motion for periodic payment was made pursuant to CAL. CIV. PROC. CODE § 667.7 (West 1980).

11. 33 Cal. 3d at 678, 660 P.2d at 831, 190 Cal. Rptr. at 372. The ruling must have taken counsel by surprise. Not every day does a *trial* court judge declare major portions of state law unconstitutional.

12. MICRA was the result of an extraordinary session of the legislature called by proclamation of the governor after a number of doctors went "on strike" or refused to perform certain risky procedures because of escalating malpractice insurance costs. While there was some debate as to the reason for the sudden increase in costs, it was clear to the governor and the legislature that some action had to be taken in order to insure the continued availability of medical services. 33 Cal. 3d at 678-79, 660 P.2d at 831-32, 190 Cal. Rptr. at 374-75. *See* 1975 Cal. Stats. 4007 (cited by the court). Section 667.7 provides:

> (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 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. As a condition to authorizing periodic payments of future damages, the court shall require the judgment debtor who is not adequately insured to post security adequate to assure full payment of such damages awarded by the judgment. Upon termination of periodic payments of future damages, the court shall order the return of this security, or so much as remains, to the judgment debtor.
>
> (b)(1) The judgment ordering the payment of future damages by peri-

amined the impact of section 667.7 on successful malpractice litigants. Two major problems seem to stick in the court's mind. First, although the periodic payments would insure that the injured person would have a steady source of funds for life, and that the damages would be paid more or less as they accrued, there was no way that a trial court could allow for the possibility that some unexpected medical problem would suddenly require more funds than were scheduled to be paid. In contrast, were plaintiff to collect a lump sum, she could invest it in a combination of liquid assests and long term annuities thereby being pre-

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odic 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.

(2) In the event that the court finds that the judgment debtor has exhibited a continuing pattern of failing to make the payments, as specified in paragraph (1), the court shall find the judgment debtor in contempt of court and, in addition to the required periodic payments, shall order the judgment debtor to pay the judgment creditor all damages caused by the failure to make such periodic payments, including court costs and attorney's fees.

(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. In such cases the court which rendered the original judgment, may, upon petition of any party in interest, modify the judgment to award and apportion the unpaid future damages in accordance with this subdivision.

(d) Following the occurrence or expiration of all obligations specified in the periodic payment judgment, any obligation of the judgment debtor to make further payments shall cease and any security given, pursuant to subdivision (a) shall revert to the judgment debtor.

* * *

(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. It is also the intent of the Legislature that all elements of the periodic payment program be specified with certainty in the judgment ordering such payments and that the judgment not be subject to modification at some future time which might alter the specifications of the original judgment.

CAL. CIV. PROC. CODE § 667.7 (West 1980).

pared for such a contingency.[13]

The court's second difficulty with the statute was that it provides for the termination of payments upon the death of the plaintiff. In the majority's view, the same problem noted above arises. Even though the plan prevents a windfall to heirs upon plaintiff's death (for harm theoretically never suffered), it also denies plaintiff fair compensation in the event actual future damages exceed estimations before death. "The sums retained by the insurer are the same funds which would have provided a financial safety valve to the victim for unexpected expenses connected with his injury during the course of his life, but which the statute prevents him from using to the extent he may find necessary."[14] Thus, the court concluded that the statute operated to place on the plaintiff the entire risk that future payments might not be adequate to meet his needs.

Having found that the statute "took" something from plaintiffs, the court turned to examine whether the statute provided some otherwise unavailable benefit to plaintiffs in return. It was theorized that this might somehow justify the statute in the same sense that worker's compensation is justified as a "quid pro quo" exchange between employer and employee.[15]

The hospital cited two advantages gained by the plaintiff: (1) that the plaintiff or his dependents would not be able to dissipate the award before the need for compensation ended,[16] and (2) that

13. 33 Cal. 3d at 682-83, 660 P.2d at 834-35, 190 Cal. Rptr. at 376-77. The court also suggests that if the plaintiff's "pain and suffering" increases, the periodic payment plan makes no provision for increased compensation. While this contention bears obvious relation to the theory that the periodic plan is intended to renumerate losses as they occur, it is not a valid criticism of the plan for a lump sum leaves plaintiff in no better a position. That plaintiff's pain and suffering increase will not increase the amount of his lump sum after entry of judgment.

14. *Id.* at 683, 660 P.2d at 835, 190 Cal. Rptr. at 377.

15. Worker's Compensation plans provide for recovery without fault for injuries suffered by an employee while working. *See* CAL. LAB. CODE § 3200 (West Supp. 1983). The employer relinquishes the right to contest liability while in turn the employee relinquishes the right to recover damages beyond those provided for under the worker's compensation system. The employer benefits from limited liability and the worker benefits from certain recovery for on-the-job injuries. *See, e.g.,* Nelson v. Metalclad Insulation Corp., 44 Cal. App. 3d 474, 118 Cal. Rptr. 725 (1975).

See Duke Power Co. v. Carolina Env. Study Group, 438 U.S. 59, 93 (1978) (discussing the constitutionality of the exchange of common law rights for otherwise unavailable benefits in general).

16. 33 Cal. 3d at 685, 460 P.2d at 836, 190 Cal. Rptr. at 378. Suppose, for example, that plaintiff is awarded a lump sum based on a life expectancy of 40 years and on the theory that his children will depend on him for only 10 years. Instead, plaintiff lives 60 years and his children become incapacitated in some way so that they are dependent upon him for the remainder of their lives. The lump sum might be long exhausted before the need for compensation ended while the peri-

a periodic payment plan enjoyed significant tax benefits.[17] The court saw no otherwise unavailable *net* benefit in either. In its view, plaintiff could invest the lump sum for continuing returns just as well, and probably better from a flexability standpoint, as the periodic payment plan could. As to the tax benefit: "It seems obvious that it is to the advantage of the victim to obtain a return on the invested lump-sum award, even though he must pay taxes on the profit, if the alternative is to forego the opportunity to earn any return."[18] The court concluded that successful medical malpractice litigants were thereby denied something of value with no benefit afforded in return. It was acknowledged that this fact in itself was insufficient to declare the statute invalid, but was cited as very relevant in determining the overall impact of the statute in regard to the equal protection challenge.[19]

The court identified three basic problems arising out of the state and federal constitutional[20] guarantees of due process:

> (1) The statute sets the tortfeasor who is a "health care provider" apart from other tortfeasors by permitting him to pay future damages of $50,000 or more on a periodic (rather than a lump-sum) basis, subject to modification on the subsequent death of the victim. (2) It sets the victim of medical malpractice apart from other victims by requiring him to accept payment on the terms above described. (3) It classifies medical malpractice victims by limiting its application to those suffering future damages of $50,000 or more, permitting all others to obtain a lump-sum judgment.[21]

Noting that the proper constitutional measure by which to examine the classifications was the rational relationship test,[22] the court set out to determine just what that test was. Some recent

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odic payments might, in some circumstances, continue past the plaintiff's death until the children's deaths.

17. The court noted:

> Damages for personal injuries are exempt from taxation (26 U.S.C. § 104(a)(2)), but the return earned on the investment of that sum is taxable. However, according to a ruling of the Internal Revenue Service relied on by the hospital, periodic payments received in satisfaction of a recovery for personal injuries are exempt from taxation because the plaintiff does not have the "economic benefit of the lump-sum amount." (Rev. Rul. No. 79-220, C.B. 1979-2, 74).

33 Cal. 3d at 685, 660 P.2d at 836, 190 Cal. Rptr. at 378.

18. *Id.*

19. *Id.* at 684, 660 P.2d at 836, 190 Cal. Rptr. at 378. *See* Wright v. Central Du Page Hospital Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Note, *Medical Malpractice,* 18 HARV. J. ON LEGIS. 143 (1981).

20. CAL. CONST. art. I, § 7; U.S. CONST. amend. XIV, § 1.

21. 33 Cal. 3d at 685-86, 660 P.2d at 837, 190 Cal. Rptr. at 379.

22. *Id.* at 686, 660 P.2d at 837, 190 Cal. Rptr. at 379. The right to recover tort damages is not subject to strict scrutiny. *See also* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

cases, noted the court, hold that legislation passes the test "if it bears a rational relationship to a conceivable legitimate state purpose,"[23] while others state that the classification made must be based upon "some ground of difference having a fair and substantial relation to the object of legislation."[24] The court concluded that on the whole it was required to make a "serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."[25] The court also observed that they must look to the impact of the legislation in its totality rather than simply to the "four corners" of the statute itself. Further, they would have to determine whether the statute was in fact serving its stated goals.[26]

The standard of review in hand, the court identified its perception of the legislative reasoning behind section 667.7:

> The assumption made by the Legislature was that insurers could provide malpractice insurance at lower rates if they could save on the cost of providing such insurance and that these lower premium rates would then be passed on to the public in the form of lower medical costs, or at least containment of such costs.[27]

The court then concluded that *hospital* costs have in fact not been

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23. *See, e.g.,* D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 520 P.2d 10, 112 Cal. Rptr. 786 (1974).

24. 33 Cal. 3d at 686, 660 P.2d at 837, 190 Cal. Rptr. at 379 (quoting Reed v. Reed, 404 U.S. 71, 75-76 (1971)).

25. 33 Cal. 3d at 686, 660 P.2d at 837, 190 Cal. Rptr. at 379, (quoting Newland v. Board of Governors, 19 Cal. 3d 705, 711, 566 P.2d 254, 258, 139 Cal. Rtpr. 620, 624 (1977)).

26. 33 Cal. 3d at 686-88, 660 P.2d at 837-39, 190 Cal. Rptr. at 379-81. The court found three cases particularly relevant. *See* Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978) (where the court rejected a cap on malpractice damages finding that the legislature was either misinformed as to the facts on which the statute was based or that the facts had changed); Carter v. Sparkman, 335 So. 2d 802 (Fla. 1976) (holding a requirement that malpractice claims be submitted to an arbitration panel); and Aldana v. Holub, 381 So. 2d 231 (Fla. 1980) (reversing *Carter* on the grounds that the statute had proved "unworkable and inequitable" thereby denying due process). The court fails to observe that the cases deal in a broad sense with malpractice claims covering all damages—certain and uncertain. Section 667.7 only subjects clearly uncertain claims to special treatment.

27. 33 Cal. 3d at 689, 660 P.2d at 839, 190 Cal. Rptr. at 381. The dissent took issue with this assessment:

> To be sure, one—but only one—of the reasons the Legislature adopted section 667.7 was its belief that the provision—along with other changes in the tort system—would help to hold down the cost of medical malpractice insurance. Contrary to the majority's claim, however, there is nothing in the Legislature's express statement of purpose . . . or in the statute's legislative history which suggests that the Legislature's sole—or even principal—objective in limiting such costs was simply a means or [sic] reducing or containing the *overall* expense of medical or hospital care. Although the Legislature may have viewed the containment of total medical costs as an incidental benefit of limiting malpractice insurance costs, its primary goal was related directly to the reduction of insurance costs and insurance premiums themselves.

33 Cal. 3d at 693, 660 P.2d at 842, 190 Cal. Rptr. at 384 (Kaus, J., dissenting).

kept down[28] and that the goal of the statute is thereby not met by the operation of section 667.7. "Since section 667.7 was premised on [the] assumption [that holding malpractice insurance costs down would in turn hold hospital costs down], the classification of malpractice victims made therein constitutes a denial of equal protection of the law under the foregoing standard."[29] Thus, the majority reached its ultimate conclusion: the trial court did not err in denying the motion for the application of section 667.7 because the statute was unconstitutional.[30]

The dissent provided able criticism of the majority opinion, noting first that "it is—to say the least—a novel proposition that a statute is to be declared unconstitutional simply because it does not accomplish all that the enacting Legislature may have hoped for."[31] It is suggested that under such logic, the entire Penal Code could be declared unconstitutional as ineffective.[32]

It is also observed—as is noted above[33]—that even if the majority's novel test is applied, it fails, in that the true legislative goal is misstated. In the dissent's view, the true overall goal was to keep health care costs down. Thus, the majority's simple conclusion, that hospital bed per day costs are up, ignores a substantial portion of the legislative goal.

Further, the court's holding is said to be "flawed" in that it as-

28. *Id.* at 690, 660 P.2d at 840, 190 Cal. Rptr. at 382. The majority appears to make this conclusion solely upon a "cost per bed" basis. No explanation is given as to why this is a valid measure. It has been suggested that the court's misinterpretation of this data was a basis for the decision to reconsider the case.

29. 33 Cal. 3d at 691, 660 P.2d at 840-41, 190 Cal. Rptr. at 382-83. The dissent rejects the court's view that the sole purpose of the Act was to hold costs down and asserts that one of the purposes was to ensure a better match of injury to payment via the periodic payment plan. *Id.* at 694-95, 660 P.2d at 843, 190 Cal. Rptr. at 385. The dissent also observes that even if the Act does not appear to hold *hospital* costs down, it does hold malpractice costs down which was, by the majority's admission, a legitimate goal of the legislature. *Id.* at 694, 660 P.2d at 843, 190 Cal. Rptr. at 385.

30. 33 Cal. 3d at 691-92, 660 P.2d at 839-40, 190 Cal. Rptr. at 381-82. The court looked for out-of-state support for its conclusion but found only two cases on point with conflicting results. *See* Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980) (declaring a periodic payment plan unconstitutional); State *ex rel.* Strykowski v. Wilkie, 261 N.W.2d 434 (1978) (upholding a periodic payment plan finding it intended to benefit those in need of long term care).

The court also rejected defendant hospital's contention that the damages assessed were excessive. 33 Cal. 3d at 692, 660 P.2d at 841-42, 190 Cal. Rptr. at 384.

31. 33 Cal. 3d at 693, 660 P.2d at 842, 190 Cal. Rptr. at 384 (Kaus, J., dissenting).

32. *Id.* This may amount to an overstatement, but it nonetheless is an excellent illustration of the nature of the majority's logic.

33. *See supra* note 27.

sumes that the *sole* purpose of MICRA was to keep costs (whatever costs) down. Rather, says the dissent, the purpose of MICRA included the implementation of periodic payment procedures to provide, in the words of the statute itself, "compensation sufficient to meet the needs of an injured plaintiff . . . for whatever period is necessary . . . ."[34] Justice Kaus observed:

> While there obviously can be a difference of opinion as to whether a periodic payment procedure is, on balance, beneficial or detrimental to injured plaintiffs, we cannot hold a statute unconstitutional simply because we might have resolved this basic policy decision differently than the Legislature.[35]

To suggest that the court's decision has failed justice would be to ignore the complexity of the issue. If you were injured in a hospital and disabled, would you want a company the hospital hired taking care of your financial security? On the other hand, if the legislature decides that policy considerations necessitate such a result, should the courts reject such decisions, based on an individual's right to choose? Until the court issues its opinion on reconsideration—and perhaps not even then—the door on the constitutional propriety of section 667.7 will remain open. In the meantime, it will be interesting to watch those furiously pushing the door in opposite directions.

B. *Permissible limitation of voter participation:* Citizens Against Forced Annexation v. Local Agency Formation Commission; Fullerton Joint Union High School District v. State Board of Education.

I. INTRODUCTION

In two recent cases, the California Supreme Court addressed the general issue of restricting voting participation in two different contexts. In *Citizens Against Forced Annexation v. Local Agency Formation Comm'n,*[1] participation in an annexation election was restricted to only those who lived in the area proposed to be incorporated, limiting the voting rights of citizens of the incorporating city. The case of *Fullerton Joint Union High School District v. State Board of Education*[2] dealt with an election held for approval to create a new school district which would include a portion of an already existing district. In this case only those who were residents of the proposed district were allowed to vote.

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34. CAL. CIV. PROC. CODE § 667.7(f) (West 1980).

35. 33 Cal. 3d at 695, 660 P.2d at 843, 190 Cal. Rptr. at 385 (Kaus, J., dissenting).

1. 32 Cal. 3d 816, 654 P.2d 193, 187 Cal. Rptr. 423 (1982).

2. 32 Cal. 3d 779, 654 P.2d 168, 187 Cal. Rptr. 398 (1982).

II. Judicial Review of Franchise Restrictions

A. Standard of Review

In evaluating the validity of a franchise restriction, the court must first determine the applicable standard of review. In most cases, the two-tiered test is applied. If the legislation bears a rational relationship to a conceivable legitimate state purpose, it is valid. If, however, the legislation involves a "suspect classification" or a "fundamental right," strict scrutiny is applied requiring the state to show that the distinctions created in the legislation are necessary to serve a compelling state interest.[3]

B. Identifiable Class of Voters

It is well settled that strict scrutiny is the standard to be applied to legislation which "excludes certain potential voters from participation."[4] It has further been held that if a voting restriction does not discriminate against an "identifiable class" of voters, the provision will not be viewed as a violation of the equal protection clause.[5] A legislative classification which has minimal or no effect on the fundamental right to vote will avoid the application of strict scrutiny,[6] while one which has a real and appreciable impact upon the equality, fairness, and integrity of the electoral process will be subject to the strict scrutiny standard of review.[7] Courts have focused on the legislative classifications effect on the electoral process in choosing its standard of review.

III. Strict Scrutiny Applied

A. Citizens Against Forced Annexation

1. Facts

A group of Eastview citizens submitted a petition to the Local

3. Curtis v. Board of Supervisors, 7 Cal. 3d 942, 951-52, 501 P.2d 537, 543-44, 104 Cal. Rptr. 297, 303-04 (1972).

4. Hawn v. County of Ventura, 73 Cal. App. 3d 1009, 1019, 141 Cal. Rptr. 111, 116, *cert. denied*, 436 U.S. 917 (1977). *See* Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Cipriano v. City of Hauma, 395 U.S. 701 (1969) (per curiam); Curtis v. Board of Supervisors, 7 Cal. 3d at 952, 501 P.2d at 544, 104 Cal. Rptr. at 304.

5. Weber v. City Council, 9 Cal. 3d 950, 513 P.2d 601, 109 Cal. Rptr. 553 (1973); Bordon v. Larce, 403 U.S. 1 (1971).

6. Gould v. Grubb, 14 Cal. 3d 661, 670, 536 P.2d 1337, 1342-43, 122 Cal. Rptr. 377, 382-83 (1975).

7. Choudhry v. Free, 17 Cal. 3d 660, 664, 552 P.2d 438, 440, 131 Cal. Rptr. 654, 656 (1976).

Agency Formation Commission of Los Angeles County (LAFCO) proposing annexation of its unincorporated territory to the City of Rancho Palos Verdes.[8] As required by statute,[9] an enviromental study was prepared and, finding no significant environmental impact, a negative impact statement was filed. A number of hearings were held and LAFCO approved the annexation proposal and instructed the city to begin annexation proceedings.[10] The plaintiffs, a coalition of residents and homeowner associations from the city sought a declaration that statutory procedures regarding annexation were unconstitutional and an injunction to prevent defendants from certifying the election's completion.[11]

A day after the lawsuit was filed, a hearing was held to hear protests, and, in compliance with statutory requirements,[12] the City called an election limiting participation to residents of the affected territory. The proposal was approved by the majority of the voters. However, the superior court granted an injunction which prevented the filing of the election's certificate of completion.

On appeal of this injunction, appellant raised an issue of first impression: whether legislation which limits voting participation to residents of the territory to be annexed violates the equal protection rights of residents of the annexing city.

2. Annexation Elections and Strict Scrutiny

The limitation of voting rights in elections held to determine whether a city will be incorporated[13] or if a territory will be an-

8. The Local Agency Formation Commission of Los Angeles County adopted this proposal by resolution pursuant to California Government Code section 35157 (West Supp. 1983). The entire process is governed by the Municipal Organization Act of 1977, CAL. GOV'T CODE §§ 35000-35500 (West Supp. 1983).

9. CAL. GOV'T CODE § 35152 (West Supp. 1983).

10. If the proposal is adopted by resolution the commission must initiate annexation proceedings. The conducting authority, after receiving protests from voters and landowners from the area to be annexed, must take one of three courses of action: (1) terminate the proceedings, (2) call a special election for the voters of the affected territory, or (3) order the territory annexed or detached without an election, depending upon the number of registered voters in the affected territory who have filed and not withdrawn written protests. See CAL. GOV'T CODE § 35228 (West Supp. 1983) as discussed by the court. 32 Cal. 3d at 820, 654 P.2d at 195-96, 187 Cal. Rptr. at 425-26.

11. California Government Code sections 35350-35357 (West Supp. 1983) provide the procedures for certification and completion of a municipal reorganization. Requirements include recording a copy of the certificate of completion with the county recorder, California Government Code section 35352 (West Supp. 1983), and filing a notice with the Secretary of State describing the reorganization, California Government Code section 35357 (West Supp. 1983).

12. CAL. GOV'T CODE § 35228 (West Supp. 1983).

13. Curtis v. Board of Supervisors, 7 Cal. 3d at 951, 501 P.2d at 545, 104 Cal. Rptr. at 303.

nexed[14] does affect a fundamental right. As discussed in section II, the standard of review to be applied in such cases is strict scrutiny. This test must be applied to "determine the constitutionally relevant boundaries, 'the geographic confines of the governmental entity concerned' and subject to strict scrutiny any measure which limits voting within those boundaries."[15]

To apply strict scrutiny in this case, the relevant boundaries must first be determined. While an argument can be made that either the annexing city or the territory to be annexed[16] is the "governmental entity concerned," the court concludes that "the relevant area includes both the affected territory and the affected city."[17] The residents of each area share the general concerns of the wealth and governance of the whole area. Residents of each area will be entitled to participate in city government, and the benefits of municipal services and will also be subject to the city's laws and tax requirements.

Since the statute limits voting rights within the "constitutionally relevant boundaries," the restriction must serve a compelling state interest to be considered valid. The Commission asserts that three state interests are served by the voting restriction: (1) avoiding the additional cost and administrative burden of extending the vote; (2) avoiding the danger that the votes of the residents of the area to be incorporated will be overwhelmed by the votes of the less interested city residents; and (3) avoiding the risk that the area to be incorporated will be unable to obtain city services if city residents do not favor annexation.[18] The court reviewed all three asserted grounds stating that each may qualify as a compelling interest under the constitutional test but determined that only the third ground "could justify compelling cities to annex adjoining territory even if the city's residents oppose annexation."[19]

14. Levinsohn v. City of San Rafael, 40 Cal. App. 3d 656, 659, 115 Cal. Rptr. 309, 310 (1974).

15. *Fullerton*, 32 Cal. 3d at 822, 654 P.2d at 197, 187 Cal. Rptr. at 427 (quoting Holt Civic Club v. Tuscaloosa, 439 U.S. 60, 68 (1978)).

16. The court points out that the city's territory will be augmented and that the legal status of the annexed territory will be altered. 32 Cal. 3d at 822, 654 P.2d at 197, 189 Cal. Rptr. at 427.

17. 32 Cal. 3d at 824, 654 P.2d at 198, 187 Cal. Rptr. at 428.

18. *Id.* at 824, 654 P.2d at 198-99, 187 Cal. Rptr. at 428-29.

19. *Id.* at 824, 654 P.2d at 199, 187 Cal. Rptr. at 429. Asserted interests one and two could serve a compelling interest in cases involving the annexation of a territory having few residents to a much larger city where the factors of inordinate cost

The determinative factor was the asserted state interest in permitting unincorporated territories the election of joining adjacent cities to obtain the benefits of municipal government and services.[20] The evolution of California's annexation statutes, which at one time allowed somewhat unstructured "sub-warfare" in annexation controversies and then eventually provided that local governmental authorities deal with annexation proposals,[21] seems to support the asserted interest.[22] The goal of the Municipal Organization Act of 1977 was to provide municipal services to areas outside of the city and the Act implied that municipal government can provide these services most efficiently by annexing the unincoporated area rather than by allowing other agencies to perform this function.[23]

The court pointed out that the legislature's goals of promoting orderly and logical community development and providing municipal services could be undermined if the annexing city had the power to veto the local commissioner's determinations. To extend such powers to municipalities could result in the "creation or perpetuation of islands of unwanted, unincorporated territories."[24] The state has a compelling interest in avoiding such areas of unwanted land, and the restrictions imposed by sections 35228 and 35231[25] are necessary to the accomplishment of this interest. The court therefore found these restrictions valid and constitutional.

B. Fullerton Joint High School District

1. Facts

The Yorba Linda community is a part of the Fullerton High School District though the two areas are physically separated by

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and administrative burden and the possible nullifying effect of disinterested voters would be a danger. This is compared to an annexation election in which the two affected areas are relatively equal and annexation would have a significant effect on each. The relevant statute did draw an acceptable distinction regarding elections in which the vote may properly be limited; however, the asserted interests can be achieved by less restrictive means.

20. *Id.* at 828, 654 P.2d at 202, 187 Cal. Rptr. at 431.

21. CAL. GOV'T CODE §§ 54774, 54790, 54796 (West Supp. 1982). Although local commissions were established to deal with annexation proposals, the Annexation Act of 1913 which empowered the residents of the affected areas to determine annexation disputes was not actually repealed until passage of the Municipal Organization Act of 1977.

22. In 1963 the California Legislature established a Local Agency Formation Commission in every county to "intervene in boundary decisions affecting local governments." Tillie Lewis Foods, Inc. v. City of Pittsburg, 52 Cal. App. 3d 983, 995, 124 Cal. Rptr. 698, 707 (1975).

23. 32 Cal. 3d at 829, 654 P.2d at 202, 187 Cal. Rptr. at 431-32.

24. *Id.* at 829, 654 P.2d at 202, 187 Cal. Rptr. at 432.

25. CAL. GOV'T CODE §§ 35228, 35231 (West Supp. 1983).

the Placentia Unified School District.[26] As a result of this separation, Yorba Linda high school students had to be bused five to seven miles to and from school each day. To alleviate the problems caused by this separation, the Orange County Committee on School District Organization prepared a plan to create a new unified school district in Yorba Linda. Having found all statutory requirements to be satisfied,[27] the plan was submitted to the State Board of Education for approval. The Committee also decided that the election would be held only in the Yorba Linda area, thus excluding all residents of the Fullerton District from participation.

The State Department of Education submitted a report to the Board stating that the plan substantially complied with the statutory requirements and approved the election limitation restricting the election to the Yorba Linda area. The Board voted unanimously to approve the plan.[28] In response to the election results, the Fullerton District filed a petition for a writ of mandate which challenged the plan's compliance with statutory requirements and claimed that the election should not have been limited to Yorba Linda residents. Although the trial court found that the plan complied with four of the statutory requirements,[29] it was held that the Board abused its discretion by acting arbitrarily and capriciously in approving a plan which tended to promote racial segregation, which failed to comply with state environmental requirements, and which violated the Fullerton District resident's right to vote.[30]

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26. A unified school district has grades kindergarten through twelve while the Yorba Linda Elementary School District has only grades kindergarten through eight. 32 Cal. 3d at 784 n.1, 654 P.2d at 171 n.1, 187 Cal. Rptr. at 401 n.1.

27. School organization plans must meet the following requirements: (a) new districts must have adequate enrollment; (b) new districts will have adequate financial ability; (c) each new district will have substantial community identity; (d) the plan will result in an equitable division of the property and facilities of the original district; and (e) formation of the new district will not promote racial or ethnic discrimination or segregation. CAL. EDUC. CODE § 4200 (West 1978).

28. The Board had to find that the plan substantially complied with the statutory requirements of Section 4200 and "review the propriety of the County Committee's designation of the territory in which the election will be held." 32 Cal. 3d at 785, 654 P.2d at 172, 187 Cal. Rptr. at 402.

29. The plan substantially complied with requirements of adequate enrollment, adequate financial ability, community identity, and equitable division of property. *Id.* at 785-86, 654 P.2d at 172, 187 Cal. Rptr. at 402.

30. *Id.* at 786, 654 P.2d at 172, 187 Cal. Rptr. at 402.

2. Limitation of the Election and the Application of Strict Scrutiny

As stated above in section II B, legislative classifications which have a real impact on the equities of the electoral process will be subject to strict judicial scrutiny.[31] The court states that this case is clearly an instance of appreciable impact on a fundamental right and, therefore, strict scrutiny should be applied.[32]

The State Board asserted that the classification at issue is geographical and thus strict scrutiny should only be applied if "the exclusion results in some impermissible end."[33] To support this assertion, the Board cited to *Town of Lockport v. Citizens for Community Action*[34] and *Holt Civic Club v. City of Tuscaloosa;*[35] however, neither of these cases supports the avoidance of strict scrutiny here.

The New York law at issue in *Lockport* provided for the adoption of a new county charter by approval of separate majorities of city and noncity residents. The substantial but different interests of the city and noncity voters was held to justify the "concurrent majorities" of the two groups.[36] It is important to note, however, that while *Lockport* does affirm that states can constitutionally require concurrent majorities of two groups with substantial but different interests, there is no support for the assertion that a classification which excludes the residents of one of the areas should not be subject to strict scrutiny.[37] The statute in *Lockport* gave *equal* recognition to the affected groups as opposed to the *selective* recognition in the statute at issue in *Fullerton.* This case does not support the Board's claim of immunity from strict scrutiny.

At issue in the other case cited by the Board, *Holt Civic Club,*[38] was an Alabama statute which allowed the extention of police

31. Choudhry v. Free, 17 Cal. 3d at 664, 552 P.2d at 440-41, 131 Cal. Rptr. at 656-57.

32. 32 Cal. 3d at 799, 654 P.2d at 182, 187 Cal. Rptr. at 412. This case is analogized to two Supreme Court decisions where voting restrictions applied to municipal and school districts were invalidated after failing the application of strict scrutiny. City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Kramer v. Union Free School Dist., 395 U.S. 621 (1969).

33. For example, the impermissible goal of racial discrimination, as demonstrated in Gomillion v. Lightfoot, 364 U.S. 339 (1960) (redefinition of city boundaries excluded most black voters).

34. 430 U.S. 259 (1977).

35. 439 U.S. 60 (1978).

36. 32 Cal. 3d at 801, 654 P.2d at 183, 187 Cal. Rptr. at 413. The requirement of separate voter approval was based on the recognition of "substantially differing electoral interests." *Id.*

37. *Id.*

38. 439 U.S. 60 (1978).

regulation and licensing authority to unincorporated areas within three miles of the city limits even though nonresidents were immune from a number of municipal powers. The residents of the unincorporated area claimed that because they were excluded from voting, the city's exercise of power beyond its limits was unconstitutional.[39] It was determined in *Holt* that the state did not deprive anyone within the relevant geographical boundary (the city of Tuscaloosa), strict scrutiny did not apply, and the plan satisfied the "rational relationship test." If a classification limits voting rights within the "geographic boundaries of the govermental entity concerned"[40] strict scrutiny still applies.[41] The impact of the election regarding the Board's plan will have a considerable impact on the entire Fullerton District[42] and the District is considered by the court to be a part of the relevant geographic area requiring the application of strict scrutiny to the classification.

The Board also cites *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*[43] to support its claim that strict scrutiny does not apply in elections which involve "a special district of limited powers whose activities disproportionately affect members of a particular group" when the vote is restricted to that group.[44] In *Salyer,* a franchise restriction allowing only landowners to vote in an election for directors of the water storage district was upheld because the financing was solely supported by levies on the landowners and the disproportionate effect of the district's activities on the landowners.[45] Similar reasoning has been applied in California cases concerning a reclamation district,[46] a small irrigation district,[47] and elections concerning a park and recreation district.[48] The court points out, however, that *Salyer* attempted to

39. 32 Cal. 3d at 802, 654 P.2d at 184, 187 Cal. Rptr. at 414.
40. *Holt Civic Club,* 439 U.S. at 68.
41. 32 Cal. 3d at 803, 654 P.2d at 184, 187 Cal. Rptr. at 414.
42. For example, the Fullerton District may owe a substantial debt to the newly created district which would have to be paid by residents of the Fullerton District. The withdrawal of all Yorba Linda students would also have a considerable impact on the Fullerton District. *Id.*
43. 410 U.S. 719 (1973).
44. 32 Cal. 3d at 803, 654 P.2d at 185, 187 Cal. Rptr. at 415.
45. *Salyer,* 410 U.S. at 731.
46. Philippart v. Hotchkiss Tract Reclamation Dist., 54 Cal. App. 3d 797, 127 Cal. Rptr. 42 (1976).
47. Schindler v. Palo Verde Irrigation Dist., 1 Cal. App. 3d 831, 82 Cal. Rptr. 61 (1969).
48. Simi Valley Recreation & Park Dist. v. Local Agency Formation Comm'n, 51 Cal. App. 3d 648, 124 Cal. Rptr. 635 (1975).

distinguish the water district election by emphasizing that education is a vital government function and has a broad impact. The water district election is of a limited purpose and disproportionate effect and should therefore be excluded from strict scrutiny.[49] This narrow exception does not support the Board's claim that strict scrutiny should not be applied in the school district election.

Having determined that strict scrutiny must be applied, the court found no compelling state interest which would validate the voting restriction. Both Yorba Linda and Fullerton District residents have a substantial interest in the election's outcome and the exclusion of Fullerton residents is a denial of equal protection.

3. The Plan's Compliance With Statutory Requirements

The court also reviewed the trial court's finding that the plan substantially complied with the requirements of section 4200 of the Education Code[50] and whether the requirements of the California Environmental Act[51] were met by the plan. The court reviewed the Board's actions to determine whether they were arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair.[52]

The court studied the plan's compliance with each of the statutory requirements: (1) the new district must have adequate enrollment; (2) the new district must have adequate financial ability; (3) the division of property must be equitable; and (4) the plan will not promote racial or ethnic discrimination or segregation.[53] In reviewing the plan, the court found that the Board did not act arbitrarily, capriciously, or without evidentiary support when it approved the proposal.[54] The Board's actions were there-

49. *Salyer,* 410 U.S. at 727-28.

50. CAL. EDUC. CODE § 4200 (West 1978).

51. *See* CAL. PUB. RES. CODE § 21050 (West 1977).

52. The Board's approval of a proposal to form a school district pursuant to California Education Code sections 4200-4419 (West 1978) qualifies as a "quasi-legislative" act. Such administrative agency decisions are therefore reviewed under the "arbitrary and capricious" standard of review. Pitts v. Perluss, 58 Cal. 2d 824, 833, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962).

53. CAL. EDUC. CODE § 4200 (West 1978). The court did not address the remaining requirement, i.e., that the new districts be organized on the basis of substantial community identity because the Fullerton High School District did not contend that the plan failed to comply in that regard. 32 Cal. 3d at 787, 654 P.2d at 173, 187 Cal. Rptr. at 403.

54. The court found that the enrollment of the new district was relatively low, 32 Cal. 3d at 789, 654 P.2d at 174, 187 Cal. Rptr. at 404; that there was a 17.19% deviation of the Yorba Linda revenue limit from the Fullerton revenue limit, *id.* at 790, 654 P.2d at 174-75, 187 Cal. Rptr. at 405; that the actual effect of the property division was uncertain, *id.* at 792, 654 P.2d at 176, 187 Cal. Rptr. at 406; and that the

fore upheld.

The court also reviewed the plan's compliance with the California Environmental Quality Act requirements that any public agency undertaking a project which may have significant environmental impact first conduct a study of the impact.[55] Although the Board had simply approved the plan and no action had been taken, this approval was an essential step in implementing the plan which would ultimately lead to environmental impact.[56] A study is required in this case.

Not only must the study be carried out, it should have been completed before the plan was approved. The Act is intended to ensure that the environmental impact of a project is considered in the decision making process.[57] In order to carry out this purpose, the Board should have had the environmental data, which a study would provide, before it in making its decision. The Board's failure to carry out and consider the plan was a violation of the Act.[58] The trial court's order that the Board vacate its approval of the plan and prohibition of the election until the Act's requirements are met was ordered to be modified consistent with this court's view.

IV. CONCLUSION

In reviewing these two cases, the court has made two important statements regarding acceptable franchise restrictions. In *Citizens Against Forced Annexation* the court affirmed that franchise restrictions affecting either the annexing city or the territory to be annexed must be subject to the strict scrutiny standard of review. The state does have, however, a compelling interest in allowing residents of unincorporated territories to take advantage of the

proposed district would have a predominantly white population while the minority enrollment of the Fullerton District would increase. *Id.* at 792, 654 P.2d at 176, 187 Cal. Rptr. at 406. None of these problems were sufficient, however, to show that the Board acted arbitrarily, capriciously, or without evidentiary support. *Id.* at 794, 654 P.2d at 177, 187 Cal. Rptr. 407.

55. CAL. PUB. RES. CODE § 2150 (West 1977).

56. This case is similar to Bozung v. Local Agency Formation Comm'n, 13 Cal. 3d 263, 529 P.2d 1017, 118 Cal. Rptr. 249 (1975) (annexation approval is a necessary step which will culminate in environmental impact and requires an environmental report).

57. Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 247, 256-57, 502 P.2d 1049, 1054-55, 104 Cal. Rptr. 761, 766-67 (1972).

58. 32 Cal. 3d at 798, 654 P.2d at 180-81, 187 Cal. Rptr. at 410-11.

benefits of municipal government and services. This interest satisfied the application of strict scrutiny, and the voting restriction in *Citizens* was held to be valid.

In *Fullerton,* the court applied strict scrutiny in the context of a school organization election. The residents of the Yorba Linda area were to vote on a proposal to create their own unified district seceding from the Fullerton District. Again the court applied strict scrutiny. In this case both areas were found to have substantial interest in the election and the exclusion of Fullerton voters was held to be a violation of equal protection.

VI. CRIMINAL LAW

A. *An arrestee has no reasonable expectation of privacy in the back seat of a police car:* **People v. Crowson.**

Although the court in *People v. Crowson*[1] resolved a question of statutory interpretation concerning enhancement of criminal sentences, it also added to the confusion surrounding the more important question of an arrested suspect's right to privacy.[2] In addressing the statutory question, the court held that the sentence enhancement allowed in Penal Code section 667.5[3] may be premised upon a foreign conviction and prison term only if the elements of the foreign crime, as defined by the law under which the defendant was convicted, are the same as those enumerated by California law for the same felony.[4] This resolved some apparent disagreement in the lower courts.[5] As to the question of an arrested suspect's privacy interests, the divided court found that the defendant had no reasonable expectation of privacy when he was placed in the back of a police car with his co-

1. 33 Cal. 3d 623, 660 P.2d 389, 190 Cal. Rptr. 165 (1983). Justice Kaus wrote the opinion for the court, with Justice Mosk concurring generally. See *infra* note 2 for a more detailed analysis of the composition of the court.

2. Justice Broussard and Chief Justice Bird concurred to establish a majority as to the enhancement question. Justice Richardson dissented on this point. On the question of the defendant's privacy rights, Justice Richardson concurred, Justice Broussard agreed with the court's holding for different reasons (thereby making the decision on the issue a plurality), and Chief Justice Bird dissented. The fact that the privacy issue was resolved by a plurality, that one member of that group may hold differently in the future, and that the perceived attitude of Broussard, the newest member of the court (who did not participate in this decision) indicating he would side with the minority, suggest that the question is far from resolved. *See* 96 L.A. Daily J., March 25, 1983, at 1, col. 2.

3. CAL. PENAL CODE § 667.5 (West Supp. 1983).

4. 33 Cal. 3d at 632, 660 P.2d at 395, 190 Cal. Rptr. at 171.

5. *Compare* People v. Hickey, 109 Cal. App. 3d 426, 438-39, 167 Cal. Rptr. 256, 262-63 (1980) *with* People v. Plies, 121 Cal. App. 3d 676, 678-82, 177 Cal. Rptr. 4, 5-7 (1981); People v. Cheri, 127 Cal. App. 3d 280, 283-85, 179 Cal. Rptr. 423, 424-26 (1981); *and* People v. Roberson, 81 Cal. App. 3d 890, 894-95, 146 Cal. Rptr. 777, 779 (1978).

suspect.[6]

The case arose when defendant Earl Bradley Crowson was arrested in San Diego after he was implicated in a robbery. He was taken to the central police station, questioned briefly, and then told he would be taken to the county jail by car. Crowson was placed in the back of a police cruiser with Ruben Romero, a suspect in the crime who had implicated Crowson. Romero and Crowson were apparently left alone for approximately half an hour, during which they discussed their alleged criminal conduct. Their statements were damaging and, unbeknownst to them, were recorded.[7] The recording was later played at Crowson's trial where he was convicted of robbery and burglary. Crowson appealed, citing the grounds noted above as reversible error.[8]

Crowson contended that the admission of the tape recording violated his federal fifth amendment rights as defined in *Miranda v. Arizona*[9] and his state constitutional right to privacy.[10] The court summarily disposed of the *Miranda* question by noting that the issue was not raised at trial and had, therefore, been waived.[11] A contrary holding would very nearly mandate proof of compliance with *Miranda* in every criminal case,[12] a result which would seem

6. 33 Cal. 3d at 629, 660 P.2d at 392, 190 Cal. Rptr. at 168.

7. *Id.* at 627, 660 P.2d at 391, 190 Cal. Rptr. at 167. Romero and Crowson apparently became aware of the recording device before anyone returned and, instead of erasing the tape, tried to "exculpate" themselves with further statements.

8. *Id.* at 628, 660 P.2d at 391, 190 Cal. Rptr. at 167.

9. 384 U.S. 436 (1966). Defendant's *Miranda* argument would be that the process amounted to an interrogation without a *Miranda* warning or that after a warning he expressed an intention not to speak without counsel present.

10. 33 Cal. 3d at 628, 660 P.2d at 391, 190 Cal. Rptr. at 167. CAL. CONST. art. I, § 1 provides in pertinent part: "All people are by nature free and independent and have inalienable rights. Among these [is the right to] privacy."

11. "Because Crowson failed to pursue this matter at trial, the People had no reason or opportunity to present evidence on this factual threshold question." 33 Cal. 3d at 628, 660 P.2d at 392, 190 Cal. Rptr. at 168.

12. *Id.* Apparently the court had touched on this issue just once before and then it was in a juvenile context. *In re* Dennis M., 70 Cal. 2d 444, 462, 540 P.2d 296, 307, 75 Cal. Rptr. 1, 12 (1969). The appellate courts have often dealt with the issue, generally resolving it just as the *Crowson* court did. *See, e.g.,* People v. Bennett, 60 Cal. App. 3d 112, 116, 131 Cal. Rptr. 305, 307 (1976); People v. Peters, 23 Cal. App. 3d 522, 530, 101 Cal. Rptr. 403, 407-08, *cert. denied,* 409 U.S. 1064 (1972) ("There is abundant authority in this state that if there is no objection at the trial to the admission of a confession or of statements obtained in violation of *Miranda,* the objection cannot be raised for the first time on appeal.").

Defendant contended on appeal that the *Miranda* issue should be heard nonetheless, either because there had been an unforeseeable change in the law or be-

to extend the privilege beyond its original intention.[13]

Turning to the question of defendant's privacy interests, the majority observed that the right to privacy guaranteed by the California Constitution is no greater than that provided for by the fourth amendment's guarantee of freedom from unreasonable searches in a criminal context.[14] This conclusion was rejected by Chief Justice Bird (with Justice Reynoso concurring), who argued vigorously that the very reason for the addition of privacy to section one rights was to expand those rights beyond the fourth amendment.[15]

The court rejected Crowson's contention that *White v. Davis*[16] created an expanded privacy interest that may be abridged only upon the showing of a compelling state interest, noting that non-criminal surveillance first amendment rights were involved.[17] Hence, the court seemed to suggest that the extent to which a person's privacy interests are protected is dependent upon the nature of the intrusion. If this is so, what may amount to an impermissible intrusion in a non-criminal/civil context may be a permissible intrusion in a criminal investigation.

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cause the assistance of his trial counsel was constitutionally defective. The court rejected these contentions.

As to defendant's first contention, neither California nor federal law recognized any privacy interest in a non-privileged custodial conversation at the time of the recording or trial, but recognized it at the time of the appeal. The court apparently was of the opinion that the change was foreseeable, although no pattern of case law was cited to support this proposition. This summary conclusion stands in sharp contrast to the court's prior handling of this issue. *See* People v. De Santiago, 71 Cal. 2d 18, 22-28, 453 P.2d 353, 355-59, 76 Cal. Rptr. 809, 811-15 (1969) (the court presented an extensive discussion of case law in support of its conclusion that the change was not foreseeable).

In rejecting the ineffective assistance claim, the court had cited People v. Pope, 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979), where a criminal defendant was found to be entitled to the assistance of an attorney acting as his diligent conscientious advocate. However, the battle on this issue is not over yet for defendant Crowson. Since the court refused to reach the issue, a writ of habeas corpus was filed with the trial court and rejected. At time of publication, the question was pending before the court of appeal. Telephone interview with Jeffrey J. Stuetz, Deputy Public Defender for the State of California (Aug. 15, 1983).

13. 33 Cal. 3d at 629, 660 P.2d at 392, 190 Cal. Rptr. at 168.

14. *See* Miranda v. Arizona, 384 U.S. 436 (1966). *Miranda* was ultimately intended to prevent police abuse of sixth amendment rights, not to add another element of proof at every criminal trial.

15. 33 Cal. 3d at 637-38, 660 P.2d at 398-99, 190 Cal. Rptr. at 174-75. This "legislative intent" argument, however, is based upon the ballot statements prepared for voters at the time of the amendment's enactment, while the majority relies on case law. Though the latter is binding authority, the former may be more persuasive. The dissent also questions the majority's distinction that here the right must be interpreted in " a criminal context." *Id.* at 638 n.1, 660 P.2d at 399 n.1, 190 Cal. Rptr. at 175 n.1 (Bird, C.J., dissenting).

16. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975).

17. 33 Cal. 3d at 629 n.5, 660 P.2d at 392 n.5, 190 Cal. Rptr. at 168 n.5.

The court then observed that Crowson's right of privacy as delineated by the fourth amendment turned on whether he had a reasonable expectation of privacy in the back of the police car (a la Katz in the phone booth).[18] The court candidly observed that Crowson undoubtedly expected that his conversation with his accomplice would be private, yet concluded that there was no "reasonable" expectation of privacy. The court pointed to numerous other decisions, from California and other states, reaching the same conclusion. The tacitly expressed critical distinction between *Crowson* and *Katz* was that Crowson was in police custody while Katz was not. Crowson's recent arrest was "a most extreme interference with his right to be left alone."[19] However, this reasoning appears circuitous. The denial of a person's liberty is not a basis for the wholesale abrogation of all his constitutional interests, especially where there is not yet a conviction.[20]

The court concluded its consideration of the privacy issue by noting that its decision in *DeLancie v. Superior Court*[21] was not in conflict with its holding in *Crowson. DeLancie,* it is observed, dealt with sections 2600 and 2601 of the Penal Code—which apply only, in the court's view, to prison inmates and jail detainees. The proposition that a convicted prisoner has greater privacy rights than an arrested suspect is noticeably incongruous.[22]

With the privacy issue disposed of, the court turned to the propriety of the trial court's enhancement[23] of Crowson's sentence.[24]

18. *Id.* at 629, 660 P.2d at 392-93, 190 Cal. Rptr. at 168-69. *See* Katz v. United States, 389 U.S. 347 (1967). Katz was in a phone booth that was "bugged." The state contended that since the booth was glass, he had no "reasonable expectation of privacy." The Supreme Court disagreed, observing that a reasonable person would expect his conversation to be private.

19. 33 Cal. 3d at 629, 660 P.2d at 392-93, 190 Cal. Rptr. at 168-69.

20. The apparent refusal of police agencies and the courts to recognize this has resulted in an effort to curtail and control the traditional strip search of various suspects.

21. 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982).

22. This conflict is noted by Justice Broussard in his opinion: "[T]he reasoning of [*DeLancie*] necessarily casts doubt upon any parallel rule declaring that arrestees placed in a police car can never reasonably expect privacy, even if the police have deliberately encouraged that expectation." 33 Cal. 3d at 635-36, 660 P.2d at 397-98, 190 Cal. Rptr. at 173-74 (Broussard, J., dissenting).

It should be noted that, but for the fact that *DeLancie* was decided after Crowson's trial, Broussard would most likely have been on the other side, thereby changing the ruling of the court. Hence, in light of the tenor of the court's newest Justice, the holding of this case may be short lived. 96 L.A. Daily J., March 25, 1983, at 1, col. 2.

23. "Enhancement" of criminal sentences is intended to provide added dis-

Crowson carried a previous felony conviction from a federal jurisdiction on his record: conspiracy to possess a controlled substance with intent to distribute. In order for this conviction to support enhancement, it had to be based on the same elements as those set forth in the California statute.[25] Crowson contended that his federal conviction was not premised upon a statute requiring an overt act, which was specifically required by the California statute, and that enhancement was therefore improper.[26] The state argued that the federal statute did require an overt act, and that even if it did not, an overt act was included in Crowson's indictment and thus supported his conviction.[27]

Since Crowson conceded that the enhancement would be proper if the federal crime was construed to include an overt act,

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couragement to repeat offenders and to exact retribution from those who commit particularly vicious crimes. *See* CAL. PENAL CODE § 667.5 (West Supp. 1983) (providing for an addition of three years where defendant is convicted of a "violent felony" or an additional year if the defendant is a previously sentenced felon). *See also* CAL. PENAL CODE §§ 667, 667.51, 667.6 (West Supp. 1983) (respectively providing for enhancement where defendant is a "serious felony habitual criminal," has committed a lewd act with a child, or has repeatedly committed certain particularly heinous crimes).

24. 33 Cal. 3d at 630, 660 P.2d at 393, 190 Cal. Rptr. at 169.

25. *See supra* notes 3, 21, & 22 and accompanying text. Section 667.5 provides in pertinent part:

> Enhancement of prison terms for new offenses because of prior prison terms shall be imposed as follows:
>
> * * *
>
> (b) [w]here the new offense is any felony for which a prison sentence is imposed, in addition and consecutive to any other prison terms therefor, the court shall impose a one-year term for each prior separate prison term served for any felony. . . .
>
> * * *
>
> (f) A prior conviction of a felony shall include a conviction in another jurisdiction for an offense which if committed in California is punishable by imprisonment in state prison provided the defendant served one year or more in prison for such offense in the other jurisdiction. A prior conviction of a particular felony shall include a conviction in another jurisdiction for an offense which includes all of the elements of the particular felony as defined under California law provided the defendant served one year or more in prison for such offense in the other jurisdiction.

CAL. PENAL CODE § 667.5 (West Supp. 1983).

26. 33 Cal. 3d at 630, 660 P.2d at 393, 190 Cal. Rptr. at 169. Crowson was convicted of violating 21 U.S.C. § 846, which provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescibed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 846 (1976). The section is ambiguous as to the necessity of an overt act. In contrast, the California statute clearly requires an overt act:

> No agreement amounts to a conspiracy, unless some act, beside such agreement, be done within this state to effect the object thereof, by one or more of the parties to such agreement and the trial of cases of conspiracy may be had in any country in which any such act be done.

CAL. PENAL CODE § 184 (West 1970).

27. 33 Cal. 3d at 630, 660 P.2d at 393, 190 Cal. Rptr. at 169.

the court resolved that issue first. Noting that the statute was unclear as to whether an overt act was required,[28] the court turned to case law applying the statute. This provided no simple solution, but the court ultimately concluded that no overt act need be proved to find a violation of the statute.[29]

This required the court to resolve conflicting appellate decisions. One case held that enhancement was improper where the specified elements of the other jurisdiction's crime are not identical to those in California,[30] while others have suggested that in some circumstances it is permissible for a court to go beyond the elements of the foreign crime to determine whether the defendant's actual *conduct* would have resulted in a similar California conviction.[31] Considering the language of the enhancement statute,[32] the court concluded that enhancement was proper only where the foreign conviction included all California elements of

28. *See supra* note 26 for the full text of the statute.

29. 33 Cal. 3d at 631-32, 660 P.2d at 394-95, 190 Cal. Rptr. at 170-71. The court points to United States v. King, 521 F.2d 61, 63 (10th Cir. 1975) in noting that the federal circuits do not agree on the requirement of an overt act. In concluding that *no* overt act is required by the Ninth Circuit, the court observes that although an overt act is often mentioned "in passing" as one of the elements of a drug conspiracy charge, *see, e.g.,* United States v. Kaiser, 660 F.2d 724, 730 (9th Cir. 1981), it has never been at issue in a case. The court also suggests that a recent Ninth Circuit decision "implicitly acknowledge[s]" that an overt act may *not* be required for a section 846 violation. *See* United States v. Melchor-Lopez, 627 F.2d 886, 890 (9th Cir. 1980). The collective third strike in the court's eyes was the circuit's consistent finding that no overt act was required by decisions interpreting the statutory predecessors to section 846. *See* Ewing v. United States, 386 F.2d 10, 15 (9th Cir. 1967) (interpreting former 21 U.S.C. § 176a); Leyvas v. United States, 371 F.2d 714, 717 n.4 (9th Cir. 1967) (interpreting former 21 U.S.C. § 174). The court concluded:

> To our knowledge, there is nothing in the legislative history of the 1970 revision of the federal drug laws—which produced, inter alia, 21 United States Code section 846—that suggests that Congress intended to add a new overt act requirement to the revised federal drug conspiracy provisions (see *United States v. DeViteri* (E.D.N.Y. 1972) 350 F. Supp. 550, 552), and cases outside of the Ninth Circuit have relied on the Ninth Circuit's Ewing decision in concluding that 21 United States Code section 846 does not require proof of an overt act. (See, e.g., *United States v. Bermudez, supra,* 526 F.2d 89, 94, *United States v. DeViteri, supra,* 350 F. Supp. 550, 551-552).

33 Cal. 3d at 632, 660 P.2d at 394, 190 Cal. Rptr. at 170.

30. People v. Hickey, 109 Cal. App. 3d 426, 438-39, 167 Cal. Rptr. 256, 262-63 (1980).

31. People v. Plies, 121 Cal. App. 3d 676, 678-82, 177 Cal. Rptr. 4, 5-7 (1981); People v. Cheri, 127 Cal. App. 3d 280, 283-85, 179 Cal. Rptr. 423, 424-26 (1981); People v. Roberson, 81 Cal. App. 3d 890, 894-95, 146 Cal. Rptr. 777, 779 (1978).

32. The relevant subsection of 667.5 is set forth in full *supra* at note 25. The court concluded that the use of the term "offense" in the statute referred to a crime and not merely the actual conduct of the defendant and that the word had a

the crime.[33] Support for this conclusion was found in case law interpreting other enhancement statutes.[34]

The People had argued that even if an overt act was not found to be an element of the crime, an overt act was set forth in the indictment on which the conviction was based. Looking to the United States Supreme Court, the court rejected this argument, noting that a guilty plea is simply an admission of "all the elements of a formal criminal charge."[35] The court also observed that enhancement should not turn on the whim of the prosecutor who drafted the indictment.[36]

Crowson thus resolved an important question as to the application of enhancement—but did little to clarify an arrestee's privacy interests. This case does not represent a final resolution of the privacy issue, as it is merely a plurality opinion on that point, and it appears that Justice Broussard may hold the other way the next time the court considers the issue.[37] An arrestee's custodial privacy interests may take a back seat to other societal interests for the moment, but the door is not yet completely closed.

B. *Penal Code section 496 authorizes only a permissive inference of guilty knowledge applicable to secondhand dealers:* **People v. Roder.**

Based on two new United States Supreme Court rulings regarding presumptions and inferences,[1] the California Supreme Court held in *People v. Roder*[2] that section 496 of the Penal Code pre-

consistent meaning throughout the statute. *See* People v. Hernandez, 30 Cal. 3d 462, 468, 637 P.2d 706, 710, 179 Cal. Rptr. 239, 243 (1981).

33. 33 Cal. 3d at 633, 660 P.2d at 395, 190 Cal. Rptr. at 171.

34. *See In re* Finley, 68 Cal. 2d 389, 393, 438 P.2d 381, 384, 66 Cal. Rptr. 733, 736 (1968) ("neither the People nor the defendant can go behind . . . adjudicated elements in an attempt to show that he committed a greater, lesser, or different offense").

35. McCarty v. United States, 394 U.S. 459, 466 (1969).

36. *See* People v. Olah, 300 N.Y. 96, 89 N.E.2d 329, 332 (1949). The court rejected the use of surplus allegations allowed by the courts under the former habitual criminal law as inapplicable, since most of the cases involved situations where defendant had a motive to attack the allegations for sentencing and parole purposes. In addition, none of the cases addressed the "inherent problems" with such practice. *See In re* Bramble, 31 Cal. 2d 43, 53, 187 P.2d 411, 417 (1947).

Justice Richardson was the lone dissenter on the enhancement issue, positing that since Crowson pleaded guilty to the indictment, he must have been guilty of all the allegations made and that enhancement was therefore proper. 33 Cal. 3d at 636-37, 660 P.2d at 398, 190 Cal. Rptr. at 174 (Richardson, J., dissenting).

37. *Id.* at 635-36, 660 P.2d at 397-98, 190 Cal. Rptr. at 173-74 (Broussard, J., dissenting).

1. Ulster County Court v. Allen, 442 U.S. 140 (1979); Sandstrom v. Montana, 442 U.S. 510 (1979). For further explanation, *see infra* notes 4-10 and accompanying text.

2. 33 Cal. 3d 491, 658 P.2d 1302, 189 Cal. Rptr. 501 (1983). In January 1980,

scribed a mandatory presumption, which created the possibility that the jury could interpret the presumption as relieving the prosecution of the burden of proving each element of the crime. As a result, the court found a constitutional error and reversed the defendant's conviction for receiving stolen property.[3]

In *Ulster County Court v. Allen*,[4] the United States Supreme Court set forth the precise guidelines for analyzing the constitutionality of an instruction regarding presumptions. Initially, the trier of fact must distinguish between the two types of presumptions. The first type, a permissive inference, "allows—*but does not require*—the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and . . . places *no* burden of any kind on the defendant."[5] The second category, a mandatory presumption, "tells the trier that he or they *must* find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection between the two facts."[6] Each type of presumption requires a different standard of analysis.[7] A permissive inference will be held constitutionally defective only if its use has caused the reasonable factfinder to make an erroneous factual determination. However, a mandatory presumption will be deemed an error if "on its face"[8] the resulting conclusion was insufficient to support the inference of guilt beyond a reasonable doubt. With the intro-

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Roder and a codefendant who were the proprietors of a secondhand shop were arrested and charged with receiving stolen property.

3. Justice Kaus authored the opinion, expressing the unanimous view of the court.

4. 442 U.S. at 157.

5. *Id.* (emphasis added).

6. *Id.* (emphasis in original).

7. A permissive inference does not force the trier of the fact to draw any conclusions. He may accept or reject the inference. Also, this type of device does *not* shift the burden of proof to the defendant, and is constitutionally infirm only upon a showing that no reasonable person could find the result permitted by the inference. *See* 33 Cal. 3d at 498, 658 P.2d at 1306, 189 Cal. Rptr. at 505.

A mandatory presumption is a more complex evidentiary device. This presumption directs the trier to assume the existence of the ultimate, elemental fact from proof of particular, designated basic facts. The trier *must* assume this ultimate fact, thus severely limiting his freedom to correlate all of the evidence presented in order to determine whether the facts offered support guilt beyond a reasonable doubt. *Id.*

8. 442 U.S. at 157-60. The Court clearly distinguished between "on its face" and "as applied" stating that mandatory presumptions may not be judged "as applied."

duction of the Court's ruling in *Sandstrom v. Montana,*[9] an even more stringent standard is required when a mandatory presumption is utilized. This test further provides that the prosecution's burden of proof has been met only if the "basic fact proved *compels* the inference of guilt beyond a reasonable doubt."[10]

In the present case, defendant Roder claimed the trial court erred in instructing the jury on the presumption of guilty knowledge as applied to secondhand dealers, which is set forth in Penal Code section 496.[11] Defendant based this contention upon the rulings in *Ulster County* and *Sandstrom.* In reversing defendant's conviction, the court held that section 496 imposed a mandatory presumption which ultimately shifted the burden of proof to the defendant, a result inconsistent with the decisions in *Winship,*[12] *In re Ulster County,* and *Sandstrom.*

Upon analyzing section 496,[13] the court found the task of categorizing the nature of the presumption in this case to be complicated because section 496 was not utilized verbatim in the jury

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9. 442 U.S. 510 (1979).

10. 33 Cal. 3d at 498 n.7, 658 P.2d at 1306 n.7, 189 Cal. Rptr. at 505 n.7.

11. CAL. PENAL CODE § 496 (West 1970) states in pertinent part:

> Every person whose principal business is dealing in or collecting used or secondhand merchandise or personal property, and every agent, employee or representative of such person, who buys or receives any property which has been stolen or obtained in any manner constituting theft or extortion, under such circumstances as should cause such person, agent, employee or representative to make reasonable inquiry to ascertain that the person from whom property was bought or received had the legal right to sell or deliver it, without making such reasonable inquiry, shall be presumed to have bought or received such property knowing it to have been so stolen or obtained. This presumption may, however, be rebutted by proof.

Compare CAL. PENAL CODE § 496 (West Supp. 1983). This statute was amended subsequent to the defendant's arrest.

12. *In re* Winship, 397 U.S. 358 (1970), established that the prosecution is constitutionally required to prove the guilt of the defendant as to the charged offense beyond a reasonable doubt, thus including the knowledge element embodied in the section 496 presumption.

13. Section 496 was not the exact jury instruction given; however, the court found the actual instruction and section 496 similar. The actual instruction stated:

> If you find beyond a reasonable doubt that the defendants or either of them, that their place of business or the place of business of either of them, principal place of business was dealing in or collecting used or secondhand merchandise or personal property or that defendants were the agents or employees of such a person, that defendant or either of them had bought or received stolen property under such circumstances as would have caused the defendant or either of them to make reasonable inquiry that the person from whom such property was bought or received had the legal right to sell or deliver it without the defendants making such reasonable inquiry, then you shall presume that defendants bought or received such property knowing it to have been stolen unless from all the evidence you have reasonable doubt that defendants knew the property was stolen.

33 Cal. 3d at 496 n.4, 658 P.2d at 1304 n.4, 189 Cal. Rptr. at 503 n.4. *Cf. supra* note 11 (text of section 496).

instructions.[14] Several discrepancies between the two were noted. First, the jury was not instructed on the statutory definition of a "presumption" as provided for in Evidence Code section 600.[15] Secondly, the jury was not informed of the provisions of subdivision 3 of section 496, which allows the burden to be shifted to the defendant upon the prosecution's establishment that (a) the defendant was a secondhand dealer; and that (b) he had in fact received stolen property under circumstances calling for reasonable inquiry.[16] The final incongruity, and apparently the most troublesome aspect, was the court's instruction concerning the conclusion of guilty knowledge. The jury was instructed to presume that defendant bought or received stolen property with knowledge of its having been stolen, "unless from all the evidence you have reasonable doubt that defendant knew the property was stolen."[17] While the first two inconsistencies may be viewed as favorable to the defendant, the final one was found to be ambiguous and thus confusing to an already bemused jury.[18] The court interpreted the last instruction as requiring the jury to *presume,* upon the finding of certain basic facts, that the defendant had criminal knowledge, unless of course it had a reasonable doubt.

The court also found fault with the trial court's clarification of rebuttable and conclusive presumptions. It concluded that the jury could have reasonably interpreted the court's statement as relieving the prosecution of the burden of proving each element of the offense beyond a reasonable doubt.[19] Accordingly, the court ruled this a constitutional error in light of *Ulster County* and

14. "The constitutional issue before us is a bit more complicated, however, because the Supreme Court in *Sandstrom* explained that a determination of the nature of the presumption at issue in any case 'requires careful attention to the words actually spoken to the jury. . . .' " 33 Cal. 3d at 502, 658 P.2d at 1309, 189 Cal. Rptr. at 508 (quoting *Sandstrom,* 442 U.S. at 514 (citation omitted)).

15. CAL. EVID. CODE § 600 (West 1966). This definition provides that a presumption is an assumption "that the law *requires* to be made" from another fact. *Id.* (emphasis added).

16. This event would normally lead the defendant to prove that he had made a "reasonable inquiry" concerning ownership of the property in question. The court's actual instructions were, in essence, that the *prosecution* had the burden of proving that there had been *no* reasonable inquiry.

17. 33 Cal. 3d at 503, 658 P.2d at 1310, 189 Cal. Rptr. at 509 (emphasis omitted).

18. During deliberations, the jury requested clarification of the instructions they had been given. *Id.*

19. *See* 33 Cal. 3d at 504, 658 P.2d at 1311, 189 Cal. Rptr. at 510 (the defendants "can go forward and raise a reasonable doubt that they actually knew that").

Sandstrom.[20]

The court concluded that section 496 should be preserved. The Attorney General requested that it be construed as a legislatively permissive inference in order to pass constitutional muster. On the basis of Evidence Code section 501, the court concurred in this conclusion. In its attempt to balance the unconstitutional effect of section 496 with its belief that some form of guidance for the trier of fact is necessary, the court stipulated that section 496 be read as a permissive inference, thus maintaining the legislative intent underlying the secondhand dealer statute. Upon doing so, the court confirmed that the prosecution must retain the burden of proving *every* element of the charged offense beyond a reasonable doubt.[21]

C. *Judge's remarks concerning credibility of witnesses held inappropriate:* **People v. Cook.**

People v. Cook, 33 Cal. 3d 400, 658 P.2d 86, 189 Cal. Rptr. 159 (1983), raises the issue of how far a judge may go with his comments in response to a request from a deadlocked jury. Here, the defendant was charged and convicted with "preventing or dissuading a witness from attending a trial by means of force or threats of unlawful injury." The prosecution's case consisted primarily of testimony from the potential witness who was threatened and from her 10 year-old daughter. There were no other witnesses to the incident. The testimony of the two witnesses was consistent, although the appellant attempted to destroy the credibility of that testimony on cross-examination.

Five and one-half hours into the second day of jury deliberations, the forewoman reported the jury deadlocked and delivered a note indicating that their differences could be resolved if they received an opinion from the court as to the credibility of the witnesses. Despite the objection by appellant's counsel, the court proceeded on the basis that its comments were "intended to be advisory only."

While the law under Cal. Const. art. VI, § 10 does provide that "[t]he court may make such comment on the evidence and the

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20. *Id.* In accordance with Chapman v. California, 386 U.S. 18 (1967), the court did not rule this error "harmless." "The presumption in question directly affected the only element of the offense that was in issue . . . . Under these circumstances, we cannot find beyond a reasonable doubt that the instruction did not affect the jury's verdict." 33 Cal. 3d at 505, 658 P.2d at 1311, 189 Cal. Rptr. at 510.

21. CAL. EVID. CODE § 501 (West 1966) provides, in pertinent part, that "[i]nsofar as any statute . . . assigns the burden of proof in a criminal action, such statute is subject to Penal Code Section 1096." CAL. PENAL CODE § 1096 relates the rule that the prosecution bears the burden of proving guilt beyond a reasonable doubt.

testimony and credibility of any witness as in its opinion is necessary for the proper determination of the cause," the purpose of this provision is limited to use of the trial court's experience and training in the analysis of evidence, when attempting to assist the jury. Because the supreme court felt the comments made at the time of the jury's deadlocked position resulted in the usurpation of "the function of the jury as the exclusive trier of fact," it reversed the judgment of conviction.

D. *Effect of court's failure to state reasons for denying bail: In re* **Pipinos.**

In re Pipinos, 33 Cal. 3d 189, 654 P.2d 1257, 187 Cal. Rptr. 730 (1982), provided an opportunity for the California Supreme Court to delimit the requirements for an adequate statement of reasons for denying release pending appeal.

Petitioner was convicted on conspiracy and possession of controlled substances for sale and subsequently sent to state prison. Petitioner moved for release on bail pending his appeal. The motion was denied for the following stated reasons: that petitioner "posed a substantial flight risk," represented "some risk to society," and there was not a "substantial likelihood of success on appeal."

On appeal, petitioner claimed that the trial court had abused its discretion and had failed to adequately articulate its reasons for denying bail. There is no absolute right to bail pending appeal. The purpose of bail is to assure that the defendant will not leave the jurisdiction. In exercising its discretion, a court may consider the likelihood of defendant's flight, danger to society created by defendant's release, and the frivolousness of appeal. If the court decides to deny bail, it should give a brief statement of reasons for the denial which would "permit meaningful review."

The court's reasons for denying petitioner bail amounted to mere conclusory findings and did not evidence a consideration of the relevant factors. Thus, the trial court's statement was inadequate because it did not allow for a review of its evaluative process by an appellate court. To pass muster, "the statement should clearly articulate the basis for the court's utilization of [the relevant factors]."

Because the trial court had failed to adequately state its reasons for denying release on bail, the court did not have an ade-

quate record to address petitioner's claim that the trial court had abused its discretion. The court denied the writ of habeas corpus, but ordered the trial court to hold a new hearing.

E. *Specific enforcement of plea bargain terms:* **People v. Mancheno.**

In *People v. Mancheno,* 32 Cal. 3d 855, 654 P.2d 211, 187 Cal. Rptr. 441 (1982), the defendant, as the result of a plea bargain, pled guilty to two counts of robbery and admitted using a firearm during the commission of the robberies. In exchange, defendant was to receive concurrent sentences and a diagnostic study by the Department of Corrections. Defendant did not receive his diagnostic study and therefore appealed, seeking specific enforcement of the plea bargain term.

The court tested both the procedure of accepting the plea and the implementation of its terms by due process standards, thus raising a constitutional right to a remedy. Such relief should redress the harm caused "without prejudicing either party or curtailing the normal sentencing discretion of the trial judge." Specific enforcement is an acceptable remedy when the parties' expectations will be satisfied without tying the hands of the trial judge to impose a proper sentence.

The Attorney General's argument that defendant waived the diagnostic study when he responded negatively to the court's question: "Is there any just or legal cause why sentence should not now be pronounced?" was not persuasive since granting the study was a precondition to his plea. The court also rejected the Attorney General's argument that the failure to perform the diagnostic study was harmless error. Accordingly, the diagnostic test was ordered to be carried out and defendant was to be resentenced.

F. *Ineffective assistance of counsel:* **People v. Fosselman**

In *People v. Fosselman,* 33 Cal. 3d 572, 659 P.2d 1144, 189 Cal. Rptr. 855 (1983), the court vacated a trial court order denying Fosselman's motion for a new trial on grounds that he received ineffective assistance of counsel. From Fosselman's point of view, however, the decision may have been more "bark than bite" as the court left the prison door open by remanding to the trial court for a finding as to the constitutional effectiveness of his lawyer.

Fosselman was charged with various counts of assault and battery after his attempt to force a young woman into an alley was foiled by onlookers. He was convicted of assault with a deadly weapon, false imprisonment, and battery. On appeal, the defendant retained new counsel and raised various grounds of error in-

cluding insufficiency of the evidence and constitutionally ineffective counsel at trial.

The court rejected the allegations of error concerning the sufficiency of the evidence with little discussion and moved on to Fosselman's claim that his counsel was ineffective. The record shows that defendant's lawyer repeatedly failed to object to the clearly improper conduct of the prosecutor who used inflammatory rhetoric while cross-examining defendant. The prosecutor also stated his personal belief as to defendant's guilt, brought out an inadmissible character witness, and attempted to arouse sexual prejudice in the predominantly female jury. Perhaps most damaging was the prosecutor's strong suggestion that Fosselman wanted to rape the woman he accosted.

The court found that the prosecutor's "style" amounted to misconduct, but noted that such misconduct by itself did not make the conviction constitutionally defective. "[S]uch errors are deemed waived if the defendant does not object to them at the trial."

The People contended that since the errors were not perfected at trial, they could not be raised via an ineffective assistance claim on appeal. The court rejected this argument:

> In other instances in which the contemporaneous objection rule applies . . . the courts have permitted the defendants to raise for the first time on appeal the "waived" issue in the context of an ineffective assistance claim. [citations omitted]. It follows that defendant may obtain a reversal if the record demonstrates that he was denied [such counsel].

Applying the test it set forth in *People v. Pope,* 23 Cal. 3d 412, 590 P.2d 859, 152 Cal. Rptr. 732 (1979), the court noted that there may have been good tactical reasons for not objecting to the prosecution's conduct and that defendant's only remedy under *Pope* was a petition for habeas corpus.

The court next addressed the propriety of the trial court's denial of a motion for new trial. The court noted that the motion was denied on the trial court's belief that, although counsel may have been ineffective, the court is without statutory authority to grant a new trial on those grounds, because ineffective assistance of counsel was not listed in the controlling statutes. The court found that, although Cal. Penal Code § 1181 (West Supp. 1983) does not provide such as a basis for new trial, defendant's right to effective counsel was a constitutional one and not subject to limitation by the legislature.

In order to assist the trial court on remand, the justices under-

took to explain the *Pope* doctrine. They noted that a reasonably competent attorney would not unreasonably omit or damage a meritorious defense:

> [I]n cases in which a claim of ineffective assistance of counsel is based upon acts or omissions not amounting to a withdrawal of a defense, a defendant may prove such ineffectiveness if he establishes that his counsel failed to perform with reasonable competence and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings.

G. *Attachment of Jeopardy:* **People v. Smith.**

The court recently faced the question of whether the Penal Code authorizes appeal by the People from post-mistrial dismissals. In *People v. Smith,* 33 Cal. 3d 596, 658 P.2d 1152, 189 Cal. Rptr. 862 (1983), the court held that, where the dismissal is based on an erroneous finding of prior jeopardy, the question is answered in the affirmative. The court observed that the Penal Code clearly provides that the People may appeal an order of dismissal before the defendant is placed in jeopardy. "An appeal may be taken from the people from . . . [a]n order . . . dismissing . . . the action before the defendant has been placed in jeopardy . . . ." CAL. PENAL CODE § 1238(a)(8) (West 1982). The court further noted that while jeopardy is generally said to attach with the commencement of the impaneled jury trial, "when a jury is discharged for failure to reach a verdict, jeopardy does not attach because the law places the parties back in status quo as if no trial had ever occurred." 33 Cal. 3d at 601, 659 P.2d at 1155, 189 Cal. Rptr. at 886 (quoting People v. Wheeler, 23 Cal. App. 3d 920, 100 Cal. Rptr. 198 (1971)). The jury reached a verdict of acquital on the greatest charged offense, but deadlocked on the lesser included offenses and, therefore, jeopardy attached only to the highest offense. Accordingly, the court held that the dismissal of the the lesser offenses was appealable error on the part of the trial court. The "judgment of acquital" was reversed.

H. *Plea bargaining:* **People v. Miller.**

Suppose that defendant accepts a plea bargain after the court refuses to supress certain damaging evidence. Suppose further that the court erred in denying suppression. Does defendant's guilty plea stick? The court answered that question negatively in *People v. Hill,* 12 Cal. 3d 731, 538 P.2d 1, 117 Cal. Rptr. 393 (1974). Suppose, however, that the evidence improperly deemed admissible was only material to some of the crimes charged. The court addressed this novel question in *People v. Miller,* 33 Cal. 3d 545, 658 P.2d 1320, 189 Cal. Rptr. 519 (1983). Said the court: "The ques-

tion raised is whether the entire judgment of conviction must be reversed when the erroneously admitted evidence was directly related to some, but not all, of the counts to which the accused pled guilty." After providing an extensive discussion of its reasoning in *Hill,* the court concluded that it was indistinguishable from the facts at bar:

> Appellant undoubtedly negotiated for what he believed was the best disposition that he could obtain given the trial court's denial of his suppression motion. This objective may well have led him to plead guilty to "untainted" as well as "tainted" counts. As in *Hill,* the denial of the motion to suppress evidence may have influenced appellant's decision to agree to the negotiated plea bargain.

The state also contended that the erroneous suppression was harmless error in that there was no conceivable defense to the charges for which a guilty plea was entered. This argument was rejected on the grounds that a reviewing court would never be able to know whether a connection existed between the guilty plea and the improperly admitted evidence. Defendant was given a choice of sticking with the penalty assessed or starting over with the original charges.

I. *Sentencing:* People v. Spears; People v. Riolo; *In re* Kelly; *In re* Stanworth.

Four cases before the court presented four different aspects in criminal law penalties. In *People v. Spears,* 33 Cal. 3d 279, 655 P.2d 1289, 188 Cal. Rptr. 454 (1983), the court held that, despite a specifically identified legislative intent to effectuate a stricter death penalty law in general, the intent was unrelated to a desire to subject minors to such harsh sanctions. The legislature's intent in construing the effect of the 1978 death penalty initiative upon minors was silent as to its specific applicability to them and any procedures that would impose the new penalty upon them.

In *People v. Riolo,* 33 Cal. 3d 223, 655 P.2d 723, 188 Cal. Rptr. 371 (1983), the court held that Cal. Penal Code § 2900.5(a) (West 1982) requires all time served in custody for an offense to be deducted from the term of imprisonment imposed for the same offense. In *Riolo,* the defendant was convicted of second-degree burglary and sentenced to a term of three years. He had previously been convicted of two criminal offenses, for which he was imprisoned for some time and eventually placed on probation. The sentencing court attempted to deny credit for that time previously served when it tacked sentences for the previous crimes to the most re-

cently imposed term of imprisonment. The supreme court reversed. Compare *In re Kelly,* 33 Cal. 3d 267, 655 P.2d 1282, 188 Cal. Rptr. 447 (1983), where a repeat offender's most recent prison sentence was enhanced based on prior incarceration for parole revocations which were accompanied with new offenses. Interpreting Cal. Penal Code § 667.5(g) (West Supp. 1983), the court found that every time the defendant committed a new offense which violated his parole, his prior incarceration time constituted a separate prison term if the parole violation was accompanied by a new committment. Therefore, in *Kelly,* the enhancements for the four prior prison sentences placed on his latest offense were found to be proper.

Lastly, in *In re Stanworth,* 33 Cal. 3d 176, 654 P.2d 1311, 187 Cal. Rptr. 783 (1982), the court determined the type of parole hearing to which a defendant is entitled. When Stanworth was sentenced to life imprisonment, the Indeterminate Sentence Law (ISL) was in force. When Stanworth's parole was under consideration, however, the Uniform Determinate Sentencing Act of 1976 (DSL) was in effect. The court agreed with the defendant's argument that use of the new guidelines prejudiced him in the determination of his parole date. The standard of punishment was substantially changed under the DSL, which no longer utilized postconviction behavior to determine parole release dates. Even so, the court held Stanworth was entitled to parole release consideration under both the ISL and DSL standards.

J. *Automatic appeals from death sentences:* **People v. Easley; People v. Robertson.**

People v. Easley, 33 Cal. 3d 65, 654 P.2d 1272, 187 Cal. Rptr. 745 (1982), *reh'g granted*, (Dec. 23, 1983), was an automatic appeal of a death sentence. Defendant had been convicted of two counts of first degree murder with two special circumstances.

On appeal, defendant raised a number of alleged errors; all were, however, found to be without merit. The exclusion of the juror who said she could not vote for the death penalty did not deprive defendant of a fair and impartial jury. The trial court had not erred in instructing the jury that all twelve jurors must agree in determining the penalty. The jury was properly instructed to consider, at the penalty phase, as an aggravating circumstance, defendant's prior criminal activity if the jury found him guilty of that offense beyond a reasonable doubt. The fact that the same jury found defendant guilty of murder and considered the possible "aggravating factor" of arson did not deprive defendant of his

due process rights. The court affirmed all aspects of the jury's determination.

In *People v. Robertson,* 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982), *reh'g denied,* (Jan. 19, 1983), defendant, Robertson, was found guilty of two counts of first degree murder and nine special circumstances after unsuccessfully attempting a diminished capacity defense. In the penalty phase of the trial, the jury fixed the punishment at death.

On appeal, the defendant claimed a number of errors in the guilt phase, the penalty phase, and regarding the special circumstances. A number of the defendant's claims were found to be without merit, and thus not warranting reversal: police officers did not enter defendant's home to make a warrantless arrest in violation of established principles; trial counsel was not deficient in failing to object to the introduction of defendant's identification of his car; counsel did not err in failing to move to suppress defendant's confessions; and the 1977 death penalty statute was properly enacted as an "urgency" statute and therefore did apply to this case.

Other claims of error were found to have some merit. The testimony of one witness stating that defendant had told her he had killed two other women should have been suppressed. In light of the overwhelming evidence, however, this error was not prejudicial. Thus, the court affirmed the judgment as to defendant's guilt and the special circumstances.

The court did find that there was prejudicial error in the penalty phase of the defendant's trial. The trial court failed to instruct the jury *sua sponte* that evidence of other crimes which had not been proved beyond a reasonable doubt could not be considered as "aggravating circumstances" in determining the penalty. This error necessitated a retrial of the penalty phase.

VII. CRIMINAL PROCEDURE

A. *Court considers continued existence of independent state grounds in search and seizure:* **People v. Chavers** *

It is a curious, but not unexpected phenomena, that many judicial decisions making important criminal law involve fact situa-

* This article was contributed by Donald L. Dalton, Literary Editor.

tions lacking any drama. Perhaps that is a good sign: evidence that the courts consider every case of threatened individual liberty an important one. Cases lacking factual significance are perfect opportunities for judges to experiment with the law. Practitioners and commentators are not likely to be disturbed by legal experimentation when it involves little more than personal inconvenience.

The California Supreme Court in *People v. Chavers*[1] may have eliminated independent state grounds[2] in search and seizure law using just such a vehicle.[3] Michael Chavers was little more than an unaccomplished, two-bit hood. He and his partner decided to hold up a convenience store at three in the morning. One of them carried a small handgun and threatened to use it against the clerk. They lifted a couple of dollars in coins and bills, a small bag of Lay's potato chips, a six-pack of sixteen ounce cans of Schlitz beer, and another can of the same brand.

The clerk was able to provide a detailed physical description of both of the bandits. The clerk's decription was corroborated by a customer who had approached the store while the robbers were still inside. The driver of a delivery truck identified the get-away

1. People v. Chavers, 33 Cal. 3d 462, 658 P.2d 96, 189 Cal. Rptr. 169 (1983).

2. The term "independent state grounds" refers to the notion that the states, by virtue of their relatively autonomous existence in the national government, may provide their citizens with a greater measure of constitutional protection under the federal and state constitutions than do the federal courts. For instance, when a state court reviews the case of a criminal defendant, it may strike down a search which is otherwise valid under the United States Supreme Court's interpretation of the fourth amendment or its state constitutional equivalent, citing independent state grounds as the justification. *See generally Developments in the Law—The Interpretation of State Constitutional Rights,* 95 HARV. L. REV. 1324 (1982) (discussion of cases involving major developments in state constitutional interpretation); Note, *Stepping into the Breach: Basing Defendants' Rights on State Rather than Federal Law,* 15 AM. CRIM. L. REV. 339 (1978) (discussion of cases in which state courts have adopted a stricter policy than the federal courts in situations involving searches incident to arrest); Note, *State Constitutional Guarantees as Adequate State Ground: Supreme Court Review and Problems of Federalism,* 13 AM. CRIM. L. REV. 737 (1976) (where local conditions indicate, state courts should be the arbiter of its citizens' rights due to familiarity and competence in the particular area); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421 (1974) (state courts are being forced to evade Supreme Court decisions due to the Court's withdrawal of protections to the private citizen in the area of criminal procedure).

3. There are those who would disagree with the characterization of robbery (CAL. PENAL CODE § 211 (West 1970)) and the use of a dangerous weapon (CAL. PENAL CODE §§ 1203.06(a)(1) and 12022.5 (West 1983)), the crimes for which Chavers was convicted, as minor offenses, especially when it is considered that the penalty for violation of these statutes ranges from two, three, or five years for robbery (CAL. PENAL CODE § 213 (West 1983)) and an extra two years for the firearm enhancement. Even so, the defendants in *Chavers,* despite the fact that they pulled a gun on a citizen, took no more than some beer and potato chips from the store they robbed.

car as a "standard size, two-door sedan, early 1970's model, possibly white in color." The investigating officers recorded these descriptions and relayed them to the police dispatcher via radio. Officers Mahakian and Becker received this information and identified a car very likely belonging to the robbery suspects. The car had been observed by the officers, "squealing around the corner" away from the robbery scene at a high rate of speed. The car was occupied by two men that matched the physical descriptions supplied by the clerk.

The investigating officers then joined Mahakian and Becker who followed the Cadillac for five minutes before pulling it over. The occupants were patted down, handcuffed, and searched for identification. During the pat-down, one of the investigating officers noticed a bag of Lay's potato chips on the dashboard of the car, as well as a number of opened and unopened cans of Schlitz beer. The officer also noticed clothing stashed under the front seat which had been identified by the clerk as belonging to the assailants. The suspects were removed from the general vicinity of the car while the officers conducted a more thorough automobile search. The other investigating officer opened the glove compartment and found a black plastic zippered shaving bag. As he lifted it, he felt something which he believed to be heavier than normal shaving utensils. He unzipped it and found a small revolver with six live rounds in it. Both individuals were then arrested.

The facts of this case sounded curiously like those evaluated by the United States Supreme Court in *United States v. Ross.*[4] Indeed, the similarity did not escape the court. Justice Richardson began the analytical portion of his majority opinion by noting that the "search of the car's interior, including its glove compartment and the shaving kit found therein, was fully consistent with Fourth Amendment principles recently expressed [in *Ross*]."[5] It was, of course, perfectly legitimate and expected that Justice Richardson would start by construing the federal Constitution, that being the minimum standard for all fourth amendment jurisprudence.[6]

4. United States v. Ross, 102 S. Ct. 2157 (1982). For a general discussion of *Ross,* see Note, *United States v. Ross: Search and Seizure Made Simple,* 10 PEPPERDINE L. REV. 421 (1982).

5. 33 Cal. 3d at 466, 658 P.2d at 98-99, 189 Cal. Rptr. at 171-72.

6. One author has noted that "[a] state court is bound to the Supreme Court's interpretation of the federal Constitution (citing Oregon v. Hass, 420 U.S. 714, 719 (1975))." *See Developments in the Law, supra* note 2, at 1367-68 n.2. Thus,

In *Ross,* the United States Supreme Court decided that policemen, who had effected a lawful stop of an automobile, could conduct an automobile search which was as broad as that which could be authorized by a magistrate's warrant.[7] The policemen in *Ross,* specifically, were permitted to conduct a search of a leather pouch and paper bag which they found in the trunk of the defendant's car. The defendant argued that after the police subdued him, the policy reasons for permitting the warrantless search of the car were extinguished and the police could proceed no further without obtaining a warrant. In *Ross,* the Supreme Court held that the traditional justifications for allowing the warrantless search of an automobile were no longer important.[8] It stated that the Court's decision in *Carroll v. United States*[9] did not depend on an emergency situation which made the obtaining of a search warrant impossible.[10] Instead, the Court recognized parameters inherent in the fourth amendment.[11]

After deciding that the search of Chavers' car was consistent with federal constitutional law, Justice Richardson went on to determine whether the California Constitution afforded Chavers any further protection.[12] Justice Richardson divided the search into three parts: (1) the search of the automobile's interior; (2) the search of the automobiles's glove compartment; and (3) the search of Chavers' shaving kit bag. This division was deemed necessary because of United States Supreme Court decisions distinguishing the search of automobiles from that of automobile

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a state court could not, because of the incorporation of most of the fourth, fifth, sixth, and eighth amendments of the United States Constitution into the due process clause of the fourteenth amendment, provide less protection for its citizens than that provided by the United States Supreme Court. *See Developments in the Law, supra* note 2, at 1367 n.1 (collecting cases).

7. 102 S. Ct. at 2172. *See also* Note, *supra* note 4, at 448-49.

8. *See infra* note 16 and accompanying text for discussion of the traditional justification for a warrantless search. *See also infra* note 11 for a discussion of the rationale of the *Carroll* decision which was relied on by Justice Stevens in *Ross. See* 102 S. Ct. at 2162-64, 2170.

9. 267 U.S. 132 (1925).

10. That has been, of course, the traditional explanation for *Carroll*: that only the *mobility* of automobiles makes their warrantless search excusable. *See* 102 S. Ct. at 2178 and n.6 (Marshall, J., dissenting).

11. *See* Note, *supra* note 4, at 427-33, discussing the *Carroll* decision. Chief Justice Taft relied on early Revenue Acts which permitted the warrantless search of vehicles, opining that the Congress which passed that legislation was the same Congress which helped ratify the fourth amendment, thereby implying that the drafters of the fourth amendment recognized an inherent exception for moving vehicles.

12. Again, if Justice Richardson had found a prior California Supreme Court opinion which invalidated the search in *Chavers,* he indicated that he would follow that decision even though the search was consistent with the federal interpretation of the fourth amendment. *See supra* note 2 and accompanying text.

compartments[13] and, more importantly, that of personal articles.[14]

The basis for Justice Richardson's analysis was the California Supreme Court's opinion in *Wimberley v. Superior Court.*[15] Justice Richardson cited *Wimberley* for the general proposition that the "exigency" which is required to justify the warrantless search of an automobile[16] "generally exists whenever probable cause is first discovered at the time the police stop a vehicle and thus have not had a prior opportunity to obtain a warrant."[17] Specifically, Justice Richardson read *Wimberley* as authority for the proposition that "when . . . the police discover facts constituting probable cause at the time they stop a vehicle, an immediate on-the-scene search of the vehicle is justified even if there are no additional exigent circumstances necessitating such an immediate search."[18] This, of course, was exactly the situation in Chavers' case; thus, there was no realistic possibility of distinguishing the two cases.

As for the search of the glove compartment, Justice Richardson turned again to *Wimberley.* The court in *Wimberley* evaluated and disallowed the warrantless search of an automobile trunk: "Because . . . the facts known to the police officers did not provide probable cause to believe that additional contraband was located in the trunk, we invalidated the search of the trunk."[19] But the court in *Chavers* reasoned that the defendants' lack of identi-

13. *See* Chambers v. Maroney, 399 U.S. 42 (1970). *See also* Note, *supra* note 4, at 433.

14. *See* Chadwick v. United States, 433 U.S. 1 (1977); Arkansas v. Sanders, 442 U.S. 753 (1979). *See also* Note, *supra* note 4, at 434-37.

15. Wimberley v. Superior Court, 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976).

16. Traditional fourth amendment jurisprudence has required the demonstration of circumstances making the obtaining of a search warrant impractical or dangerous before authorizing a warrantless search. *See generally* Dalton, *Tracing the Bright-Line Through Search and Seizure: Robinson, Robbins and Belton,* FORUM (a bimonthly publication of California Attorneys for Criminal Justice) July-August 19 (1982). The warrantless search of automobiles has been generally upheld on the basis of the automobile's inherent mobility. *See* Note, *supra* note 4, at 452; *see also supra* note 10 and accompanying text.

17. 33 Cal. 3d at 467-68, 658 P.2d at 99-100, 189 Cal. Rptr. at 172-73.

18. *Id.*

19. 33 Cal. 3d at 469, 658 P.2d at 101, 189 Cal. Rptr. at 174. In her dissent, Chief Justice Bird disagreed with the majority's assessment that *Wimberley* contains the "controlling principle" for a glove compartment search. 33 Cal. 3d at 475 n.2, 658 P.2d at 105 n.2, 189 Cal. Rptr. at 178 n.2 (Bird, C.J., concurring and dissenting). She read *Wimberley* as holding that "probable cause to search is not necessarily sufficient to justify the search of the car's trunk (citing 16 Cal. 3d at 568, 547 P.2d at 424, 128 Cal. Rptr. at 648)." She stated that the "question whether a search war-

fication made the search of Chavers' glove compartment, a possible receptacle of identification, completely reasonable.[20] It was also possible that the weapon used in the crime was located in the glove compartment, in close proximity to the defendants. This fact reinforced the reasonableness of the search.

In approving the search of Chavers' glove compartment, the court overruled three courts of appeal decisions[21] which had required that there be exigent circumstances, above and beyond those which justified the search of the automobile's interior, in order to justify the warrantless search of an automobile compartment. Under these decisions, police officers would have to show facts and circumstances which would point to the conclusion that contraband was hidden in that specific compartment. The court cited with approval, however, another courts of appeal decision[22] which found it proper to search "areas adjacent and immediately accessible to the occupants, such as . . . a glove compartment. . . ."[23] The supreme court found no basis for the lower court determinations requiring additional exigent circumstances for the compartment search and rejected Chavers' defense on this point.[24]

Justice Richardson cited two California Supreme Court opinions to validate the search of Chavers' shaving kit bag: *Guidi v. Superior Court*[25] and *People v. Lilienthal.*[26] Justice Richardson characterized the police officer's discovery of the handgun in the shaving kit as "inadvertent," the result of an "entirely legitimate seizure of the kit. . . ."[27] The inadvertence of the discovery triggered, in the court's mind, the "plain view" exception to the warrant requirement.[28] The two decisions noted above rested on that exception. Justice Richardson was not troubled by the fact that the inadvertent discovery was the result of the police officer's "sense of touch . . . [because] the knowledge [the police officer]

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rant might be required to justify a trunk search (or a glove compartment search) was not raised in *Wimberley*. . . ." *Id.*

20. 33 Cal. 3d at 470, 658 P.2d at 101, 189 Cal. Rptr. at 174.

21. People v. Gott, 100 Cal. App. 3d 1, 3-4, 160 Cal. Rptr. 307, 308 (1979); Jackson v. Superior Court, 74 Cal. App. 3d 361, 368, 142 Cal. Rptr. 299, 303 (1977); and People v. Jochen, 46 Cal. App. 3d 243, 119 Cal. Rptr. 914 (1975).

22. People v. Gregg, 43 Cal. App. 3d 137, 117 Cal. Rptr. 496 (1974).

23. 33 Cal. 3d at 471, 658 P.2d at 102, 189 Cal. Rptr. at 175 (citing People v. Gregg, 43 Cal. App. 3d at 142, 117 Cal. Rptr. at 499).

24. 33 Cal. 3d at 471, 658 P.2d at 102, 189 Cal. Rptr. at 175.

25. Guidi v. Superior Court, 10 Cal. 3d 1, 513 P.2d 908, 109 Cal. Rptr. 684 (1973).

26. People v. Lilienthal, 22 Cal. 3d 891, 587 P.2d 706, 150 Cal. Rptr. 910 (1978).

27. 33 Cal. 3d at 471, 658 P.2d at 102, 189 Cal. Rptr. at 175.

28. *Id. See* Harris v. United States, 390 U.S. 234, 236 (1968) ("[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced into evidence"). *Id.*

gained was as meaningful and accurate as if the container had been transparent and [the police officer] had seen the gun within the container."[29] Justice Richardson also noted the admittedly dangerous nature of the contraband and said that this was also a factor in allowing the warrantless search.[30]

Chief Justice Bird submitted a fairly restrained dissent. She felt that the court's consideration of the search of the automobile's interior was unnecessary given the fact that defendant had failed to raise the unconstitutionality of that search on appeal.[31] She characterized that discussion as "basically dictum."[32] To her, then, the only issue was whether there was any reason to treat the search of the glove compartment any differently than that of the interior, the defendant having conceded the legality of the latter. But given the fact that a glove compartment, as well as the trunk, is inseparable from the automobile itself, Chief Justice Bird could see no justification, and the defendant did not offer one himself, for distinguishing the search of one from the other.[33]

The Chief Justice did, however, refuse to adopt the reasoning of the United States Supreme Court in *United States v. Chadwick,*[34] or the California Supreme Court's decision in *Wimberley v. Superior Court* as establishing the proper principle for governing the warrantless search of automobile compartments.[35] Both decisions indicated a greater measure of protection for those areas than subsequent opinions admit. She failed to proffer her own standard, preferring to leave that question unanswered until confronted with "a case in which it is squarely posed."[36]

Chief Justice Bird argued, however, that there are reasons for providing greater protection for the search of a closed container,

29. 33 Cal. 3d at 471, 658 P.2d at 102, 189 Cal. Rptr. at 175.
30. *Id.* at 473, 658 P.2d at 103, 189 Cal. Rptr. at 176.
31. *Id.* at 473-74, 658 P.2d at 104, 189 Cal. Rptr. at 177 (Bird, C.J., concurring and dissenting).
32. *Id.* Chief Justice Bird's reluctance to address the majority's opinion on the legitimacy of the automobile search also stems from her reluctance to make independent state grounds an issue in *Chavers. See infra* note 39 and accompanying text. Apparently, by her silence, she intended to avoid calling attention to the issue, thereby leaving its settlement for another time.
33. 33 Cal. 3d at 474-75, 658 P.2d at 104, 189 Cal. Rptr. at 177 (Bird, C.J., concurring and dissenting).
34. United States v. Chadwick, 433 U.S. 1, 12 (1977).
35. 33 Cal. 3d at 475-76, 658 P.2d at 105, 189 Cal. Rptr. at 178 (Bird, C.J., concurring and dissenting).
36. *Id.* at 476, 658 P.2d at 105, 189 Cal. Rptr. at 178 (Bird, C.J., concurring and dissenting).

unconnected with the automobile, such as Chavers' shaving kit. Even so, she acknowledged the existence of exigent circumstances which rendered it impractical to obtain a search warrant.[37] She noted the particularly dangerous nature of the handgun and the fact that the officers were entitled to continue searching the glove compartment for the stolen currency. Chief Justice Bird objected to the majority's plain view justification as not satisfying constitutional standards. The Chief Justice stated that "absent exigent circumstances [which were existent in Chavers' case], our state and federal constitutions require more than the existence of probable cause to justify an intrusion into a closed container."[38]

This, of course, leaves the most important feature of this opinion for last. States may, legitimately, provide a greater measure of constitutional protection for their citizens than that provided by the federal Constitution.[39] This they may do because of the federal scheme of the national government.[40] California has traditionally recognized this as a state constitutional imperative.[41] But some read the *Chavers* opinion as a retreat from this position.[42]

Justice Richardson recognized the traditional existence of a broader measure of protection for criminal defendants in California when he said, in *Chavers*: "On occasion we have elected to afford a 'broader security against unreasonable searches and seizures than that required by the United States Supreme Court. . . .' "[43] In the same sentence, however, he stated that "the challenged search was also lawful under our own prior decisions. . . ."[44] By this, Justice Richardson refused to extend Cali-

37. *Id.* at 477, 658 P.2d at 106, 189 Cal. Rptr. at 179 (Bird, C.J., concurring and dissenting).

38. *Id.*

39. *See* Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding . . . does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution. . . ."). *Id.*

40. People v. Brisendine, 13 Cal. 3d 528, 550-51, 531 P.2d 1099, 1112-14, 119 Cal. Rptr. 315, 329-30 (1975).

41. California's equivalent to the fourth amendment of the United States Constitution is identical to the federal provision. *See, e.g.,* CAL. CONST. art I, § 13. But in 1974, California ratified section 24 to article I which reads in part: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." Justice Mosk, writing for the majority in *Brisendine,* characterized this provision as the "ultimate confirmation" of the legitimacy of independent state grounds in California. 13 Cal. 3d at 551, 531 P.2d at 1114, 119 Cal. Rptr. at 330. *See also* 13 Cal. 3d at 548 n.16, 531 P.2d at 1112 n.16, 119 Cal. Rptr. at 328 n.16 (collecting cases).

42. L.A. Daily J., Feb. 18, 1983, at 14, col. 3.

43. 33 Cal. 3d at 467, 658 P.2d at 99, 189 Cal. Rptr. at 172 (citing 13 Cal. 3d 528, 549, 531 P.2d 1099, 1112, 119 Cal. Rptr. 315, 328).

44. 33 Cal. 3d at 467, 658 P.2d at 99, 189 Cal. Rptr. at 172. He reaffirmed this point later in the opinion where he stated: "[T]he police conduct in this case was

fornia's constitutional protection of criminal defendants beyond the point to which the court had previously gone. But the real question is whether that point is still farther out than the point established in *Ross*.[45]

Justice Richardson said that the "general principles" for a lawful, warrantless search of an automobile in California were examined in *Wimberley*: "(1) exigent circumstances render[ing] the obtaining of a warrant an impossible or impractical alternative, and (2) probable cause exist[ing] for the search."[46] *Wimberley* stands for the proposition that "when, as in [*Chavers*], the police discover facts constituting probable cause at the time they stop a vehicle, an immediate on-the-scene search of the vehicle is justified even if there are no additional exigent circumstances necessitating such an immediate search."[47] This is certainly no broader than *Ross* which permits police to conduct an immediate, warrantless search of an automobile as long as they have probable cause before they stop the vehicle.[48]

It should be noted that Justice Richardson cited the "Truth-in-Evidence" provision of Proposition 8.[49] This provision reads in part: "[R]elevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings. . . ." It appears to prohibit California courts from pro-

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proper both under *Ross* and under our own controlling 'automobile exception' and 'container' authorities . . . ." *Id.* at 473, 658 P.2d at 103, 189 Cal. Rptr. at 176.

45. If it is, then the state must prove, in a given case, that the search was consistent with *Chavers* as well as with *Ross*. But, if *Chavers* is no broader than *Ross*, then a criminal defendant is afforded no independent state grounds to challenge the search and must rely on federal precedent.

The concept of independent state grounds, however, does not necessarily imply that those grounds will be more protective of individual liberty than the federal standard. Justice Mosk quoted the United States Supreme Court's opinion in Jankovich v. Indiana Toll Road Comm'n, 379 U.S. 487 (1963), in *Brisendine*, to the effect that "even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate ground of decision depriving this Court of jurisdiction to review the state judgment." *Id.* at 491-92. A state constitutional provision identical to its federal counterpart, is still an independent state ground. By the same token, a state court's adoption of a United States Supreme Court opinion as the standard in that state does not make the state grounds any less independent. *See, e.g., Developments in the Law, supra* note 2, at 1368 n.5 (collecting cases). That is, however, independence only in the most technical sense.

46. 33 Cal. 3d at 467, 658 P.2d at 99, 189 Cal. Rptr. at 172 (quoting 16 Cal. 3d at 563, 547 P.2d at 421, 128 Cal. Rptr. at 645).

47. 33 Cal. 3d at 468, 658 P.2d at 100, 189 Cal. Rptr. at 173.

48. *See supra* note 7 and accompanying text.

49. CAL. CONST. art I, § 28(d).

viding a greater measure of protection for criminal defendants than that provided by the United States Constitution. Justice Richardson's use of the signal "but see" in the sentence noted above which discusses independent state grounds appears to affirm that interpretation.[50] But Justice Richardson's parenthetical reference to that provision tends to confuse the issue because direct reliance would have settled the question of independent state grounds once and for all.

The effect of *People v. Chavers* on independent state grounds for search and seizure in California is unclear. It is apparent that Justice Richardson would not have upheld the searches if he felt California Supreme Court precedent foreclosed that result. Thus, even though Justice Richardson cited *Ross* with approval, that did not necessarily make it the standard in California. The state will still be required to prove that a given search did not violate the California Supreme Court's interpretation of the federal and state constitutions.[51] Independent state grounds for search and seizure, at least in a technical sense, are still viable in California.[52]

B. *Justification for granting change of venue:* **Odle v. Superior Court.**

In *Odle v. Superior Court,* 32 Cal. 3d 932, 654 P.2d 225, 187 Cal. Rptr. 455 (1982), the defendant was charged with the stabbing death of a woman and the shooting death of the officer who attempted to apprehend him, along with assault with a deadly weapon on a peace officer, auto theft, kidnapping, and possession of a firearm. After the denial of two motions for change of venue,

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50. Justice Richardson used brackets to characterize section 28 as a "repeal of [the] state exclusionary rule." 33 Cal. 3d at 467, 658 P.2d at 99, 189 Cal. Rptr. at 172.

51. *See supra* note 45 and accompanying text.

States can legitimately interpret both the federal Constitution and federal judicial decisions interpreting the Constitution as providing more protection for individuals than provided by the federal judicial opinions. *See, e.g.,* City of Tacoma v. Heater, 67 Wash. 2d 733, 735-36, 409 P.2d 867, 869 (1966). That is just one of the methods used by state courts to affirm independent state grounds. *See Developments in the Law, supra* note 2, at 1384 and n.122.

52. This issue was presaged by one commentator. *See* Suarez, *Proposition 8: Dark Clouds Gathering,* FORUM, March-April 6 (1983). The author noted two court of appeals decisions which were still pending at the time of publication: McClanahan v. Superior Court, 139 Cal. App. 3d 31, 188 Cal. Rptr. 513 (1983); and Jeter v. Superior Court, 138 Cal. App. 3d 934, 188 Cal. Rptr. 351 (1983). In neither of these decisions did the court discuss the availability of independent state grounds. *See also* People v. Ruggles, 138 Cal. App. 3d 950, 188 Cal. Rptr. 401 (1983), in which one of the concurring justices stated that article I, section 28, subsection (d) of the California Constitution "abrogates California decisional law imposing higher standards for searches and seizures than under Federal decisional law." 138 Cal. App. 3d at 968-69, 188 Cal. Rptr. at 413.

defendant petitioned for mandate to compel the venue change. Defendant claimed there was a reasonable likelihood that he could not receive a fair trial in Contra Costa County, due to widespread prejudicial publicity.

Change of venue should be granted if it is shown that there is a reasonable likelihood that a fair trial is impaired from the "dissemination of potentially prejudicial publicity." Five different factors were considered in determining the prejudicial effect: (1) community size; (2) the nature and extent of publicity; (3) status of the accused; (4) status and prominence of victims; and (5) the nature and gravity of the offense. Reviewing these factors, the court viewed the community as large and diverse; the publicity was not found to be hostile to defendant, and considerable time had passed since the major coverage occurred; the defendant was not portrayed as an outsider to the community; and the victims' status was found to be inconclusive. None of these factors militated in favor of a change of venue for defendant.

Accordingly, the court denied the change of venue, noting that if the prejudicial effect was more widespread than determined here, this effect could be revealed in voir dire. The defendant could then renew his motion, as supported by the voir dire examination, and a change of venue could then be ordered by the trial judge.

VIII. EVIDENCE

A. *Where similar offenses are involved, the technique of "sanitizing" a prior conviction is ineffective to dispel the prejudice in admitting evidence of the prior felony:* **People v. Barrick.***

I. INTRODUCTION

In *People v. Beagle,*[1] the California Supreme Court unanimously held that although Evidence Code section 788[2] authorizes

* This article was contributed by Mark Eugene Johnson, third year staff member.

1. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

2. Section 788 of the Evidence Code of California reads in full:

For the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony unless:

(a) A pardon based on his innocence has been granted to the witness by the jurisdiction in which he was convicted.

the admission of prior felony convictions to impeach the credibility of a witness, a trial court must, when requested, exercise its discretion under section 352[3] and exclude this evidence if the probative value of the prior conviction is outweighed by other factors, such as the risk of undue prejudice.[4] Cases in which the prior felony conviction is for the same or substantially similar conduct for which the accused is on trial obviously present the greatest danger of prejudice to the defendant.[5] The prior conviction, however, may also be highly probative on the issue of the credibility of the defendant if he or she decides to take the stand. In order to strike a balance between the risk of undue prejudice and the probative value of the prior conviction in such a situation, the method of impeachment by making "sanitized" references to an earlier conviction arose in California subsequent to *Beagle*.

The meaning of a "sanitized" reference to prior criminal activity can best be described by an example.[6] In cases where the defendant is on trial for a crime (e.g., robbery) for which he has an earlier conviction for the same or similar conduct (e.g., robbery, burglary, etc.), impeachment by means of asking him questions, if and when he testifies, concerning the specific type of prior convic-

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(b) A certificate of rehabilitation and pardon has been granted to the witness under the provisions of Chapter 3.5 (commencing with section 4852.01) of Title 6 of Part 3 of the Penal Code.

(c) The accusatory pleading against the witness has been dismissed under the provisions of Penal Code Section 1203.4, but this exception does not apply to any criminal trial where the witness is being prosecuted for a subsequent offense.

(d) The conviction was under the laws of another jurisdiction and the witness has been relieved of the penalties and disabilities arising from the conviction pursuant to a procedure substantially equivalent to that referred to in subdivision (b) or (c).

CAL. EVID. CODE § 788 (West 1966). Section 788 is the only exception to the rule that "evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness." CAL. EVID. CODE § 787 (West 1966).

3. Section 352 of the Evidence Code of California reads in full:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

CAL. EVID. CODE § 352 (West 1966).

4. 6 Cal. 3d at 452-53, 492 P.2d at 7-8, 99 Cal. Rptr. at 319-20. *See also* People v. Woodard, 23 Cal. 3d 329, 335-36, 590 P.2d 391, 397, 152 Cal. Rptr. 536, 538-40 (1979); People v. Rollo, 20 Cal. 3d 109, 115-16, 569 P.2d 771, 773-74, 141 Cal. Rptr. 177, 179-80 (1977); People v. Rist, 16 Cal. 3d 211, 218-19, 545 P.2d 833, 838-41, 127 Cal. Rptr. 457, 462-64 (1976); People v. Antick, 15 Cal. 3d 79, 96-99, 539 P.2d 43, 54-55, 123 Cal. Rptr. 475, 486-88 (1975).

5. *See* Gordon v. United States, 383 F.2d 936, 940 (D.C. Cir. 1967).

6. The California Supreme Court first uses the term "sanitized" in People v. Barrick, 33 Cal. 3d 115, 122, 654 P.2d 1243, 1246, 187 Cal. Rptr. 716, 719 (1982), but gives no explanation as to how it arrived at the term.

tion would violate *Beagle*.[7] To circumvent the holding, trial courts would frequently allow the prosecution to ask questions such as: "Have you ever been convicted of a felony involving theft?" This process of making indirect references to the prior conviction has been labeled as "sanitizing" by the California Supreme Court.[8] Once sanitized, the prejudice of admitting the prior conviction for purposes of impeachment was thought to be dispelled.[9]

The California Supreme Court, however, has rejected this reasoning. In *People v. Barrick,*[10] Justice Broussard, writing for the majority,[11] analyzed the reasons underlying the *Beagle* decision[12] and held that where similar offenses are involved, the technique of "sanitizing" the prior felony is ineffective to dispel the prejudice in admitting evidence of the prior conviction.[13]

This article will examine the scope of the law of impeachment in California subsequent to *Beagle,* present the facts of *Barrick,* and then examine the basis for the supreme court's decision in the *Barrick* case. In addition, this article will discuss how the court has unnecessarily circumscribed the application of section 788 to such an extent that little remains of the original legislative expression. Lastly, the impact of Proposition 8[14] on *Barrick* will be discussed.

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7. 6 Cal. 3d 441, 492 P.2d 1, 99 Cal. Rptr. 313 (1972).

8. *See supra* note 6.

9. The California court of appeal decisions in line with this reasoning include People v. Madaris, 122 Cal. App. 3d 234, 175 Cal. Rptr. 869 (1981), and People v. Moultrie, 99 Cal. App. 3d 77, 160 Cal. Rptr. 51 (1979). *See infra* notes 25-28 and accompanying text. (Both cases were subsequently overruled by the *Barrick* decision).

10. 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982).

11. Two separate dissenting opinions were written by Richardson, J., and Kaus, J. *Id.* at 136-37, 654 P.2d at 718-20, 187 Cal. Rptr. at 729-30.

12. The *Beagle* court had in turn adopted the reasoning of Judge (now Chief Justice) Burger in Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967) which identified some of the more important factors for the trial court to consider in exercising its discretion whether to allow evidence of the prior felony conviction for the purpose of impeachment. Such factors include: whether the conviction contains an element reflecting on the defendant's honesty; the nearness or remoteness of the prior conviction; whether the conviction involved the same or substantially similar conduct for which the accused is on trial; and what the effect would be if the defendant does not testify for fear of being prejudiced because of impeachment by prior convictions.

13. 33 Cal. 3d at 121, 654 P.2d at 1245, 187 Cal. Rptr. at 718.

14. *See infra* notes 86-90 and accompanying text.

II. BACKGROUND

In *Beagle,* the defendant was convicted of arson and attempted arson. A prior conviction for issuing a check without sufficient funds was charged and admitted. In rejecting all of defendant's contentions and in affirming the judgment of conviction, the Supreme Court of California addressed its discussion to the relationship between Evidence Code section 788,[15] authorizing impeachment by evidence of a felony conviction, and Evidence Code section 352,[16] giving the trial judge discretion to exclude evidence under certain conditions. The court expressly disapproved of a line of courts of appeal decisions adhering to the view that the trial judge does not have the discretion to exclude evidence of a prior felony conviction where the lawfulness of the conviction has been established or uncontested.[17] The court concluded that when read together, sections 788 and 352 give the trial judge discretion to exclude evidence of prior felony convictions offered for impeachment purposes where the probative value of the evidence with regard to credibility is outweighed by the risk of undue prejudice.[18]

In order to guide the trial courts in their exercise of discretion under the above sections, the supreme court set forth the key factors to be considered.[19] These factors were quoted from Judge

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15. *See supra* note 2.

16. *See supra* note 3.

17. Numerous court of appeal decisions were overruled by *Beagle. See* People v. House, 12 Cal. App. 3d 756, 90 Cal. Rptr. 831 (1970); People v. Grant, 11 Cal. App. 3d 687, 89 Cal. Rptr. 784 (1970); People v. Stewart, 11 Cal. App. 3d 242, 89 Cal. Rptr. 707 (1970); People v. Sneed, 8 Cal. App. 3d 963, 88 Cal. Rptr. 32 (1970); People v. Tiner, 11 Cal. App. 3d 428, 89 Cal. Rptr. 834 (1970); People v. Goodman, 8 Cal. App. 3d 705, 87 Cal. Rptr. 665 (1970); People v. Hall, 7 Cal. App. 3d 562, 86 Cal. Rptr. 504 (1970); People v. Carter, 7 Cal. App. 3d 332, 88 Cal. Rptr. 546 (1970); People v. Savala, 2 Cal. App. 3d 415, 82 Cal. Rptr. 647 (1969); People v. Romero, 272 Cal. App. 2d 39, 77 Cal. Rptr. 175 (1969); People v. Donovan, 272 Cal. App. 2d 426, 77 Cal. Rptr. 293 (1969); People v. Aulisi, 264 Cal. App. 2d 149, 70 Cal. Rptr. 220 (1968); People v. Kelly, 261 Cal. App. 2d 708, 68 Cal. Rptr. 337 (1968).

18. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320. With specific regard to section 788, the court in *Beagle* noted that by the very language of the statute, "[t]he trial court is not *required* to allow impeachment by prior conviction every time a defendant takes the stand in his own defense." 6 Cal. 3d at 452, 492 P.2d at 7, 99 Cal. Rptr. at 319 (emphasis in original). Since the *Beagle* decision, the relationship between California Evidence Code sections 788 and 352 has been analogized to the relationship between Federal Rules of Evidence rules 402 and 403. Federal Rule 402 states that "[a]ll relevant evidence is admissible." However, under rule 403, relevant evidence can be excluded on the grounds of prejudice, confusion, or waste of time.

19. The California Supreme Court emphasized that these were merely discretionary guidelines, stating: "We do not purport to establish rigid standards to govern that which in each instance must depend upon the sound exercise of judicial discretion." *Id.* at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.

(now Chief Justice) Burger's opinion in *Gordon v. United States*[20] and include an analysis of the elements of the prior conviction to determine whether it reflects on the defendant's honesty, the remoteness of the prior conviction, the similarity of the prior conviction to the crime currently at issue, and what the effect will be if the defendant does not testify out of fear of the jury being prejudiced by evidence of the prior convictions.[21] A motion to exclude, in cases where the defense asserted that these factors did not support admissibility of the prior conviction for impeachment purposes, became known as a *Beagle* motion.[22]

After *Beagle,* in cases where the defendant took the stand and an attempt was made to impeach him by means of a prior felony conviction, similar to the one for which he was on trial, the practice among prosecutors was to "sanitize" or ease the prejudicial impact of the impeachment by changing the nature of the question. Rather than asking if he had ever been convicted of a specific felony, the defendant would be asked: "Have you ever been convicted of a felony involving theft?"[23] This method was thought by many trial courts to be sufficient to dispel the potential

20. 383 F.2d 936, 940 (D.C. Cir. 1967). *See supra* note 12 and accompanying text.

21. The court stressed the importance of considering the effect of making the defendant hesitant to testify out of fear that he or she would be prejudiced by prior convictions. In such an instance, the judge may decide that it is more beneficial to have the jury hear the defendant's testimony than to have the defendant "remain silent out of fear of impeachment." 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320. *See infra* note 73. As a general rule, character evidence is not admissible to show the defendant's propensity to commit the crime with which he is charged. *See* CAL. EVID. CODE § 787, *supra* note 2. *Beagle* is based on the proposition that although a prior offense is otherwise admissible under rule 788 as an attack on credibility, the jury may use that evidence to consider the propensity of the defendant to commit the offense for which he is on trial, a result which is clearly impermissible under rule 787.

22. *Beagle* has been held applicable to impeachment of prosecution witnesses, although the court's discretion is more limited. People v. Carr, 32 Cal. App. 3d 700, 102 Cal. Rptr. 79 (1973). A motion by the prosecution to exclude evidence of a prior conviction should be heard before or during the presentation of the prosecution's case. Where the defense moves to exclude evidence of a prior conviction, the motion should be considered at the close of the People's case in chief or thereafter before the defendant takes the stand to testify. People v. Delgado, 32 Cal. App. 3d 242, 252-53, 102 Cal. Rptr. 746 (1973); *see also* People v. Carr, 32 Cal. App. 3d 700, 102 Cal. Rptr. 75 (the court rejected appellant's argument that the rule in *Beagle* be restricted to defendants in criminal actions).

23. Such was the phrasing of the question in *Barrick*. 33 Cal. 3d at 122, 654 P.2d at 1246, 187 Cal. Rptr. at 719. Variations in the cases included: "Have you ever been convicted of a felony?" and "Have you ever been convicted of a felony involving dishonesty?"

prejudice in telling the jury that the defendant had previously been convicted of the same or similar crime for which he was currently on trial.[24]

Two California courts of appeal decisions relied upon by the Attorney General in *Barrick*[25] expressly approved of the procedure of sanitizing prior convictions for impeachment. In *People v. Moultrie,*[26] the defendant was charged with five counts of robbery. The trial court denied the defendant's *Beagle* motion to exclude evidence of his prior attempted robbery conviction, but allowed the prosecution to ask: "Have you ever been convicted of a felony involving theft?" In *People v. Madaris,*[27] the defendant was charged with possession of a concealable firearm. A *Beagle* motion to disallow evidence of a prior robbery conviction was denied; however, the court allowed the defendant to be impeached by proof of his conviction of a "felony involving theft." In both cases, the courts of appeal sustained this method as an acceptable procedure for introducing evidence of the prior conviction without prejudicing the defendant. The question was held to be a fair compromise between portraying the conviction as more serious than it was and cloaking the defendant with "a false aura of veracity."[28]

In contrast, when the Second District Court of Appeal was presented with facts similar to those in the *Madaris* and *Moultrie* decisions, it reached a different conclusion. In *People v. Betts,*[29] the defendant was charged with attempted grand theft. Attempting to sanitize two prior convictions for burglary and unlawful taking of a vehicle, the trial court allowed the prosecutor to ask if the defendant had ever been convicted of a "felony involving the trait of honesty." The appellate court held that the trial court erred in allowing the question.[30] Relying on the California Supreme Court decision of *People v. Rollo,*[31] which held identical prior offenses may not be used to impeach,[32] the *Betts* court noted that "the trier of fact could well 'imagine that the appellant's prior convictions were similar to or identical with the charge for which

24. The defense counsel in *Barrick* obviously did not agree; when this question was presented to his client, the defendant was advised not to testify. 33 Cal. 3d at 122, 654 P.2d at 1246, 187 Cal. Rptr. at 719.

25. 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716.

26. 99 Cal. App. 3d 77, 86, 160 Cal. Rptr. 51, 55 (1979).

27. 122 Cal. App. 3d 234, 239, 175 Cal. Rptr. 869, 871 (1981).

28. People v. Moultrie, 99 Cal. App. 3d at 86, 160 Cal. Rptr. at 61; People v. Madaris, 122 Cal. App. 3d at 239, 175 Cal. Rptr. at 871. *See supra* notes 26, 27 and accompanying text.

29. 110 Cal. App. 3d 225, 167 Cal. Rptr. 768 (1980).

30. 110 Cal. App. 3d 225, 230-31, 167 Cal. Rptr. 768, 774 (1980).

31. 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977).

32. *Id.* at 120, 569 P.2d at 777, 141 Cal. Rptr. at 183.

he was on trial.' "[33]

At the time of the *Barrick* decision, the California Supreme Court was presented with a split of authority among the California courts of appeal concerning sanitizing prior convictions for impeachment purposes. One line of authority noted that sanitizing was a proper means of eliminating the prejudice to the defendant arising from a prior similar felony conviction, while another felt that prejudice could actually be fostered because the method left too much to the imagination of the jury.

III. STATEMENT OF FACTS

On May 29, 1980, a Riverside police officer received a report of a man lying in the front seat of a car parked in an empty parking lot. After proceeding to the area, the officer found Michael Barrick asleep in a 1969 Datsun. After attempting for several minutes to awaken him by calling out and by rocking the vehicle, the officer was finally able to unlock the Datsun and shake the defendant awake.

The defendant was questioned as to his name and the reason he was present in the otherwise deserted lot. Barrick responded that he was driving a friend's car, became sleepy, and pulled over into the parking lot to rest. He did not remember the name of the friend who had lent him the car. Barrick identified himself as "Steven Johnson," but could not produce any form of identification. The officer returned to the patrol car to check the defendant's name with police records and to determine the ownership of the Datsun.

Unsure of how "Johnson" was spelled, the police officer returned to the vehicle and asked Barrick for the correct spelling of

33. 110 Cal. App. 3d 225, 230, 167 Cal. Rptr. 768, 774 (citing *Rollo,* 20 Cal. 3d at 119, 569 P.2d at 776, 141 Cal. Rptr. at 182). With regard to this matter the court stated:

> To begin with, it is highly unlikely that a jury which is advised only that the defendant has been convicted of "a felony" will let the matter rest. Normal human curiosity will inevitably lead to brisk speculation on the nature of that conviction, and the range of such speculation will be limited solely by the imaginations of the individual jurors. Some may assume, for example, that the defendant's prior conviction was similar to or identical with the charge for which he is on trial. Others may speculate that the conviction involved some form of unspeakable conduct, such as torture murder, gang rape, or child molestation. Why else, the jurors might naturally ask, was the name of the crime withheld from them?

Betts, 110 Cal. App. 3d at 230, 167 Cal. Rptr. at 774.

his name, to which he replied "B-A-R-R-I-C-K." After this response, the officer smelled alcohol on the defendant's breath and inquired as to whether he had been drinking. The defendant replied that he had drank some beers and smoked some marijuana at a party. The marijuana, Barrick felt, was "sprayed with something."[34]

On returning to his patrol car, the police officer learned that the Datsun was stolen. The defendant was arrested, advised of his *Miranda* rights,[35] and placed in custody.

At the trial, a witness for the defense testified that Barrick had been at a party earlier in the evening where he had consumed beer and marijuana laced with PCP.[36] One witness stated he observed that the defendant was getting very intoxicated. Barrick, according to the witness, left the party at 5:30 or 6:00 p.m. and stumbled off down the street.

Prosecution witnesses revealed that a different ignition and toggle switch had been installed in the stolen vehicle and the locked gas cap had been bent in order to allow gas to be poured into the gas tank. The defendant's wallet was found underneath the front seat.

Prior to the trial, the defendant's counsel made a *Beagle* motion[37] to prohibit the prosecution from impeaching Barrick with a prior felony conviction for automobile theft. Recognizing the potential prejudice of allowing a jury to hear that the defendant had a prior conviction for automobile theft, the trial court ruled that the prosecution could only ask if he had ever been convicted of a "felony involving theft."[38] This was done in an attempt to remove the prejudicial impact of the earlier conviction. The defense attorney obviously was not satisfied and advised the defendant not to testify.[39]

Barrick was convicted for the unlawful driving or taking of a vehicle[40] and acquitted of the charge of receiving stolen property.[41]

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34. 33 Cal. 3d at 121, 654 P.2d at 1246, 187 Cal. Rptr. at 719.

35. Miranda v. Arizona, 384 U.S. 436 (1966).

36. "PCP" is an abbreviation for Phencyclidine, an animal tranquilizer.

37. *See supra* note 22 and accompanying text.

38. By requiring that the question be phrased in such a manner, the trial court was obviously following the example set forth in People v. Moultrie, 99 Cal. App. 3d 77, 160 Cal. Rptr. 51, which was handed down a year earlier. *See supra* notes 25-28 and accompanying text.

39. *See supra* note 24.

40. CAL. VEH. CODE § 10851 (West Supp. 1983). The section reads in full:

> Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent either permanently or temporarily to deprive the owner thereof of his title to or possession of the vehicle, whether with or without intent to steal the same, or any person who is a party or accessory to or an accomplice in the driving or unauthorized tak-

The California Supreme Court granted a hearing "to consider the propriety of impeaching a defendant by a 'sanitized' reference to a prior conviction as a 'felony involving theft.' "[42]

IV. ANALYSIS OF THE HOLDING

The primary issue presented to the California Supreme Court was whether the trial court erred in ruling that if the defendant testified, the prosecutor could attempt to impeach the defendant by asking whether the defendant had ever been convicted of a "felony involving theft." In an opinion authored by Justice Broussard, the court concluded that the trial court had erred, and held that where similar offenses are involved, the technique of sanitizing the prior crime is ineffective to dispel the prejudice of admitting evidence of it.[43]

A. Factors to Consider Regarding the Probative Value of a Prior Felony Conviction

After an initial discussion of the *Beagle* decision and the effect it has had on California Evidence Code section 788,[44] the court

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ing or stealing is guilty of a public offense, and upon conviction thereof shall be punished by imprisonment in the state prison, or in the county jail for not more than one year or by a fine of not more than five thousand dollars ($5,000) or by both such fine and imprisonment. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of the vehicle by the same or a different person.

Id. The prosecutor also charged two prior felony convictions for the purposes of sentence enhancement (CAL. PENAL CODE § 667.5(b)) and to preclude probation (CAL. PENAL CODE § 1203(e)(4)).

41. CAL. PENAL CODE § 496 (West Supp. 1983). Subdivision 1 of section 496 reads in full:

Every person who buys or receives any property which has been stolen or which has been obtained in any manner constituting theft or extortion, knowing the property to be so stolen or obtained, or who conceals, sells, withholds or aids in concealing, selling, or withholding any such property from the owner, knowing the property to be so stolen or obtained, is punishable by imprisonment in a state prison, or in a county jail for not more than one year; provided, that where the district attorney or the grand jury determines that such action would be in the interests of justice, the district attorney or the grand jury, as the case may be, may, if the value of the property does not exceed four hundred dollars ($400), specify in the accusatory pleading that the offense shall be a misdemeanor, punishable only by imprisonment in the county jail not exceeding one year.

Id.

42. 33 Cal. 3d at 121-22, 654 P.2d at 1246, 187 Cal. Rptr. at 719.

43. *Id.* at 128, 654 P.2d at 1251, 187 Cal. Rptr. at 724.

44. *See supra* notes 2, 15-18 and accompanying text.

lists four criteria which must be examined by the trial judge to determine the probative value of the prior felony convictions:

1. The prior conviction must contain an element reflecting on the defendant's honesty.[45]

Before admitting evidence of the prior felony conviction, trial courts have the duty to determine whether it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."[46] Whenever a witness takes the stand, the fact of consequence involved is the defendant's credibility.[47] Evidence Code section 786 further limits the judge's line of inquiry by providing that the sole trait relevant to the witness' credibility is truthfulness.[48] Therefore, if a prior felony does not reflect on the character trait of truthfulness, it must be excluded as irrelevant at the outset, since Evidence Code section 350 unequivocably provides that "no evidence is admissible except relevant evidence."[49]

According to the majority in *Barrick,* the "initial determination regarding the probative value of the prior felony conviction is made by examining the elements of the offense itself."[50] While an earlier conviction may be probative of one or more separate traits of character, it may not involve the one trait that is relevant to impeaching credibility—truthfulness. Unless the evidence contains an element reflecting on the defendant's honesty, it should not be admitted.[51]

The court also noted that varying types of offenses are entitled to differing degrees of weight in balancing the probative value with the prejudicial effect of the past offense.[52] Some offenses, such as perjury, impact heavily on truthfulness; these should be

45. 33 Cal. 3d at 123-24, 654 P.2d at 1247-48, 187 Cal. Rptr. at 720-21.

46. CAL. EVID. CODE § 210 (West 1966). Section 210 reads in full:

"Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

Id. Note that under section 210, "relevant evidence" includes not only evidence of the ultimate facts actually in dispute, but also evidence of other facts from which such ultimate facts may be presumed or inferred.

47. *See* B. JEFFERSON, CALIFORNIA EVIDENCE BENCHBOOK § 28.4 (1982). The credibility of a witness is always an issue.

48. Section 786 reads in full:

Evidence of traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness.

CAL. EVID. CODE § 786 (West 1966).

49. CAL. EVID. CODE § 350 (West 1966).

50. 33 Cal. 3d at 123, 654 P.2d at 1247, 187 Cal. Rptr. at 720.

51. *Id.*

52. *Id.* at 124, 654 P.2d at 1248, 187 Cal. Rptr. at 721.

given a great deal of probative value on the issue of credibility. On the other hand, offenses in which the behavior is assaultive have little to do with the defendant's credibility as a witness and should be given little or no weight in the balance.[53] Certain theft crimes contain elements that are both larcenous and assaultive, and thus bear only in part on the individual's veracity. Such offenses should be given only a moderate amount of weight in the balancing process.[54]

2. The prior felony conviction must not be too remote.[55]

According to *Barrick*, "the second factor for the trial court to consider is the nearness or remoteness in time of the prior felony conviction."[56] As a general guideline, the ten-year rule prescribed by the Federal Rules of Evidence has been followed.[57] Unless the probative value of the prior offense substantially outweighs its prejudicial impact, it will not be admitted.[58]

3. The prior felony conviction should not be for the same or substantially similar conduct for which the accused is on trial.[59]

In examining this factor, the *Barrick* court focused on the pro-

53. *Id.* In 1967, the court in Gordon v. United States, *supra* note 5, noted that:

> In common human experience acts of deceit, fraud, cheating, or stealing, for example, are universally regarded as conduct which reflects adversely on a man's honesty and integrity. Acts of violence on the other hand, which may result from a short temper, a combative nature, extreme provocation, or other causes, generally have little or no direct bearing on honesty and veracity. A "rule of thumb" thus should be that convictions which rest on dishonest conduct relate to credibility whereas those of violent or assaultive crimes generally do not.

383 F.2d at 940.

54. An example is a crime such as robbery.

55. 33 Cal. 3d at 125, 654 P.2d at 1248, 187 Cal. Rptr. at 721.

56. *Id.* The courts have approved the admission of offenses in numerous cases. In People v. Lassell, 108 Cal. App. 3d 720, 166 Cal. Rptr. 678 (1980), a felony conviction occurring four years prior was admissible. In People v. James, 88 Cal. App. 3d 150, 151 Cal. Rptr. 354 (1978), an offense occurring five years prior was admitted. In the instant case the prior conviction occurred two years before the trial.

57. Under Rule 609(b) of the Federal Rules of Evidence, a conviction is not admissible to impeach if more than ten years have passed since the date of the conviction or the witness' release from confinement (if the witness was in fact confined), whichever is later, unless the trial judge determines that the probative value of the prior conviction substantially outweighs its prejudicial effect.

58. *See supra* note 57.

59. 33 Cal. 3d at 125-26, 654 P.2d at 1248-49, 187 Cal. Rptr. at 722.

pensity issue which was specifically addressed in *Beagle*.[60] As a general rule in California, evidence of specific instances of conduct is inadmissible to show that the defendant has the propensity to commit the crime with which he is charged.[61] The rule is subject, however, to section 788, which permits certain kinds of criminal convictions to be used for the purpose of attacking a witness' credibility.[62]

This third factor is relevant in cases where the witness whose testimony is sought to be impeached is also the defendant. Where the earlier conviction is for the same or substantially similar conduct for which the accused is on trial, a special danger arises in that the jury is likely to consider the prior offense not only on the issue of credibility, but also on the question of whether the accused is the type of person who would commit the charged crime.[63] Such use clearly violates the general rule regarding the use of character evidence. As the supreme court stated in the earlier case of *People v. Antick*,[64] "only the most disciplined minds would be able to restrict their use of the prior felony evidence to assessing the defendant's credibility as a witness and disregard its obvious implications with respect to his tendencies in the area of unlawful conduct."[65]

The court also noted two other reasons why the use of similar prior convictions for impeachment must be closely circumscribed. First, the jury may decide that due to the earlier offense, the defendant is the type of person who should be "put away," regardless of whether he or she is guilty or innocent of the charged crime.[66] Second, the admission will draw the jurors away from the central issue of the guilt or innocence of the accused and focus them on his or her past criminal history.[67]

Accordingly, the court noted that "[a] strict limitation on the admission of similar prior convictions is . . . necessary."[68] In the

60. 6 Cal. 3d at 452, 492 P.2d at 12, 99 Cal. Rptr. at 324. Evidence Code section 788 is the only exception to this general rule. *See supra* note 2 and accompanying text.

61. California Evidence Code section 787 (West 1966) provides that "[s]ubject to [s]ection 788, evidence of specific instances of his conduct is inadmissible to attack or support the credibility of a witness."

62. *See supra* note 2.

63. This issue was specifically addressed in People v. Rollo, 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977), where the court held that identical prior offenses may not be used to impeach.

64. 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975).

65. *Id.* at 97, 539 P.2d at 61, 123 Cal. Rptr. at 472. This exact language is relied upon by the *Barrick* court. 33 Cal. 3d at 125, 654 P.2d at 1249, 187 Cal. Rptr. at 722.

66. *Id.*

67. *Id.*

68. *Id.* at 126, 654 P.2d at 1249, 187 Cal. Rptr. at 722. This limitation is necessary because "[w]hile the risk of undue influence is substantial when any prior convic-

balancing process, such evidence should be given a great deal of weight in favor of the inadmissibility of the conviction for purposes of impeachment.

4. The trial court must consider the effect on the defendant if the defendant does not testify out of fear of being prejudiced due to impeachment by prior convictions.[69]

As with the third factor, this element is relevant when the witness whose testimony is sought to be impeached is the defendant. Allowing impeachment by a prior felony conviction will in most cases chill the defendant's testimony on the stand.[70] This danger is most acute where the only evidence in the accused's defense is his or her own version of the facts.

All relevant evidence should be offered to the jury to assist it in its fact-finding process.[71] In cases where the only evidence on behalf of the defendant is his own testimony, this fourth element in and of itself should be sufficient to prevent the prosecution's use of the earlier offense to impeach.[72]

While Barrick's conviction two years earlier contained an element reflecting on his honesty, it was for an offense similar to the charged crime. On that basis, the court held that the type of sanitized impeachment involved was not permissible.[73]

B. Criticism of the Ruling

In *Barrick*, the California Supreme Court continued its gradual

tion is used to impeach the credibility of a defendant-witness, it is far greater when the prior conviction is similar or identical to the crime charged." *Id.*

69. *Id.* at 129, 654 P.2d at 1251, 187 Cal. Rptr. at 724.

70. Where the defendant has numerous prior convictions, the possibility of the chilling effect of priors similar to the crime for which the defendant is on trial mandates that those prior offenses be excluded.

71. California Evidence Code section 351 (West 1966), provides: "Except as otherwise provided by statute, all relevant evidence is admissible."

72. A final consideration which was deemed important in *Beagle* and in the decisions upon which the *Beagle* court relied is the desirability in a particular case that the jury hear the defendant's version of the conduct charged as criminal. Even though a judge might find that the prior convictions are relevant to credibility and the risk of prejudice to the defendant does not warrant their exclusion, he may nevertheless conclude that it is more important that the jury have the benefit of the defendant's version of the case than to have the defendant remain silent out of fear of impeachment.

73. 33 Cal. 3d at 130. 654 P.2d at 1252, 187 Cal. Rptr. at 725.

destruction of the legislative principle established in section 788, that allows a criminal defendant to be impeached by the use of a prior felony conviction. Although several previous decisions had continually narrowed the discretion of the trial judge, the *Barrick* court has effectively erased section 788 from the Evidence Code.

Section 788 provides that "for the purpose of attacking the credibility of a witness, it may be shown by the examination of the witness or by the record of the judgment that he has been convicted of a felony."[74] In *Beagle,* the court held that the trial judge had discretion under section 788 to exclude evidence of prior convictions "when their probative value on credibility is outweighed by the risk of undue prejudice."[75] The court stated, however, that it was not attempting to set forth "rigid standards" to dictate that which should be dependent upon the exercise of the trial court's discretion.[76] In addition, the court emphasized that a defendant who decided to take the witness stand on his or her behalf is not "entitled to a false aura of veracity." The general rule is that felony convictions bearing on veracity are admissible.[77]

Regardless of the court's assurance made in *Beagle* that it would not specify "rigid standards" of admissibility to govern the trial court's discretion in these cases, subsequent decisions have proved otherwise:

1) *People v. Antick*[78] (1975) — the supreme court held that the lower court abused its discretion by admitting prior convictions which were too remote in time.
2) *People v. Rist*[79] (1976) — the supreme court ruled that an earlier conviction similar to the charged offense could never be used for impeachment purposes if dissimilar prior convictions were available.
3) *People v. Rollo*[80] (1977) — the court ruled that a trial judge could not achieve a compromise solution by withholding from the jury the type, but not the fact, of a prior conviction.
4) *People v. Fries*[81] (1979) — the supreme court held that a prior robbery conviction impacted only slightly on a defendant's credibility as a witness.
5) *People v. Spearman*[82] (1979) — the court held that a person

74. CAL. EVID. CODE § 788 (West 1966); *see supra* note 2.
75. 6 Cal. 3d at 453, 492 P.2d at 7-8, 99 Cal. Rptr. at 320.
76. *Id.*
77. *Id.*
78. 15 Cal. 3d 79, 539 P.2d 43, 123 Cal. Rptr. 475 (1975).
79. 16 Cal. 3d 211, 545 P.2d 833, 127 Cal. Rptr. 457 (1976).
80. 20 Cal. 3d 109, 569 P.2d 771, 141 Cal. Rptr. 177 (1977).
81. 24 Cal. 3d 222, 594 P.2d 19, 155 Cal. Rptr. 194 (1979).
82. 25 Cal. 3d 107, 599 P.2d 74, 157 Cal. Rptr. 883 (1979).

could not be impeached with a prior conviction of possession of heroin for sale when he was being tried for that same offense.

6) *People v. Barrick*[83] (1982) — the court ruled that the technique of "sanitizing a prior felony is ineffective to dispel the prejudice in admitting evidence of the prior conviction; therefore, such evidence is inadmissible for impeachment purposes."

By permitting numerous exceptions to section 788, the court has effectively destroyed the intent of that section, which was to permit evidence of prior felony convictions for the purpose of impeachment, subject, of course, to the trial court's sound discretion. The supreme court has assumed the role of legislative draftsmen, a function far beyond its power.

The court specifically stated in *Beagle* that the defendant, if he or she decides to testify, is not to be cloaked with a false appearance of truthfulness.[84] However, the future ramifications of *Barrick* and its predecessors will be to allow defendants in similar cases in the future to assume that "false aura of veracity" which was expressly condemned in *Beagle,* even if the accused has committed recent numerous offenses of the same type.

V. IMPACT OF *BARRICK*

Any analysis of the *Barrick* decision necessarily entails a discussion of the effect of the recent passage of Proposition 8, the "Victim's Bill of Rights."[85] The general theme of Proposition 8 is that all relevant evidence should be admissible. As the amendment to article 1, section 28, subdivision (d) of the state constitution provides:

> RELEVANT EVIDENCE SHALL NOT BE EXCLUDED IN ANY CRIMINAL PROCEEDING, INCLUDING PRETRIAL AND POST CONVICTION MOTIONS AND HEARINGS[86]

In addition, the section goes on to provide in subdivision (f):

> Any prior conviction of any person in any criminal proceeding, whether adult or juvenile shall subsequently be used without limitation for purposes of impeachment or enhancement of sentence in any criminal

83. 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982).
84. 6 Cal. 3d at 453, 492 P.2d at 8, 99 Cal. Rptr. at 320.
85. CAL. CONST. art. I, § 28. *See* Brosnahan v. Brown, 32 Cal. 3d 235, 650 P.2d 274, 185 Cal. Rptr. 30 (1982). The California Supreme Court held that Proposition 8 was fundamentally constitutional.
86. CAL. CONST. art. I, § 28, subd. (d).

proceeding.[87]

The majority in *Barrick* makes no mention of this provision. However, as Justice Richardson points out in the dissenting opinion, the amendment clearly destroys the *Beagle-Barrick* line of decisions.[88] In contrast, Justice Kaus, in his dissenting opinion, stated that he did "not believe it [was] necessary at this time to decide what effect Proposition 8 will have on the resolution of similar issues in the future."[89]

VI. CONCLUSION

The *Barrick* decision is certain to have a restrictive effect on impeachment through the use of prior felony convictions. The California Supreme Court has further limited the scope of trial court discretion in admitting evidence of the earlier offense to attack the credibility of the defendant-witness. As it stands, very little remains for the trial judge to determine, and very few prior convictions will be admissible for purposes of impeachment.

Proposition 8, however, will remedy this situation provided its specific provisions are upheld by the supreme court.[90] If such is the case, there will be a return to the original legislative intent underlying Evidence Code section 788.

B. *Admission of temporary restraining order held prejudicial:* **Stafford v. United Farm Workers of America.**

In *Stafford v. United Farm Workers of America, AFL-CIO,* 33 Cal. 3d 319, 656 P.2d 564, 188 Cal. Rptr. 600 (1983), the court held that it was prejudicial error to admit evidence of a temporary restraining order (TRO) issued previously against the defendants. The personal injury case arose out of a three-car collision, which occurred when a union member parked his truck on the side of the road in violation of the TRO. The order had been issued

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87. *Id.* at § 28, subd. (f).

88. 33 Cal. 3d at 136, 654 P.2d at 1257, 187 Cal. Rptr. at 730 (Richardson, J., dissenting). Justice Richardson stressed that in light of the passage of Proposition 8 and the adoption of section 28(f) of the California Constitution:

> "Any prior felony conviction of any person in any criminal proceeding, whether adult or juvenile, shall subsequently be used *without limitation* for purposes of impeachment or enhancement of sentence in any criminal proceeding . . . ." (Italics added.) Assuming that this new constitutional provision is not misconstrued, persons such as defendant upon taking the witness stand will no longer be able to suppress the fact of their prior felony convictions.

Id.

89. *Id.* at 137, 654 P.2d at 1257, 187 Cal. Rptr. at 730 (Kaus, J., dissenting).

90. *See The California Supreme Court Survey,* 10 PEPPERDINE L. REV. 835, 895, 897 n.9 (1983). The author analogizes to Proposition 13 and concludes that Proposition 8 may be severely limited in the future.

about a week before the accident in order to keep the union from blocking access to a tomato field, and also prohibited other conduct, including rock throwing, violence, and threatening behavior. Because the TRO had no bearing on the issues of vicarious liability and negligence, it was erroneously admitted into evidence at trial.

IX. FAMILY LAW

A. *Post judgment events may be considered in child custody determinations: In re* Elise K.

In re Elise K., 33 Cal. 3d 138, 654 P.2d 253, 187 Cal. Rptr. 483 (1982), presented the supreme court with a question that had been thought to be well settled: an appellate court's authority to consider post-judgment events. However, in the context of a difficult factual setting involving a child custody issue, the general rule that "an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration" can have a harsh result. Appellant, the mother of Elise K., appealed from a judgment entered pursuant to California Civil Procedure Code section 232(a)(7) (West Supp. 1983), which had terminated her custody of the child. Along with the Los Angeles County Department of Adoptions, she urged the appellate court to consider all the circumstances arising since the custody termination. Both parties felt that new information would provide a basis for the court to return the child to appellant instead of leaving her homeless.

The court found that the general rule was not absolute, through the application of California Civil Procedure Code section 909 (West Supp. 1983). This statute permits appellate courts, in cases where trial by jury is not a matter of right or has been waived, to make "factual determinations contrary to or in addition to those made by the trial court." Furthermore, under section 909, the reviewing court may consider "additional evidence of or concerning facts occurring at any time prior to the decision of the appeal." Therefore, the court was able to consider post-judgment events which were compelling enough to reverse the previous judgment terminating the custody and control of appellant Sandra K. over her daughter Elise.

X. GOVERNMENT TORT LIABILITY

A. *Civil Procedure Code section 12(a) applies to Government Code section 945.6:* **DeLeon v. Bay Area Rapid Transit District.**

The case of *DeLeon v. Bay Area Rapid Transit District* (BART), 33 Cal. 3d 456, 658 P.2d 108, 198 Cal. Rptr. 181 (1983), makes California Civil Procedure Code section 12(a) (West Supp. 1983) applicable to California Government Code section 945.6 (West 1980). This entitles plaintiffs with a cause of action against a public entity to the same extension on the six month statute of limitations afforded to plaintiffs with civil actions, when the last day of that limitations period is a holiday. Here, plaintiff had filed her complaint against BART on December 26, 1979, six months and one day after her first claim had been denied by the public entity on June 25, 1979. The supreme court found section 12(a) to state a general rule for the computation of time for statutes of limitation. Citing the need for consistency and certainty in computing these time periods, the court found no reason to depart from this general rule, as a case will not be found to come under an exception unless there is "a clear expression of provision for a different method of computation."

XI. JUDGMENTS

A. *Attorney neglect and clients' rights:* **Carroll v. Abbott Laboratories, Inc.**

Carroll v. Abbott Laboratories, Inc., 32 Cal. 3d 892, 654 P.2d 775, 187 Cal. Rptr. 592 (1982), presents the issue of when an attorney's neglect should be grounds for vacating the dismissal of a lawsuit. In this case, counsel for defendant requested production of documents in plaintiff's possession. Plaintiff's counsel asked for and received four extensions of time, but still failed to produce the requested documents. After plaintiff's counsel failed to appear at the hearing on defendant's motion to compel, the court served him with an order compelling production of the documents. Counsel then failed to comply with the court's order, as well as a second order compelling production, and plaintiff's action as to this defendant was dismissed.

Several days after the dismissal, counsel filed a motion for relief from dismissal, claiming that neither he nor his client possessed the requested documents. Counsel also admitted a total lack of communication with his client for about five months. Counsel's motion was granted on the condition that both he and his client file declarations stating that they did not know the loca-

tion of the requested documents. This condition was not fulfilled, however, and counsel filed a second motion for relief, stating that his client claimed she had given the documents to him and he had later returned them to her.

The trial court ultimately found that counsel had substantially complied with the court order compelling production. The court stated, however, that counsel had been "grossly negligent in the representation of plaintiff's interest," and that the dismissal was set aside only because it was an inappropriately harsh penalty.

In reviewing the trial judge's decision, the court noted that in order to obtain relief under California Civil Procedure Code section 473 (West Supp. 1983), the attorney must show that the neglect was excusable. Generally, "the negligence of the attorney . . . is imputed to his client and may not be offered by the latter as a basis for relief." However, in cases where the attorney's neglect is essentially positive misconduct which obliterates the existence of the attorney-client relationship, and unknowingly deprives the client of representation, the attorney's negligence should not be imputed to the client.

In this case, counsel continued to act for his client, although in a grossly ineffectual manner. His actions did not supersede the existence of the attorney-client relationship nor constitute a total failure to represent his client. This case did not, therefore, fall under the exemption for excusable neglect, and the relief from dismissal should not have been granted. The trial court's decision was accordingly reversed.

XII. JUDICIAL REVIEW

A. *A judge who is not present at oral argument may not participate in the decision:* **Moles v. Regents of the University of California.**

The case of *Moles v. Regents of the University of California,* 32 Cal. 3d 867, 654 P.2d 740, 187 Cal. Rptr. 557 (1982), resolves the issue of whether a judge who did not hear the appellant's oral argument can participate in the judicial panel's written decision.

The plaintiff-appellant filed a petition for writ of mandate in the superior court. He claimed that the defendants had violated his due process rights under both the state and federal constitutions, as well as the rights accorded him under university regulations. After the superior court denied his petition, plaintiff appealed.

On appeal, a three-judge court of appeal panel heard oral argument; however, one justice was replaced before the written decision was prepared. The new panel's decision unanimously affirmed the decision of the superior court.

Appellant claimed that it is "inherently unfair" for a judge not present at the oral argument to participate in the decision. Finding no authority that would allow a justice who had not heard the oral argument to participate in the final decision, the court stated that law and policy compel the conclusion that such a practice should not be permitted. "To hold otherwise would inevitably infringe on the rights of litigants to oral argument or appeal." The case was returned to the court of appeal for reargument.

XIII. JURISDICTION

A. *Review of in personam jurisdiction standards:* **Secrest Machine Corp. v. Superior Court.**

In *Secrest Machine Corp. v. Superior Court,* 33 Cal. 3d 664, 660 P.2d 399, 190 Cal. Rptr. 175 (1983), the supreme court reviewed the policy considerations governing in personam jurisdiction. If anything, the case may have broadened California's long-arm statute, because it certainly did not narrow it.

Defendant Secrest was the builder of a specialized type of levelling machine with its principal place of business in Virginia. Much of Secrest's manufacturing was performed in Virginia. Secrest was a Delaware corporation and maintained no offices in California and had no employees in California.

The president of F & S, a California company, heard of Secrest by word of mouth and decided to investigate the purchase of a Secrest levelling machine. He sent an F & S employee to Virginia to negotiate the purchase. After lengthy negotiations, an agreement was reached whereby the California company would take delivery of a leveller in Virginia, but acceptance of the merchandise was conditioned upon the machine rendering satisfactory performance in the F & S California plant. Secrest sent an employee to California to install the machine and ensure its proper operation. The employee remained in California for two days.

F & S consulted with Secrest about maintaining the leveller and received drawings detailing various modifications that could be made for certain non-Secrest accessories. Before the incident in question, Secrest twice sent F & S sales circulars and advertised six times in a nationally distributed trade magazine.

Ruben Ramos lost five fingers while using the machine. He brought a products liability action against Secrest in California asserting California's "long arm" statute as a basis for the court's

personal jurisdiction over Secrest. Secrest made a special appearance to quash service; however, the trial court denied the motion.

On appeal, the supreme court affirmed the trial court's decision. The court observed that the reach of personal jurisdiction cannot be delineated on a mechanical basis. The court held that the quality and nature of the party's contacts must be considered in light of the requirements of due process and fairness.

Applying these standards to *Secrest Machine Corp.*, the court found that Secrest was subject to service of process. The company was held to have established minimum contacts related to the cause of action through its sale and continued service of the levelling machine in California.

Having found the requisite contacts, the court turned to the question of whether it would be "fair" to require Secrest to litigate the claim in California. In short, the court found that it would be less of a burden for Secrest to come to California than it would be for Ramos to go to Virginia to pursue the claim. Secrest's writ of mandate was denied.

XIV. JUVENILE LAW

A. *Juvenile court must specify whether an offense is a felony or misdemeanor:* ***In re*** **Kenneth H.**

In re Kenneth H., 33 Cal. 3d 616, 659 P.2d 1156, 189 Cal. Rptr. 867 (1983), presented the court with two straightforward questions of statutory interpretation. Juvenile Kenneth H. was charged with burglary. The "accusatory" pleadings filed against him characterized the offense as a felony. At a jurisdictional hearing, the charges were found to be true and this finding was in turn referenced at Kenneth's dispositional hearing. However, the juvenile court never expressly characterized Kenneth's conduct as a felony or a misdemeanor before revoking his home probation and sending him to a county camp.

Kenneth's counsel argued that the juvenile court erred in not specifying whether his offense was a felony or a misdemeanor. The court, pointing to California Welfare and Institutions Code section 702 (West Supp. 1983), noted that the issue had already been resolved by the court of appeal in *In re Dennis C.*, 104 Cal. App. 3d 16, 163 Cal. Rptr. 496 (1980). The court held that a juvenile

court must state whether the crime found would be a felony or a misdemeanor if committed by an adult.

It was also contended that the trial court failed to make necessary findings of fact justifying its order that Kenneth be removed from his parents' custody. California Welfare and Institutions Code section 726 (West Supp. 1983) requires a court to make one of the following findings before removing a child from his or her parents' custody:

> (a) That the parent or guardian is incapable of providing or has failed or neglected to provide proper maintenance, training and education for the minor.
> (b) That the minor has been tried on probation in such custody and has failed to reform.
> (c) That the welfare of the minor requires that his custody be taken from his parent or guardian.

CAL. WELF. & INST. CODE § 726 (West Supp. 1983). The disposition order signed by the judge included printed recitals of the provisions of section 726. A check mark was placed next to subsection (b) indicating that Kenneth had been "tried on probation and failed to reform." No other relevant references to section 726 were made. Kenneth contended that this was not sufficient to satisfy the finding requirement. The justices disagreed. In *In re John H.,* 21 Cal. 3d 18, 577 P.2d 177, 145 Cal. Rptr. 357 (1978), the court held that an order including only a printed statement of statutory language satisfied the statute's requirement that a determination of "probable benefit" be established by the Youth Authority before commitment. In reaching this holding, the *John H.* court found it necessary to reverse a court of appeal decision holding that orders supported only by findings "couched in the language of 726 were insufficient to support the trial court's decision." The court in *Kenneth H.* found no significant difference between merely reciting the appropriate terms of section 726 and checking a box next to the appropriate clause.

The matter was remanded to the trial court for a determination of whether the burglary was a felony or a misdemeanor.

XV. LABOR LAW

A. *Notice of appeal from Labor Commission must be timely filed:* **Pressler v. Donald L. Bren Co.**

In *Pressler v. Donald L. Bren Co.,* 32 Cal. 3d 831, 654 P.2d 219, 187 Cal. Rptr. 449 (1982), a dispute arose between an employee and his former employer. The employee filed an action with the Labor Commission to recover amounts which he claimed were owed him under the employment contract. An informal administrative hearing was held and the former employee was awarded the full

amount claimed under the contract. Each party received a certified copy of the decision; a notice of appeal was filed by the employer thirteen days later, three days after the statutory period had expired. California Labor Code section 98.2(a) (West Supp. 1983) requires that notice of appeal be filed within ten days of the service of notice of an order, decision, or award.

The court thus faced the issue of whether an untimely appeal from a Labor Commission decision may be heard. In a conventional appeal, the failure to file a timely notice leaves the appellate court no discretion but to dismiss the appeal. Although an appeal from a Labor Commission decision is distinguishable because it provides for de novo review by the courts, the result of an untimely notice is the same: failure to appeal within the prescribed period results in the decision or award becoming final. It is clear from the statutory language and its underlying legislative purpose that the prescribed deadline is "mandatory and jurisdictional" and cannot be waived for "mistake, inadvertence, or other similar excuse." 32 Cal. 3d at 837-38, 654 P.2d at 223, 187 Cal. Rptr. at 453.

B. *Noncompliance with organizational security provisions:* San Lorenzo Education Association v. Wilson

In *San Lorenzo Education Association v. Wilson,* 32 Cal. 3d 841, 654 P.2d 202, 187 Cal. Rptr. 432 (1982), *modified,* 33 Cal. 3d 399a (1983), a collective bargaining agreement existed between the plaintiff, San Lorenzo Education Association CTA/NEA, and the San Lorenzo Unified School District. The agreement contained an "organizational security" clause which required all employees to either join the union or pay a service fee to the union. Defendants, district employees, refused to comply with this provision. The Association successfully brought suit in several small claims cases and defendants appealed to the Alameda County Superior Court which found in favor of the Association. On appeal to the California Supreme Court, defendants argued that plaintiff had incorrectly brought suit, claiming that section 3540.1, subdivision (i)(2) of the California Government Code provides dismissal as the sole remedy for failure to pay the service fee.

Organizational security is defined in the Government Code as "[a]n arrangement that requires an employee, *as a condition of continued employment,*" to join the union or alternatively pay a service fee. CAL. GOV'T CODE § 3540.1(i)(2) (West 1980) (empha-

sis added). Defendants urged that this terminology prescribes the dismissal of a noncomplying employee to the exclusion of all other remedies, such as private civil actions.

The court, however, held that this section "does not prescribe a remedy at all, let alone an exclusive one." 32 Cal. 3d at 845, 654 P.2d at 205, 187 Cal. Rptr. at 435. It is merely a definitional section, and is not intended as a substantive limitation on remedies. Thus, plaintiff's civil suits were properly filed.

XVI. LIMITATION OF ACTIONS

A. *Civil Procedure Code section 337.15(c) provides an exception to the application of the ten year limitation period for cross-complaints for indemnity:* **Valley Circle Estates v. VTN Consolidated, Inc.**

The court in *Valley Circle Estates v. VTN Consolidated, Inc.*, 33 Cal. 3d 604, 659 P.2d 1160, 189 Cal. Rptr. 871 (1983), was presented with a straightforward but interesting question of statutory interpretation. Consider the following hypothetical:

> S is a seller and developer of residential real property who contracts with civil engineer E to grade and survey a particular piece of property called Redacre. The grading is completed by E in year 6 and a house is completed by S and persons other than E in year 8. Redacre is eventually sold to plaintiff P. The soil on Redacre settles, causing damage to P's home. P sues both S and E. S cross-claims against E for indemnity.

California Civil Procedure Code section 337.15 (West 1982) provides in part:

> (a) No action may be brought to recover damages from any person . . . who develops real property or performs . . . surveying . . . or construction of an improvement to real property more than 10 years after the substantial completion of the development or improvement for any of the following:
>
> (1) Any latent deficiency in the . . . surveying . . . or construction of an improvement to, or survey of, real property.
>
> (2) Injury to property, real or personal, arising out of any such latent deficiency. . . .
>
> . . . .
>
> (c) As used in this section, "action" includes an action for indemnity brought against a person arising out of that person's performance or furnishing of services or materials referred to in this section, except that a cross-complaint for indemnity may be filed . . . in an action which has been brought within the time period set forth in subdivision (a) of this section.
>
> E moves for dismissal of all claims against him. The trial court grants his motion. What result on S's appeal?

Such were the facts in *Valley Circle.* Defendant VTN (a.k.a. E) argued that the limitations in subparagraph (a) applied with full force to the cross-claims contemplated in subparagraph (c). The court disagreed. Looking to the "clear, unambiguous, and reasonable" language of the statute, the court found one "clear" excep-

tion to the ten-year limitation: cross-claims. "[A] defendant timely sued [under subdivision (a)] may file under subdivision (c) a cross-complaint for indemnity against a third party who could not otherwise be reached by a direct action for indemnity filed by the defendant, or by a direct suit for damages filed by the plaintiff." This result was consistent with the common law rule that a cause of action for indemnity does not accrue until the indemnitee has suffered a loss through payment of an adverse judgment or settlement.

The court pointed out that its decision did not create an "infinite period" of liability for subcontractors. Rather, the period in which a claim could arise would be limited by the section's overall ten-year limitation which would begin to run upon completion of the general contractor's work. Hence, the correct answer to the hypothetical (as evidenced by the result in *Valley Circle)* is reversal of the trial court's judgment.

XVII. NUISANCE

A. *Statutory interpretation of red light abatement law:* **People *ex rel.* Van de Kamp v. American Art Enterprises, Inc.**

In the case of *People ex rel. Van de Kamp v. American Art Enterprises, Inc.*, 33 Cal. 3d 328, 656 P.2d 1170, 188 Cal. Rptr. 740 (1983), the court was faced with the interpretation of California Penal Code section 11225 (West 1982), known as the Red Light Abatement Law. The state had filed this action, under California Penal Code section 11230 (West 1982), alleging that the defendants, owners of a building in Chatsworth, California, used the structure as headquarters for the publishing and distribution of sexually explicit material, constituting a nuisance under section 11225. The court was called upon to determine whether the provisions of the Red Light Abatement Law required a damages award against the owners of property that had been judicially declared a nuisance.

In its search through the various code sections that comprise the Red Light Abatement Law, the court could find no provisions purporting to authorize the imposition of a monetary damages award as an alternative to abatement of the nuisance. The court refused to impose the damages award upon the defendants, finding that the primary objective of an abatement action is "to 're-

form' the property and ensure that the nuisance is abated, not to punish for past acts." Although the court recognized the statute as authorizing "a variety of sanctions to cover the costs of closing the property and the costs of prosecution," because those remedies are in rem, such costs can only be attained through a sale of the property.

XVIII. PARTNERSHIPS

A. *Disassociation from a partnership does not terminate fiduciary duties:* Leff v. Gunter

In *Leff v. Gunter,*[1] the defendant partnership appealed from a judgment in favor of the plaintiff,[2] after the jury entered a verdict finding the defendants liable for unfair competition by reason of a breach of fiduciary duty.[3] The defendants challenged portions of the jury instructions,[4] contending they misstated the law by "ac-

1. 33 Cal. 3d 508, 658 P.2d 740, 189 Cal. Rptr. 377 (1983). The defendants, a copartnership, consisted of William L. Gunter, Robert B. Russell, and Robert B. Russell & Associates.

2. The judgment was in the amount of $416,666, based on a one-sixth share of lost profits. *Id.* at 513, 658 P.2d at 743, 189 Cal. Rptr. at 380.

3. Plaintiff Ted Leff, along with Henry Sender, an architectural engineer, agreed to enter a joint bid on a United States government project involving the construction of an Internal Revenue Service Center in Fresno, California. The terms of the contract did not require the bid to be awarded to the lowest bidder; however, it did require that the bidder have control over any site proposed for the center.

Shortly thereafter, Leff and Sender orally agreed to form a partnership with the defendants. Sender had previously formed such an arrangement on a project in Memphis, Tennessee with the same parties (except Leff) and under the same terms.

Upon formation of the partnership, Leff began to forward Sender all information he had obtained concerning proposed sites for the center. Sender relayed all the materials to the partners, now defendants. Plaintiff was the only bidder to select and include a site known as the Pilobos site in his initial bid. After defendants had received the proposed final bid and related information, they informed Sender they had decided to withdraw from the Fresno joint venture. This occurred between February and March, 1970. At this time the defendants did not intimate that they intended to bid independently on the Fresno project. However, on April 10, 1970, defendants submitted their own joint bid for the same Pilobos site. It was later discovered that the defendants, having made the successful bid under the name of Russell and Associates, had created the new partnership by oral agreement sometime in mid-January of 1970. Plaintiff and Sender were unaware of the existence of that association. *Id.* at 511-12, 658 P.2d at 742-43, 189 Cal. Rptr. at 379-80.

4. The challenged jury instructions read as follows:

> No. 44 stated: You are instructed that where one partner secretly enters into a contract sought to be contracted by the partnership which another partner is negotiating on behalf of the partnership such partner is in violation of his fiduciary duty to the excluded partner.
>
> No. 45 directed: You are further instructed that such fiduciary duty continues for so long as the other party is negotiating on behalf of the original partnership.

33 Cal. 3d at 513, 658 P.2d at 743, 189 Cal. Rptr. at 380.

knowledging a previously unrecognized cause of action for breach of fiduciary duty through fair competition by a former partner *after termination* of the partnership."[5] Acknowledging that any "secret preemptive activities"[6] conducted by a partner during an agreed upon association would constitute an impropriety, defendants contended that any such impropriety was removed by virtue of their disassociation with plaintiff before they submitted their own bid. The California Supreme Court disagreed with each of the defendants' objections.[7]

The court, relying heavily upon well established precedent, reasoned that post-dissolution competition with a former partner would be greatly facilitated by the partner's access to relevant information, available only as a result of the partnership relationship. The court concluded that a formal disassociation from a partnership or joint venture, therefore, does not relieve a former partner of fiduciary duty unless the parties specifically agree otherwise.[8] This principle also applies to transactions which are merely contemplated and which "constitut[e] the object or purpose for which the partnership was formed."[9] However, the court noted that benefits resulting from the partnership arrangement after dissolution may be allowable only if each partner "fully compensates his co-partner[s] for [their] share of the prospective business opportunity."[10] Thus, inherent in the copartnership venture is a fiduciary duty which continues to exist even after

5. *Id.* (emphasis added).

Defendants contended that since the partnership was fully dissolved, there remained no fiduciary duty. However, when plaintiff met with a government representative on March 27, 1970, to discuss the joint bid, he asserted he was not aware of any disassociation at the time.

6. *Id.*

7. "Defendants have cited no contrary authority. Nor do defendants assert any persuasive reason in logic or principle which relieves a partner from such continuing [fiduciary] duty." *Id.* at 514, 658 P.2d at 744, 189 Cal. Rptr. at 381.

8. This principle had been firmly established by the court in Page v. Page, which held: "Partners are trustees for each other, and in all proceedings connected with the conduct of the partnership every partner is bound to act in the highest good faith to his copartner." 55 Cal. 2d 192, 197, 359 P.2d 41, 44, 10 Cal. Rptr. 643, 646 (1961). *See also* Sadugor v. Holstein, 199 Cal. App. 2d 477, 483, 18 Cal. Rptr. 859, 862 (1962) (with respect to copartnership to acquire land: "A joint venturer holding the property for the joint venture is a trustee for his coventurer and this is so though he purchased the property with his own funds."); Lasry v. Lederman, 147 Cal. App. 2d 480, 487, 305 P.2d 663, 667 (1957).

9. Koyer v. Willmon, 150 Cal. 785, 787, 90 P. 135, 136 (1907).

10. Page v. Page, 55 Cal. 2d 192, 197, 359 P.2d 41, 44, 10 Cal. Rptr. 643, 647 (1961).

dissolution.[11]

Reliance upon basic equitable principles of partnership also assisted the court in reaching its ultimate decision. The defendants argued they were under no duty to share profits with their former partners where those profits were obtained from their separate activities after dissolution of the partnership. The court stated, however: "From the evidence in the instant matter, the jury could well have concluded that defendants secretly began work on their independent bid during their participation in the joint venture. . . ."[12] Instituting a formal bid *after* dissolution of the partnership failed to remove the impropriety of their conduct during the partnership. The court recognized that focusing only upon the formal bid date in conjunction with the status of the partnership would be deceptive. The fact remained that the "defendants here sought to appropriate a partnership opportunity for themselves. Their hands are no cleaner because of a more careful orchestration of their clandestine competition."[13]

Upon resolution of defendants' appeal, the court addressed plaintiff's cross-appeal wherein plaintiff alleged that the trial court erred in denying him prejudgment interest on his subsequent recovery. Plaintiff based this appeal on section 3287(a) of the Civil Code which allows prejudgment interest on damages which are calculable.[14] Defendants never challenged the basis of computation of plaintiff's recovery although they contested the underlying issue of liability giving rise to the damages. The court, however, quickly distinguished these objections:

> Damages are deemed certain or capable of being made certain within the provisions of subdivision (a) of section 3287 where there is essentially no dispute between the parties concerning the basis of computation of damages if any are recoverable but where their dispute centers on the issue of liability giving rise to damage.[15]

Thus, the court concluded that once plaintiff's entitlement to dam-

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11. *See* Donleavey v. Johnston, 24 Cal. App. 319, 328-29, 141 P. 229, 233 (1914) ("The sound rule is, that [a former partner] cannot make any profit to himself from a secret transaction initiated while the relation of trustee and cestui que trust exists, no matter when it springs into actual operation.") (citation omitted). *See also* CAL. CORP. CODE § 15021(1) (West 1977).

12. 33 Cal. 3d at 516-17, 658 P.2d at 746, 189 Cal. Rptr. at 383.

13. *Id.* at 517, 658 P.2d at 746, 189 Cal. Rptr. at 383.

The court completely rejected defendants' claim that the imposition of fiduciary obligations on joint venturers violates public policy designed to encourage competitive bidding on public projects. *Id.* at 518, 658 P.2d at 747, 189 Cal. Rptr. at 384.

14. Plaintiff relied on California Civil Code section 3287(a) (West 1970), which provides in relevant part:

> Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day.

15. 33 Cal. 3d at 519, 658 P.2d at 748, 189 Cal. Rptr. at 385 (quoting Esgro Cen-

ages was established, as to those damages calculable and actually calculated mechanically, the prejudgment interest on the sum awarded became due from the time the damages became due. Accordingly, the court remanded the case to the trial court for the purpose of calculating and awarding the plaintiff the appropriate prejudgment interest.

XIX. PENAL AND CORRECTIONAL INSTITUTIONS

A. *By statute, California prisoners retain all free press rights except where curtailed for institutional security and public safety:* **Bailey v. Loggins**

Prior conflicts, and the desire to avoid confrontation between the executive branch of the government and the judiciary, have resulted in an abyss where the constitutional rights of prisoners are concerned.[1] In the past, high courts, including the United States Supreme Court, have dealt with prisoners' rights on an issue-by-issue basis.[2] Thus, clear guidelines for the degree of constitutional protections afforded prisoners have never materialized.

Although the harshness of the "hands off" doctrine has subsided,[3] it has not been fully laid to rest.[4] However, the California Supreme Court recently made the most successful attempt to date to shed the remaining fragments of the doctrine. In *Bailey v.*

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tral, Inc. v. General Ins. Co., 20 Cal. App. 3d 1054, 1060, 98 Cal. Rptr. 153, 157 (1971) (citation omitted)).

1. Historically, courts have adopted a "hands off" approach, avoiding almost all consideration of prisoners' constitutional rights. This doctrine has been effectuated by denying claimants the courts' jurisdiction to hear such cases. *See generally* Note, *Beyond the Ken of the Courts: A Critique of Judicial Refusal to Review the Complaints of Convicts,* 72 YALE L.J. 506 (1963).

2. Recently, the courts have taken a stance on certain isolated issues. However, each decision has been tempered by the acknowledgment that final deference should be accorded the Department of Corrections. *See, e.g.,* Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132-36 (1977) (prison officials deserve substantial latitude in decision making and their decisions should be upheld unless conclusively proved incorrect).

3. *See supra* note 1. When the United States Supreme Court initially addressed the first amendment rights of incarcerated persons, it stated that "federal courts will discharge their duty to protect constitutional rights." Procunier v. Martinez, 416 U.S. 396, 405-06 (1974) (citing Johnson v. Avery, 393 U.S. 483, 486 (1969)).

4. *See generally* Calhoun, *The Supreme Court and the Constitutional Rights of Prisoners: A Reappraisal,* 4 HASTINGS CONST. L.Q. 219, 223-25 (1977) (author comments that Court's rationale underlying the *Martinez* decision perpetuated the "hands off" doctrine it attempted to discard).

Loggins,[5] a four to three decision, the court limited the "usual deference"[6] traditionally afforded the Department of Corrections. The court stated that prison officials "[do] not have total or arbitrary power, but must exercise [their] authority even-handedly. . . ."[7] While the California Supreme Court did not completely dismiss the realities underlying the "hands off" doctrine, its decision in *Bailey* should be viewed as the most notable attempt to analyze and delineate the scope of constitutional protections to which prisoners are entitled.

Superintendent Otis Loggins, representing the California Department of Corrections, appealed a judgment ordering: (1) the publication of two articles in the Soledad prison newspaper; (2) the enactment of specific guidelines limiting administrative censorship of prisoner-authored articles; and (3) the formulation of procedures for expeditious review of those articles administratively deemed "controversial" and thus unsuitable for publication.[8] Initially, the suit was instituted by Artie Bailey, the inmate editor of the Star News, after two prisoner-authored articles were rejected for publication on a content basis.[9] After complying with

5. 32 Cal. 3d 907, 654 P.2d 758, 187 Cal. Rptr. 575 (1982).

6. The phrase "usual deference" had been used consistently in prisoners' rights cases, seemingly as an offshoot of the "hands off" doctrine. As the judiciary began to relax the doctrine and acknowledge its jurisdiction in such cases, it tempered the final result of its decisions by granting prison officials, in essence, the ultimate determination.

7. *Id.* at 922, 654 P.2d at 768, 187 Cal. Rptr. at 585.

8. Bailey v. Loggins, No. 73331 (Superior Court of Monterey County, Feb. 14, 1978) (Silver, J.). The trial court issued a peremptory writ mandating the officers of the Department to publish two articles in the Star News, the prisoner-authored publication for Soledad Prison. The articles had previously been rejected by Soledad Prison's Associate Superintendent, who was acting as supervisor of the content of the publication. In addition, the trial court ordered the formulation of guidelines in an effort to limit administrative censorship of the Star News to matters which could reasonably be deemed a threat to institutional security or which described the construction of weapons or similar dangerous devices. The court found the existing censorship regulations overbroad and also deemed the appeal procedure inadequate. *See* 32 Cal. 3d at 910-13, 654 P.2d at 760-62, 187 Cal. Rptr. at 577-79.

9. In September 1976, Willie Brandt, an inmate at Soledad Prison, submitted two articles to Artie Bailey for publication in the Star News. The content of the articles related to two prison lectures, one of which had been given by the Deputy Legal Affairs Secretary to the Governor. Both articles had been approved for publication by Bailey, the inmate editor, and by Estin, the civilian journalism instructor.

According to prison guidelines, the articles were then submitted to Associate Superintendent Dobreff for administrative review of content. Both Dobreff and the acting superintendent declined permission for publication of the articles. Bailey subsequently instituted first and second level appeals, both of which were rejected. It was not until February 1, 1977, that Bailey was officially informed of the reasons underlying the prohibition of publication of the articles. The Director of Corrections, Enomoto, explained his ruling on the appeal to Bailey, granting the request for administrative guidelines on content, but denying the request for pub-

the Department of Corrections' appellate procedure, Bailey was finally informed a year later that the articles were in conflict with the department's regulations[10] because they "spoke favorably of collective organization and bargaining by the prisoners." The director concluded that the articles "constituted a subtle—or perhaps, not so subtle—attack upon administration."[11]

After the court of appeal affirmed the trial court judgment, the California Supreme Court granted a petition for hearing considering the following issues ripe for determination: (1) the power of the department to reject an article submitted for publication; (2) the process of appealing the decision; and (3) the validity of the trial court's action in issuing a peremptory writ mandating department officers to publish previously rejected articles.[12]

The major issue with which the court dealt was the editorial control of the newspaper by department officials. Recognizing that Penal Code sections 2600 and 2601[13] govern the rights of those incarcerated in California, the court concluded that "by statute California prisoners retain *all rights* encompassed under the heading of the freedom of the press. . . ."[14] These rights, however, are limited "to the extent that . . . [they] must be curtailed for institutional security and public safety."[15] Thus, the court applied established principles of constitutional law to

lication of the specific articles. *See* 32 Cal. 3d at 911, 654 P.2d at 760, 187 Cal. Rptr. at 577.

10. Director Enomoto found the articles in violation of Section 413.11, Misuse of Publication, which states that a prison newspaper shall not "be used to. . .attack any law, rule, or policy to which inmates or employees may object. . . . Grievances will be given consideration when called to attention through designated channels, and institutional publicatons [sic] shall not be used for this purpose." For a complete version of the Department of Corrections Regulations sections concerning prisoner publications, see 32 Cal. 3d at 911 n.2, 654 P.2d at 760 n.2, 187 Cal. Rptr. at 577 n.2.

The original regulations have subsequently been replaced three times by the Department. The new regulations are numbered as Regulations sections 720-26.

11. 32 Cal. 3d at 912, 654 P.2d at 761, 187 Cal. Rptr. at 578.

12. *Id.* at 914, 654 P.2d at 763, 187 Cal. Rptr. at 580.

13. *See* CAL. PENAL CODE §§ 2600-2601 (West 1982). Section 2600 provides that " [a] person sentenced to imprisonment in a state prison may, during any such period of confinement, be deprived of such rights, *and only such rights,* as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." CAL. PENAL CODE § 2600 (West 1982)(emphasis added).

14. 32 Cal. 3d at 915, 654 P.2d at 763, 187 Cal. Rptr. at 580 (emphasis added). The court further clarified these rights as those originating in the first amendment of the United States Constitution, and in CAL. CONST. art. I, § 2.

15. 32 Cal. 3d at 915, 654 P.2d at 763, 187 Cal. Rptr. at 580.

prisoners.[16]

This application required the court to recognize the rule which provides that a state, after establishing a forum for the expression of ideas, may not prohibit the public from using the forum because the state disapproves of the content of ideas, expressions, or beliefs.[17] In addition, a "state may not condition the exercise of a privilege . . . on the renunciation or nonexercise of constitutionally protected rights."[18] However, application of these principles to a prison publication depends upon the purposes served by that newspaper, the governing regulations in effect, and the method of application of those regulations by prison authorities.

Prison officials are not compelled to authorize a publication of any type within their particular institution.[19] However, once a newspaper is established with the stated purpose of serving as a forum for inmate expression,[20] some constitutional safeguards au-

16. The court appeared to rely upon the United States Supreme Court ruling in Procunier v. Martinez, 416 U.S. 396 (1974). Although the Court had declined to precisely enumerate the scope of prisoners' first amendment rights, it did set forth for the first time a constitutional standard of review.

Martinez involved the constitutionality of regulations enabling prison officials to censor prisoner-authored mail or mail addressed to prisoners. The court held that such censorship must meet two standards. The restrictions "must further an important or substantial governmental interest unrelated to the suppression of expression," and the officials could not use the censorship regulations merely "to eliminate unflattering or unwelcome opinions or factually inaccurate statements." 416 U.S. at 413. In addition, the court held that restrictions should be drawn as narrowly as possible, so that the authorized limitations on first amendment rights would not be overly broad in protecting the particular governmental interest involved. *Id.*

Shortly thereafter, the United States Supreme Court directly addressed the scope of prisoners' rights under the first amendment. In Pell v. Procunier, 417 U.S. 817 (1974), the Court stated, "a prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." 417 U.S. at 822. *Cf.* Coffin v. Reichard, 143 F.2d 443, 445 (6th Cir. 1944), *cert. denied,* 325 U.S. 887 (1945). *See also* ABA Joint Committee on the Legal Status of Prisoners, *The Legal Status of Prisoners,* 14 AM. CRIM. L. REV. 377, § 1.1, at 417 (1977) [hereinafter cited as *The Legal Status of Prisoners*].

17. 32 Cal. 3d at 915, 654 P.2d at 763, 187 Cal. Rptr. at 580. *See* Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967).

18. 32 Cal. 3d at 915, 654 P.2d at 763, 187 Cal. Rptr. at 580. This doctrine includes the privilege of using state property. *See also* Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946).

19. *See* Luparar v. Stoneman, 382 F. Supp. 495, 499 (D. Vt. 1974), *appeal dismissed,* 517 F.2d 1395 (2d Cir. 1975). Prison officials may sponsor journalism classes without publishing inmates' work. They also may use prisoner labor to produce a "house organ" wherein only the views of the administration are expressed. 32 Cal. 3d at 915, 654 P.2d at 763, 187 Cal. Rptr. at 580.

20. 32 Cal. 3d at 916, 654 P.2d at 764, 187 Cal. Rptr. at 581. The trial court concluded that the Star News was in fact a limited forum for prisoner expression. The court based this conclusion upon several factors:

(1) the regulations in and of themselves emphasized the nature of the publication, stating that its purpose was to "supply inmates with news

tomatically come into play.[21] The standard of review is at least that of a "reasonable basis."[22] Yet, it appears that the court has been inclined to adopt a more stringent standard of review when dealing specifically with the first amendment right of free speech

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happenings within the institution and department;" Reg. 721; that it should appeal to all inmates, Reg. 723; and that it must conform to journalistic standards, Reg. 725;

(2) the publication served an important communicative purpose;
(3) it was freely circulated among the inmates and staff and was also distributed to other similar institutions;
(4) subscriptions were accepted from interested persons, organizations and agencies; and
(5) development of the morale of the prisoners' families was another purpose of the publication.

Thus, it is clear that the department's own regulations and practices consistently categorized the Star News as a publication authorized to express the ideas, beliefs, and views of the prison population. These elements constituted the major issue of concern to the court, whether the publication was essentially an "in house organ," or was actually a forum for prisoner expression.

21. Two federal decisions directly address the first amendment protection issue. In Luparar v. Stoneman, the Department of Corrections sought to limit distribution of a prisoner-authored, partially state funded publication. The court rejected the argument that state funds entitled the department to act as a publisher and therefore exercise complete control over its contents. The district court ruled that:

> [t]he state is not required to establish or support an inmate newspaper, and once it does so, it can withdraw its approval or support for any reason, except those impermissible under the first amendment. However, once the state has allowed a newspaper to be established, the objection of prison officials, or those in the Department of Corrections, to its editorial content is not a permissible reason under the first amendment to prohibit its distribution.

Luparar v. Stoneman, 382 F. Supp. at 499.

In Pittman v. Hutto, the Fourth Circuit addressed the issue of censorship, holding that:

> prison officials may limit first amendment rights, . . . whenever they reasonably conclude that the exercise of such rights possesses the likelihood of disruption of prison order or stability or otherwise interferes with the penological objectives of the institution.

Pittman v. Hutto, 594 F.2d 407, 411 (4th Cir. 1979) (citing Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129-32 (1977)).

The California Supreme Court merged the two rules and stated that both the district court and the circuit court "essentially agree that the administration cannot exercise arbitrary control; censorship can only be imposed to protect prison order and security, or to further some substantial state interest." 32 Cal. 3d at 918, 654 P.2d at 765, 187 Cal. Rptr. at 582.

22. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. at 132.

The Court's most extensive review of first amendment rights of prisoners occurred in *Jones,* which dealt with the right of association by inmates. The Court held that the right of association, "necessarily curtailed by the realities of confinement," may be limited by department officials upon a reasonable determination that association by an inmate group was likely to interfere with the state's legitimate interests in security, order and prisoner rehabilitation. *Id.*

for prisoners.[23] Generally, most courts have required department officials to justify any content-based prohibitions.[24] However, the range of that burden has varied drastically from a showing that the restriction is vital to protect against a "clear and present danger,"[25] to a requisite showing that "it is necessary to avoid substantial interference with prison discipline."[26]

The defendants in this case argued that because a prison is not a "public forum,"[27] the prisoners should not be afforded any rights concerning a prison publication. However, the court rejected this contention and distinguished the *Jones* ruling,[28] stating that the facts in *Jones* did not "involve a prison newspaper, and nothing in that opinion indicat[ed] that a newspaper cannot serve as a forum for prisoner expression."[29] The court further stated that "all [courts] recognize that prison administrators do not have total and arbitrary power, but that First Amendment values appropriate to expressive forums enter into the balance."[30]

The court analyzed the first amendment values involved by the use of two traditional theories. The first of these theories was premised on the Star News being a public forum. Once established as such, the state "[could] not infringe the right of free expression within the parameters of the forum."[31] The department

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23. In *Jones,* the standard of review was formulated primarily for the first amendment right of association. The restrictions were content-neutral and geared to group activity. Upon adoption of the reasonable basis standard, the Court emphasized that group activity posed a more severe threat to legitimate penological objectives than did the rights of free expression and beliefs. *But see* Pittman v. Hutto, 448 F. Supp. 61, 65-66 (E.D. Va. 1978) (court argued that the restriction on group activity in *Jones* was content based), *aff'd,* 594 F.2d 407 (4th Cir. 1979). Thus, the decisions reached in *Luparar* and *Pittman* evidenced a higher level of review. *See supra* note 21.

24. *See generally* Aikens v. Jenkins, 534 F.2d 751 (7th Cir. 1976); Jackson v. Ward, 458 F. Supp. 546 (W.D.N.Y. 1978) (prison officials' censorship of inmates' access to published materials); O'Connell v. Southworth, 422 F. Supp. 182 (D.R.I. 1976) (prison officials' denial of use of monies from inmates' welfare fund to distibute leaflets); Fortune Soc'y v. McGinnis, 319 F. Supp. 901 (S.D.N.Y. 1970).

25. *See The Legal Status of Prisoners, supra* note 16, § 6.5, Commentary at 526 (advocating no content-based censorship "except where that content could otherwise be prohibited under the 'clear and present danger' standard.").

26. Martinez v. Oswald, 425 F. Supp. 112, 115 (W.D.N.Y. 1977).

27. Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

28. *Id. See supra* notes 22-23 and accompanying text.

29. 32 Cal. 3d at 918, 654 P.2d at 766, 187 Cal. Rptr. at 583. The court does acknowledge that many courts have offered differing opinions as to the amount of discretionary control granted prison officials in first amendment speech cases. *See supra* notes 24-26 and accompanying text.

30. 32 Cal. 3d at 918, 654 P.2d at 766, 187 Cal. Rptr. at 583. *See also* Pittman v. Hutto, 594 F.2d 407, 411 (4th Cir. 1979); Gray v. Creamer, 465 F.2d 179, 186 (3d Cir. 1972); Luparar v. Stoneman, 382 F. Supp. 495, 499-501 (D. Vt. 1974), *appeal dismissed,* 517 F.2d 1395 (2d Cir. 1975); Payne v. Whitmore, 325 F. Supp. 1191, 1193 (N.D. Cal. 1971).

31. 32 Cal. 3d at 919, 920, 654 P.2d at 767, 187 Cal. Rptr. at 584 (citing Wirta v.

could, however, censor the publication in accordance with established constitutional guidelines, to provide for reasonable security within the institution and the reasonable protection of the public.[32] Thus, the court authorized limited control over such a publication, but only that amount of control necessary to serve "valid penological objectives."[33] As a result, the court mandated the drafting of regulations to evidence sensitivity to first amendment values and, further, the avoidance of prohibitions unnecessary to any institutional or penological purpose.

The second theory concerned the application and enforcement of department-imposed regulations. Those regulations which provide "extraordinary latitude for discretion," possibly resulting in "invit[ing] prison officials and employees to apply their own personal prejudices and opinions as standards for [prison] censorship,"[34] are unconstitutional. The court ruled that in applying and enforcing regulations, the department must act in a "non-arbitrary, neutral, even-handed manner."[35] The court required that future regulations drafted by the department be "framed and applied uniformly with due regard for constitutionally protected rights of free expression." The regulations should also be in accord with the standards of *Procunier v. Martinez* and Penal Code section 2600.[36]

Alameda-Contra Costa Transit Dist., 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967)).

The Department also argued that the state as publisher enjoyed the same complete control over the publication as do private publishers. The court summarily rejected this argument, stating that the Department of Corrections "is clearly an arm of the state and this fact will always distinguish it from the purely private publisher as far as censorship rights are concerned." 32 Cal. 3d at 919, 654 P.2d at 766, 187 Cal. Rptr. at 583 (quoting Bazaar v. Fortune, 476 F.2d 570, 574, *aff'd*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974)). For an excellent historical account of the state publisher versus private publisher rule, see Gambino v. Fairfax City School Bd., 429 F. Supp. 731 (E.D. Va. 1977), *aff'd*, 564 F.2d 157 (1977); American Civil Liberties Union of Va. v. Radford College, 315 F. Supp. 893 (W.D. Va. 1970); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970).

32. CAL. PENAL CODE §§ 2600-2601 (West 1982).

33. 32 Cal. 3d at 920, 654 P.2d at 767, 187 Cal. Rptr. at 584.

34. Procunier v. Martinez, 416 U.S. 396, 415 (1974).

35. The court did not discuss the validity of Department Regulations §§ 723 and 724, except to imply that they may "risk being applied in a manner which is not neutral with regard to elements of protected expression." 32 Cal. 3d at 920, 654 P.2d at 767, 187 Cal. Rptr. at 584. The court concluded that determination of the constitutionality of the regulations was unnecessary, since those regulations were no longer in effect and there remained no controversy over publication of a specific article.

36. 32 Cal. 3d at 921, 654 P.2d at 767, 187 Cal. Rptr. at 584 (citation omitted).

The final issue addressed by the court was the availability of appeals from departmental decisions. Recognizing that delay in the appellate process may be an effective form of censorship, the court again turned to the ruling in *Luparar*: "The prison administration must . . . ensure an expeditious review procedure. To be valid, the regulations must proscribe a definite brief time within which the review of submitted material will be completed."[37] Finding the present appellate process inadequate,[38] the court affirmed the trial court ruling requiring the enactment of departmental rules providing for immediate review.

Finally, the court refused to discard the traditional practice of affording "usual deference" to the department by refusing to affirm the trial court's order for new departmental regulations. The court reversed[39] the trial court's order because of the absence of controversy over publication of specific articles. The court proceeded no further than to remind the department of the requirement of uniformity it had already prescribed in the drafting of any new regulations.

Justice Newman and Chief Justice Bird, in separate opinions, concurred with the majority.[40] Chief Justice Bird emphasized that the reissuance of regulations similar to those previously presented to the court would be unacceptable since all regulations must "hereafter . . . comport with the First Amendment principles applicable to state publications. . . ."[41] Chief Justice Bird thus may have implied that she would have struck down some or all of the existing regulations.

Justice Newman concurred with the result, yet found the majority's reliance on the United States Constitution and Penal Code section 2600 unacceptable. Justice Newman preferred to rely on

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37. 382 F. Supp. at 502.

38. The high court and the trial court both rejected the appeals procedure in effect at the time of the rejection of the Brandt articles. The process provided for three levels of appeal and permitted a 45 day period between the initial grievance and the final ruling. This time limit could be extended in "extraordinary" cases. The regulations failed to distinguish cases which involved rejection of newsworthy articles from other prison grievances. This was found to be unsuitable in light of first amendment considerations. 32 Cal. 3d at 921, 654 P.2d at 768, 187 Cal. Rptr. at 585.

39. The court reversed the trial court's order "[i]n deference to the responsibilities and authority of the department." 32 Cal. 3d at 922, 654 P.2d at 768, 187 Cal. Rptr. at 585. This language is the only evidence that the court refuses to fully abandon the "hands off" doctrine, and also denotes that there remains some of the traditional "usual deference" on which officials may rely.

40. The majority opinion was written by Justice Broussard with Justice Reynoso concurring.

41. 32 Cal. 3d at 923, 654 P.2d at 769, 187 Cal. Rptr. at 586 (Bird, C.J., concurring).

sections 2(a) and 3 of Article I of the California Constitution.[42] He also believed legislative standards and objectives should be based on either security or public protection, rather than on "good" journalistic standards or "valid" penological objectives, in order to permit restraints on speech and press as afforded by Penal Code section 2600.

Justice Richardson was joined in his dissenting opinion by Justice Mosk, both of whom emphatically disagreed with the majority ruling. Justice Richardson stated that "prison authorities should have *broad* discretion to select among, and edit or reject, those articles submitted for publication. . . ."[43] This contention has a two-fold basis. First, Justice Richardson disagreed with the purpose attributed to the Star News by the majority. He instead classified the Star News as a "house organ," with provisions for strict supervisory control by the prison administration.[44] Secondly, he found the major premise upon which the majority based its decision to be inaccurate. Citing *Jones,* Justice Richardson reiterated that "a prison is most emphatically not a public forum."[45]

Justice Richardson delivered an emotional argument throughout his dissenting opinion. His consistent refusal to acknowledge even the most basic rights of the incarcerated resulted in his complete rejection of all theories and established constitutional principles underlying the majority's ruling. His overwhelming reliance on *Jones,* without acknowledgment of any differences,

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42. CAL. CONST. art. I, §§ 2(a) & 3 (West Supp. 1983) provide:

> Sec. 2. (a) Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.
>
> Sec. 3. The people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good.

Id.

43. 32 Cal. 3d at 923, 654 P.2d at 769, 187 Cal. Rptr. at 586 (Richardson, J., dissenting) (emphasis in original). He further stated that such discretion should be afforded department officials "without later being required to justify their actions on institutional, social or penological grounds. Nor would I require the department to formulate elaborate review procedures. . . ." *Id.*

44. "According to the department's administrative manual, the purposes of publishing Star News are to educate and train participating inmates, . . . disseminate administrative information to inmates, and report activities within the institution and department." *Id.* at 924, 654 P.2d at 769, 187 Cal. Rptr. at 586.

45. *Id.* at 924, 654 P.2d at 770, 187 Cal. Rptr. at 587. *But see supra* notes 17-21 and accompanying text, and notes 27-30 and accompanying text (*Jones* distinguished from freedom of speech cases).

qualifies him as a staunch supporter of the "hands off" doctrine.[46]

Justice Kaus' dissenting opinion offers the most realistic and thus the most persuasive argument against first amendment protection for prison newspapers. While he conceded that "reasonable persons can differ on the threshold question whether the paper is established as an educational-rehabilitative exercise or as a market place for ideas," he urged adoption of the former in order to limit the "rolling barrage of First Amendment artillery" on the department so that such newspapers may ultimately flourish. Justice Kaus noted that if the department found the imposed guidelines to be intolerable, the authorization of worthwhile publications could cease, as prison officials are not compelled to publish inmate newspapers.[47]

In accord with Justice Richardson, Justice Kaus found the majority ruling to be based on an inaccurate foundation, as he did not view a prison newspaper as a "public forum." He supported this contention with the department's administrative manual which provides that a "newspaper" or "house organ" shall be a "part of the educational and vocational training programs."[48] He further admonished the majority for, in effect, telling the defendants "first, what type of publication they ought to permit and, second, that they are not doing it right."[49] Justice Kaus' description of the function of the newspaper reveals the crux of his conclusion: "its mission is to educate, to rehabilitate and to inform within clearly designated limitations. It is not intended as a 'forum for the expression of ideas.' "[50]

The effect of the court's ruling does not finally abolish the historical approach of the "hands off" doctrine, but it does provide more insight than previous attempts through a cohesive analysis of first amendment rights of the incarcerated population. Distinguishing between the first amendment freedom of speech and the

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46. Such considerations are peculiarly within the province and professional expertise of corrections officials, and, in the absence of substantial evidence in the record to indicate that the officials have exaggerated their response to these considerations, *courts should ordinarily defer to their expert judgment in such matters.*

32 Cal. 3d at 925, 654 P.2d at 771, 187 Cal. Rptr. at 588 (Richardson, J., dissenting) (quoting Pell v. Procunier, 417 U.S. 817, 827 (1974)) (emphasis in original).

47. 32 Cal. 3d at 930, 654 P.2d at 774, 187 Cal. Rptr. at 591 (Kaus, J., dissenting).

48. 32 Cal. 3d at 929, 654 P.2d 773, 187 Cal. Rptr. at 590 (Kaus, J., dissenting).

Justice Kaus held that the majority erroneously based its review on the regulations which were in effect at the time of the original trial. In Kash Enters., Inc. v. City of Los Angeles, 19 Cal. 3d 294, 572 P.2d 1302, 138 Cal. Rptr. 53 (1977), the court stated, "[u]nder settled principles, the version of the [regulation] in force at present is the relevant legislation for purposes of this appeal." *See* 32 Cal. 3d at 927 n.2, 654 P.2d at 773 n.2, 187 Cal. Rptr. at 590 n.2.

49. 32 Cal. 3d at 929, 654 P.2d at 774, 187 Cal. Rptr. at 591 (Kaus, J., dissenting).

50. *Id.* at 930, 654 P.2d at 774, 187 Cal. Rptr. at 591 (Kaus, J., dissenting).

freedom of association protection, the court avoided the necessity of offering a hard and fast ruling on the broad scope of prisoners' first amendment rights. The court acknowledged that the case dealt solely with the freedom of speech issue. An attempt to broaden the scope of this ruling to other first amendment protections may be a difficult task. As Justice Richardson noted, a prison setting is unique;[51] it seems unlikely that the majority would advocate the present result beyond the prison-publication issue.

Furthermore, the Department of Corrections may not be seriously affected by the court's ruling. Justice Kaus stated, "the practical effect of the majority decision is likely to be nil. There is obviously enough leeway in the court's criteria . . . to enable a sophisticated prison administration to regulate the content of a prison newspaper pretty much as it wants, provided it is done in slightly less ham-handed fashion than heretofore."[52] However, as a result of the majority's ruling, the department must establish guidelines to follow in a more "even-handed" manner. In addition, inmates may have judicial recourse as a result of unfair censorship. It was not the court's intention to strip the department of all authority, but it has attempted to achieve uniformity and thus fairness when dealing with a segment of the population that may be at an unfair disadvantage.

XX. PROBATE

A. *Local subdivision ordinance cannot bind probate court's discretion:* **Wells Fargo Bank v. Town of Woodside**

In interpreting whether a subdivision ordinance has binding effect on a probate court's order providing a widow with her allotted homestead property in an estate, the supreme court in *Wells Fargo Bank v. Town of Woodside,* 33 Cal. 3d 379, 657 P.2d 819, 189 Cal. Rptr. 41 (1983), held that the court order takes precedence. The probate court is statutorily invested with broad discretion to accommodate the interests of the decedent's family and creditors;

51. *Id.* at 926, 654 P.2d at 771, 187 Cal. Rptr. at 588 (Richardson, J., dissenting) (granting deference to prison officials "[g]iven the highly volatile and unpredictable environment existing behind prison walls, and the complexity of balancing rehabilitative efforts with overall prison security and discipline. . .").

52. *Id.* at 928, 654 P.2d at 772, 187 Cal. Rptr. at 589 (Kaus, J., dissenting) (footnote omitted).

thus, the locality "has no power, in essence, to 'veto' a division accomplished by the probate court. . . ." In this case, the laws were in direct conflict, but because the order which set the homestead apart effectively vested title with the widow, the local ordinance was superseded.

XXI. PUBLIC UTILITY LAW

A. *Distribution of unclaimed refunds:* Cory v. Public Utilities Commission

As a result of a series of court decisions regarding its accounting practices, Pacific Telephone had overcharged its customers by approximately $381 million. The Public Utilities Commission (PUC) ordered Pacific to refund the excess charges to customers or former customers who could be located and then to distribute any unclaimed funds on a pro rata basis to current customers. In *Cory v. Public Utilities Commission,* 33 Cal. 3d 522, 658 P.2d 749, 189 Cal. Rptr. 386 (1983), the California State Controller, Kenneth Cory, petitioned the supreme court for review of the PUC decision asserting that the excess funds should be paid to the state under the Unclaimed Property Law. *See* CAL. CIV. PROC. CODE §§ 1500-1589 (West 1982 & Supp. 1983). The PUC contended that various comments in 1967 by the California Law Revision Commission suggested that the unclaimed refunds fell outside the bounds of the Unclaimed Property Law, and that the statute empowered the PUC to determine how overcharge refunds should be distributed.

After reviewing the history of the state's handling of unclaimed utility refunds, the court concluded that the state controller had correctly asserted that the money should be paid to the state fund. The court stated:

> [The Public Utilities Code] does not authorize the commission's order to pay the unclaimed refunds to current customers. The section authorizes refund orders; it does not deal with unclaimed property . . . . There is nothing in the section indicating that the commission having ordered the refunds is authorized to subsequently repudiate the property rights of unlocated former customers, declare a forfeiture, and provide a windfall for current customers who have already received the full refund to which they are entitled under section 453.5 [CAL. PUB. UTIL. CODE § 453.5 (West Supp. 1983)].

As to the PUC's allegation that the unclaimed property provisions were not intended to apply to unclaimed refunds, the court observed that although various dispositions of such property had been made in the past, under the present law it fell within the unclaimed property law. "There is no more reason to allocate the unclaimed rate refunds to current telephone customers than

there would be for a bank to allocate unclaimed property to its current customers." The PUC's order was therefore annulled.

XXII. WATER LITIGATION

A. *Public trust doctrine protects navigable waters from harm caused by diversion of nonnavigable tributaries:* National Audubon Society v. Superior Court*

I. INTRODUCTION

Mono Lake lies nestled at the foot of the Sierra Nevada mountains, near the eastern entrance to Yosemite National Park. For years, it existed virtually unnoticed by the general public. Today, it is at the center of a public drama. The California Supreme Court, using the Mono Lake controversy as a backdrop, radically departed from settled principles of California water law, and decided that a public trust underlies all navigable bodies of California water. This public trust doctrine should prove to be one of the most important evironmental tests to emerge in the last decade.

II. THE SUBJECT MATTER

A. Mono Lake

Mono Lake's strange beauty, as well as its ecological value, has been imperiled by substantial diversions of the streams which feed it.[1] In 1940, the predecessor to the California Water Resource Board[2] granted the Department of Water and Power of the City of Los Angeles (DWP) a license to divert water from the lake's tributary streams. The DWP, acting quickly to secure a water supply for the Los Angeles area, promptly built facilities and began di-

* This Article was contributed by Elizabeth M. Buechler, third-year staff member.

1. For a general discussion of the effects of these diversions on Mono Lake, see Hoff, *The Legal Battle Over Mono Lake,* Cal. Lawyer, Jan. 1982, at 28; Young, *The Troubled Waters of Mono Lake,* National Geographic, Oct. 1981, at 504; Jehl, *Mono Lake: A Vital Way Station for Wilsons Phalarope,* National Geographic, Oct. 1981, at 520; CALIF. DEP'T OF WATER RESOURCES, REPORT OF THE INTERAGENCY TASK FORCE ON MONO LAKE (Dec. 1979) [hereinafter cited as TASK FORCE REPORT].

2. At that time, the California Water Resource Board was known as the Division of Water Resources. It has endured many name changes over the years, but shall be referred to here as the "Water Board." *See, e.g.,* National Audubon Soc'y v. Superior Court, 33 Cal. 3d 419, 424 n.1, 658 P.2d 709, 711 n.1, 189 Cal. Rptr. 346, 348 n.1, *modified,* 33 Cal. 3d 726a (1983).

verting the stream water to the DWP's Owens Valley aqueduct.[3] These diversions, now equalling 99,580 acre-feet per year, caused the lake's surface to drop forty-three feet and reduced the surface area of the lake from 85 square miles to 60.3 square miles.[4]

This drastic change is indirectly responsible for a host of adverse environmental impacts. Mono Lake is the second largest lake in California; it has the highest saline count of any California lake. The lake has no outlets, and loses water only by evaporation or seepage, which leaves the natural salts behind. With less water entering the lake, its saline content has increased dramatically. This, in turn, has upset the natural balance of wildlife which depends on the lake for its support. While the lake does not support normal fish life, it does have a large brine shrimp and brine fly population which serve as food for millions of local and migratory birds. The increased salinity has reduced the brine shrimp population, thereby making it harder for the birds to feed.[5] The diversion has also caused the loss of nesting sites for the birds which used to nest on the lake's islands. As the lake lowered, areas that were once islands became peninsulas, giving natural predators easy access to the nests.[6] This loss in nesting sites and food stuffs has also affected the birds' migratory patterns.[7] The diversions have also had their impact on man. As the surface level of the lake has dropped, the lake bed has been exposed. It has dried into a highly alkaline silt which is easily picked up by the winds. This creates an "alkaline smog" that is irritating to the mucous membranes and respiratory systems of humans and animals.[8] "Mono Lake has long been treasured as a unique scenic, recreational and scientific resource,"[9] but these es-

3. In 1940, only about half of the water from the Mono Lake streams was diverted by the DWP. In 1970, however, a second tunnel was constructed. This enabled DWP to take virtually the entire flow of the feeder streams. 33 Cal. 3d 419, 424, 658 P.2d 709, 711, 189 Cal. Rptr. 346, 348 (1983).

4. *Id.* at 429, 658 P.2d at 714, 189 Cal. Rptr. at 351.

5. Birds must maintain "osmotic equilibrium" and can do so only by increasing either their secretion of salts, or increasing their intake of fresh water. The birds around Mono Lake have already reached their limit of salt secretion. The Task Force predicts that the raising of young birds will be adversely affected because the adults will have to devote time to obtaining fresh water that could have been spent feeding the young. *Id.* at 430 n.10, 658 P.2d at 715 n.10, 189 Cal. Rptr. at 352 n.10.

6. This loss was hardest felt by the California gull. In 1979, Negret Island, once one of the gull's favorite nesting sites, was raided by coyotes. The number of gulls around the lake declined sharply. In 1981, 95% of the hatched chicks failed to reach maturity. *Id.* at 430, 658 P.2d at 716, 189 Cal. Rptr. at 353.

7. *Id.* at 424, 658 P.2d at 711, 189 Cal. Rptr. at 348.

8. *Id.* at 431, 658 P.2d at 716, 189 Cal. Rptr. at 353. DWP claims that the air quality of the basin has not been affected and presents no hazard to human health. *Id; see* TASK FORCE REPORT, *supra* note 1, at 22.

9. 33 Cal. 3d at 431, 658 P.2d at 716, 189 Cal. Rptr. at 353 (citing City of Los

thetic values are also being diminished.[10]

B. The Controversy

In 1913, the City of Los Angeles built an aqueduct to carry water from the Owens River in the Antelope-Mojave plateau to Los Angeles.[11] The rights to the water in Owens Valley were hotly, and sometimes violently, contested by Owens Valley residents and the DWP.[12] But when the fighting was over, the water went to Los Angeles, leaving the Owens Lake a dry alkali flat. Soon, however, Los Angeles needed more water. In 1940, the DWP asked for a permit to divert water from Mono Lake. The Board, relying on a 1921 legislative enactment, to the effect that domestic use was the highest and best use for water,[13] granted the permit stating that "there is apparently nothing that this office can do to prevent it."[14] The diversions continued until the Mono Lake Committee, a citizen's group, began bringing the issue to the public's attention, drawing other interested groups into the controversy.[15] On May 21, 1979, the National Audubon Society filed suit for injunctive and declaratory relief in the Superior Court for Mono County.[16] The fight for Mono Lake had begun.

A series of tactical procedural moves followed. First, the DWP

Angeles v. Aitken, 10 Cal. App. 2d 460, 462-63, 52 P.2d 585, 586 (1935)); TASK FORCE REPORT, *supra* note 1, at 22-24.

10. The results of continued diversion remain a source of controversy. The Audubon Society believes that in fifty years the lake will have dropped another fifty feet, and will continue to diminish until it dries up. The DWP disputes this, contending instead that the lake will be lowered by another forty-three feet over eighty to one hundred years, and then will approach an environmental equilibrium where the inflow equals the outflow despite the diversions. This stabilization will supposedly occur when the lake is about fifty-six percent of the original surface area and forty-two percent shallower than its natural size. 33 Cal. 3d at 429, 658 P.2d at 715, 189 Cal. Rptr. at 352.

11. *Id.* at 426, 658 P.2d at 713, 189 Cal. Rptr. at 350.

12. After building the aqueduct from the Owens Valley to Los Angeles, the DWP continued to acquire water rights in the Owens Valley. The Valley's residents, who depended on the water for their agriculture, raised intense opposition to the diversions—including dynamiting the aqueduct on several occasions, and once forceably seizing possession of the aqueduct gates. County of Inyo v. Public Utils. Comm'n., 26 Cal. 3d 154, 157, 604 P.2d 566, 567, 161 Cal. Rptr. 172, 173 (1980).

13. This 1921 amendment has since been codified as CAL. WATER CODE § 1254 (West 1971). *See also* CAL. WATER CODE § 1255 (West 1971), which authorizes the Board to "reject an application when in its judgment the proposed appropriation would not best conserve the public interest."

14. 33 Cal. 3d at 428, 658 P.2d at 714, 189 Cal. Rptr. at 351.

15. *Id.* at 427, 658 P.2d at 713, 189 Cal. Rptr. at 350.

16. 33 Cal. 3d at 431, 658 P.2d at 716, 189 Cal. Rptr. at 353.

contended that plaintiffs lacked standing to sue to enjoin violations of the public trust. It cited *Antioch v. Williams Irrigation District*[17] and *Miller & Lux v. Enterprise Canal and Land Co.*,[18] as authority for the proposition that only the state or federal government has standing to contest diversions of water affecting downstream navigability.[19] The court turned to *Marks v. Whitney*,[20] which expressly held that any member of the public has standing to raise a claim of harm to the public trust,[21] and concluded that plaintiffs did have standing to sue.[22]

The DWP then moved for a change of venue. The court granted the motion, and moved the action to Alpine County.[23] A trial date was set for March 1980. In January, DWP cross-complained, bringing in one hundred and seventeen individuals and entities, including the federal government.[24] The federal government, as a cross-defendant, removed the case to federal court.[25] The district court, on a motion by DWP, stayed its proceedings under the federal abstention doctrine[26] in order to allow California courts to resolve two important issues of California law: (1) does the public trust doctrine apply to non-navigable streams that feed a navigable lake, and how does it function with regard to the California water rights system—is it subsumed or does it function indepen-

17. 188 Cal. 451, 205 P. 770 (1922) (appropriation of water in San Joaquin River by City of Antioch held not actionable despite subsequent contamination of fresh water by sea water which began creeping upstream due to a diminished flow of fresh water).

18. 142 Cal. 208, 75 P. 770 (1904) (appropriator of many years has right to water as against trespassing appropriator).

19. *Williams Irrig. Dist.*, 188 Cal. at 457, 205 P. at 691; *Enterprise Canal and Land Co.*, 142 Cal. at 214, 75 P. at 771.

20. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971) (tidelands are subject to public trust, and any dispute would be based on an infringement of the *jus privatum* or the *jus publicum*).

21. *Id.* at 261, 491 P.2d at 381, 98 Cal. Rptr. at 797.

22. 33 Cal. 3d at 431 n.11, 658 P.2d at 716 n.11, 189 Cal. Rptr. at 353 n.11.

23. At this point, DWP sought an extraordinary writ to bar this transfer, perhaps with the feeling that Alpine County was too rural to appreciate the City of Los Angeles' position. The court denied the writ. *Id.* at 431, 658 P.2d at 716, 189 Cal. Rptr. at 353.

24. *Id.*

25. Pursuant to 28 U.S.C. § 1331 (Supp. V 1981), federal courts have jurisdiction over federal questions. The case was removed to the United States District Court for the Eastern District of California. *Id.* at 431, 658 P.2d at 716-17, 189 Cal. Rptr. at 353.

26. See *id.* at 431 n.12, 658 P.2d at 717 n.12, 189 Cal. Rptr. at 354 n.12 for full explanation of the doctrine. In essence, it is appropriate for the federal court to abstain from judgment where there are difficult questions of state law presented which relate to "policy problems of substantial public import whose importance transcends the result in the case then at bar." Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 814 (1976).

dently of that system?[27] and (2) must all administrative remedies be exhausted by plaintiffs before seeking a judicial remedy?[28]

The Superior Court for Alpine County examined the questions presented by the federal court and on November 9, 1981, entered summary judgment against plaintiffs.[29] The court's notice of intended ruling stated that the water rights system was comprehensive and exclusive in determining the legality of the diversions and that the public trust doctrine did not operate independently, but rather, was subsumed into that system. The court also concluded that plaintiffs were required to exhaust all administrative remedies before turning to the courts. The National Audobon Society filed a petition for mandate directly to the Supreme Court of California to review the order of summary judgment. The supreme court issued an alternative writ and heard the case.[30]

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27. 33 Cal. 3d at 432, 658 P.2d at 717, 189 Cal. Rptr. at 353-54. The court phrased the question differently:

> What is the interrelationship of the public trust doctrine and the California water rights system, in the context of the right of the [DWP] to divert water from Mono Lake pursuant to permits and licenses issued under the California water rights system? . . . Stated differently, can the plaintiffs challenge the [DWP's] permits and licenses by arguing that those permits and licenses are limited by the public trust doctrine, or must the plaintiffs challenge the permits and licenses by arguing that the water diversions and uses authorized thereunder are not "reasonable or beneficial" as required under the California water rights system?

Id.

28. In response, and in objection to the form of the abstention order, the DWP petitioned the United States Court of Appeals for the Ninth Circuit for leave to file an interlocutory appeal. This petition was denied. *Id.* at 432 n.13, 658 P.2d at 717 n.13, 189 Cal. Rptr. at 354 n.13. Plaintiffs responded to the abstention order by filing a new complaint for declaratory relief. This, DWP claimed, constituted a request for an advisory opinion which was beyond the jurisdiction of the California courts. The court refused to accept DWP's interpretation. It noted that this was a matter of first impression. If the court were to characterize plaintiff's amended complaint as a request for an advisory opinion, it would be refusing to cooperate with the federal court which had decided to abstain from deciding the case until the state supreme court had decided the applicable law. The court also noted that this was not a case in which the usual objections to advisory opinions would apply: "If the issue of justiciability is in doubt, it should be resolved in favor of justiciability in cases of great public interest." *Id.* at 432 n.14, 658 P.2d at 717 n.14, 189 Cal. Rptr. at 354 n.14.

29. *Id.* at 432-33, 658 P.2d at 717-18, 189 Cal. Rptr. at 354-55.

30. *Id.* at 433, 658 P.2d at 718, 189 Cal. Rptr. at 355.

III. THE DECISION

A. The Public Trust and the California Water Rights System

1. The Public Trust Doctrine

Despite its deceptively recent appearance, the public trust doctrine originated in Roman law[31] and has developed into a concept under which the sovereign must hold "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.' "[32] California acquired title as trustee to such lands and waterways upon its admission to the union,[33] and has repeatedly recognized and enforced its trust obligations.[34]

While the trustee originally held property for the public so that it could "enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein [free] from the obstruction or interference of private parties,"[35] the public trust has evolved to accommodate other uses of the public waterways. In *Marks v. Whitney,*[36] the court said that the trust includes the right to fish, hunt, bathe, swim, and use for boating and recreation. The court also acknowledged that "[t]he public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs."[37] In a statement that acknowledges how the public needs have changed, of particular relevance to the Mono Lake situation, the court went on to say:

> [T]here is a growing public recognition that one of the most important public uses of the tidelands . . . is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat

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31. *Id.* "By the law of nature, these things are common to mankind—the air, running water, the sea and consequently the shores of the sea." INSTITUTES OF JUSTINIAN 2.1.1. Spanish law, and subsequently Mexican law, also recognized the public trust doctrine. This is particularly relevant in California because Hispanic rights were guaranteed by the Treaty of Guadalupe Hidalgo. 33 Cal. 3d at 434 n.15, 658 P.2d at 718 n.15, 189 Cal. Rptr. at 355 n.15. *See also* Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right,* 14 U.C.D. L. REV. 195, 197 (1980); Dyer, *California Beach Access: The Mexican Law and the Public Trust,* 2 ECOLOGY L.Q. 571 (1972).

32. 33 Cal. 3d at 434, 658 P.2d at 718, 189 Cal. Rptr. at 355 (citing Colberg, Inc. v. California *ex rel.* Dep't Pub. Works, 67 Cal. 2d 408, 416, 432 P.2d 3, 8, 62 Cal. Rptr. 401, 406 (1967), *cert. denied,* 390 U.S. 949 (1968)).

33. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330, *cert. denied,* 449 U.S. 840 (1980).

34. 33 Cal. 3d at 434, 658 P.2d at 719, 189 Cal. Rptr. at 355. *See generally* Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 MICH. L. REV. 471 (1970) (giving history of the public trust doctrine).

35. Illinois Cent. R.R. v. Illinois, 146 U.S. 387, 452 (1892). *See also* City of Long Beach v. Mansell, 3 Cal. 3d 462, 482, 476 P.2d 423, 437, 91 Cal. Rptr. 23, 37 (1970).

36. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *see supra* note 20 and accompanying text.

37. *Id.* at 259, 491 P.2d at 380, 98 Cal. Rptr. at 796.

> for birds and marine life, and which favorably affect the scenery and climate of the area.[38]

While the *Marks*[39] language and the decisions of *Illinois Central Railroad v. Illinois*[40] and *City of Los Angeles v. Aitken*[41] leave no doubt that the public trust covers Mono Lake, the question arises whether it applies to the tributary streams which are not themselves navigable, but from which the water is being diverted. These non-navigable tributaries certainly affect the navigablility of Mono Lake, but are they protected by the public trust?

The court examined its decisions in *People v. Gold Run Ditch and Mining Co.*[42] and *People v. Russ*[43] in reaching its decision that the trust applies to the Mono Lake tributaries. In *Gold Run,* the court upheld an injunction that stopped the defendant mining companies from dumping sand and gravel into the American River. The court held that it was "an unauthorized invasion of the rights of the public to its navigation,"[44] and that "the rights of the people in the navigable rivers of the State are paramount and controlling. The State holds the absolute right to all navigable waters and soils under them. . . ."[45] In *Russ,* defendant erected dams on non-navigable sloughs. The court ordered the trial court to determine if the dams affected the navigability of the river, saying that "[d]irectly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. *Neither may the waters of a navigable stream be diverted in substantial*

38. *Id.* at 259-60, 491 P.2d at 380, 98 Cal. Rptr. at 796.

39. *Id.* at 251, 491 P.2d at 374, 98 Cal. Rptr. at 790.

40. 146 U.S. 387 (1892) (state grants of submerged lands of Lake Michigan subject to a public trust). The *National Audubon* court, citing *Illinois* and others, states that while earlier decisions applied the public trust only to tidelands, it has become well settled that the public trust encompasses all navigable lakes and streams. 33 Cal. 3d at 435, 658 P.2d at 719, 189 Cal. Rptr. at 356.

41. 10 Cal. App. 2d 460, 52 P.2d 585 (1935) (property owners in the vicinity of Mono Lake entitled to substantial damages as compensation for appropriation of their marginal property rights). "Mono Lake is a navigable body of water." *Id.* at 466, 52 P.2d at 588.

42. 66 Cal. 138, 4 P. 1152 (1884).

43. 132 Cal. 102, 64 P. 111 (1901).

44. 66 Cal. at 147, 4 P. at 1156.

45. *Id.* at 151, 4 P. at 1159. One wonders whether plaintiffs will be able to use the court's reliance on this language to their favor in future court battles. Later in the decision, the court speaks of balancing the public trust interest in Mono Lake with Los Angeles' need for water. But if the people's rights are "paramount and controlling" and the state's right "absolute", is there room for balancing? This is, in fact, the most difficult issue raised by this case.

quantities by drawing from its tributaries . . . ."[46]

The court, despite DWP's objection that *Gold Run* did not involve diversion of water and *Russ* did not actually find an impairment to navigation,[47] made no attempt to distinguish the facts, and held that the priorities in those cases applied fully to the situation at hand. In what may become buzz words in future cases of this type, the court reasoned that "if you can't fill it, you can't drain it."[48] One of the most important factors of this decision concerns the vesting of property. Parties who acquire rights in property which is covered by the public trust can only acquire those rights *subject to* the trust and, therefore, can assert no vested right to use those ownership rights in a manner that is detrimental to the trust.[49] The interest in public trust property cannot be given away.[50] By making all qualified property subject to a

46. 132 Cal. at 106, 64 P. at 114 (emphasis added).

47. 33 Cal. 3d at 436, 658 P.2d at 720, 189 Cal. Rptr. at 357.

48. *Id.* The court's actual words were: "If the public trust doctrine applies to constrain *fills* which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the *extraction* of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." *Id.* at 436-37, 658 P.2d at 720, 189 Cal. Rptr. at 357. *See* Johnson, *Public Trust Protection for Stream Flows and Lake Levels,* 14 U.C.D. L. REV. 233, 257-58 (1980); *see also* Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law,* 14 U.C.D. L. REV. 357, 359-60 (1980). In narrow language, the court declared that it "need not consider the question whether the public trust extends for some purposes—such as protection of fishing, environmental values, and recreation interests—to nonnavigable streams." 33 Cal. 3d at 437 n.19, 658 P.2d at 721 n.19, 189 Cal. Rptr. at 358 n.19. *See generally* Walston, *The Public Trust Doctrine in the Water Rights Context: The Wrong Environmental Remedy,* 22 SANTA CLARA L. REV. 63, 85 (1982).

49. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358 (citing City of Berkeley v. Superior Court, 26 Cal. 3d 515, 521, 606 P.2d 362, 365, 162 Cal. Rptr. 327, 330 (1980), noting that Illinois Cent. R.R. Co. v. Illinois, 146 U.S. 387 (1892), "remains the primary authority even today, almost nine decades after it was decided.").

The court originally articulated a possible, but rare, exception to this policy: if "(a) the Legislature intended to grant a right free of the trust . . . and (b) either the grant serves the purpose of the trust *or* the grantee, in reasonable reliance on the grant, has rendered the property unsuitable for trust purposes." 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360 (emphasis added). The court modified its opinion by deleting the language quoted above. *See* 33 Cal. 3d 726a (1983).

Legislative intent as expressed in part (a) of the exception would be difficult to find under the decision in People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) (action for title to tidelands conveyed by state commissioners pursuant to statutory authorization). That court held that "statutes purporting to authorize the abandonment of . . . public use will be carefully scanned to ascertain whether or not such was the legislative intention and that intent must be clearly expressed or necessarily implied. It will not be implied *if any other inference is reasonably possible." Id.* at 597, 138 P. at 88 (emphasis added).

50. In *Illinois,* the Court said: "A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power, and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters . . . than it can abdicate its police powers. . . ." 146 U.S. at 453-54.

public trust, this decision creates a possible taking problem.[51] Yet, the court heads off any discussion of this by simply rejecting the claim. "We do not divest anyone of title to property; the consequence of our decision will be only that some landowners whose predecessors in interest acquired property . . . will . . . hold it subject to the public trust."[52] With this language, the court sidesteps the classically sticky question of what constitutes a taking. In concluding its discussion of the public trust, the court says "[i]t is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands, and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust."[53]

2. The relationship between the California Water Rights System and the Public Trust Doctrine.

Water law in California is a combination of riparian and appropriative doctrines.[54] The riparian doctrine confers upon the landowner water rights of any watercourse that is contiguous to his land and for use on his land. The appropriation doctrine, on the other hand, allows for diversion of water for other than riparian uses. Under either doctrine, water may be used, but not owned.[55] To aid in setting priorities for water usage, the Water Commission Act created the Water Board. The Board was given the duty of providing an orderly method for the appropriation of the state's waters,[56] but this limited role was radically altered by a series of events in 1926. First, the Supreme Court of California decided

51. Taking property without just compensation is prohibited. U.S. CONST. amend. V. *See generally* Walston, *supra* note 48, at 85.

52. 33 Cal. 3d at 440, 658 P.2d at 723, 189 Cal. Rptr. at 360 (citing City of Berkeley v. Superior Court, 26 Cal. 3d at 532, 606 P.2d at 372, 162 Cal. Rptr. at 337). The court also notes that "any improvements made on such lands could not be appropriated by the state without compensation." 33 Cal. 3d at 440 n.22, 658 P.2d at 723 n.22, 189 Cal. Rptr. at 360 n.22 (citing Illinois Central. R.R. Co. v. Illinois, 146 U.S. at 455). The argument remains, however, that if there is a taking of property rights, there is a "taking" which requires compensation. The counterargument is that zoning has never been seen as a "taking", and no more rights are surrendered in the public trust situation than in the zoning situation.

53. 33 Cal. 3d at 441, 658 P.2d at 724, 189 Cal. Rptr. at 360-61.

54. People v. Shirokow, 26 Cal. 3d 301, 307, 605 P.2d 859, 864, 162 Cal. Rptr. 30, 34 (1980) (gives a brief summary of early California water law).

55. 3 WITKIN, SUMMARY OF CALIFORNIA LAW, REAL PROPERTY 2232 (1973).

56. Temescal Water Co. v. Department of Pub. Works, 44 Cal. 2d 90, 95, 280 P.2d 1, 4 (1955).

Herminghaus v. Southern California Edison Co.,[57] holding that riparian rights not only took priority over appropriations,[58] but riparian rights were also not limited by the doctrine of reasonable use.[59] In response to that decision, a constitutional amendment was passed.[60] That amendment established the state water policy which requires that all uses of water shall conform to the standard of reasonable use.[61] While the constitutional amendment itself did not actually expand the authority of the Water Board, later statutory and judicial developments made it clear that the Water Board had authority to oversee reasonable uses of water,[62] safeguard the scarce water resources of the state,[63] and in the

57. 200 Cal. 81, *cert. granted*, 274 U.S. 728 (1926), *cert. dismissed*, 275 U.S. 486 (1927) (per curiam) (action by riparian owner for injunction of diversions of water by appropriator).

58. *See also* City of San Diego v. Cuyamaca Water Co., 209 Cal. 105 (1930), cited by the court at 33 Cal. 3d at 442, 658 P.2d at 725, 189 Cal. Rptr. at 361.

59. Herminghaus v. Southern Cal. Edison, 200 Cal. 81, 100-01 (1926).

60. CAL. CONST. art. X, § 2 (enacted as art. XIV, § 3) reads in pertinent part:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

CAL. CONST. art. X, § 2 (West Supp. 1983).

61. Public trust cases must also conform to this standard. Although the 1928 amendment declares in-stream uses as reasonable, the point is settled by statute. CAL. WATER CODE § 1243 (West 1971), provides that "[t]he use of water for recreation and preservation and enhancement of fish and wildlife resources is a beneficial use of water."

62. *See* Peabody v. City of Vallejo, 2 Cal. 2d 351, 367, 40 P.2d 486, 491 (1935) (rule of reasonable use applies to every water right and every method of diversion); People *ex rel.* State Water Resources Control Bd. v. Forni, 54 Cal. App. 3d 743, 749-50, 126 Cal. Rptr. 851, 854-55 (1976) (use of water limited to reasonable use; the court held diversion of water from Napa River for frost protection was reasonable). *See also* CAL. WATER CODE § 1257 (West 1971), which states in pertinent part: "[T]he board shall consider the relative benefit to be derived from (1) all beneficial uses of the water concerned" and "[t]he board may subject such appropriations to such terms and conditions as in its judgment will best develop, conserve and utilize in the public interest, the water sought to be appropriated." *See also* Johnson Rancho County Water Dist. v. State Water Rights Bd., 235 Cal. App. 2d 863, 45 Cal. Rptr. 589 (1965) (board is to consider variety of beneficial uses).

63. People v. Shirokow, 26 Cal. 3d 301, 309, 605 P.2d 859, 864, 162 Cal. Rptr. 30, 35 (1980) (decision based on legislative intent to "vest in the board expansive powers to safeguard the scarce water resources of the state"); *see also* Temescal Water Co. v. Department of Pub. Works, 44 Cal. 2d 90, 280 P.2d 1 (1955) (board's decision

process, weigh and protect the public trust values.[64]

Although the public trust doctrine and the California water rights system developed independently of one another, they became intertwined through necessity. It is the nature of this relationship that is at issue. The DWP asserted that the public trust was subsumed into the water rights system,[65] while the National Audubon Society urged the court that the public trust is antecedent to those rights and thus controlling.[66] The court, taking a middle position, rejected both assertions and advocated a balancing test, stating that:

> [B]oth the public trust doctrine and the water rights system embody important precepts which make the law more responsive to the diverse needs and interests involved in the planning and allocation of water resources. To embrace one system of thought and reject the other would lead to an unbalanced structure, one which would either decry as a breach of trust appropriations essential to the economic development of this state, or deny any duty to protect or even consider the values promoted by the public trust.[67]

In balancing these two precepts, the court made three conclusions. First, the state, as sovereign, retains supervisory control over all navigable waters; this "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust."[68] Secondly, the Water Board, by authority from the legislature, may grant permits for certain parties to take water from flowing streams, "even [if] this taking does not promote, and may unavoidably harm the trust uses at the source stream."[69] The court's conclusion demonstrates its awareness of the existing dependence of California's economic and population centers upon appropriated water and the practical need to make efficient use of the state's limited water resources.[70] Finally, the court interconnects the first two

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to grant application to appropriate water held to be quasi-judicial and not ministerial).

64. 33 Cal. 3d at 443-44, 658 P.2d at 726, 189 Cal. Rptr. at 362.

65. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363-64.

66. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363.

67. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 363-64.

68. *Id.* at 445, 658 P.2d at 727, 189 Cal. Rptr. at 364.

69. *Id.* at 446, 658 P.2d at 727, 189 Cal. Rptr. at 364. The court notes, however, that this does not affect the restrictions imposed by the public trust upon *transfers* of properties that are free from the trust. *Id.* at 446 n.26, 658 P.2d at 727 n.26, 189 Cal. Rptr. at 364 n.26.

70. *Id.* at 446, 658 P.2d at 728, 189 Cal. Rptr. at 365. The court goes so far as to say that "it would be disingenuous to hold that such appropriations are and have always been improper to the extent that they harm public trust uses, and can be

conclusions by finding that the state has an affirmative duty to consider the public trust "in the planning and allocation of water resources, and to protect public trust uses whenever feasible."[71]

This finding imposes a duty on the Water Board to continue supervision of the water supply after water has been allocated. The result of the court's decision is that the Water Board is not confined by past Board decisions; rather, it may reconsider past decisions, including whether a diminished diversion from Mono Lake would better serve the public's interest, in light of the impact of water diversion on the Mono Lake environment.[72]

B. Question Two: Must Administrative Remedies Be Exhausted?

Before addressing the issue of concurrent jurisdiction of the Water Board, the court questioned whether the plaintiffs had any Water Board remedy to exhaust. Two possible grounds appeared: (1) plaintiffs could claim DWP's diversion was an unreasonable use of water in violation of the California Constitution; or (2) plaintiffs could invoke California Water Code section 2501,[73] which provides that the Board may determine all rights to water

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justified only upon theories of reliance or estoppel." *Id.* at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364. The court also notes that the population and economy of this state does *not* depend upon the conveyances of *tidelands. Id.* at 446 n.26, 658 P.2d at 727 n.26, 189 Cal. Rptr. at 364 n.26. *See also* Comment, *The Public Trust Doctrine and California Water Law: National Audubon Society v. Department of Water and Power,* 33 HASTINGS L.J. 653, 668 (1982).

71. 33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 365. The court also states that "the state must bear in mind its duty as trustee to consider the effect of the taking on the public trust [cites omitted] and to preserve, *so far as consistent* with the public interest, the uses protected by the trust." *Id.* at 446-47, 658 P.2d at 728, 189 Cal. Rptr. at 365 (emphasis added). The "so far as consistent" language may be a future loophole for those appropriators who wish to receive more water.

72. 33 Cal. 3d at 447-48, 658 P.2d at 727-28, 189 Cal. Rptr. at 365-66. The power to reconsider is given to the board even if the public trust *was* considered when the allocation decision was made. The case for reconsideration is stronger, however, when the public trust has *not* been considered. *Id.* No responsible body, judicial or administrative, has ever considered whether the gain of water to Los Angeles is worth the loss to Mono Lake, or even whether a lesser taking would be a feasible balance. As the court states, "[i]t is clear that some responsible body ought to reconsider the allocation of the waters of the Mono Basin." *Id.* at 477, 658 P.2d at 729, 189 Cal. Rptr. at 365. The court looks to CAL. WATER CODE § 106 (West 1971), which states that "domestic purposes [are] the highest use of water and that the next highest use is for irrigation." The court recognizes that section 106 must be read *in conjunction with* later enactments that require consideration of in-stream uses, such as CAL. WATER CODE §§ 1243 and 1257 (West 1971), and also judicial decisions which explain the policy behind the public trust doctrine. "Thus, neither domestic and municipal uses nor in-stream uses can claim an absolute priority." 33 Cal. 3d at 447 n.30, 658 P.2d at 729 n.30, 189 Cal. Rptr. at 365 n.30.

73. CAL. WATER CODE § 2501 (West 1971) states: "The board may determine, the proceedings provided for in this chapter, all rights to water of a stream system whether based upon appropriation, riparian right, or other basis of right." *Id.*

of a stream system.[74] The plaintiffs carefully avoided and, indeed, expressly disclaimed any interest in charging that DWP's use of water is unreasonable, thereby making this remedy unavailable. Further, by using section 2501, it is uncertain whether plaintiffs would even be considered "claimants to water."[75] The court, however, construed the legislative intent,[76] and previous case law[77] as authorizing broad powers and jurisdiction to the Water Board. The result of this broad authority permits a person claiming that a use of water is harmful to public trust interests to seek a Board determination of allocation of water in a stream system.[78] This interpretation gives present and future plaintiffs a remedy that was previously uncertain.

The existence of such a remedy induces the question of whether the administrative remedies must be exhausted before one may resort to the court because, "[i]t is well settled that where an administrative remedy is provided by statute, that remedy must be pursued and exhausted before the court will act."[79] Precedent, however, leads one to believe that the courts have concurrent jurisdiction with the Water Board.[80] When the Water

74. *Id.*

75. CAL. WATER CODE § 2525 (West 1971) requires petitions to the Water Board to be filed by "claimants to water of any stream system." The full statute reads:

> Upon petition signed by one or more claimants to water of any stream system, requesting the determination of the rights of the various claimants to the water of that stream system, the board shall, if, upon investigation, it finds the facts and conditions are such that the public interest and necessity will be served by a determination of the water rights involved, enter an order granting the petition and make proper arrangements to proceed with the determination.

1943 Cal. Stat. ch. 368, § 2525 (amended at Cal. Stat. ch. 1932, § 156).

76. 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 366. "[W]e have discerned a legislative intent to grant the Water Board a 'broad', 'open-ended', 'expansive' authority to undertake comprehensive planning and allocation of water resources." *Id.*

77. *See In re* Waters of Long Valley Creek Stream Sys. v. Ramelli, 25 Cal. 3d 339, 348-49, 599 P.2d 656, 661, 158 Cal. Rptr. 350, 355 (1979) (Board has power to adjudicate competing riparian claims); People v. Shirokow, 26 Cal. 3d 301, 308, 605 P.2d 859, 864-65, 162 Cal. Rptr. 30, 35 (1980) (Board has power to adjudicate prescriptive claims).

78. 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 367.

79. *Id.* at 453, 658 P.2d at 733, 189 Cal. Rptr. at 370 (Richardson, J., dissenting) (citing Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 292, 109 P.2d 942, 949 (1941)). It is the court's *present* interpretation of the power behind Water Code section 2501, however, which gives the plaintiffs an administrative remedy. *See supra* note 77 and accompanying text.

80. 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 367 (citing Allen v. California Water and Tel. Co., 29 Cal. 2d 466, 176 P.2d 8 (1946)). Also, all of the public

Board had limited powers,[81] there were cases that the court had to decide; where jurisdiction existed, claims were often filed directly in superior court.[82] Since then, the court itself decided the issue in favor of concurrent jurisdiction. In *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*[83] [hereinafter "*EDF II*"],[84] the court said:

> Apart from overriding considerations such as are presented by health and safety dangers involved in the reclamation of waste water, we are satisfied that the courts have concurrent jurisdiction with . . . administrative agencies to enforce the self-executing provisions of Article X, section 2. Private parties thus may seek court aid in the first instance to prevent unreasonable water use or unreasonable method [sic] of diversion.[85]

After citing *EDF II,* the court then decided whether it should overturn that case. Some "overriding considerations" were presented for granting the Water Board exclusive jurisdiction. The majority decided to read *EDF II* narrowly, however, finding that while health issues were involved with the Mono Lake controversy, they were not of a nature analogous to the *EDF II* exception of reclamation of waste water.[86] This interpretation affirms the courts' concurrent jurisdiction with the Water Board. In contrast, the dissent[87] believed the health considerations of Mono Lake were comparable to the water reclamation exception in *EDF II* and that Mono Lake presented "similarly complex, overriding and 'transcendent' issues which demand initial consideration by the Water Board."[88] The majority turned to balancing various factors in determining whether *EDF II* should be overruled.[89] On one hand, there is the Water Board's experience and expert knowledge combined with a duty of comprehensive plan-

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trust cases cited in the opinion were filed directly in the courts. 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 367.

81. 33 Cal. 3d at 449, 658 P.2d at 730, 189 Cal. Rptr. at 367.

82. *Id.*

83. 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980) (action challenging construction and location of a dam and subsequent diversion of water from river; state courts have concurrent jurisdiction with legislatively established state adminstrative agencies).

84. In Environmental Defense Fund Inc. v. East Bar Mun. Util. Dist. [hereinafter "EDF I"], 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904 (1977), the court held that the plaintiff's action to enjoin the performance of a contract to build a dam, thereby diverting water from the American River, was barred by a failure to exhaust administrative remedies. The United States Supreme Court, however, vacated and remanded in light of California v. United States, 438 U.S. 645 (1978), thereby setting the stage for EDF II. 439 U.S. 811 (1978).

85. 26 Cal. 3d at 200, 605 P.2d at 10, 161 Cal. Rptr. at 475.

86. 33 Cal. 3d at 450 n.31, 658 P.2d at 730 n.31, 189 Cal. Rptr. at 368 n.31.

87. *Id.* at 453, 658 P.2d at 733, 189 Cal. Rptr. at 370 (Richardson, J., concurring and dissenting).

88. *Id.* at 455, 658 P.2d at 734, 189 Cal. Rptr. at 370 (Richardson, J., concurring and dissenting).

89. *See supra* notes 10, 11 and 43 and accompanying text.

ning, and on the other hand, there is a line of precedent and reliance by the plaintiffs on that authority.[90] Adding to the side of precedent and reliance, the apparent legislative intent to have the Water Board act as a referee or reference to the courts,[91] the court held that *EDF II* and concurrent jurisdiction must continue.[92] Justice Richardson, in his dissent,[93] quoting from *EDF I*[94] which was vacated, believed that the Water Board should have exclusive jurisdiction to facilitate full and effective use of its experience and expertise in balancing all of the competing interests.[95] Justice Kaus, in a concurring opinion,[96] expressed a desire to overturn *EDF II,* but also stated that it would be improper to apply the rule of exclusive jurisdiction to the plaintiffs in the present action because of their justifiable reliance on the concurrent jurisdiction as articulated in *EDF II.*[97] The Justice, by discussing plaintiff's reliance, expressed a concept of fairness which was probably a silent factor in the majority's determination. This concept of fairness is fundamental; one should not switch rules "in the middle of the game." If the court had accepted the dissent's view and dismissed the case either by overruling *EDF II* or by declaring that it fit the *EDF II* exception of overriding health and safety issues, years of court time and expense, both for the legal system and the parties involved, would have been wasted. Also, instead of a fair determination of the merits, the complex procedural tactics of the defendant would have prevailed. With the de-

90. 33 Cal. 3d at 451, 658 P.2d at 731, 189 Cal. Rptr. at 368. *See also supra* notes 13, 75-79 and accompanying text.

91. *See* CAL. WATER CODE §§ 2000, 2001, 2075 (West 1971). Pertinent parts include section 2000, which states that: "[i]n any suit brought in any court of competent jurisdiction in this State for determination of rights to water, the court may order a reference to the board, as referee, of any or all issues involved in the suit"; section 2001, which states: "the court may refer the suit to the board for investigation of and report upon any or all of the physical facts involved"; and section 2075, which states: "In case suit is brought in a federal court for determination of the rights to water within or partially within, this State, the board may accept a reference of such suit as master or referee for the court."

92. 33 Cal. 3d at 451, 658 P.2d at 731-32, 189 Cal. Rptr. at 368.

93. *Id.* at 453, 658 P.2d at 733, 189 Cal. Rptr. at 370 (Richardson, J., dissenting and concurring).

94. The United States Supreme Court vacated the court's judgment in EDF I and remanded the case for consideration in light of California v. United States, 438 U.S. 645 (1978). EDF II, 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466 (1980).

95. 33 Cal. 3d at 455, 658 P.2d at 734, 189 Cal. Rptr. at 371.

96. *Id.* at 453, 658 P.2d at 733, 189 Cal. Rptr. at 369 (Kaus, J., concurring).

97. *Id.*

cision for concurrent jurisdiction, the case can move forward and hopefully reach a determination of the merits.

IV. THE IMPACT

Environmentalists may herald this decision as the "Savior of Mono Lake," but the actual impact on the lake may not be realized for several years. This ruling by the California Supreme Court on California law will now be taken into federal court on the district court level[98] where its holdings would be put into practice. The district court will have to weigh the respective values of protecting the public trust in Mono Lake against the value of the water being diverted.[99] Each consideration encompasses many facets; the priceless scenic beauty, the natural environment, and wildlife will be pitted against the economic and practical reliance of the Los Angeles basin on Mono Lake water for domestic use. Regardless of the district court's decision, the determined advocates on either side are unlikely to let the case drop at the district court level; an appeal to the Ninth Circuit is bound to follow.[100] Despite the judicial system's attempt at effective and speedy determinations, time, money, and effort will be expended by both sides for years to come.

Although there is some question as to whether relief will arrive in time to save the lake from destruction, it is certain that as a result of the recent court decision, change is imminent. One of the significant changes will be in future decisions by the Water Board. Presently the Board must consider the public trust interest when allocating water resources.[101] Delays in Water Board hearings may arise because more facts must be gathered, but there may also be a more careful allocation of very precious resources, both in water and natural environments throughout the state.

Another significant change is in the ownership of property throughout California. Property subject to the trust and once

98. *See generally* 33 Cal. 3d at 431-32, 658 P.2d at 716-17, 189 Cal. Rptr. at 353-54.

99. *See supra* notes 65-67 and accompanying text.

100. Even if the Audubon Society should be the ultimate winner in the courts, DWP has a near fail-safe alternative—the legislature. Since Los Angeles is an important economic and population center, a city where the citizens' money and power seem virtually endless, that city will have a strong lobby and bargaining position within the legislature. The citizens of Los Angeles hope to change the laws to overrule the public trust doctrine in situations where water is essential to population centers. Of course, this would not be a totally one-sided fight. As we have seen, the public, represented by such groups as the National Audubon Society and the Mono Lake Committee, will be sure to let their views be known. Protecting the environment has become an important interest, but then, so is turning on the tap and having water readily available for one's use.

101. 33 Cal. 3d at 446, 658 P.2d at 728, 189 Cal. Rptr. at 364.

owned totally in fee simple is now owned subject to the public trust.[102] The exact property to which the new restriction will apply, however, remains in question. The language in *Marks,*[103] which makes the public trust flexible so that it can adapt to changing public needs,[104] was interpreted by the court to include in the public trust all non-navigable streams which affect navigable lakes.[105] The *Marks*[106] language, with the support of this decision, can be utilized to incorporate other properties into the public trust as well. This stretching of the public trust ensures that California's valuable environmental resources will, at the very least, not be thoughtlessly and ruthlessly destroyed, but rather any diminishing of value will be weighed against the benefit to be gained.[107] This does not guarantee that California's resources will be maintained; it only assures that the public trust must be taken into consideration. This is certainly a step in the right direction.

V. CONCLUSION

The California Supreme Court has taken a giant step forward in recognizing a system that can work to protect the environment. The public has a viable interest in its environment and its scarce resources, and the public trust doctrine ensures this interest will at least be considered, and hopefully protected. The effectiveness of this protection remains to be seen. Will the DWP continue to divert the amount of water it wants or will Los Angeles have to learn to live without Mono Basin water? Moderation and compromise seem to be the best solution. How the public trust doctrine will actually affect Mono Lake and similar future regions remains to be seen.

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102. *Id.* at 437, 658 P.2d at 721, 189 Cal. Rptr. at 358.
103. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971); *see supra* note 6 and accompanying text.
104. *See supra* notes 20 and 36 and accompanying text.
105. 33 Cal. 3d at 437, 658 P.2d at 721, 189 Cal. Rptr. at 357.
106. 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).
107. 33 Cal. 3d at 447, 658 P.2d at 728, 189 Cal. Rptr. at 365.

XXIII. WORKERS' COMPENSATION

A. *Special risk exception to the coming and going rule may apply to an employee who has left the employer's premises:* **Parks v. Workers' Compensation Appeals Board**

In *Parks v. Workers' Compensation Appeals Board,*[1] the court confronted the question of when the cloak of workers' compensation insurance ceases to protect an employee at the end of a working day.[2] At issue was whether a school teacher was entitled to benefits when she was assaulted in her car immediately after leaving a school parking lot after work, under circumstances in which the teacher's car was "immobilized by departing school children who blocked the traffic."[3] The resolution of this question required application of the "going and coming rule" and the rule's "special risk" exception.[4] While the court broke no legal ground concerning the nature of the theory, the case represents the first time that the court has expressly held that the special risk exception to the going and coming rule may apply to an employee who has left the employer's premises and is on her way home.[5]

Ms. Parks taught kindergarten through third grade at a school

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1. 33 Cal. 3d 585, 660 P.2d 382, 190 Cal. Rptr. 158 (1983). (Bird, C.J., with Mosk, Kaus, Broussard, Reynoso and Grodin, JJ., concurring; Richardson, J., dissenting). The case was heard on appeal from the decision of the Workers' Compensation Appeals Board (WCAB).

2. In order to understand the policy considerations underlying any decision dealing with workers' compensation, it is necessary to keep in mind the overall purpose of the scheme:

> The primary purpose of the workers' compensation law is to insure an injured employee and those dependent on him adequate means of subsistence while he is unable to work, and to bring about his recovery as soon as possible in order that he may be returned to productive employment. Liability for an employee's injury is placed, as part of the cost of production, on the business or industry in which the employee was engaged.
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> * * *
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> Liability for the employee's injury, where the conditions essential to the application of the act concur, is imposed on the employer regardless of negligence. The theory, unlike that of the common law, is not to provide indemnity for negligent acts or compensation for legal wrongs, but to furnish economic insurance, although the act does not make the employer an insurer of the employee at all times during the period of employment.

65 CAL. JUR. 3d, Work Injury Compensation § 1, at 20-21 (1981).

3. 33 Cal. 3d at 587, 660 P.2d at 382, 190 Cal. Rptr. at 158.

4. In short, the "going and coming rule" provides that there is no workers' compensation protection for an employee on the way to or from work. The "special risk exception" to this rule provides for such protection where, due to peculiar circumstances, an employee is exposed to special risks going and coming to work because of the work's location or other factors. Both of these doctrines are discussd more fully *infra* at notes 11, 18, and 19.

5. "The California cases have not applied the exception to an employee . . . driving home directly *after* work." 33 Cal. 3d at 590, 660 P.2d at 385, 190 Cal. Rptr. at 161 (emphasis in original).

in Watts (a subdivision of Los Angeles).[6] At the end of a winter school day in 1979, she left school with a group of teachers and walked to her car.[7] Shortly after exiting the parking lot, she stopped her car for a group of children crossing the street on their way home from school. While she was stopped, three youths ripped open the door on her car, forcibly grabbed her purse and fled.[8]

As a result of the incident, Ms. Parks was unable to return to work for three weeks due to the physical and emotional trauma caused by the attack.[9] A workers' compensation claim was filed[10] and an award was granted by a workers' compensation judge. The school district appealed the decision to the WCAB, which rescinded the award. Parks then appealed to the supreme court.

Writing for the majority, Chief Justice Bird observed that the ultimate issue presented to the court was a "simple" one:

> Does the fact that Parks was leaving her job after work and had driven a short distance down a public street at the time the injury occurred automatically bring her case within the proscription of the so-called "going and coming" rule?[11]

The "going and coming" rule springs from a basic tenet of the policy behind workers' compensation: the protection afforded applies only to injuries suffered "in the course of employment."[12] Generally, traveling to and from work is considered to be outside the course of employment.[13] As the court notes, the rule seems sim-

6. Watts is not generally regarded as a crime free neighborhood.

7. It was customary for the teachers to leave in groups for purposes of safety.

8. A quick reading of the majority opinion implies that the thieves may have been school children; however, the dissent emphasized that the villians were unidentified. 33 Cal. 3d at 593, 660 P.2d at 387, 190 Cal. Rptr. at 163 (Richardson, J., dissenting).

9. Parks surfered pain in her shoulder, experienced periodic dizziness for some time after the attack, and developed an anxiety about being alone upon entering or leaving school grounds. Eventually she sought a transfer to another school. *Id.* at 587, 660 P.2d at 383, 190 Cal. Rptr. at 159.

10. In this case, there was no other party from which to seek recovery. Persons seeking workers' compensation benefits are best advised to seek compensation from a tortfeasor without the shield of their employer's immunity. *See* CAL. LAB. CODE § 3601 (West Supp. 1983). Workers' compensation provides only for rehabilitation and lost pay—not for all generally conpensable injury; thus, workers' compensation is a sure but very shallow pocket.

11. 33 Cal. 3d at 588, 660 P.2d at 383, 190 Cal. Rptr. at 159.

12. *See* CAL. LAB. CODE § 3600 (West Supp. 1983). The "course of employment" generally means the "time, place, and circumstance" surrounding an injury. *See* 2 HANNA, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 9.01(1)(b) (2d ed. 1983).

13. The court had previously discussed the going and coming rule in Hinjosa

ple enough, but its application may be an arduous task. When does the employee cross the magic line—when he walks out the workplace door, when he is a mile away, or somewhere in between? A bright line test is not practical. Hence, the courts have devised a number of exceptions to the rule so as to implement the doctrine in "marginal situations," one of which is the "special risk exception."[14] This exception provides for compensation where "the employment creates a special risk," provided that the injuries are "sustained within the field of that risk."[15]

In *General Insurance Co. v. Workers' Compensation Appeals Board,*[16] the court set forth a two-pronged test for the application of the special risk exception. It will apply "(1) if 'but for' the employment the employee would not have been at the location where the injury occurred, and (2) if 'the risk is distinctive in nature or quantitatively greater than risks common to the public.' "[17]

The court observed that there was no question that, but for her teaching position, Parks would never have been in the vicinity of her injury. Therefore, the question was whether that risk was distinctive in nature, or more likely to happen to Parks than to the general public.[18]

Noting that no California case had applied the special risk exception specifically where the employee was away from the em-

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v. Workers' Comp. Appeals Bd., 8 Cal. 3d 150, 153-60, 501 P.2d 1176, 1178-83, 104 Cal. Rptr. 456, 458-63 (1972). This rule seems consistent with those in other areas of the law: for purposes of employer liability, a person driving from home to work is seldom found to be in the course of his employment. Likewise, commuting expenses are generally said to be incurred without the scope of one's employment and are therefore not deductible for tax purposes.

14. The other exceptions apply where the employee is on a "special mission," where transportation provided or required by the employer is utilized, where there is an agreement that travel time is to be compensated, where the employee is traveling from one place of work to another, where the employee is traveling on business, or where the employee is required to live or board on the employer's premises. *See* 65 CAL. JUR. 3d, Work Injury Compensation §§ 102-108 (1981).

Another method of dealing with the harshness of the rule is to abolish it. Both Michigan and New Jersey have taken this route. *See* 1 LARSON, THE LAW OF WORKMEN'S COMPENSATION § 15.12 (1982). The rule has likewise been dropped in Germany (where the first workers' compensation law was enacted in 1884) and in France. *See* Hammond v. Great Atl. & Pac. Tea Co., 56 N.J. 7, 12 n.3, 264 A.2d 204, 207 n.3 (1970). As to the early history of workers' compensation in Europe, *see* J. SMITH, CALIFORNIA WORKMEN'S COMPENSATION PRACTICES § 1.2, 3 (1973).

15. 33 Cal. 3d at 589, 660 P.2d at 384, 190 Cal. Rptr. at 160 (citing Freire v. Matson Navigation Co., 19 Cal. 2d 8, 11, 118 P.2d 809, 811 (1941)). *See also* General Ins. Co. v. Workers' Comp. Appeals Bd., 16 Cal. 3d 595, 600-01, 546 P.2d 1361, 1363-64, 128 Cal. Rptr. 417, 419-20 (1976).

16. 16 Cal. 3d 595, 546 P.2d 1361, 128 Cal. Rptr. 417 (1976).

17. 33 Cal. 3d at 590, 660 P.2d at 385, 190 Cal. Rptr. at 161 (quoting General Ins. Co. v. Workers' Comp. Appeals Bd., 16 Cal. 3d 595, 600-01, 546 P.2d 1361, 1364, 128 Cal. Rptr. 417, 419-20 (1976)). The court *clearly* sets forth the two-pronged test for the first time in the instant case.

18. 33 Cal. 3d at 592, 660 P.2d at 386, 190 Cal. Rptr. at 162.

ployer's premises and on the way home, the court pointed to a pair of prior decisions applying the exception. One case allowed recovery where it was clear that the employee had yet to reach the employer's premises at the time of the accident,[19] the other where the employee's location was uncertain.[20] Hence, it was concluded that the claimant need not be on the employer's premises at the time of the accident. It was also observed that other states have applied the rule where the claimant was similarly *just leaving* the employer's premises.[21]

Addressing the second prong, the court noted that Parks was "regularly subjected at the end of each day's work to the risk of becoming blocked by school children and becoming a 'sitting duck' for assault. . . . Her risk was clearly 'quantitatively greater' than that to which passing motorists might be subjected to on a

19. *See* R.G. Greydanus v. Industrial Accident Comm'n., 63 Cal. 2d 490, 407 P.2d 296, 47 Cal. Rptr. 384 (1965). In *Greydanus* the claimant was a few feet short of his employer's premises:

> Basterretche was permanently employed to milk cows at the dairy operated by petitioner R.G. Greydanus. As required, he reported for work each morning at 4:30 a.m. at the milking barn situated beside a two-lane highway near Chino. In order to reach the barn it was necessary to turn off the highway into a short driveway leading to the barn. On the morning of March 20, 1963, as Basterretche proceeded in his automobile to turn left off the highway to drive to the barn, his vehicle was struck by a truck which was attempting to pass him on the left. At the time of the impact Basterretche had completed his turn, and his car was headed directly toward the barn. The wheels were a few feet short of touching the apron of the driveway, but most of the vehicle was over the highway lane he was crossing. Basterretche received multiple injuries for which the commission awarded compensation.

Id. at 491, 407 P.2d. at 297-98, 47 Cal. Rptr. at 385-86.

20. *See* Pacific Indem. Co. v. Industrial Accident Comm'n, 28 Cal. 2d 329, 170 P.2d 18 (1946) (where the court found that, although the claimant had only entered the means of access to the employment premises, compensation should not be denied because the field of the risk to which he was subjected encompassed that area).

21. *See* Oliver v. Wyandotte Indus. Corp., 308 A.2d 860 (Me. 1972) (where compensation was awarded to claimant injured off the employer's premises due to a dangerous condition on the employer's premises); Notowitz v. Rose Towel & Linen Supply Co., 36 A.D.2d 543, 316 N.Y.S.2d 694, *aff'd,* 29 N.Y.2d 502, 272 N.E.2d 485, 323 N.Y.S.2d 975 (1971) (claimant assaulted by men just outside the workplace).

The California court noted:

> The teaching of these cases from sister jurisdictions as well as our own decisions in *Henslick* and *Greydanus* is clear. Compensation will be allowed for injuries off the work premises both before or after work if the injury occurs within the field of a risk created by the employment. This is true whether the employment creates a risk in gaining entry to the workplace or in exiting therefrom.

33 Cal. 3d at 592, 660 P.2d at 386, 190 Cal. Rptr. at 162.

sporadic or occasional basis."[22]

Ultimately, it must be kept in mind that *Parks* is a classic "hard" case—and hard cases traditionally make bad law. Hence, *Parks* should not be viewed as a green light to award compensation for all ills that befall a worker going or coming from work when that harm occurs a "few blocks" or more from the workplace. The moment an employee leaves the premises, or until he gets there, there must be *some* causal link between the injury and the employment to support a compensation award. The further away from the premises that the injury occurs, the stronger the causal link must be.[23] In establishing this sliding scale, *Parks* blurs the bright line at the edge of the employer's premises, but allows compensation decisions more in accord with the policy considerations behind workers' compensation than the simple bright line test.

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22. 33 Cal. 3d at 592, 660 P.2d at 386, 190 Cal. Rptr. at 162. The dissent rejected this conclusion: "The hazard which caused petitioner's injury, the 'hit and run' assault by unidentified criminals, was not 'special' to her, nor was it a 'special risk' of her employment as a teacher, nor was it 'causally' related to the school. It was a common danger to which the public in general was and is equally susceptible." *Id.* at 594, 660 P.2d at 388, 190 Cal. Rptr. at 163 (Richardson, J., dissenting). In support of this conclusion, Richardson pointed to the court's finding in *General Insurance Co.*, where the claimant was struck and killed while exiting from his car across the street from work. General Ins. Co. v. Workers' Comp. Appeals Bd., 16 Cal. 3d at 598, 546 P.2d at 1362, 128 Cal. Rptr. at 418. The dissenting Justice believed that the *General Insurance Co.* claimant's risk of being struck by a passing motorist was common to the general public, as was Mrs. Parks' risk of being assaulted by thieves when her car was stopped. This analogy ignores a crucial distinction: the traffic on the road was not directly related to the employer's business in *General Insurance Co.*, while the children who were blocking the street were a direct result of the employer's "business" in *Parks*. That Ms. Parks may just as well have been stopped by a light is irrelevant—a case is decided by the facts that exist, not the facts that might have been.

23. *Compare* Greydanus v. Industrial Accident Comm'n, 63 Cal. 2d 490, 407 P.2d 296, 47 Cal. Rptr. 384 (1965) *and* Pacific Indem. Co. v. Industrial Accident Comm'n, 28 Cal. 2d 329, 170 P.2d 18 (1946), *with* General Ins. Co. v. Workers' Comp. Appeals Bd., 16 Cal. 595, 546 P.2d 1361, 128 Cal. Rptr. 417 (1976).