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I. ADMINISTRATIVE LAW

A. Invasion of management as a defense for public utilities is now disfavored and state agencies can regulate business practices of public utilities with respect to providing adequate and efficient service to the general public: General Telephone Company of California v. Public Utilities Commission.

General Telephone Company of California v. Public Utilities Commission, 34 Cal. 3d 817, 670 P.2d 349, 195 Cal. Rptr. 695 (1983), signaled the downfall of claims of “invasion of management” as a viable means for public utilities to thwart regulatory orders designed to facilitate more efficient customer service. The scene was set when the California Public Utilities Commission ordered General Telephone to introduce a competitive bidding process for procurement of central office switching equipment (COSE). Inadequate and unsatisfactory service to the public was the rationale cited for the mandate. General Telephone sought to overturn the decision by claiming that the Commission had exceeded its jurisdiction and encroached on management decision-making. The court responded by affirming the Commission’s right to use such orders to correct poor service.

Since public utilities commissions are creatures of statute, Public Utilities Commission v. United Fuel & Gas Co., 317 U.S. 456, 468 (1943), the court first considered whether sections 728, 761 and 762 of the California Public Utilities Code authorized the Commission to take such action. Section 728 enables the Commission to correct rates and practices or contracts affecting such rates when they are unreasonable or unjust. Cal. Pub. Util. Code § 728 (West 1975). Section 761 allows the Commission to fix practices, equipment, service or methods when it finds such to be inadequate or insufficient. Cal. Pub. Util. Code § 761 (West 1975). Section 762 provides the Commission with authority to make im-
provements or changes in existing public utility equipment or fa-
cilities when it finds such action to be reasonable. CAL. PUB. UTIL.
CODE § 762 (West 1975). Finally, section 701 permits all steps
“necessary and convenient” to the fulfillment of the Commission’s
responsibilities. CAL. PUB. UTIL. CODE § 701 (West 1975). The
court stated that it is sometimes willing to permit regulatory
agencies to exercise powers not expressly stated in their man-
date. The statutory language was found to be adequate support
for the order under review.

Although the statutes provided the necessary jurisdiction, the
justices saw a need to resolve conflicting language in Pacific Tele-
phone and Telegraph Company v. Public Utilities Commission, 34
Cal. 2d 822, 215 P.2d 441 (1950). Pacific Telephone provided that
the Public Utilities Commission did not have the power to over-
see utility contracts for labor, materials or services and that deci-
sions as to conducting business were the responsibility of
management, i.e. the “invasion of management” rationale. How-
ever, the court pointed to several cases in explaining that this
principle has waned and now appears to be disfavored. Gay Law
Students Association v. Pacific Telephone and Telegraph Com-
pany, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979), and
Southern Pacific Company v. Public Utilities Commission, 41 Cal.
2d 354, 260 P.2d 70 (1953). In exercising its lawful powers, the
Commission will intrude on the function and realm of manage-
ment to some extent. Management and business decisions are
subject to the state’s exercise of its police powers in the regula-
tion of public utilities. This aspect of control cannot be avoided
by asserting private autonomy because the state expects the pub-
lic utility to conduct its affairs more like a governmental entity
than like a private corporation. Specifically, the intrusion on man-
agement’s prerogative “has little application in the area of direct
consumer-utility contact” or customer service.

General Telephone does not necessarily entail the complete
demise of management as a defense against regulatory orders. Al-
though the rationale’s continued vitality is in doubt, it might still
be successfully utilized in instances of excessive and unnecessary
intermeddling on the part of the Public Utilities Commission.
However, the decision does note that cries of “invasion of man-
agement” will not stand up to commission mandates seeking to
safeguard efficient service and reasonable rates for the consumer.
The duty to protect and provide for the consuming general public in the public utility area is too strong.

B. Public retirement system may increase rates of contribution even if no additional benefits conferred: International Association of Firefighters, Local 145 v. City of San Diego.

In International Association of Firefighters, Local 145 v. City of San Diego, 34 Cal. 3d 292, 667 P.2d 675, 193 Cal. Rptr. 871 (1983), the court reinforced prior holdings that a public retirement system may be modified, even to affect vested contractual rights, for the purpose of accommodating changed conditions, as long as the overall integrity of the system is maintained. The question presented was whether a public retirement system could increase rates of contribution of its safety members without providing commensurate added benefits. The court reached its conclusion by determining that the public retirement plan relied on an actuary and that a local statute contemplated regular changes in contribution based on the advice of the actuary. Secondly, the court could find no relationship between a vested pension right destroyed and the fact that there was no corresponding benefit conferred upon the employees when the rate of contribution increased. The court suggested that vested rights are destroyed, for example, when an entire retirement system is destroyed, if substitution of a fixed retirement pension for a fluctuating plan occurs, or when disadvantageous changes to retired employees are made. However, there is no vested right to a fixed contribution rate. The Association also argued that the City should be precluded from raising the contribution rate because of representations made in the employee's retirement handbook which stated that a member's contribution would not increase with age. The court found that this provision did not guarantee that the rate would never change for other reasons.

Chief Justice Bird and Justice Mosk, in dissent, found that the increased contributions were violative of the contract clauses of both the federal (U.S. Const. art. I, § 10) and California (Cal. Const. art. I, § 9) constitutions. Employees have a vested right to contribute at the rate determined at the time of employment. An increase in the rate should be justified under only two conditions: (1) necessity for the system's continued viability and (2) an increase in benefits. The justices relied on the test established in Allen v. City of Long Beach, 45 Cal. 2d 128, 131, 287 P.2d 765, 767 (1955), that compels that "[s]uch modifications must be reason-
able, and it is for the courts to determine upon the facts of each case what constitutes a permissible change."

C. **Leaving job to follow nonmarital relationship, without imminent marriage, is insufficient to show good cause for unemployment benefits: Norman v. Unemployment Insurance Appeals Board.**

In order to qualify for unemployment insurance benefits, a person who leaves work voluntarily must do so with "good cause." Unemp. Ins. Code § 1256 (West Supp. 1984). In *Norman v. Unemployment Insurance Appeals Board*, 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134 (1983), a woman left her job in California to follow her "fiancé" to another state. When she could not find work, the woman applied for unemployment compensation benefits. The application was denied, and upon a subsequent appeal, the Unemployment Insurance Appeals Board concluded that the plaintiff did not have good cause to leave her job in California and so denied her benefits. The Board's decision was grounded on the presumption that while a legally married person may have good cause to voluntarily leave his employment to follow his spouse, the legislature did not intend to extend such a privilege to an unmarried person.

The plaintiff sought a writ of mandate in superior court and argued that, in light of *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976), and *Department of Industrial Relations v. Workers' Compensation Appeals Board*, 94 Cal. App. 3d 72, 156 Cal. Rptr. 183 (1979), her "nonmarital relationship [was] the equivalent of a marriage for purposes of determining 'good cause.'" The superior court agreed with the plaintiff and held that the absence of a marital relationship did not, as a matter of law, preclude an award of unemployment compensation benefits.


The supreme court noted that new regulations promulgated in
1980 allowed unemployment insurance appeals boards to find “good cause” if a person voluntarily left employment due to an “imminent marriage.” However, no marriage was “imminent” when the plaintiff left California.

In response to the plaintiff’s argument that denial of benefits accorded those who are married violated her constitutional rights of privacy and freedom of association, the supreme court held that the state has a “legitimate interest in promoting marriage.” Thus, the court disagreed with the plaintiff’s argument that “nonmarried persons must be afforded all the rights and benefits extended to married persons.”

D. Communications between welfare recipients and lay representatives authorized to represent them in administrative proceedings are privileged: Welfare Rights Organization v. Crisan.

In Welfare Rights Organization v. Crisan, 33 Cal. 3d 766, 661 P.2d 1073, 190 Cal. Rptr. 919 (1983), the California Supreme Court was asked to decide whether communications between welfare claimants and lay representatives authorized to represent them in administrative proceedings under the aid to families with dependent children (AFDC) program are privileged. The majority of the supreme court concluded that they were.


The United States Supreme Court in Goldberg v. Kelly held that recipients of aid under AFDC have the right to an evidentiary hearing before their benefits are terminated. The recipient is entitled to notice setting forth in detail the reason or reasons for termination, and an opportunity to be heard. While the hearing need not conform to the requirements of a judicial trial, it must afford the recipient a meaningful opportunity to be heard. If he desires, the recipient may retain an attorney to represent him, but none is required. Goldberg, 397 U.S. at 264, 266-68, 270.

The federal regulations setting forth the requirements for state plans provide that every AFDC recipient “may be represented by an authorized representative, such as legal counsel, relative, friend, or other spokesman, or he may represent himself.” 45 C.F.R. § 205.10(a)(3)(iii) (1983). California’s statute, which tracks
the federal regulations, provides for representation by legal counsel or by a lay person. **Cal. Welf. & Inst. Code § 10950 (West Supp. 1984)** provides in part:

> If any applicant for or recipient of public social services is dissatisfied with any action of the county department relating to his application for or receipt of public social services, . . . he shall, in person or through an authorized representative, . . . be accorded an opportunity for a fair hearing.

Justice Kaus, writing the majority opinion, noted that the existence of the attorney-client privilege was of such general knowledge that "the Legislature must have implied its existence as an integral part" of the statute. Furthermore, the choice of the words "authorized representative" instead of "counsel" indicated "that the Legislature recognized that attorneys alone could not satisfy the representational needs of the state's welfare claimants" and that representation by lay persons was necessary to provide a "fair hearing." By necessary implication, the attorney-client privilege extended to confidential communications between recipients of AFDC benefits and lay representatives under **Cal. Welf. & Inst. Code § 10950 (West Supp. 1984)**.

While **Cal. Evid. Code § 911 (West 1966)** expresses the legislature's intention that common law privileges were to be abolished and to prevent courts from creating new nonstatutory privileges, Justice Kaus reasoned that **Cal. Evid. Code § 950 (West 1966)** defines "lawyer" for purposes of the attorney-client privilege as "a person authorized, or reasonably believed by the client to be authorized, to practice law in any state or nation." Accordingly, the reach of the privilege was broad enough to cover the issue at hand simply because the Evidence Code "does not require that the purported lawyer actually be one" for purposes of the privilege.

The majority, however, confined their holding to confidential communications under **Cal. Welf. & Inst. Code § 10950.** Other statutes which permit lay representation before administrative tribunals, such as **Cal. Unemp. Ins. Code § 1957 (West Supp. 1984)** and **Cal. Lab. Code § 5700 (West 1971)**, were left unaffected and undisussed.

Justice Richardson dissented. The legislature had expressed its intent in **Cal. Evid. Code § 911 (West 1966)** to the effect that no new nonstatutory privileges were to be created by the courts:

> Except as otherwise provided by statute:
> (a) No person has a privilege to refuse to be a witness.
(b) No person has a privilege to refuse to disclose any matter or to re-
fuse to produce any writing, object, or other thing.
(c) No person has a privilege that another shall not be a witness or shall
not disclose any matter or shall not produce any writing, object, or other
thing.

The above statute is made applicable to administrative proceed-
ings through CAL. EVID. CODE § 901 (West 1966).

Justice Richardson contended that CAL. EVID. CODE § 950 (West
1966), which the majority concluded was broad enough to include
communications between a recipient of AFDC and his lay repre-
sentative, did not reach so far. Indeed, the definition of a "law-
yer" contained therein refers only to a "person authorized, or
reasonably believed by the client to be authorized, to practice law
in any state or nation." In Justice Richardson's words: "Obvi-
ously, a lay advocate is not authorized to practice law."

Furthermore, as Justice Richardson noticed, other jurisdictions
have declined to extend the privilege to a client and administra-
tive representatives who are not attorneys. United States v.
United Shoe Machinery Corporation, 89 F. Supp. 357, 358-60 (D.
Mass. 1950); Brungger v. Smith, 49 F. 124 (C.C.D. Mass. 1892); Hunt
v. Maricopa County Employee Merit System Commission, 127
Ariz. 259, 619 P.2d 1036 (1980); McCormick on Evidence §§ 88, 179-
81 (2d ed. 1972).

Also, federal cases addressing the issue of whether nonattorney
patent agent communications are privileged are divided. The ma-
ajority rule denies a privilege. Duplan Corporation v. Deering Mil-
G.m.b.H., Chem. F. v. Hygrade Food Products Corporation, 253 F.
Supp. 999 (D.N.J. 1966). The minority allows a privilege if the pat-
ent agent is registered. Sperry v. Florida, 373 U.S. 379 (1963); In re

In conclusion, Justice Richardson contended that procedural
due process simply did not require a privilege in this type of ad-
ministrative hearing. Merely because a federal regulation permits
a lay advocate to represent a recipient, the state's interests in pre-
cluding the judicial creation of new nonstatutory privileges pre-
ponderated. Also, the United States Supreme Court in Goldberg
v. Kelly "neither held nor implied that formal evidentiary rules
would be required" in such administrative hearings. While recog-
nizing that there were supporting policies militating in favor of
extending the privilege, Justice Richardson felt this to be a task
better accomplished by the legislative branch.
E. ALRB review of alleged misconduct during union electoral proceedings requires an objective standard measuring suppression of free expression and ALRB findings of fact are conclusive only when they are supported by substantial evidence: *Triple E Produce Corporation v. Agricultural Labor Relations Board.*

In *Triple E Produce Corporation v. Agricultural Labor Relations Board*, 35 Cal. 3d 42, 671 P.2d 1260, 196 Cal. Rptr. 518 (1983), the court reversed an ALRB decision validating a union representation election and certifying a union as an exclusive bargaining representative. The election was tainted by union threats to employees that failure to vote for the union would result in termination of employment regardless of the election's outcome. The ALRB had determined that such conduct was only campaign propaganda and did not influence the employees since only a small number heard the statements. The justices disagreed and held that such coercion "created an impermissible atmosphere of fear."

The court noted that the California Agricultural Labor Relations Act (CAL. LAB. CODE §§ 1140-1166 (West Supp. 1984)) and the National Labor Relations Act (29 U.S.C. §§ 141-188 (1976)) parallel each other. The purpose of both is not only to promote collective bargaining, but to ensure that such bargaining is conducted "by the employee's freely chosen representatives." Employees have the right to join labor unions and to collectively bargain with their employers. However, at the same time, they are expressly permitted to elect not to engage in such activity. Coercion of employees by employers or labor organizations is prohibited. CAL. LAB. CODE §§ 1153-1154 (West Supp. 1984).

The court determined that an objective standard was appropriate for review of alleged misconduct during union electoral proceedings. The test for deciding "whether statements 'constitute an unlawful interference and/or threat is not the employee's reaction but whether the statements would reasonably tend to interfere with or restrain employees in the exercise of their'" free choice in voting. *Jack Brothers v. McBurney, Inc.*, 4 A.L.R.B. No. 18, 1, 3 (1978). The subjective reactions of employees are not the focal point in assessing the effect of a threat. Instead, the inquiry
is into whether the conduct reasonably tended to create an atmosphere of fear and coercion.

The court concluded that the union's threats were pervasive and had induced fear among the workers. ALRB findings of fact are only conclusive when they are supported by substantial evidence and it was decided that such was not the case. Worker testimony revealed that at least some employees were fearful about voting and losing their jobs. Even if statements reach only a few ears, it is reasonable to expect that they have been discussed, repeated, or disseminated among the employees, and therefore, their impact will carry beyond the person to whom they are directed. United Broadcasting Company of New York, Inc., 248 N.L.R.B. 403, 404 (1980). Assertions that threats cannot be effectuated without employer cooperation or that employees may not believe they are likely to be carried out are not a justification for unfair labor procedure. The test of coerciveness is not the effect upon individual listeners.

Two justices disagreed with the court's conclusion. Justice Mosk disapproved of the campaign tactics but thought additional testimony before the ALRB was needed to determine whether the conduct did or did not affect the election process. Justice Broussard in dissent agreed that an objective test was proper but believed that substantial evidence for the ALRB's decision did exist and that the court had substituted its judgment for the Board's. He reasoned that the decision as to coercive effect was better left to the expertise of the ALRB.

The Triple E court acted to strike down what they perceived as a threat to the integrity of elections in the labor relations field. They sought to preserve a free and fair election process. If suspect conduct was condoned, it would certainly invite similar adventures in the future by competing unions and employers. Such corruption would harm the interest of the workers and frustrate the express purpose of the Agricultural Labor Relations Act. The Triple E decision marks a familiar warning that attempts to subvert an equitable labor relations system will not be tolerated, no matter which side originates the challenge.

II. ARBITRATION

Bad faith or inconsistent actions may allow a finding of waiver of the right to arbitrate: Christensen v. Dewor Developments.

In Christensen v. Dewor Developments, 33 Cal. 3d 778, 661 P.2d 1088, 191 Cal. Rptr. 8 (1983), the California Supreme Court considered an issue involving waiver of the right to arbitrate.
In 1980, a dispute arose concerning the performance of a construction contract. The contract contained an arbitration clause, but the plaintiffs filed a civil complaint against the contractor. In their complaint, the Christensens expressly reserved their right to arbitrate. The plaintiffs admitted that the sole purpose for filing the complaint was to "obtain from the defendants an answer and affirmative defenses so that the Christensens could have some feel for what the Defendants' position would be at arbitration."

The plan backfired when the defendants demurred without answering. The trial court subsequently sustained the demurrer as to each cause of action save one, which was struck down on the court's own motion.

Shortly after, the plaintiffs filed an amended complaint restating the same causes of action. Once again, the defendants demurred to the complaint and alleged that the plaintiffs' right to arbitrate had been waived. However, one day before the hearing set for the second demurrer, the plaintiffs dismissed their complaint "without prejudice."

Two months after the plaintiffs voluntarily dismissed their amended complaint "without prejudice," they filed a petition to compel arbitration. The court denied the petition, finding that the plaintiffs, by litigating their complaint through a demurrer for the purpose of "unilateral discovery," while at all times intending to dismiss, had acted in bad faith. By so acting in bad faith, the court held that the plaintiffs had waived the right to arbitrate. As the court stated: "For a party to file a lawsuit in order to discover his opponent's theories . . . tends to defeat the expecta-
tions of the parties, in addition to imposing unnecessary and inap-
propriate burdens upon already congested court calendars."

The court did rule, however, that the trial court properly al-
lowed the plaintiffs to dismiss their amended complaint "without
prejudice" just prior to their petition to compel arbitration, and
thus plaintiffs would be allowed to pursue their court action.

III. ATTORNEY DISCIPLINE

A. Willful misappropriation of a client's funds entails
severe discipline which may be supplemented by
restitution to the client: Bate v. State Bar.

In Bate v. State Bar, 34 Cal. 3d 920, 671 P.2d 360, 196 Cal. Rptr.
209 (1983), the court addressed the issue of appropriate discipline
for an attorney who willfully misappropriates a client's funds. The
court concluded that moral turpitude is involved in the willful
misappropriation of a client's funds and that such misconduct is a
serious breach of professional ethics subject to severe discipline.

The petitioner converted funds from a settlement he negotiated
for his own personal use without informing or gaining permission from her. Initially, the State Bar Court hearing
panel recommended disbarment. However, the review depart-
ment reduced the recommended discipline to suspension and
probation.

In reviewing the case, the court stated that the usual penalty
for willful misappropriation of funds is disbarment, unless miti-
gating circumstances are present. See Worth v. State Bar, 22 Cal.
3d 707, 711, 586 P.2d 588, 590, 150 Cal. Rptr. 273, 275 (1978). Misap-
propriation cases are decided on their own facts. The review de-
partment's disciplinary recommendations are given substantial
credence, but the court is not opposed to doling out even harsher
punishment when proper. However, in the petitioner's case,
death threats and the use of misappropriated money for foreign
travel to reflect on the situation provided sufficient impetus for
the justices to hold that the proposed discipline was not too
lenient.

An additional element of the case rankled the court. Petitioner
had misappropriated over $2,000 and had never attempted to re-
pay any of the unlawfully taken money. He had precipitated fi-
nancial harm on his client and had not been required to make
restitution. The court held the recommended discipline to be in-
adequate in this respect. The court ordered the petitioner to
make restitution to his client before his suspension was stayed.

The impact of the Bate decision will be to remind the practicing
attorney and the general public that misappropriation of a client's
funds is a serious offense to be dealt with harshly. The court's concern over attorney indiscretions is with protection of the public, preservation of public confidence in the legal profession, and maintenance of the highest professional standards in the practice of law whatever the reason for such misconduct.

B. An attorney must keep his personal funds separate from his client's money; a lawyer must maintain adequate and accurate records as to his dealings with and on behalf of his client; and criminal procedural safeguards and protections do not apply to attorney discipline proceedings: Fitzsimmons v. State Bar.

In Fitzsimmons v. State Bar, 34 Cal. 3d 327, 667 P.2d 700, 193 Cal. Rptr. 896 (1983), the petitioner attracted his troubles when he failed to maintain business records of his dealings with and on behalf of a client. He neglected to secure written directives for disbursement of his client's funds. He delivered money for his client without obtaining a receipt. Furthermore, he received compensation for fees and expenses for which he kept no substantiating records. This conduct was deemed to be improper and warranted discipline.

The court found the petitioner's initial error to be the placement of his client's funds in his own vault. This violated a well-established principle that when an attorney receives his client's funds, he must promptly deposit them in a bank account separate from his own unless the client instructs otherwise in writing. This procedure prevents the loss of a client's money through commingling of funds. A violation of the rule is not excused because of good faith or lack of harm to the client.

The court next addressed whether an attorney's failure to provide adequate and accurate records relating to services performed for a client could amount to a violation of the attorney's oath. The court stated that failure to maintain proper records, books, vouchers, receipts or checks is a breach of an attorney's duty to his client. Weir v. State Bar, 23 Cal. 3d 564, 576, 591 P.2d 19, 24, 152 Cal. Rptr. 921, 926 (1979). It is improper for a lawyer to receive compensation or reimbursement for services rendered without providing substantiating records. See CAL. BUS. & PROF. CODE § 6128(c) (West 1974). The court also made it clear that obtaining prior written instructions regarding the disposition of a client's funds is
imperative for it “serves to avoid costly litigation involving attorney, client, and third parties.”

Finally, petitioner argued that he was placed in double jeopardy when the review department ignored the hearing panel's dismissal and ordered a de novo hearing before a second panel. The court considered whether attorney discipline proceedings are entitled to the same procedural safeguards and protections as criminal proceedings. The justices responded by asserting that a bar proceeding is not a criminal one. “Proceedings before the State Bar are *sui generis*, neither civil nor criminal in character, and the ordinary criminal procedural safeguards do not apply.” *Yokozeki v. State Bar*, 11 Cal. 3d 436, 447, 521 P.2d 858, 865, 113 Cal. Rptr. 602, 609, *cert. denied*, 419 U.S. 900 (1974). The hearing panel's findings are only recommendations. The review department hearing is not an appeal from a hearing panel's decision. Both the review department and the supreme court are free to make independent findings and conclusions.

Two justices were not thoroughly satisfied with the court's decision. Chief Justice Bird concurred but did not agree that the petitioner's failure to secure a written receipt after delivering his client's funds to a third party, as his client requested, amounted to a breach of an attorney's oath and duties. Justice Richardson dissented because he viewed the court's decision to publicly reprove petitioner as being insufficient discipline. He thought suspension was more appropriate.

The *Fitzsimmons* decision provides two lessons for the practicing attorney. First, it is best to keep detailed records. This will help to avoid future pitfalls and trouble. Second, disciplinary proceedings are less formal than civil or criminal adjudications and do not provide all of their protective trappings.

C. Other misconduct besides that constituting moral turpitude can warrant attorney discipline, and procedural due process is afforded when a simple majority of the court hearing panel is present: *In re Morales*.

*In re Morales*, 35 Cal. 3d 1, 671 P.2d 857, 196 Cal. Rptr. 353 (1983), illustrated that punishment of an attorney may be proper even if his misconduct does not amount to moral turpitude. Attorney Morales was convicted of misdemeanor offenses involving failure to withhold or pay certain payroll taxes and unemployment insurance contributions. The state bar found such wrongdoing amounted to “other misconduct warranting discipline” rather
than moral turpitude. This finding was affirmed and discipline was ordered.

The court stated that illegal misconduct not constituting moral turpitude may still warrant discipline if it "demeans the integrity of the legal profession and constitutes a breach of the attorney's responsibility to society." In re Rohan, 21 Cal. 3d 195, 204, 578 P.2d 102, 106, 145 Cal. Rptr. 855, 859 (1978). Morales made an unlawful business decision in avoiding a legal obligation. The justices asserted that it was reasonably foreseeable that such misconduct would interfere in the rendering of sound advice to clients.

The court also held that Morales was not deprived of procedural due process when a majority of lawyers did not comprise his court hearing panel. A court hearing panel is composed of three members only one of whom may be a non-lawyer. Cal. State Bar Rules of Proc., rule 558, reprinted in CAL. R. CT. at 507 (West 1984). Morales' panel met in the presence of one lawyer and one non-lawyer. The other attorney referee was absent. This simple majority was held to be sufficient due process.

Chief Justice Bird concurred but expressed the view that finding of moral turpitude should be the only standard for imposing discipline upon attorneys. She concluded that Morales' conduct had involved moral turpitude.

The Morales decision serves to remind the practicing attorney that the absence of moral turpitude will often not be enough to avoid punishment for misconduct. Attorney misbehavior in whatever form threatens the integrity of the profession and will not be ignored.

D. The supreme court can utilize the State Bar for recommendations as to moral turpitude; imposition of final discipline is not authorized until a judgment of conviction is final; a criminal conviction by itself does not evidence moral turpitude nor support a recommendation of disbarment (unless moral turpitude per se is involved): In re Strick.

In re Strick, 34 Cal. 3d 891, 671 P.2d 1251, 196 Cal. Rptr. 509 (1983), presented the court with three issues regarding the decision-making and procedural process in attorney discipline matters. First, the court was asked to address whether section 6102,
subdivision (a) of the California Business and Professions Code, CAL. BUS. & PROF. CODE § 6102(a) (West Supp. 1984), required the supreme court to decide the merits of imposing interim suspension on its own and only where the face of the record of conviction showed that the offense involved or probably involved moral turpitude. Second, the justices considered whether final discipline of an attorney could be recommended and imposed without a final criminal conviction. Third, the court discussed whether a criminal conviction, not involving moral turpitude per se, could support a finding of moral turpitude and a recommendation of disbarment. The answer was negative to all issues.

The first issue involved the petitioner's conviction of several criminal offenses. The supreme court referred the convictions to the State Bar for a report and recommendations as to whether the offenses involved moral turpitude or other misconduct warranting discipline. The petitioner challenged the jurisdiction of the State Bar in conducting proceedings directed toward the merits of placing attorneys on interim suspension. The justices responded by asserting that the State Bar can review attorney criminal conviction cases where an examination of the facts and circumstances is necessary to a determination as to moral turpitude. The court's practice of referring such cases to the State Bar is recognized and authorized by rule 951(a) of the California Rules of Court, CAL. R. CT. 951(a) (West 1984), and the CAL. BUS. & PROF. CODE § 6102(c) (West 1974). However, the State Bar's authority extends only to issuing reports and recommendations, the supreme court retains the sole power to order suspension from the practice of law. The justices went on to review the facts of the petitioner's case and to order interim suspension because the State Bar may have overstepped the scope of its authority in this matter.

In regard to the second issue, the court believed that the State Bar may have been influenced by petitioner's conviction for voluntary manslaughter in recommending disbarment on his forgery conviction. This was deemed to be improper because the manslaughter offense was still in the appellate process when disbarment was recommended. Imposition of final discipline is not authorized until the judgment of conviction is final on appeal or the time for seeking appeal has passed. CAL. BUS. & PROF. CODE § 6102(b) (West Supp. 1984); CAL. R. CT. 951(b) (West 1984). The justices inferred that consideration of a conviction, still technically undecided as reflecting on moral turpitude, and the need for disbarment in different matters was unauthorized as well.

Finally, as to the third issue, the court concluded that the State Bar's finding of moral turpitude and recommendation of disbar-
ment for the petitioner's forgery violation was not supported by sufficient evidence. The State Bar had improperly considered the circumstances surrounding the manslaughter charge. The forgery conviction transcript was devoid of facts because the petitioner had pled nolo contendere. The only factor was the petitioner's record of conviction. The court held that conviction alone does not evidence moral turpitude and cannot be the sole basis for disbarment. The matter was referred back to the State Bar for a hearing and report on discipline.

In re Strick was an effort to correct some misunderstood or misplaced instructions. The court emphasized that the State Bar plays an important role in attorney discipline proceedings, but that the court is there as a watchdog to make sure that misapplications and errors are corrected.

E. Attorneys should avoid representing multiple criminal defendants because of possible conflicts of interest: Gendron v. State Bar.

In Gendron v. State Bar, 35 Cal. 3d 409, 671 P.2d 349, 197 Cal. Rptr. 198 (1983), the court considered the problem of multiple criminal defendant representation in a single case. Petitioner had contracted with the County of Madera to provide public defender services. The contract established a reserve account whereby petitioner was to retain separate defense counsel if he was unable to provide representation due to conflicts of interest. However, petitioner jointly represented defendants charged with the same crime without obtaining written conflict of interest waivers. Petitioner opposed requests for separate counsel as his office policy was to declare conflicts of interest in multiple-defendant cases only when defendants were expected to testify against each other. The court concluded that such practices amounted to gross negligence and violations of an attorney's fiduciary duty to conscientiously pursue his client's best interests.

A presumption against joint representation of criminal defendants is adhered to because of the great potential for conflicts of interest. An attorney should avoid such practices and can only pursue them after obtaining the informed and written consent of his clients. See Cal. Rule of Professional Conduct Rules 4101, 5-102 (West 1984). Each client has the right to conflict-free advice.

The Gendron decision emphasizes the point that conflict of interest is seriously scrutinized because it all too often leads to the
detriment of client rights. Potential harm to the client from conflict of interest is even worse in criminal cases because the client's freedom is at stake. The lesson to be learned is that the best course of action for criminal defense counsel is nonacceptance of joint representation of criminal defendants.

F. **An attorney's willful and habitual disregard for the interests of his clients combined with failure to communicate with such clients constitutes moral turpitude justifying disbarment: McMorris v. State Bar.**

In *McMorris v. State Bar*, 35 Cal. 3d 77, 672 P.2d 431, 196 Cal. Rptr. 841 (1983), an attorney established a history for repeated acts of misconduct and prior discipline extending over a number of years. He continuously failed to perform services for his clients and neglected to communicate with them regarding the status of their cases. As a result of this improper behavior, the clients' interests were inevitably set back and harmed. The court concluded that such conduct warranted disbarment.

Persistent refusal to perform services for which one is retained and for which one accepts remuneration can only be considered deliberate and willful. It is a breach of good faith and the fiduciary duty owed by an attorney to his clients. Habitual disregard of clients' interests combined with failure to communicate constitutes moral turpitude justifying disbarment.

The lesson of *McMorris* is that an habitual course of misconduct leads to disbarment. When an attorney shows such contempt and disrespect for the profession, its standards and the public, the only palatable punishment is disbarment.

**IV. ATTORNEYS**

*The California Supreme Court has recently handed down several decisions which not only reevaluate disciplinary procedures for attorneys accused of professional misconduct, but also tend to increase the punishment for such misconduct.*

First, in *Hightower v. State Bar*, 34 Cal. 3d 150, 666 P.2d 10, 193 Cal. Rptr. 153 (1983), the California Supreme Court reversed the Committee of Bar Examiner's decision denying an applicant admission to the Bar for alleged misconduct. While employed as a law clerk, the applicant forged his employer's signature, allegedly at his employer's request. The first hearing resulted in a finding that the applicant had knowingly practiced law without a license and forged legal documents. After the requisite two year waiting
period had ended, the applicant again appeared before the panel. The applicant insisted he was of good moral character, but the Committee required the applicant to adopt the previous findings before being granted a full hearing. The applicant refused the request and appealed. The supreme court held that the Committee had to either certify the applicant or grant him a full hearing because the applicant had met his threshold burden of establishing good moral character. The court emphasized that it will continue to require strict adherence to all procedural safeguards.

In the area of fee collection, the supreme court expressed its disapproval of attorneys misappropriating fees in excess of the amount provided in the written retainer agreement by withholding a client's settlement fund. In *Grossman v. State Bar*, 34 Cal. 3d 73, 664 P.2d 542, 192 Cal. Rptr. 397 (1983), the attorney kept 40 percent of the settlement fund after agreeing to only 33 1/3 percent as his fee. The court stated that under a fixed fee contract, "an attorney may not take compensation over the fixed fee without the client's consent to a renegotiated fee agreement. This is true even if the work becomes more onerous than originally anticipated." (citing *Reynolds v. Sorosis Fruit Company*, 133 Cal. 625, 66 P. 21 (1901); *Baldie v. Bank of America*, 97 Cal. App. 2d 70, 217 P.2d 111 (1950)).

In *Warner v. State Bar*, 34 Cal. 3d 36, 664 P.2d 148, 192 Cal. Rptr. 244 (1983), two attorneys were disbarred; one for charging unwarranted and unconscionable fees and the other for misappropriating money entrusted to him. It was later discovered that each attorney gave false testimony at his respective disciplinary hearing. The supreme court held that their previous violations of the Code of Professional Responsibility coupled with their present misconduct demonstrated a "persistent inability to conform to the requirements of [one's] oath and duties as an attorney." Disbarment was therefore the appropriate remedy.

The supreme court in *Wren v. State Bar*, 34 Cal. 3d 81, 665 P.2d 515, 192 Cal. Rptr. 743 (1983), modified a two-year suspension levied against an attorney to a two-year probation resulting from his various acts of misconduct. Petitioner willfully failed to communicate with his client, willfully failed and refused to perform services for which he had been employed, and willfully failed to use due diligence in prosecuting his client's claim. At his disciplinary hearing, petitioner attempted to mislead the Bar review panel by giving false and misleading statements. The court reiterated the
general rule: "a petitioner has the burden of showing the findings are not supported by the evidence or [were] otherwise improper. . . 'In meeting this burden, [a] petitioner must demonstrate that the charges of unprofessional conduct are not sustained by convincing proof and to a reasonable certainty.'"

Finally, the supreme court disbarred an attorney for misappropriating large sums of money from a client who was on the verge of bankruptcy. In Rimel v. State Bar, 34 Cal. 3d 128, 665 P.2d 956, 192 Cal. Rptr. 866 (1983), the court held that an attorney should be disbarred if his continued practice "would place the public at jeopardy." Other factors the court considered relevant in determining whether disbarment was too harsh were the promotion of confidence in the legal profession, the maintenance of professional standards (see Garlow v. State Bar, 30 Cal. 3d 912, 917, 640 P.2d 1106, 180 Cal. Rptr. 831 (1982)), the level of the offense and the extent to which it was interwoven with the practice of law, the nature of the offense, and the likelihood of future transgression. In Rimel, the attorney consistently placed his personal financial consideration above those of his clients, thereby warranting disbarment.

V. ATTORNEY FEES

Application of the private attorney general theory requires use of guidelines in Serrano III for the calculation of the attorney fees: Press v. Lucky Stores.

In Press v. Lucky Stores, 34 Cal. 3d 311, 667 P.2d 704, 193 Cal. Rptr. 900 (1983), the court had the opportunity to review applicability of the private attorney general theory for the recovery of attorney fees that it had previously approved in Serrano v. Unruh, 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982) (Serrano III). See 10 Pepperdine L. Rev. 849 (1983). In the Press case, plaintiffs sought to qualify an initiative measure by obtaining valid signatures of registered California voters. They solicited these signatures while in front of a supermarket and were commanded to leave. The court ordered a temporary restraining order and a preliminary injunction prohibiting defendant from denying plaintiffs access to the premises. Plaintiff sought attorney fees and the court determined that they were entitled to them under the Serrano III adoption of section 1021.5 of the Code of Civil Procedure. Attorney fees are proper if:

(1) plaintiffs' action "has resulted in the enforcement of an important right affecting the public interest," (2) "a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a
The court stressed that the fact that litigation enforces existing rights does not mean that a substantial benefit to the public cannot result. In this case, for example, the general public benefited from the enforcement of fundamental constitutional rights—free speech and the petition provisions of the California Constitution.

The court also drew parameters for the discretion a court can take in the calculation of attorney fees under *Serrano III*. There must be a reasonable relationship between the lodestar figure and the fee ultimately awarded under the objectives set forth in *Serrano III*. The determination of the touchstone or lodestar figure is based on a calculation of the time spent and a reasonable hourly compensation for each attorney who was involved in the presentation of the case. That figure may be adjusted by the application of a multiplier, which takes into consideration a number of factors concerning the lawsuit. The discretion of the trial court in adjusting the award must be based on this lodestar adjustment method. What the supreme court has made clear here is that the court may not devise its own arbitrary formulas. The guidelines for the calculation of fees under *Serrano III* is designed for the purpose of maintaining objectivity. The ultimate goal is to make an award that bears a rational relationship to the skill of the attorneys and the time and effort expended by the attorneys on the litigation.

VI. CIVIL PROCEDURE

A. A motion for summary judgment should not be granted by the trial court in the presence of numerous disputed facts concerning foreseeability: *Bigbee v. Pacific Telephone and Telegraph Company*.

In *Bigbee v. Pacific Telephone and Telegraph Company*, 34 Cal. 3d 49, 665 P.2d 947, 192 Cal. Rptr. 857 (1983), petitioner was seriously injured in respondent telephone company's telephone booth when an automobile driven by a drunk driver veered off the main thoroughfare and crashed into the booth in which petitioner was trapped. Petitioner was making a telephone call at the time he saw the automobile speeding toward him. He asserted at the trial level that he was unable to escape from the booth because the door jammed due to respondent's negligent maintenance. It
was also contended that had the booth been properly maintained, the petitioner would have escaped without injury. Petitioner presented evidence that showed the booth was in a hazardous location and did not have adequate “bumper posts” to help guard against injury. He asserted that the booth had been hit previously, but no subsequent precautions were taken to protect against future accidents. According to respondent’s policy manual, telephone booth doors, to be in proper working order, should “open with a slight pull on the handle. . . .” The trial court granted a summary judgment motion in respondent’s favor.

Writing for the majority, Chief Justice Bird reversed and remanded to the trial court. The trial court had held that the drunken driver veering off the street was unforeseeable as a matter of law. The *Bigbee* court held, however, that “[o]rdinarily, foreseeability is a question of fact for the jury. It may be decided as a question of law only if, ‘under the undisputed facts there is no room for a reasonable difference of opinion.’” The court went on to say that if there is any triable issue of fact it is error for a trial court to grant summary judgment.

On appeal, numerous new facts were presented. Therefore, the court believed that the “threshold question as to whether the facts assumed to be true by the court in *Bigbee I* . . . and the facts presented in [the present] case were sufficiently different to permit [the supreme] court to redecide the question as to whether foreseeability [was] a triable issue.” The issue was properly stated by Chief Justice Bird: “Is there room for a reasonable difference of opinion as to whether the risk that a car might crash into the phone booth and injure an individual inside was reasonably foreseeable under the circumstances [of this case]?”

The court held that when there are as many facts in dispute regarding foreseeability as there were in the instant case, it is error for the trial court to grant a summary judgment motion, even if the judge believes the party seeking the motion will ultimately prevail on the facts.

B. *Complaint charging advertiser with unfair competition and deceptive advertising need not set forth the specific language of each deceptive statement, but an allegation of fraud requires a representative selection of advertisements:* Committee on Children’s Television, Inc. v. General Foods Corporation.

In *Committee on Children’s Television, Inc. v. General Foods*
Corporation, 35 Cal. 3d 197, 673 P.2d 660, 197 Cal. Rptr. 783 (1983), the supreme court focused on some of the pleading problems that arise in an action alleging fraud and a violation of consumer protection statutes by a national advertiser who conducts an extensive television advertising campaign. In this case, the fourth amended complaint filed by consumer groups and individuals against a manufacturer of sugared breakfast cereals was dismissed without leave to amend by the trial court for failing to specifically state which of defendant's advertisements contained misrepresentations.

The court concluded that the complaint stated a cause of action for injunctive relief and restitution under the unfair competition law and the false advertising law. The court said that it was unnecessary for the plaintiff to plead the exact language of every deceptive statement; a description of a scheme to mislead and an allegation that each misrepresentation to each consumer conforms to that scheme was sufficient. This is especially true when, as here, defendants are in the best position to know what was in each advertisement and when each commercial appeared on television. In connection with this cause of action the court also held that organizational plaintiffs may sue under unfair competition laws and false advertising laws. The court declined to decide whether a plaintiff other than a business competitor can collect damages on a cause of action for unfair competition and false advertising.

The court agreed with the trial judge that the complaint lacked the specificity required to allege fraud, but unlike the trial judge, the court granted plaintiffs leave to amend their complaint. In the court's view, the addition of a representative selection of advertisements in the form of television commercial storyboards, along with an indication of the fraudulent statements contained in those advertisements, would satisfy the specificity requirement. The court also held that alleging reliance on the advertising campaign, without specifying the specific commercial, was sufficient. It was also sufficient that defendant was alleged to have made misrepresentations to children with the hopes that the children would influence their parents to buy the cereal, and that defendant was successful in his plan.

Finally, the court upheld the dismissal without leave to amend the cause of action for breach of fiduciary duty and a claim for damages by the consumer organizations. The court stated that
the seller-buyer relationship does not create a fiduciary duty, and that the organizational plaintiffs could show no damages to themselves as organizations.

C. Court defines excusable neglect for failure to file a claim for injury against a public entity within the statutory period: Ebersol v. Cowan.

In Ebersol v. Cowan, the California Supreme Court took the opportunity to define the parameters of Government Code section 946.6, which authorizes judicial relief from the claim filing requirements of Government Code sections 945.4 and 911.2. Section 945.4 sets out the statutory requirements for filing a claim against a public entity. Government Code section 911.2 requires that the claim against a public entity relating to a cause of action for personal injury be presented to that entity not later than the 100th day after the accrual of the cause of action.

When a claim has not been timely, section 911.4 permits written application to the public entity to file a late claim. If the public entity denies or fails to act on this request within forty-five days a petition may be presented to the court.

The issue for the court to determine when presented with such a petition is whether the failure to make a timely claim was through mistake, inadvertance, surprise, or excusable neglect. If this finding is made, the court must then decide whether the public entity would be prejudiced by the granting of the petition.

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1. 35 Cal. 3d 427, 673 P.2d 271, 197 Cal. Rptr. 602 (1983). The majority opinion was prepared by Justice Reynoso with Justices Mosk, Richardson, Broussard, and Grodin concurring. Chief Justice Bird prepared a separate concurring opinion.
2. CAL. GOV'T CODE § 946.6 (West 1980).
3. CAL. GOV'T CODE § 945.4 (West 1980) provides:

   Except as provided in Sections 946.4 and 946.6, no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented in accordance with Chapter 1 (commencing with Section 900) and Chapter 2 (commencing with Section 910) of Part 3 of this division until a written claim therefor has been presented to the public entity and has been acted upon by the board, or has been deemed to have been rejected by the board, in accordance with Chapters 1 and 2 of Part 3 of this division.
4. CAL. GOV'T CODE § 911.2 (West 1980) mandates that:

   A claim relating to a cause of action for death or for injury to person or to personal property or growing crops shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than the 100th day after the accrual of the cause of action. A claim relating to any other cause of action shall be presented as provided in Article 2 (commencing with Section 915) of this chapter not later than one year after the accrual of the cause of action.
5. Id.
7. See CAL. GOV'T CODE § 911.6 (West 1980).
8. See CAL. GOV'T CODE § 946.6(c)(1) (West 1980).
In this case, the petitioner was a school bus driver for a private company. While transporting some children to a county-operated work training program for retarded children, one of the children bit her on the hand. Petitioner went to the hospital for treatment. On the same day she spoke with an attorney who informed her that she did not have a case. Subsequently, petitioner was admitted to the hospital three times for treatment. She contacted eight other attorneys within a three month period requesting assistance. None expressed an interest in her case. Finally, after the hundred-day limitation for filing a claim, an attorney responded and attempted to take action pursuant to Government Code section 911.4 and 946.6. The court rejected the late claim, and upon petition the trial court failed to find a sufficient showing of mistake, inadvertance, surprise, or excusable neglect.

The supreme court reversed, finding an abuse of discretion on the part of the trial court. The court found that section 946.6 should be looked upon as a remedial statute intended to provide relief from technical rules which otherwise provide a trap for the unwary claimant. Consequently, as a result of the petitioner's continued and diligent efforts to seek legal assistance, relief should have been granted on the basis of excusable neglect.

Since the elements of this case would preclude the average per-
son from knowing whether they had a claim or not, the most prudent course was the one petitioner sought, which was to seek legal counsel.\footnote{14}

D. \textit{The remedy of preliminary injunction will issue for violation of a statute or ordinance unless the defendant demonstrates irreparable harm: IT Corporation v. County of Imperial.}

In \textit{IT Corporation v. County of Imperial}, 35 Cal. 3d 63, 672 P.2d 121, 196 Cal. Rptr. 715 (1983), the court ruled upon the proper standard to be used when a government entity seeks to enjoin an alleged violation of a statute or ordinance which specifically provides for injunctive relief. The court first noted that it is well-settled law that a preliminary injunction rests within the discretion of the trial court. A defendant can prove abuse of discretion if it is shown that the trial court has acted unreasonably or made a judgment contrary to uncontradicted evidence. The trial court must analyze two factors for a preliminary injunction: (1) the likelihood that the plaintiff will prevail on the merits; and (2) the interim harm the plaintiff is likely to sustain if the injunction is denied, compared to the harm the defendant is likely to suffer if the injunction is issued. In \textit{IT Corporation}, the court addressed the question as to whether this traditional test for a preliminary injunction was applicable to a government entity seeking to enjoin the violation of a statute which provides that the remedy will be an injunction. In other words, if preliminary injunctive relief is provided by statute, has the legislature ipso facto determined that a significant public harm will result and that injunctive relief is the most appropriate way to protect against the harm?

The court concluded that if the remedy of injunction is provided in a statute or ordinance, only a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant. The burden, then, is on the defendant to show that it would suffer grave or irreparable harm from the issuance of the preliminary injunction. The court must then balance the actual harms to the parties. The ultimate goal in determining whether a preliminary injunction should issue is to minimize that harm.

\footnote{had been found it was relatively minor. \textit{Id.} at 436 n.9, 673 P.2d at 276 n.9, 197 Cal. Rptr. at 606 n.9.}  
\footnote{14. \textit{Id.} at 439, 673 P.2d at 279, 197 Cal. Rptr. at 609.}

In Laguna Village, Inc. v. Laborers International Union of North America, the court addressed the issue of whether "a motion to dismiss, timely filed in federal court following removal of the case from state court, and prior to remand, constitutes a responsive pleading to the state complaint." Laguna Village was developing property and "no trespass" signs were posted. Laborers International Union came onto the property, despite plaintiff's protests, attempting to organize the non-union construction workers. Plaintiff filed suit in superior court for trespass, seeking injunctive relief and damages.

Under the provisions of the Labor Management Relations Act, the defendant attempted to remove the case to federal court and at the same time defendant sought to dismiss the matter under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The
plaintiff filed a brief opposing dismissal and moved that the case be remanded back to state court. The federal court determined that there were no federal issues and on July 28th remanded the case to state court, declining to consider the motion to dismiss.

Defendant requested an extension in order to prepare a response to the complaint until August 31st. Plaintiff agreed. No response was filed, on September 10th plaintiff was granted a default and the matter was calendared for a hearing on damages. Defendant did not appear at that hearing. As a result, actual and punitive damages were awarded the plaintiff in the amount of $11,045.41 and defendant was permanently enjoined from entering plaintiff's property for the purpose of union organizing. Five weeks later defendant sought relief from the default judgment under the Code of Civil Procedure section 473. Counsel for de-

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Every defense, in law or fact, to a claim for relief in any pleading shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . (6) failure to state a claim upon which relief can be granted . . . . The defendant also relied upon San Diego Unions v. Garmon, 359 U.S. 236 (1958), which the defendant maintained held that neither the state nor the federal courts have jurisdiction over litigation of the type before the court and therefore the “complaint 'fail[ed] to state a claim upon which relief can be granted.'” Laguna Village, 35 Cal. 3d at 177, 672 P.2d at 863, 197 Cal. Rptr. at 100.

5. The default was entered for failure to comply with CAL. CIV. PROC. CODE § 412.20 (West Supp. 1984). See supra note 2.

6. Defendant’s counsel later claimed that he failed to attend this hearing because he felt that he had filed a responsive pleading and thus was in compliance with CAL. CIV. PROC. CODE § 585(b) (West Supp. 1984) which states:

(b) OTHER ACTIONS; PERSONAL SERVICE; HEARING. In other actions, if the defendant has been served, other than by publication, and no answer, demurrer, notice of motion to strike (of the character hereinafter specified), notice of motion to transfer pursuant to Section 396b, notice of motion to quash service of summons or to stay or dismiss the action pursuant to Section 418.10 or notice of the filing of a petition for writ of mandate as provided in Section 418.10 has been filed with the clerk or judge of the court within the time specified in the summons, or such further time as may be allowed, the clerk, or the judge if there is no clerk, upon written application of the plaintiff, shall enter the default of the defendant. The plaintiff thereafter may apply to the court for the relief demanded in the complaint; the court shall hear the evidence offered by the plaintiff, and shall render judgment in his or her favor for such sum (not exceeding the amount stated in the complaint), as appears by such evidence to be just. If the taking of an account, or the proof of any fact, is necessary to enable the court to give judgment or to carry the judgment into effect, the court may take the account or hear the proof, or may, in its discretion, order a reference for that purpose. If the action is for the recovery of damages, in whole or in part, the court may order the damages to be assessed by a jury, or if, to determine the amount of damages, the examination of a long account is involved by a reference as above provided.

7. CAL. CIV. PROC. CODE § 473 (West Supp. 1984) states in pertinent part:

ALLOWABLE AMENDMENTS. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect,
The defendant also argued that the motion to dismiss that was filed in federal court prior to remand constituted a responsive pleading for purposes of default.

Under the Code of Civil Procedure sections 412.20(a)(3) and 412.20(a)(4), the defendant must file a written response to the pleadings within 30 days. Further, the Code of Civil Procedure section 585(b) states that a default shall be entered unless defendant has filed one of the enumerated responses. A motion to dismiss, filed in federal court, is not one of the enumerated responses.
In considering defendant's argument, that a dismissal is a responsive pleading when filed in federal court and remanded to state court, the court noted that this was a case of first impression in California. No California authority could be found to determine the effect to be given pleadings filed in federal court in a case subsequently remanded to state court.

The court was most persuaded by a modern line of "out of state" cases that tended to give effect to pleadings filed in federal court before remand. Especially influential was the case of Teamsters Local 515 v. Roadbuilders, Inc., heard by the Georgia Supreme Court which was procedurally similar. The Georgia court held that:

> the time has passed when technical rules were applied to those who sought unsuccessfully to remove cases to the federal courts. We therefore hold that a timely answer filed in district court following timely removal of the action is sufficient to prevent a default in a state court if the case is subsequently remanded from district court.

Overall, the court was able to establish three major policy reasons to give effect to federal motions or pleadings in state court: (1) the courts are concerned with judicial economy; (2) giving effect to the federal motion is not unfair to the plaintiff because he is fully aware of the proceedings in district court; and (3) by giving effect to the federal motion or pleading, courts can avoid the forfeiture of claims and resolve litigation on the merits.

The court applied the second and third policy considerations along with the policy that section 473 should be liberally con-


11. 249 Ga. 418, 291 S.E.2d 698 (1982). In this case, the defendants also caused the case to be removed from superior court to United States district court. The defendant filed a timely answer to plaintiff’s amended complaint which had been filed in superior court. Subsequently, the case was remanded back to superior court. Ultimately, the superior court held that a timely answer filed in federal district court following timely removal of the action is sufficient to prevent default. Id. at 421, 291 S.E.2d at 701.

12. Id.

13. Judicial economy was the motive for the court’s decision in Edward Hansen, Inc. v. Kearny Post Office Ass’n, 166 N.J. Super. 161, 399 A.2d 319 (1982). The court in Laguna Village found no support for defendant’s position in this policy consideration. Defendant could have also complied with the state court filing requirements at little added time and expense. 35 Cal. 3d at 181, 672 P.2d at 886, 197 Cal. Rptr. at 103.


15. This point was also gleaned from Teamsters Local 515. Id.
strued in favor of a determination on the merits. The conclusion was to give effect to defendant's motion for dismissal. Further, the court found that a motion for dismissal is not unlike a demurrer in that it admits all allegations of fact which are material and relevant. This finding only added support to the court's conclusion that "the motion to dismiss filed in federal court is sufficiently similar to a demurrer to constitute a responsive pleading for the purpose of avoiding entry of default."  

F. The five year limitation of Civil Procedure Code section 583 is tolled from the date an arbitration award is filed with the court to the date set for a trial de novo; court's failure to set a new trial date also exempts plaintiff from section 583 where plaintiff has acted with reasonable diligence: Moran v. Superior Court.

In Moran v. Superior Court, 35 Cal. 3d 229, 673 P.2d 216, 197 Cal. Rptr. 546 (1983), the issue before the court was whether the trial court had properly denied defendant's motion to dismiss for failure to commence trial within five years. Plaintiff's suit for medical malpractice had progressed to the point of trial when the trial court ordered the case to arbitration, thus tolling the five year limit of Civil Procedure Code section 583. After arbitration and recommencement of the five year limit, defendants requested a trial de novo. Plaintiff then contacted the trial court and was informed that a trial date would be set within the time limit, however, the trial court did not set the case for trial and the time limit expired. The trial judge rejected defendant's motion to dismiss under section 583, but the court of appeal reversed and ordered dismissal.

The supreme court determined that the trial court had acted correctly in refusing to dismiss the case. First, plaintiff had ac-
tively pursued the case with reasonable diligence and, but for the actions of the trial court, would have met the five year limit. Thus, the trial court's actions made it impossible for plaintiff to comply with section 583; and impossibility is an implied exception to the rule. Second, the trial court had a duty to calendar the case in the same priority as it had held prior to arbitration to insure the earliest possible trial date. Until the trial court fulfills its duty and sets a new date for trial, the time limit of section 583 is to be tolled. Therefore, plaintiff did not fail to commence the action within five years because the delay caused by the trial court is not part of the five year period.

G. A trial judge is not required to satisfy rule 203.5 of the California Rules of Court before exercising discretionary dismissal under section 583(a) of the California Civil Procedure Code: Wilson v. Sunshine Meat and Liquor Company.

I. INTRODUCTION

In Wilson v. Sunshine Meat and Liquor Company,1 the court considered whether a trial judge had exceeded his power to dismiss a case and whether he ignored certain requirements in doing so.2 The necessity for review arose when a trial court dismissed a plaintiff's personal injury action under section 583(a) of the California Civil Procedure Code for failure to bring the case to trial within two years after filing the complaint.3 The action was filed in June 1976, but it remained dormant for nearly five years, except for some discovery by the defendant.4 In May of 1981, the plaintiff moved to specially set the case for trial.5 The defendant vigor-

2. Id. at 558, 669 P.2d at 11-12, 194 Cal. Rptr. at 775-76.
3. Id. at 557, 669 P.2d at 11, 194 Cal. Rptr. at 775. When the dismissal was rendered, section 583(a) provided: “The court, in its discretion, may dismiss an action for want of prosecution pursuant to this subdivision if it is not brought to trial within two years after it was filed. The procedure for obtaining such dismissal shall be in accordance with rules adopted by the Judicial Council.” CAL. CIV. PROC. CODE § 583(a) (West 1976). The section's language was amended in 1982 so that it now states that dismissal may be granted on a motion by either a party or the court. See CAL. CIV. PROC. CODE § 583(a) (West Supp. 1984).
4. 34 Cal. 3d at 557, 669 P.2d at 11, 194 Cal. Rptr. at 775. The plaintiff's injury occurred when he was allegedly struck by defendant's employee, resulting in loss of sight in one eye. After filing his complaint, the plaintiff did nothing to pursue his claim for four years and ten-plus months. He never conducted discovery. However, the defendant did issue a few interrogatories and take some depositions. Id.
5. Id.
ously opposed the motion, complaining that the plaintiff had neglected to pursue the matter with any diligence and that an instant trial would result in prejudice. Subsequently, the trial court dismissed the case by declaring that the plaintiff showed no reason for delay nor any diligence. The plaintiff appealed and contended that the trial judge had abused his discretion by failing to follow subdivisions (a) and (e) of rule 203.5 of the California Rules of Court. The justices disagreed and held that neither subdivision applied, and that the trial judge had acted properly.

II. MAJORITY OPINION

The majority began by reiterating an already established rule of procedure. When a trial judge feels compelled to dismiss a case for lack of prosecution, even though five years have not elapsed since its filing, the judge "should do so and accept review on that basis." The issues of diligence in pursuing an action and of dismissal under section 583(a) are subject to inquiry with every motion to specially set a case for trial when the motion is made to avoid the impact of the close of the five year statutory period. The court concluded that the trial judge did indeed have the power to dismiss under section 583(a) and had followed correct

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6. Id. at 557-58, 669 P.2d at 11, 194 Cal. Rptr. at 775. The defendant noted that its discovery was no longer up-to-date and that it was difficult to prepare for trial on short notice. It would be impossible to arrange an independent medical examination of the plaintiff's injuries.
7. Id. at 558, 669 P.2d at 11, 194 Cal. Rptr. at 775.
8. Id. at 558-59, 669 P.2d at 11-12, 194 Cal. Rptr. at 775-76.
9. Id. at 558-59, 669 P.2d at 12, 194 Cal. Rptr. at 776.
10. Id. at 557, 669 P.2d at 10-11, 194 Cal. Rptr. at 774-75 (quoting Weeks v. Roberts, 68 Cal. 2d 802, 807-08, 442 P.2d 361, 364, 69 Cal. Rptr. 305, 308 (1968)). The trial court "should not exercise its discretion to dismiss on the basis of inconvenience to the court and in the guise of a refusal to specially set." Id.
11. Id. at 559, 669 P.2d at 12, 194 Cal. Rptr. at 776.
12. Id. at 560-61, 669 P.2d at 13, 194 Cal. Rptr. at 777. See Beswick v. Palo Verde Hosp. Ass'n, 188 Cal. App. 2d 254, 260, 10 Cal. Rptr. 314, 318 (1961) ("The action of the court on such a motion is tantamount to action upon a motion to dismiss for failure to prosecute within the two-year period prescribed by section 583 of the Code of Civil Procedure, . . . and its decision will be disturbed only in cases of manifest abuse.").
13. The reader should be reminded that four years and ten months had elapsed on plaintiff's cause of action before he moved to specially set for trial. See CAL. CIV. PROC. CODE § 583(b) (West Supp. 1984) ("Any action . . . shall be dismissed by the court . . . unless such action is brought to trial within five years after the plaintiff has filed his action. . . .")
14. 34 Cal. 3d at 559, 669 P.2d at 12, 194 Cal. Rptr. at 776. See supra note 3, where the text of § 583(a) is provided. The court also asserted that a "trial court's
procedure.\textsuperscript{15}

Rule 203.5(a) of the California Rules of Court mandates notice to the opposing party of a motion for dismissal pursuant to section 583(a).\textsuperscript{16} The plaintiff urged that the trial court had not provided such notice prior to its order of dismissal.\textsuperscript{17} However, the majority found that the subdivision "by its terms" only applied to parties seeking dismissal and not to the trial court.\textsuperscript{18} The court stated that when a court initiates a motion to dismiss on its own, notice is commanded by due process, but where a "lack of diligence" issue is "triggered by a plaintiff-initiated motion to specially set" then no such condition is required.\textsuperscript{19} The court thus found the plaintiff's first contention to be without merit.

The plaintiff's second claim on appeal was that the trial judge "failed to refer explicitly" to the numerous factors for consideration in rendering a dismissal decision contained in rule 203.5(e).\textsuperscript{20}


\textsuperscript{16} Id. at 557, 669 P.2d at 11, 194 Cal. Rptr. at 775. The trial court indicated its awareness of its obligations under the Weeks decision by stating:

[I]t would be the court's opinion that the motion to specially set should be denied, and bearing in mind the admonition of the Supreme Court that you should not hide behind that, I guess, when you're going to exercise your discretion, so that you'll have something to appeal from, counsel, the court at this time is going to order that the matter be dismissed on its own motion under 583(a) of the Civil Code of Procedure.

\textsuperscript{17} Id. at 558, 669 P.2d at 11, 194 Cal. Rptr. at 775 (emphasis in original).

\textsuperscript{18} Id. at 559, 669 P.2d at 12, 194 Cal. Rptr. at 776. See CAL. R. CT. 203.5(a) (West 1984) (repealed 1984, current version at CAL. R. CT. 373(a) (West 1984)), which reads:

A party seeking dismissal of a case pursuant to subdivision (a) of section 583 of the Code of Civil Procedure shall serve and file a notice of motion at least 45 days before the date set for hearing of the motion, and the party may, with the memorandum of points and authorities, serve and file an affidavit or declaration stating facts in support of the motion. The filing of the notice of motion shall not preclude the opposing party from further prosecution of the case to bring it to trial.

\textsuperscript{19} Id. at 419, 556 P.2d at 771, 134 Cal. Rptr. at 409. But cf. Tate v. Superior Court, 45 Cal. App. 3d 925, 119 Cal. Rptr. 835 (1975); Andre v. General Dynamics, Inc., 43 Cal. App. 3d 839, 118 Cal. Rptr. 95 (1974) (the court indicated that the requirements of 203.5(a) might apply to a trial court's own motion to dismiss).

\textsuperscript{20} Id. at 561 n.7, 669 P.2d at 13 n.7, 194 Cal. Rptr. at 777 n.7. See Farrar v. McCormick, 25 Cal. App. 3d 701, 102 Cal. Rptr. 190 (1972) (the court held that the notice provision of 203.5(a) did not apply to a defendant's motion to dismiss that followed a motion to specially set).

CAL. R. CT. 373(a) (West 1984) (emphasis added).

\textsuperscript{17} Id. at 560, 669 P.2d at 12, 194 Cal. Rptr. at 776. See Sanborn v. Chronicle Publishing Co., 18 Cal. 3d 406, 556 P.2d 764, 134 Cal. Rptr. 402 (1976), where a similar dismissal was upheld and 203.5(a) was never mentioned. However, the trial judge did consider the factors provided in 203.5(e). Id. at 419, 556 P.2d at 771, 134 Cal. Rptr. at 409. But cf. Tate v. Superior Court, 45 Cal. App. 3d 925, 119 Cal. Rptr. 835 (1975); Andre v. General Dynamics, Inc., 43 Cal. App. 3d 839, 118 Cal. Rptr. 95 (1974) (the court indicated that the requirements of 203.5(a) might apply to a trial court's own motion to dismiss).

\textsuperscript{18} Id. at 561 n.7, 669 P.2d at 13 n.7, 194 Cal. Rptr. at 777 n.7. See Farrar v. McCormick, 25 Cal. App. 3d 701, 102 Cal. Rptr. 190 (1972) (the court held that the notice provision of 203.5(a) did not apply to a defendant's motion to dismiss that followed a motion to specially set).

\textsuperscript{19} Id. at 558, 669 P.2d at 12, 194 Cal. Rptr. at 776. See CAL. R. CT.
The majority found this to be irrelevant. The subdivision does not require the court to provide an oral or written basis for its decision nor is it provided that the court must state that it considered all the factors. The trial court's announced reasons for dismissing the case were sufficient.

The majority concluded by stating that the judgment of a lower court is "presumed correct." A decision will only be disturbed in cases of clear abuse. The trial court must consider both fairness to the plaintiff and fairness to the defendant. The dismissal statute seeks to prevent unreasonable delays in litigation and where long delay is evident, its enforcement will only be excused by "some showing of excusable delay." The plaintiff failed to provide any tenable reason for neglecting the action for four years and ten months.

III. DISSENTING OPINION

Justice Reynoso dissented, with Chief Justice Bird concurring, because he thought dismissal of the action without prior notice vi-
olated the plaintiff's procedural due process rights. He stated that notice is fundamental to due process and that "[f]orfeiture of one's day in court, without notice, effectively denies an individual's due process right of access to the courts." The justice also asserted that the notice provisions of rule 203.5(a) might apply to a section 583(a) dismissal because the section states that the trial court must act "in accordance with rules adopted by the Judicial Council."

IV. Conclusion

The Wilson decision provides a warning that trial judges have fairly broad and conclusive powers with regard to dismissals for unreasonable and inexcusable delay. The trial court can initiate a motion to dismiss on its own and, in certain situations, order dismissal without express notice. The lesson to be learned is that trial attorneys should pursue their client's claims with diligence and keep their cases current. Failure to do so may yield little sympathy from the court.

VII. Community Property

Alleged misrepresentations as to the value of community property in a settlement agreement, brought out after dissolution, may be barred by res judicata and the statute of limitations: Miller v. Bechtel Corporation.

In Miller v. Bechtel Corporation, the plaintiff, Florrie Miller, the former wife of H. Eric Miller, brought an action seeking damages and an order setting aside a property settlement agreement and the decree of dissolution. The plaintiff sought such relief on the ground that her former husband and the Bechtel Corporation misrepresented the value of certain stock owned as community property.

Miller had been employed by the Bechtel Corporation, and had

24. 34 Cal. 3d at 563, 669 P.2d at 15, 194 Cal. Rptr. at 779 (Reynoso, J., dissenting).
25. Id. See generally Lambert v. California, 355 U.S. 225 (1957); Payne v. Superior Court, 17 Cal. 3d 908, 553 P.2d 565, 132 Cal. Rptr. 405 (1976). Justice Reynoso also thought that the remedy of appeal from a discretionary dismissal was "illusory" because the trial court's decision will not be overturned unless there is manifest abuse. 34 Cal. 3d at 563, 669 P.2d at 15, 194 Cal. Rptr. at 779 (Reynoso, J., dissenting). See Denham, 2 Cal. 3d at 564, 468 P.2d at 197-98, 86 Cal. Rptr. at 69-70.
26. 34 Cal. 3d at 564, 669 P.2d at 15, 194 Cal. Rptr. at 779 (Reynoso, J., dissenting). See supra note 3 for the text of § 583(a).
2. Id. at 870-71, 663 P.2d at 178, 191 Cal. Rptr. at 620.
purchased stock valued at the time at $294,000 with community funds.\(^3\) The stock was purchased pursuant to a stockholders' agreement, and gave Bechtel the right of first refusal if Miller desired to sell or transfer the stock.\(^4\) At the time Miller and the plaintiff entered into a property settlement agreement under dissolution proceedings, the plaintiff agreed to release her community interest in the stock for $147,000 in cash.\(^5\) The parties were aware of Bechtel's right to purchase the stock at face value pursuant to the stockholders' agreement.

The marital property settlement was entered into in 1971, but in 1978, the plaintiff brought her action alleging that Miller and Bechtel had misrepresented the true value of the stock. She asserted that the market value of the stock was over $1,000,000 in 1971, and that Miller had sold the shares for over $2,000,000 in 1977.\(^6\)

The defendants denied the misrepresentation in their answer, and alleged that plaintiff's cause of action was barred by the statute of limitations\(^7\) and the doctrine of res judicata. Defendants moved for summary judgment, and presented affidavits in support. The affidavits showed that Miller's attorney, Haerle, represented to Hamlin, plaintiff's attorney, at the time the property settlement agreement was being discussed, that the stock had a value of $294,000 "according to the stockholders' agreement."\(^8\) Also, an officer of the Bechtel Corporation told Hamlin that if Miller attempted to transfer the stock to Mrs. Miller, Bechtel would exercise its option to purchase the shares.\(^9\)

Before the judgment of dissolution was final, plaintiff asked a stockbroker to examine the stockholders' agreement, and also asked another attorney to look at the agreement. Shortly after

\(^3\) Id. at 871, 663 P.2d at 179, 191 Cal. Rptr. at 621.
\(^4\) Id.
\(^5\) Id.
\(^6\) Id. at 871-72, 663 P.2d at 179, 191 Cal. Rptr. at 621. Plaintiff brought her action on grounds of intentional and negligent misrepresentation. It was alleged that Bechtel was negligent in assessing the value of the shares in that Bechtel had no reasonable basis for assigning a value of $294,000, and that Bechtel knew that the value was greater than the represented amount. Plaintiff prayed for compensatory and punitive damages.
\(^7\) CAL. CODE CIV. PROC. § 337(3) (West 1982) provides a four-year period of limitations for actions for rescission based on a written agreement, and CAL. CODE CIV. PROC. § 338(4) (West 1982) establishes a three-year period for tort actions in fraud or mistake. Both begin to run when the aggrieved party discovers facts constituting the fraud or mistake.
\(^8\) 33 Cal. 3d at 872, 663 P.2d at 179, 191 Cal. Rptr. at 621.
\(^9\) Id.
this, Hamlin withdrew from the case without further investigating the actual market value of the stock.10 Plaintiff's new attorney also failed to follow through on requests to ascertain the market value of the stock. Both had "suspicions" about the method of valuation of the shares used by Bechtel.

The trial court granted defendants' motion for summary judgment except as to Hamlin and his law firm.11 The judge gave the following reasons for his decision: (1) Miller and Bechtel had accurately represented the value of the shares as $294,000 "pursuant to the stockholders' agreement;"12 (2) the final judgment of dissolubion approving the property settlement agreement was res judicata for the purpose of ascertaining the value of the stock;13 (3) plaintiff's cause of action was barred by the statute of limitations.14 Plaintiff's cause of action was barred because she had "constructive knowledge," through her attorney, "or presumed knowledge sufficient to put her on inquiry" at the time the property settlement agreement was entered into, and shortly thereafter.15

The supreme court affirmed the trial court's decision, and noted that plaintiff had failed to make inquiries "as to the method by which the value of the stock was determined before she signed the marital settlement agreement and that, although she made inquiry thereafter, she failed to pursue the matter."16 The court also held that plaintiff's attorneys, as her representatives, entertained doubts about the method of valuation of the stock but failed to pursue these questions. In the words of Justice Mosk, who wrote the majority opinion: "Since plaintiff's representatives chose not to pursue their inquiry further despite their suspicions, she is charged with knowledge of facts which would have been revealed if she had pursued the investigation."17

Plaintiff contended that she had no duty to inquire because, as a fiduciary, her former husband himself had an obligation to make a full and complete disclosure of the "true value" of the stock.18 The court answered that, even if this were so, when the plaintiff

10. Id. at 872-73, 663 P.2d at 180, 191 Cal. Rptr. at 622.  
11. Id. at 873, 663 P.2d at 180, 191 Cal. Rptr. at 622.  
12. Id.  
13. Id.  
14. Id.  
15. Id.  
16. Id. at 874, 663 P.2d at 181, 191 Cal. Rptr. at 623.  
17. Id. at 875, 663 P.2d at 181, 191 Cal. Rptr. at 623. Plaintiff argued that further inquiry "would have been" fruitless because Bechtel was a "closed corporation" which "jealously guarded" its financial records. Id. at 873, 663 P.2d at 180, 191 Cal. Rptr. at 622. The supreme court rejected this argument. Id. at 874, 663 P.2d at 181, 191 Cal. Rptr. at 623.  
18. Id. at 874-75, 663 P.2d at 181, 191 Cal. Rptr. at 623.
became "aware of facts which would make a reasonably prudent person suspicious, she had a duty to investigate further, and she was charged with knowledge of matters which would have been revealed by such an investigation." 19 Because she could have obtained knowledge of facts constituting fraud or mistake shortly after the judgment of dissolution became final, the statute of limitations began to run from that time, and thus, plaintiff's cause of action was now barred.

In a dissenting opinion, Chief Justice Bird disagreed with the majority on the issue of the statute of limitations. According to the Chief Justice, the statute does not begin to run until the aggrieved party discovers the facts of fraud or mistake. Also, "[a] plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she 'is [under] a duty to inquire and the circumstances are such that the plaintiff is negligent in failing to inquire.'" 20 In the absence of such a duty, the limitations period does not begin to run until the plaintiff has actual knowledge of the fraud or mistake even though the means for obtaining the information are available. 21

The Chief Justice argued that here there was not duty to inquire due to the existence of a fiduciary relationship between husband and wife. This relationship imposes an obligation on each spouse to make full disclosure of all community property, 22 including any "material facts affecting their value." 23 It should then follow that the plaintiff had no duty to investigate; rather, she should be allowed to rely on her husband's obligation to fully disclose the nature and value of all community assets. 24

Challenging the majority's assertion that the attorneys' "suspicions" would be imputed to the plaintiff, thereby giving rise to plaintiff's duty to investigate, Chief Justice Bird countered that the statute of limitations begins to run only when the aggrieved

23. 33 Cal. 3d at 878, 663 P.2d at 183, 191 Cal. Rptr. at 625 (citing Boeseke v. Boeseke, 10 Cal. 3d 844, 849, 519 P.2d 161, 164, 112 Cal. Rptr. 401, 404 (1974)).
24. 33 Cal. 3d at 879, 663 P.2d at 184, 191 Cal. Rptr. at 626.
party "has knowledge of facts" sufficient to put him on inquiry regarding mistake or fraud. In the Chief Justice's view, "suspicions" did not rise to the level of "knowledge of facts."26

In conclusion, Chief Justice Bird argued that, at any rate, the motion for summary judgment should have been denied: "Summary judgment may not be granted where contradictory inferences may be drawn from the supporting declarations or affidavits."27 Circumstances sufficient to put a party on notice should be triable issues of fact. Thus, according to the Chief Justice, the case should have gone to trial.28

VIII. CONSERVATORSHIP

Evidence of availability of third party assistance to meet a person's basic needs is admissible in a proceeding to decide if the individual is gravely disabled: Conservatorship of Early.

In Conservatorship of Early, 35 Cal. 3d 244, 673 P.2d 209, 197 Cal. Rptr. 539 (1983), the supreme court adopted the opinion of a court of appeal which held that, in deciding whether a person is "gravely disabled" for purposes of a conservatorship proceedings, evidence that third parties will help provide the proposed conservatee's basic needs for food, clothing and shelter should be admitted and the jury should be instructed to consider such evidence.

The court held that the state has no interest in imposing a conservatorship and involuntarily confining an individual when the person's needs will be met without the state's action. A conservatorship should be imposed only when it is truly necessary, and that decision cannot be made without considering available alternatives such as assistance from third parties. Thus, it was error in this case to exclude evidence that petitioner had family who would care for him, and to instruct the jury that the petitioner was gravely disabled if he could not meet his basic needs by himself.

As an additional part of the decision the court also held that the offices of public guardian and district attorney were not inherently incompatible and therefore the same individual may serve in both capacities.

25. Id. at 879-80, 663 P.2d at 185, 191 Cal. Rptr. at 627 (citing Hobart, 26 Cal. 2d at 437, 159 P.2d at 972).

26. 33 Cal. 3d at 879-80, 663 P.2d at 185, 191 Cal. Rptr. at 627.

27. Id. at 881, 663 P.2d at 186, 191 Cal. Rptr. at 628.

28. Id. at 882-83, 663 P.2d at 186-87, 191 Cal. Rptr. at 628-29.
IX. CONSTITUTIONAL LAW

A. Vehicle Code section 23152(b), making it a crime to drive with a blood-alcohol level of .10 percent or greater, held constitutional: Burg v. Municipal Court.

In Burg v. Municipal Court, 35 Cal. 3d 257, 673 P.2d 732, 197 Cal. Rptr. 145 (1983), the supreme court declared California's recently adopted drunk driving law, Vehicle Code section 23152(b), to be constitutional. The statute makes it a crime for anyone with a blood-alcohol level of .10 percent or greater to drive a motor vehicle. The defendant in this case challenged the law as failing to give adequate notice of the proscribed conduct because a person cannot determine by means of his senses when his blood-alcohol level has reached .10 percent.

Finding the .10 percent figure to be rationally related to the state's exercise of its legitimate police powers, the court went on to conclude that the statute described the violation with a reasonable degree of certainty—all that is required by the Constitution. Noting that the .10 percent figure has been used in drunk driving laws for a number of years, and that charts are readily available to the public to aid in determining when a person is approaching the .10 percent level, the court determined that a person of ordinary intelligence has fair notice that if he consumes a quantity of alcohol he is in jeopardy of violating the statute. This factor alone, the court held, sufficed to give adequate notice and thus the statute was constitutional.

B. People's initiative for a reapportionment plan found in violation of California Constitution which allows only one redistricting every ten years: Legislature of the State of California v. Deukmejian.

I. INTRODUCTION

On September 15, 1983, the California Supreme Court told the people of California that an initiative which they sought to have placed on the ballot for special election was unconstitutional. In Legislature of the State of California v. Deukmejian, the court had been asked to issue a writ of mandamus to prohibit an elec-

1. 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983). The majority opinion was offered by the court. A separate dissenting opinion was by Justice Richardson.
tion at which time the people would vote as to whether to read-
just state legislative and congressional district boundaries.

The petitioners asserted several arguments. The principal
claim was that the initiative was violative of article XXI of the
California Constitution, which sets out that redistricting will oc-
cur at the time of the decennial census. They also opposed the
initiative on the basis that it would violate article I, section 2 of
the United States Constitution and the Permanent Reapportion-
ment Act. The other arguments included that the districts the ini-
tiative sought to create violated the equal representation
standard, and the equal protection clauses of the state and fed-

2. CAL. CONST. art. XXI, § 1 reads:
§ 1. Decennial adjustment of boundary lines; standards
Section 1. In the year following the year in which the national census is
taken under the direction of Congress at the beginning of each decade, the
Legislature shall adjust the boundary lines of the Senatorial, Assembly,
Congressional, and Board of Equalization districts in conformance with the
following standards:
(a) Each member of the Senate, Assembly, Congress, and the Board of
Equalization shall be elected from a single-member district.
(b) The population of all districts of a particular type shall be reason-
ably equal.
(c) Every district shall be contiguous.
(d) Districts of each type shall be numbered consecutively commencing
at the northern boundary of the state and ending at the southern bound-
ary.
(e) The geographical integrity of any city, county, or city and county, or
of any geographical region shall be respected to the extent possible with-
out violating the requirements of any other subdivision of this section.

3. U.S. CONST. art. I, § 2(3) provides in pertinent part that:
Representatives... shall be apportioned among the several States which
may be included within this Union, according to their respective numbers.
... The actual enumeration shall be made within three years after the
first Meeting of the Congress of the United States, and within every subse-
quent Term of ten years in such manner as they shall by law direct.

4. 2 U.S.C. § 2a. The Act provides in subdivision a:
[O]n the first day, or within one week thereafter, of the first regular ses-
sion of the Eighty-second Congress and of each fifth Congress thereafter,
the President shall transmit to the Congress a statement showing the
whole number of persons in each State... as ascertained under... each
subsequent decennial census of the population, and the number of Repre-
sentatives to which each State would be entitled under an apportionment
of the then existing number of Representatives by the method known as the
method of equal proportions, no State to receive less than one
Member.


5. See Karcher v. Daggett, 103 S. Ct. 2653 (1983). In this case, the Supreme
Court held that a New Jersey reapportionment plan violated the United States
Constitution since the population deviations in the plan were not functionally
equal as a matter of law; the plan was not a good-faith effort to achieve population
equality; and the attempt to justify the population deviations on the ground that
they preserved the voting strength of racial minority groups was not supported by
the evidence.
eral constitutions. They also purported claims that the initiative disenfranchises certain voters, denying them due process; failed to provide for redistricting by the Legislature in 1991 as mandated by article XXI; and that the initiative was not accompanied by descriptive material and was therefore incomprehensible to the voters. By way of amici curiae, the argument was raised that the initiative violated the California constitutional provision which prohibits initiative measures from embracing more than one subject.

II. THE MAJORITY

The court began its analysis by establishing jurisdiction. The court conceded that it is usually more appropriate to review initiatives after the electoral process. However, the court determined that it should make an exception in this case. The basis for this judgment was that the pending election would cost $15 million. To substantiate this decision the court relied on Assembly of State of California v. Deukmejian, when the court had intervened prior to an election on a challenged reapportionment referendum.

The argument that was most persuasive to the court and on

7. See supra note 2.
8. CAL. CONST. art. II, § 8, cl. d states that "(d) [a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." Id.
9. In Brosnahan v. Eu, 31 Cal. 3d 1, 4, 641 P.2d 200, 201, 181 Cal. Rptr. 100, 101 (1982), the court held that "[a]s we have frequently observed, it is usually more appropriate to review constitutional and other challenges to ballot propositions or initiative measures after an election rather than to disrupt the electoral process by preventing the exercise of the people's franchise, in the absence of some clear showing of invalidity." Id.
10. 30 Cal. 3d 638, 639 P.2d 939, 180 Cal. Rptr. 297 (1982). In this case respondents sought to challenge three reapportionment statutes passed by the legislature in 1981. Members of the legislature sought to keep the referendum off the ballot, stating that they did not operate to stay the implementation of the new reapportionment statutes.

The court found that under the state constitution, filing a valid referendum stays the implementation of the statute until after the vote of the electorate. The statute only takes effect if approved by voters.

The court finally determined that the districts created by the legislature would be used in the forthcoming election. This was based on practical considerations. However, the court declined to pass judgment on the constitutionality of those new districts or to speak to the allegations of "political gerrymandering."
which its decision turned is that there can be only one reapportionment per decade. The basis for this determination was article XXI of the constitution,\textsuperscript{11} which was based on the former article IV, section 6.\textsuperscript{12} The court looked to the history of this constitutional provision to gain support for its position. The case law is sparse, but \textit{Wheeler v. Herbert}\textsuperscript{13} was on point. That court held that article IV, section 6 limited the legislature's power to redistricting only once after each decennial census. The court reconfirmed that holding in two subsequent cases of \textit{Dowell v. McLees}\textsuperscript{14} in 1926 and \textit{Yorty v. Anderson}\textsuperscript{15} in 1963. In \textit{Yorty}, the court did qualify the interpretation of the law stating that the rule would not preclude the legislature from enacting a second statute if the first one had been invalidated by judicial decision or nullified by referendum.\textsuperscript{16}

In June 1980, article XXI replaced article IV, section 6. The court pointed out that article XXI perpetuates the command of article IV, section 6 that the legislature "shall adjust the boundary lines" in the year following the federal census. The court could find no reason to conclude that there should be a different inter-

\begin{footnotesize}
\begin{enumerate}
\item See supra note 2.
\item CAL. CONST. art. 10, § 6 provided:
\begin{quote}
[t]he census taken under the direction of the Congress of the United States, in the year one thousand eight hundred and eighty, and every ten years thereafter, shall be the basis of fixing and adjusting the legislative districts; and the Legislature shall, at its first session after each census, adjust such districts and re-apportion the representation so as to preserve them as near equal in population as may be.
\end{quote}
\item 152 Cal. 224, 92 P. 353 (1907). In this case the question was presented as to whether a statute that permitted a change in the boundary between Fresno and Kings counties was valid. The statute was challenged on a number of grounds including the fact that article IV, § 6 of the California Constitution did not permit the legislature to change a legislative district. This change could only occur if the legislature's power of redistricting was exercised, which power could be used only once a decennial. The court ultimately determined that while the legislature can only redistrict at the time of the decennial census, this statute did not call for redistricting and therefore was upheld.
\item 199 Cal. 144, 147, 248 P. 511, 511 (1926). After a consolidation of San Diego and East San Diego, the court rejected a claim that the consolidation and annexation had altered the boundaries of the 79th Assembly District. The court stated:
\begin{quote}
[Based on the reasoning and conclusions in \textit{Wheeler v. Herbert},] \textit{in fixing and readjusting the boundaries of assembly districts the legislature acts pursuant to the provisions of section 6 of article IV of the constitution. Under that section, which is mandatory and prohibitory, the power to form legislative districts can be exercised but once during the period between one United States census and the succeeding one.}
\end{quote}
\item Id. at 146, 248 P. at 511.
\item 60 Cal. 2d 312, 384 P.2d 417, 33 Cal. Rptr. 97 (1963). In this case the petitioners sought a writ of mandamus to compel the Reapportionment Commission to convene and to reapportion the state senatorial districts. The court invoked the prohibition in \textit{Wheeler} and \textit{Dowell}.
\item Id. at 316-17, 38 P.2d at 420, 33 Cal. Rptr. at 100.
\end{enumerate}
\end{footnotesize}
interpretation of article XXI than article IV, section 6.17

The people argued that article XXI was applicable to the legislature but not the peoples' initiative power. The court found substantial support for its reply that 1) an initiative is subject to the same state and federal constitutional limitations as is the legislature,18 and that 2) the power of the people, in the use of statutory initiative, is coextensive with the power of the legislature.19

The court also looked for support in an attorney general's opinion written thirty years ago20 which concluded that "after a districting statute has become effective, the lawmaking power of the state may not make a second revision, whether by means of a legislative enactment or an initiative statute."21 The people retorted that the once-a-decade rule only applied when statutes have become effective and because there had been no election under the provisions of the legislature's redistricting plan it was not effective. The court found authority in article IV, section 8 of the constitution22 which states that the initiative became effective when signed by the governor.

17. See supra note 12.
20. 18 Op. Att'y Gen. 11 (1951). This opinion was written by Leonard M. Friedman, then a deputy attorney general and later a distinguished and highly respected jurist. His opinion attempted to answer four questions:

(1) Is a congressional apportionment act subject to a referendum?
(2) If the people, acting under the referendum, reject a congressional reapportionment statute, may the people simultaneously or thereafter adopt a new apportionment by means of an initiative?
(3) If a congressional apportionment statute adopted by the Legislature becomes effective, may it be repealed and a new apportionment statute subsequently adopted by means of an initiative?
(4) Is the reapportionment of state legislative districts subject to referendum?

Our conclusions are summarized as follows: The first, second and fourth questions are answered in the affirmative. Although the matter is not free from doubt, we believe that the third question should be answered in the negative.

Id.

21. Id. at 16.
22. CAL. CONST. art. IV, § 8 provides:

§ 8. Bills; procedure; effective date of statutes; urgency measures

Sec. 8. (a) At regular sessions no bill other than the budget bill may be heard or acted on by committee or either house until the 31st day after the bill is introduced unless the house dispenses with this requirement by
The people urged the court to exempt initiatives from the once-a-decade principle. The court declined but suggested that “[t]he people of this state, as the ultimate source of legitimate political power, are of course free through constitutional amendment to adopt whatever changes in the existing system they consider appropriate, subject only to limitations contained in the Constitution of the United States.”

III. The Minority

Justice Richardson took strong objection to removal of a qualified initiative measure from the ballot. His first contention was that there is a strong policy consideration that allows deference to the people’s franchise.

Further, “[e]ven grave doubts as to the constitutionality of an initiative measure do not compel a court to determine its validity prior to submission to the electorate.” Justice Richardson was

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(b) The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, three fourths of the membership concurring.

(c) The Legislature may make no law except by statute and may enact no statute except by bill. No bill may be passed unless it is read by title on 3 days in each house except that the house may dispense with this requirement by rollcall vote entered in the journal, two thirds of the membership concurring. No bill may be passed until the bill with amendments has been printed and distributed to the members. No bill may be passed unless, by rollcall vote entered in the journal, a majority of the membership of each house concurs.

(c) Except as provided in paragraph (2) of this subdivision, a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute and a statute enacted at a special session shall go into effect on the 91st day after adjournment of the special session at which the bill was passed.

(d) Statutes calling elections, statutes providing for tax levies or appropriations for the usual current expenses of the State, and urgency statutes shall go into effect immediately upon their enactment.

(d) Urgency statutes are those necessary for immediate preservation of the public peace, health, or safety. A statement of facts constituting the necessity shall be set forth in one section of the bill. In each house the section and the bill shall be passed separately, each by rollcall vote entered in the journal, two thirds of the membership concurring. An urgency statute may not create or abolish any office or change the salary, term, or duties of any office, or grant any franchise or special privilege, or create any vested right or interest.

Id. at 681, 669 P.2d at 33-34, 194 Cal. Rptr. at 797-98.

23. 34 Cal. 3d at 681, 669 P.2d at 30, 194 Cal. Rptr. at 794.

24. Justice Richardson begins his argument by asserting that: For the first time in 35 years this court has removed from the ballot a qualified initiative measure, thereby preventing the people of California from voting on a subject of great importance to them—the reapportionment of their legislative boundaries, federal and state . . . . I regret this defeat of the people’s right to vote.

25. Gayle v. Hamm, 25 Cal. App. 3d 250, 256, 101 Cal. Rptr. 628, 633 (1972) (emphasis added). In this case, the county refused to certify an initiative on the grounds that even if enacted it would be unconstitutional. Petitioners sought a
convinced that the initiative was valid. He relied on the legislature's attorney who advised the legislature on March 21, 1983, that the people may enact an initiative which adjusts boundary lines if it is done in time for the orderly conduct of the 1984 direct primary elections. Further, the cost of the election should be entirely irrelevant to the premature disposition of the matter.

The initiative is seen as part of a long chapter in California political history dedicated to the people's efforts to realign voting boundaries. The initiative power should be held as a precious right. Justice Traynor stated eighteen years ago that "[t]he makeup and apportionment of the Legislature involve peculiarly political questions that are not appropriate for this court to decide. They are far better entrusted to the collective political wisdom of the Legislature subject to the power of initiative and referendum reserved to the people."26

Enforcement of the once-a-decade rule in this instance is error. Nowhere, claims Justice Richardson, does the constitution espouse such a limitation.27 While the constitution may limit the legislature from adopting multiple reapportionment plans, it contains no language placing similar restrictions upon the people's initiative power. Further, if adhering to strict construction, article XXI calls for a readjusting of the boundaries "in the year following" the census. The legislature's plan was enacted in the third year following the census.

writ of mandamus to compel certification of the initiative. The respondent argued that the court should judge the constitutionality of the initiative before it went to the ballot. The court found strong policy reasons for not pre-judging this initiative and stated:

A premature interposition of the judiciary constitutes an unwarranted limitation upon this reserve power. To accept the position espoused by defendants in this case, namely, that the court must determine the validity of the initiative ordinance at the processing juncture represented by this case and the showing made by defendants would be tantamount, in our opinion, to requiring every proponent of an initiative measure to first seek the advisory opinion of the courts as to the validity before getting the measure to the electorate. In our view, the court should shortcut the normal initiative procedure only where the invalidity of the proposed measure is clear beyond a doubt.

Id. at 258, 101 Cal. Rptr. at 634.


27. CAL. CONST. art. II, § 1 vests in the people "all political power" and "the right to alter or reform" their government.

28. CAL. CONST. art. XXI, § 1 directs the legislature: "In the year following the year in which the national census is taken . . ." to adjust voting boundaries. See supra note 2.
Justice Richardson distinguished the three cases relied upon by the majority. *Wheeler v. Herbert*\(^2\) and *Dowell v. McLees*\(^3\) involved statutory changes in county boundary lines. Again, the court was dealing only with the legislature's power to redistrict, not the people's. This same principle was upheld in *Yorty v. Anderson.*\(^{31}\) Further, the *Yorty* court maintained that the legislature may adopt a second reapportionment plan within a single census period if the courts or the people by referendum have nullified the initial plan.\(^{32}\) Justice Richardson interpreted this precedent to mean that “[t]he Legislature's role in reapportionment cannot rise to a higher level than that of its source, the people, nor can it, a creation of the people, constitutionally preempt the people.”\(^{33}\)

**IV. Conclusion**

The court's invalidation of a people's initiative and judgment of its constitutionality before it went to ballot raises strong policy considerations that go to the heart of the democratic system. The roots of this country can be found in the town meeting, where the people's voice was heard in its purest form. The initiative is the people's voice and there is concern that the citizen's voice has been unjustly stifled in this case. Further, the system of checks and balances has taken a blow. For “[i]f the people are denied any right to approve or disapprove a blatantly gerrymandered reapportionment plan, then there is absolutely no check on the Legislature's abuse of power.”\(^{34}\)

The majority did not dwell on the issue of its jurisdiction to determine the constitutionality of an initiative before it is voted upon by the people. And while there may be concern that the vote would have cost the people $15 million,\(^{35}\) there is legal authority that the court had no power to judge the issues\(^{36}\) and that

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29. See supra note 13 and accompanying text.
30. See supra note 14 and accompanying text.
31. See supra note 15 and accompanying text.
32. 60 Cal. 2d at 316-17, 294 Cal. Rptr. at 420, 33 Cal. Rptr. at 100. The *Yorty* court is consistent with the Attorney General's opinion (18 Op. Att'y Gen. 11 (1951)) which indicated that the congressional reapportionment was subject to referendum, and that once rejected the people simultaneously or thereafter may adopt a new apportionment by means of initiative. The distinction in this instance and the case at bar is that the referendum must take place before the legislature's apportionment plan becomes effective. The Attorney General suggests that the redistricting becomes operative law “either because there is no referendum against it or because a referendum is unsuccessful.” Id. at 15.
33. 34 Cal. 3d at 688, 669 P.2d at 38, 194 Cal. Rptr. at 802.
34. Id. at 690, 669 P.2d at 40, 194 Cal. Rptr. at 804.
35. Id. at 666, 669 P.2d at 21, 194 Cal. Rptr. at 785.
36. See *Gayle v. Hamm*, 25 Cal. App. 3d 250, 255, 101 Cal. Rptr. 628, 632 (1972). That court held that unless there was a compelling showing that it was “clear beyond a question” that the initiative was unconstitutional, the initiative must go to
half a million voters had a legal and constitutional right to call for a public vote.

C. Counsel’s representations to the court regarding a conflict of interest should be given considerable weight: Leversen v. Superior Court.

The supreme court issued a writ of mandate to the superior court to grant the petitioner's motion to be relieved as counsel in Leversen v. Superior Court, 34 Cal. 3d 530, 668 P.2d 755, 194 Cal. Rptr. 448 (1983). The supreme court was convinced that the petitioner had made good faith representations, supported by evidence, that if he was not relieved he would be unable to fulfill the defendant's constitutional right to assistance of counsel free from any conflict of interest.

The conflict arose in this case when the co-defendant, represented by other counsel, called a witness that the petitioner's firm was defending in a similar criminal matter. Because the witness was known by another name, the petitioner had no prior reason to believe there was a conflict. The witness claimed his privilege against self-incrimination and refused to testify. The petitioner argued that even though the witness asserted the privilege, the petitioner would be called upon to use confidential information in calling rebuttal witnesses. He was convinced that his continued representation would violate the privilege of confidentiality to other clients. When the witness was called to the stand, and it was discovered that he was an uncharged crime partner, the full extent and relevance of the privileged information became clear.

The trial court remained unconvinced that the conflict was significant and declared that it, not counsel, was the "final arbiter" in determining the existence of a material conflict of interest. The supreme court found otherwise. Based on the holding of the United States Supreme Court in Holloway v. Arkansas, 435 U.S. 475, 484 (1978), the court affirmed "that counsel is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop." The representations in this case left the court convinced that the petitioner, if allowed to continue, would use confidential information that had been ac-
required during the client relationship. Such a breach of duty is a violation of both case law and CAL. BUS. & PROF. CODE § 6068(e) (West 1974) (preserving the secrets of a client is an attorney's duty). The obligation of the attorney to withdraw under such circumstances was unquestionable, and should have been supported by the superior court. The failure of the court to allow withdrawal deprived the defendant of his constitutional right to assistance of counsel free from conflict of interest.

D. Mail ballot does not violate constitutional right to a secret vote: Peterson v. City of San Diego.

The case of Peterson v. City of San Diego, 34 Cal. 3d 225, 666 P.2d 975, 193 Cal. Rptr. 533 (1983), allowed the California Supreme Court to determine whether a mail ballot violates CAL. CONST. art. II, § 7, which provides that "[v]oting shall be secret." Since voting procedure by absentee ballot and mail is virtually the same, the court began its inquiry by reaffirming the validity of the absentee ballot which has existed in California for sixty years. The use of the mail ballot is authorized by Elections Code sections 1340-1352 and 23511.1. Mail balloting has two advantages. First, voting by mail is more convenient than voting at the polling place and increases voter participation. Second, mail balloting is far less expensive. The court proceeded by urging that, because the right to vote is a fundamental right, all reasonable efforts to facilitate and increase its exercise must be upheld. The secrecy provision of the constitution should not be interpreted to preclude any reasonable measures to facilitate and increase voter participation. The court determined that mail ballot and absentee ballots were reasonable measures that expand voter participation.

The court briefly explored the statutory provisions designed to protect the integrity of elections. For example, it is a crime to interfere with a voter lawfully exercising the right to vote (CAL. ELEC. CODE § 29612 (West 1977)), to offer employment, gifts, or lodging as an inducement for voting or refraining from voting (CAL. ELEC. CODE §§ 29620-29624 (West 1977)), to coercive or intimidate the voter (CAL. ELEC. CODE § 29630 (West 1977)), or to interfere with the secrecy of voting (CAL. ELEC. CODE § 29645 (West 1977)). All of these apply equally to the absent voter in his right to a secret ballot. The court concluded that, without a showing of significant wrongdoing in mail ballot voting or a potential for fraud, the provisions allowing mail voting are valid.

X. CONTEMPT

Potential finding of contempt against court
reporter for failure to transcribe criminal trial record held moot: In re Beam.

The defendant, a superior court reporter, failed to transcribe the record for a mandatory criminal appeal. This case was before the supreme court to show cause why the defendant should not be held in contempt and declared incompetent to continue serving as a court reporter. The matter was deemed moot, however, because the reporter was no longer preparing transcripts and the criminal court record in question was completed by another reporter.

XI. CONTRACT LAW

A. A claim of fraud in the inducement of a contract containing an arbitration clause is subject to arbitration: Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street.

In Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street, the supreme court addressed for the first time the enforcement of an arbitration clause in a contract when one party alleges that the contract was the result of fraud in the inducement. The court adopted the rule followed by the federal courts and the majority of state courts: "in the absence of indication of contrary intent, and where the arbitration clause is reasonably susceptible of such an interpretation, claims of fraud in the inducement of the contract (as distinguished from claims of fraud directed to the arbitration clause itself) will be deemed subject to arbitration."

The plaintiff filed suit for rescission of a lease agreement; one basis for the suit was an allegation of fraud in the inducement.

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2. Id. at 316, 673 P.2d at 252, 197 Cal. Rptr. at 582. "Whether a claim that the whole contract is void may be made the subject of arbitration is a question yet unsettled." Sauter v. Superior Court, 2 Cal. App. 3d 25, 29 n.2, 82 Cal. Rptr. 395, 397 n.2 (1969).
5. 35 Cal. 3d at 323, 673 P.2d at 257-58, 197 Cal. Rptr. at 587-88.
6. The plaintiff was a law firm which entered into a lease agreement with the
The defendant filed a petition to compel arbitration\textsuperscript{7} as agreed upon in the contract.\textsuperscript{8} The plaintiff's response stated that the fraud in the inducement was ground for revocation of the agreement and therefore the court should not compel arbitration. The trial court agreed and denied the defendant's petition.\textsuperscript{9}

In deciding whether a trial court must determine the fraud claim before ordering arbitration, the court looked first to the example of the federal courts.\textsuperscript{10} In the leading case of Robert Lawrence Company v. Devonshire Fabrics, Inc.,\textsuperscript{11} the court of appeal stated that the federal arbitration statute,\textsuperscript{12} along with the federal
policy of promoting arbitration, and requires that the arbitration clause be distinguished from the contract as a whole. Thus, unless the arbitration clause itself was procured by fraud, a sufficiently broad arbitration clause would include charges that the contract was procured through fraud.

The United States Supreme Court adopted the Devonshire rule in Prima Paint Corporation v. Flood & Conklin Manufacturing Company. This conclusion, the Court stated, was mandated by the federal arbitration statute and "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts."

Turning next to the judicial decisions of states with statutes similar to California's, the court found that, with two exceptions, to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id.

13. 271 F.2d at 410 (citing series of federal cases representing a "liberal policy of promoting arbitration").

14. "That the Arbitration Act envisages a distinction between [sic] the entire contract between the parties on the one hand and the arbitration clause of the contract on the other is plain on the face of the statute." Id. at 409.

15. Id. at 411 ("If this arbitration clause was induced by fraud, there can be no arbitration . . . ").

16. Id. at 410. The court of appeals decided that the arbitration clause in question, see supra note 11, was broad enough "to encompass a charge of fraud in the inducement." Id. at 412.

17. 388 U.S. 395 (1967). The arbitration clause which the Supreme Court considered in Prima Paint provided that "any controversy or claim arising out of or relating to this Agreement . . . shall be settled by arbitration . . . ." Id. at 398.


19. Louisiana rejected the federal rule in George Engine Co. v. Southern Shipbuilding Corp., 350 So. 2d 881 (La. 1977). The Louisiana Supreme Court interpreting the Louisiana arbitration statute, determined that the issue of fraud in the inducement is to be decided by the trial court before enforcing an arbitration clause. Id. at 884-85. LA. REV. STAT. ANN. § 9:4201 (West 1983) provides in pertinent part: "A provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract . . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Minnesota has modified the rule somewhat in Atcas v. Credit Clearing Corp. of Am., 292 Minn. 334, 197 N.W.2d 448 (1972), wherein it permits the party who asserts fraud to have the issue determined judicially if they completely rescind the contract. Cf. CAL. CIV. PROC. CODE § 1281.2 (West 1982), supra note 7, and 9 U.S.C. § 2 (1976), supra note 12. All three statutes appear on their face to say the same thing.
the other states adhere to the federal rule. The court paid particular attention to Matter of Weinrott (Carp), a New York Court of Appeals decision which overturned longstanding New York law and adopted the federal rule in an effort to encourage arbitration.

When the court finally examined the California arbitration statute, it concluded that the statute was similar to the federal statute and other state statutes and thus was susceptible to application of the federal rule. In addition, the court determined that "the majority rule is in accord with this state's strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." For these reasons, the court adopted the majority rule.

Applying the rule to this case, the court concluded that the arbitration clause in the lease agreement was broad enough to include the issue of fraud and therefore the defendant's petition to compel arbitration should be granted.

20. 35 Cal. 3d at 320-22, 673 P.2d at 255-57, 197 Cal. Rptr. at 584-86 (citing cases in eight states). See generally Annot., supra note 4.
22. Id. at 198-99, 298 N.E.2d at 47-48, 344 N.Y.S.2d at 855-56. A further benefit which the New York Court of Appeals sought to attain through its holding was to bring state law into accord with federal law. Id. at 199 n.2, 298 N.E.2d at 48 n.2, 344 N.Y.S.2d at 856 n.2.
23. CAL. CIV. PROC. CODE § 1281.2 (West 1982); see supra note 7.
25. The court compared the California statute to the New York statute construed in Weinrott which provides: "A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. Where there is no substantial question whether a valid agreement was made or complied with, . . . the court shall direct the parties to arbitrate." N.Y. CIV. PRAC. LAW § 7503(a) (McKinney 1980) (emphasis added). In the court's view, the two statutes were harmonious, but the "valid agreement" referred to in the New York statute is the agreement to arbitrate. Weinrott, 32 N.Y.2d at 198, 298 N.E.2d at 47, 344 N.Y.S.2d at 855. The California statute is concerned with grounds for revocation of the entire contract. CAL. CIV. PROC. CODE § 1281.2 (West 1982); see supra note 7.
26. 35 Cal. 3d at 322, 673 P.2d at 257, 197 Cal. Rptr. at 587.
27. Id. at 323, 673 P.2d at 257, 197 Cal. Rptr. at 587.
28. Although the arbitration clause in this case was not as broad as the one in Prima Paint, supra note 17, the court felt that it still contemplated the inclusion of allegations of fraud. See, e.g., J.P. Stevens & Co. v. Harrell Int'l, Inc., 299 So. 2d 69, 70 (Fla. Dist. Ct. App. 1974), cert. dismissed sub nom. Flagship Products, Ltd. v. J.P. Stevens & Co., 313 So. 2d 707 (Fla. 1975) (clause stating that "[i]n the event the parties are unable to agree as to the effect or interpretation of any terms or provisions of this agreement, then the matter shall be submitted to arbitration," held to include claim of fraud in the inducement).
29. 35 Cal. 3d at 324, 673 P.2d at 258, 197 Cal. Rptr. at 588.
B. Although federal maritime law applies to construction of an exculpatory clause, the clause will not be enforced unless the intention to do so is clearly expressed: Fahey v. Gledhill.

In Fahey v. Gledhill, 33 Cal. 3d 884, 663 P.2d 197, 191 Cal. Rptr. 639 (1983), the owner of a non-commercial pleasure yacht contracted with a marine repair company for the repair of his yacht. When the yacht was damaged due to the negligence of the repair company's employees, the yacht owner brought suit for damages. The defendant repair company presented the work order signed by the plaintiff which contained an exculpatory clause. The clause provided that defendant would “not be liable for any loss of, or damage to said vessel, its contents or gear, or any loss of the use thereof from any cause whatsoever, excepting only [the defendant’s] willful misconduct. . . .”

The trial court found that the plaintiff and defendant were in an equal bargaining position, and that the exculpatory clause was neither ambiguous nor overbroad. Further, the trial court determined that federal maritime law governed the validity of the clause, and that under admiralty law the contract exempted the defendant from responsibility for negligent damage to the yacht.

The supreme court agreed that federal maritime law governed the interpretation of the contract, but reversed the lower court's holding regarding the validity of the exculpatory clause. While it recognized that an exculpatory clause releasing a ship repairer from his own negligence may not be contrary to public policy and invalid, the court stated that “[t]he rationale for permitting a party to disclaim responsibility for his own negligence” is found in the “equal bargaining power” of the parties. Thus, to insure that the parties actually intended the distribution of risk created by an exculpatory clause, the court held that such clauses would not be enforced “unless the intention is unequivocally expressed in the plainest of words.” Further, “the language of the agreement to exclude negligence liability must be clear and unequivocal and cause those decisions were not based on California’s statute; and second, because those decisions were, in Justice Mosk's view, incorrectly decided. Justice Mosk turned instead to the Louisiana Supreme Court's decision in George Engine Co. v. Southern Shipbuilding Corp., 350 So. 2d 881 (La. 1977), to support his belief that if a contract is unenforceable due to fraud then the entire contract, including any arbitration clause, is unenforceable. 35 Cal. 3d at 324-28, 673 P.2d at 258-60, 197 Cal. Rptr. at 588-90 (Mosk, J., dissenting).
go beyond describing the scope of the loss and reflect the physical
or legal responsibility."

The clause in question, by excluding liability for loss or damage
"from any cause whatsoever," sufficiently described the scope of
the loss. However, the words "from whatever cause whatsoever"
did not clearly and unequivocally exclude negligence of the de-
fendant or his employees. On this basis the supreme court
reversed.

C. Parol evidence should not be used to explain a
written agreement challenged under the usury laws:
McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc.

In McConnell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 33
Cal. 3d 816, 662 P.2d 916, 191 Cal. Rptr. 458 (1983), the supreme
court held that parol evidence could not be used to explain the
meaning of a written agreement which was challenged as violat-
ing section 2 of the Usury Law.

Section 2 of the Usury Law provides in part that "interest shall
not be compounded . . . unless an agreement to that effect is
clearly expressed in writing and signed by the party to be charged

Plaintiffs were customers of a brokerage firm. In order to
purchase securities on margin, the customers entered into a writ-
ten agreement whereby the brokerage firm advanced the money
necessary for the purchase; the customer, in turn, agreed to repay
the advance with interest. The customer's obligation to pay inter-
est was set forth as follows: "The monthly debit balance in my ac-
count(s) shall be charged, in accordance with your usual custom
with interest at a rate which shall include the average rate paid
by you on your general loans . . . ." (emphasis added). The
"usual custom" of the brokerage firm was to compound interest
monthly, adding interest owing to the debit balance of the
account.

Plaintiffs brought suit individually and on behalf of a class of
customers who maintained margin accounts with the brokerage
firm. At trial, the judge determined that parol evidence was ad-
missible to show what each plaintiff understood to be the "usual
custom" of the defendant brokerage firm in charging interest. The
judge then determined that individual issues dominated over
class issues and ordered that the class be decertified.

The California Supreme Court reversed the lower court's order.
Noting that section 2 of the Usury Law was designed to "protect
borrowers, prevent the unjust enrichment of lenders, and deter
lenders from violating its terms," the supreme court held that pa-
rol evidence should not have been admitted to explain what each customer understood to be the defendant's "usual custom." Rather, the real issue was whether the intention to charge compound interest was expressed in clear terms in the agreement. Thus, because the plaintiffs' complaint merely alleged violation of section 2 of the Usury Law for failure of defendants to clearly express in a writing signed by the customer that interest would be compounded, the admission of the parol evidence was improper.

XII. CRIMINAL LAW

A. Penal Code section 190.2(a)(17) which establishes special circumstance in cases of felony murder requires proof that defendant had the intent to kill: Carlos v. Superior Court.

In Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), the supreme court was asked to interpret CAL. PENAL CODE § 190.2(a)(17) (West Supp. 1984), which lists a murder committed during the course of enumerated felonies to be a special circumstance which requires a convicted murderer to be sentenced to death or to life imprisonment without the possibility of parole. The question before the court was whether the special circumstance required an intent to kill. The court concluded that it did.

The court admitted that the statute did not expressly state that an intent to kill was necessary, but the court concluded that a reasonable reading of the statute based on accepted rules of construction led to the conclusion that intent to kill was a necessary element of the special circumstance.

The court looked first to the statements of the proponents of the 1978 death penalty initiative, the source of section 190.2. Based on statements in the proponents' literature, the court concluded that they intended for an accomplice to a felony murder to face the death penalty only if the accomplice had intentionally aided in the killing.

Recognizing that the evidence of the intended meaning was not totally clear, the court went on to follow the rule of construction that any reasonable doubt as to the meaning of a penal statute should be decided in the defendant's favor. The court pointed out that this was especially true when dealing with felony murder cases since the felony murder rule is a highly artificial concept.
with the potential for punishing a defendant beyond the extent of his culpability.

The final basis for the court's holding was the desire to interpret the statute so as to avoid constitutional questions which might invalidate the statute. The court noted that sentencing someone, who had no intent to kill, to death or to life imprisonment without parole might violate the eighth amendment's prohibition against cruel and unusual punishment. Equal protection issues would also arise since some murderers who had intent to kill would receive a more lenient sentence than some who had no such intent. By construing section 190.2(a)(17) to require a showing of intent to kill, these constitutional problems were avoided.

Although the defendant in this case was only an accomplice and not the actual killer, the court's interpretation of section 190.2(a)(17) applies to all defendants charged with first degree felony murder; they are not subject to a special circumstance finding unless they had the intent to kill.

B. De Lancie is not retroactively applied and the question as to admissibility of evidence obtained in violation of De Lancie remains unanswered: Donaldson v. Superior Court.

I. INTRODUCTION

In Donaldson v. Superior Court, the court ruled on a narrow issue. The question considered was whether retroactive application was appropriate for the already established principle that surreptitious interception of private communications in police stations and jailhouses is unlawful in California, unless done to protect institutional security. The justices concluded that this sanction should be utilized only prospectively in governing police conduct.


2. Id. at 27, 672 P.2d at 111, 196 Cal. Rptr. at 705. See De Lancie v. Superior Court, 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982), where the court first adopted this maxim restricting secret monitoring. The justices emphatically avoided the more meaningful issue in the case, i.e., whether the De Lancie decision requires the exclusion of evidence obtained in such manner. 35 Cal. 3d at 28, 34, 672 P.2d at 111, 118, 196 Cal. Rptr. at 705, 710. A decision by the court to suppress these recorded communications might conflict with Proposition 8's "Truth-in-Evidence" provision, Cal. Const. art. 1, § 28, cl. d (West 1983), because the federal standard in this area affords less protection to police station or jailhouse prisoners, detainees and visitors than does the California standard enumerated in De Lancie. See infra notes 10-27 and accompanying text.

3. 35 Cal. 3d at 27, 672 P.2d at 111, 196 Cal. Rptr. at 705.
The court's decision surely provided defendant Donaldson with reason to scold himself for voluntarily walking into a police station on October 6, 1980. Defendant entered the station in order to speak to his brother who was there to take a polygraph test in connection with a recent murder. He was escorted to an interview room where both he and his brother were left alone with the door closed. The police listened to and recorded the brothers' conversation in which defendant incriminated himself in the murder. At a subsequent evidentiary hearing, defendant moved to suppress the evidence of the overheard conversation, but the trial court denied his request. And to defendant's misfortune, the California Supreme Court had no sympathy for him either.

II. HISTORICAL BACKGROUND

The debate concerning the propriety of surveillance in police stations and prisons has primarily revolved around the fourth amendment to the United States Constitution and its restrictions on official search and seizure.

A. The Federal Standard: The Traditional Approach

*Lanza v. New York* established the federal position on secret

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4. *Id.* The *De Lancie* decision restricting secret recordings was not rendered until 1982. *See supra* note 2.
5. *Id.* The murder victim was a woman teacher at a preschool. Defendant's brother was considered a witness by the police. He was not a suspect nor was he under arrest.
6. *Id.*
7. *Id.* at 28, 672 P.2d at 111, 196 Cal. Rptr. at 705. The interview room was “bugged” with a hidden microphone.
8. *Id.* “[D]efendant emphasized the fact that neither he nor his brother was in custody. The prosecution in reply asserted that the location of the conversation, not the status of the conversants, was the controlling factor, and that neither brother could expect privacy in a police interview room.” *Id.* The trial judge agreed with the state's assessment. The supreme court found defendant's argument unpersuasive as well.
9. This is evidenced by the decision not to apply the teachings of *De Lancie* to defendant's case since the questioned police activity occurred before that opinion was handed down. *Id.* at 27-28, 672 P.2d at 111, 196 Cal. Rptr. at 705.
interception of communications in jails or police stations. In that case, a conversation between two brothers in a jail visiting room was recorded and one of the brothers was convicted for refusing to answer inquiries by a legislative committee based on the tape. In upholding the conviction, the United States Supreme Court stated that a jail visiting room was not a protected area under the fourth amendment, and to allege differently "is at best a novel argument." The Lanza Court concluded that "official surveillance has traditionally been the order of the day" in prisons.

Although Lanza utilized a protected area analysis, its rationale survived Katz v. United States' rejection of the former and adoption of a reasonable expectation of privacy standard. The highest court in the land has never repudiated its holding in Lanza, and the lower federal courts have consistently followed it by allowing admission of monitored conversations in jails or police stations. It appears that the courts have simply adopted the Katz terminology in this area by refusing to recognize an expectation

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12. Id. at 143 ("to say that a public jail is the equivalent of a man's 'house' or that it is a place where he can claim constitutional immunity from search or seizure of his person, his papers, or his effects, is at best a novel argument. . . . [T]he obvious that a jail shares none of the attributes of [the] privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day.") (footnote omitted). Although the Lanza decision referred only to jails, later decisions have applied the same analysis to police station interview rooms. See Williams v. Nelson, 457 F.2d 376, 377 (9th Cir. 1972).
13. Lanza, 370 U.S. at 139-41.
14. Id. at 143.
15. Id. (footnote omitted).
16. See Katz v. United States, 389 U.S. 347, 351-52 (1967) ("the Fourth Amendment protects people not places. . . . What [a person] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."). See also 389 U.S. at 361 (Harlan, J., concurring) ("there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"). However, Lanza has been criticized and questioned. E.g., Bonner v. Coughlin, 517 F.2d 1311, 1316 (7th Cir. 1975), cert. denied, 435 U.S. 932 (1978) ("[w]e are persuaded . . . that the surrender of privacy is not total and that some residuum meriting the protection of the Fourth Amendment survives the transfer into custody."); see generally 3 W. LaFave, Search and Seizure § 10.9 (1978); Gianelli & Gilligan, Prison Searches and Seizures: "Locking" the Fourth Amendment Out of Correctional Facilities, 62 Va. L. Rev. 1045 (1976).
17. See Bell v. Wolfish, 441 U.S. 520, 556-57 (1979) ("It may be well argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protection for such a person."); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 129 (1977) ("[T]his Court has repeatedly recognized the need for major restrictions on a prisoner's rights."). Both of these cases refer for support to the Lanza decision.
of privacy in detention facilities whether the individual’s presence is voluntary or involuntary.\(^{19}\)


Initially, California courts followed federal precedent in upholding the legality of intercepting conversations in police stations or jails, and using the taped statements against criminal defendants.\(^{20}\) The common practice of monitoring inmates', detainees' and others' conversations was approved by the courts.\(^{21}\) It was believed that individuals could not reasonably expect privacy in a jail or police station.\(^{22}\)

However, the California Supreme Court's 1982 decision in *De Lancie v. Superior Court*\(^{23}\) significantly altered the state courts' tolerance of covert police interception of such communications. The "holding necessarily implied that secret monitoring of conversations between detainees and visitors, 'undertaken for the purpose of gathering evidence for use in criminal proceedings, rather than to maintain the security of the jail' was unlawful."\(^{24}\)

As explained in *Donaldson*, the *De Lancie* court reached its conclusion based on three considerations. First, detainees and prisoners need to communicate privately with their families and

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\(^{19}\) See 35 Cal. 3d at 30, 672 P.2d at 113, 196 Cal. Rptr. at 707; Henry, *supra* note 10, at 1112. See also *Bell*, 441 U.S. at 557.

\(^{20}\) See, e.g., *People v. Dominguez*, 121 Cal. App. 3d 481, 505, 175 Cal. Rptr. 445, 459 (1981), and cases cited therein. A monitored conversation was excluded in only one instance because of the particular factual situation involved in the case. See *North v. Superior Court*, 8 Cal. 3d 301, 310-12, 502 P.2d 1305, 1311, 104 Cal. Rptr. 833, 839 (1972).

\(^{21}\) See *North*, 8 Cal. 3d at 312, 502 P.2d at 1311-12, 104 Cal. Rptr. at 839-40. The reader should recall that the court in this case did exclude the recorded conversation, however, it was stated that the decision did not reflect disapproval of the common practice.

\(^{22}\) See 35 Cal. 3d at 34, 672 P.2d at 115, 196 Cal. Rptr. at 709 ("[T]hey state a legal fiction: that no one can reasonably expect privacy in a jail or police station unless the conversation is protected by an evidentiary privilege."); *People v. Finchum*, 33 Cal. App. 3d 787, 791, 109 Cal. Rptr. 319, 321 (1973) ("Hope would be the most that anyone in such a situation could have had, and hope falls far short of what the law recognizes as reasonable expectation.").

\(^{23}\) 31 Cal. 3d 865, 647 P.2d 142, 183 Cal. Rptr. 866 (1982). It was a civil case. The court held secret monitoring conducted for reasons other than institutional security provided a cause of action. Because the case was civil in nature, the court never decided the admissibility or inadmissibility of evidence obtained in such a manner.

\(^{24}\) 35 Cal. 3d at 35, 672 P.2d at 116, 196 Cal. Rptr. at 710 (quoting *De Lancie v. Superior Court*, 31 Cal. 3d 865, 877, 647 P.2d 142, 150, 183 Cal. Rptr. 866, 874 (1982)).
friends without state officials listening in on their conversations.\textsuperscript{25} Second, legislation has been enacted to restore civil rights to prison inmates.\textsuperscript{26} And finally, persons whose statements can be overheard only through the use of hidden microphones or tapped telephone wires often do have a reasonable expectation of privacy regardless of their location.\textsuperscript{27} In response to the above, the court saw a need to fashion protection against the ever present ear of law enforcement.

III. ANALYSIS

A. Majority Opinion

Justice Broussard began by declaring that \textit{De Lancie}’s purpose “would not be furthered” by retroactively applying its holding to defendant’s case.\textsuperscript{28} It was explained that the \textit{De Lancie} decision was intended “to limit clandestine police monitoring in order to protect the private communications of inmates, detainees and visitors.”\textsuperscript{29} Two reasons were provided for why retroactive application would serve no useful purpose. First, such a use would only benefit persons who had made incriminating admissions; it would not restore already invaded privacy.\textsuperscript{30} And second, such a holding would not increase \textit{De Lancie}’s “deterrent effect” with regard to future illicit monitoring by law enforcement officials.\textsuperscript{31}

The majority supported its decision not to apply \textit{De Lancie} to antecedent searches with legal rationales as well. Nonretroactive application should only be considered where a decision establishes a new rule or standard of law, i.e., a “clear break with the past.”\textsuperscript{32} \textit{De Lancie} expressly disapproved of past practice and es-

\textsuperscript{25} 35 Cal. 3d at 35, 672 P.2d at 116, 196 Cal. Rptr. at 710. The \textit{Donaldson} court also stated that listening to and recording such conversations offends the constitutional right to privacy. \textit{See CAL. CONST.} art. 1, § 1 (West 1983).
\textsuperscript{26} 35 Cal. 3d at 35, 672 P.2d at 117, 196 Cal. Rptr. at 711. \textit{See CAL. PENAL CODE} §§ 2600, 2601 (West 1982), which provide that a prisoner may only be deprived of such rights necessary to provide for reasonable institutional security and that he expressly retains certain civil rights like the right to have personal visits.
\textsuperscript{27} 35 Cal. 3d at 36, 672 P.2d at 117, 196 Cal. Rptr. at 711.
\textsuperscript{28} \textit{Id.} at 27, 672 P.2d at 111, 196 Cal. Rptr. at 705.
\textsuperscript{29} \textit{Id.} at 39, 672 P.2d at 119, 196 Cal. Rptr. at 713.
\textsuperscript{30} \textit{Id.}
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.} at 36-37, 672 P.2d at 117-18, 196 Cal. Rptr. at 711-12. \textit{See Desist v. United States}, 394 U.S. 244, 248 (1969) (“[I]t was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future.”). The court also stated that retrospective operation is assumed where a judicial decision only explains or enforces prior law, resolves a conflict between lower courts, or considers an issue not previously presented to the courts. \textit{See Wellenkamp v. Bank of America}, 21 Cal. 3d 943, 953-54, 582 P.2d 970, 977, 148 Cal. Rptr. 379, 386 (1978); People v. Jones, 106 Cal. App. 3d 9, 16, 166 Cal. Rptr. 131, 134 (1980).
tablished new precedent in California.\textsuperscript{33} When it is determined that the court's holding represents a definite shift, the California practice is to weigh three factors applied by the federal courts: (a) the purpose of the new standard; (b) the extent of law enforcement's reliance on the old standards, and (c) the effect of retroactivity on the administration of justice.\textsuperscript{34} Although the majority never fully addressed these variables in relation to the facts of defendant's case, it was concluded that search and seizure decisions are generally not given retroactive effect.\textsuperscript{35}

\section*{B. Concurring Opinions}

Justices Richardson and Mosk agreed that \textit{De Lancie} should not be applied retroactively because both had dissented from the original decision.\textsuperscript{36} Justice Mosk also stated that the solution to the problems of monitoring jailhouse conversations is to post signs to serve as warning and notice to conversants.\textsuperscript{37}

\section*{C. Dissenting Opinion}

Justice Reynoso, with Chief Justice Bird concurring, dissented.\textsuperscript{38} He declared that "[a] person does not relinquish rights by voluntarily walking into a police station."\textsuperscript{39} He thought that

\textsuperscript{33} 35 Cal. 3d at 37, 672 P.2d at 118, 196 Cal. Rptr. at 712. See United States v. Johnson, 457 U.S. 537, 551 (1982) ("Such a break has been recognized only when a decision explicitly overrules a past precedent . . ., or disapproves a practice . . . arguably . . . sanctioned in prior cases . . ., or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved."). The \textit{De Lancie} decision seems to fit the categories presented in \textit{Johnson}. See \textit{supra} notes 21-27 and accompanying text.

\textsuperscript{34} 35 Cal. 3d at 38, 672 P.2d at 118, 196 Cal. Rptr. at 712 (citing People v. Kaanehe, 19 Cal. 3d 1, 10, 559 P.2d 1028, 1034, 136 Cal. Rptr. 409, 415 (1977)). The factors are based on determinations found in Stovall v. Denno, 388 U.S. 293, 297 (1967). However, the factors enumerated in \textit{Stovall} were questioned in \textit{Johnson}. 457 U.S. at 543-44.

\textsuperscript{35} 35 Cal. 3d at 38, 672 P.2d at 119, 196 Cal. Rptr. at 713. The court further stated that retroactive application is usually the case where a decision "‘imply[es] questions of guilt and innocence.’" \textit{Id.} at 39 n.11, 672 P.2d at 119 n.11, 196 Cal. Rptr. at 713 n.11 (quoting Pryor v. Municipal Court, 25 Cal. 3d 238, 258, 599 P.2d 636, 648, 158 Cal. Rptr. 330, 342 (1979)).

\textsuperscript{36} 35 Cal. 3d at 39, 672 P.2d at 120, 196 Cal. Rptr. at 714. See \textit{De Lancie}, 31 Cal. 3d at 879-82, 647 P.2d at 151-53, 183 Cal. Rptr. at 875-77 (Richardson & Mosk, JJ., dissenting).

\textsuperscript{37} 35 Cal. 3d at 40, 672 P.2d at 120, 196 Cal. Rptr. at 714.

\textsuperscript{38} \textit{Id.} at 40-41, 672 P.2d at 120-21, 196 Cal. Rptr. at 714-15.

\textsuperscript{39} \textit{Id.} at 40, 672 P.2d at 120, 196 Cal. Rptr. at 714. Justice Reynoso stated that a
the issue of retroactivity was irrelevant because De Lancie had “merely clarified existing law;” since defendant's conversation was recorded for evidentiary purposes and not for security reasons, the police activity was unlawful and the evidence obtained inadmissible.

IV. Conclusion

The true impact of Donaldson will be the memory of what the court refused to address in its decision: the suppression of evidence under the De Lancie principle. The importance of this issue is evidenced by the “Truth-in-Evidence” provision of Proposition 8 which permits all “relevant evidence” to be admitted in any criminal prosecution. In practical effect, the amendment replaced California's exclusionary standard with that of the federal standard. On the other hand, the De Lancie decision rejected the federal standard. The inference that violations of De Lancie's teachings would be remedied by exclusion of the intercepted evidence has more than likely been undermined by Proposition 8. The court has yet to face this dilemma.

C. Written form may suffice to meet Boykin-Tahl effective waiver test; “package deal” plea bargaining requires judicial scrutiny: In re David Ibarra.

I. Introduction

The California Supreme Court in In re David Ibarra reached two significant decisions related to plea bargaining: (1) the trial court may rely on a validly executed waiver form in assessing the voluntariness of a guilty plea; and (2) the acceptance of a “package deal” plea bargaining requires judicial scrutiny.
"Plea deal" plea bargain is not inherently coercive, but must be looked at in the totality of the circumstances.

Ibarra's case arose after two armed gunmen robbed a store. Police pursued the robbers' car, and a front seat passenger leaned out the window of the car and began shooting. One officer observed Ibarra pulling on the assailant's belt buckle. Eventually, the car pulled over. A witness recognized the driver and the front seat passenger as the armed robbers.

Ibarra maintained his innocence, stating he was asleep in the back seat of the car during the robbery. He stated that he pled guilty because his counsel advised him that the plea bargain was available only if all three defendants were to plead guilty. Further, counsel told him if this plea was withdrawn, his codefendants would likely be found guilty and face severe sentences. Counsel asked petitioner to initial a printed waiver form which he did. The judge questioned the petitioner as to whether he had read the form, understood his rights, and discussed them with counsel. Later, Ibarra said he had not read the form and had not understood his rights. He also stated that he had met with counsel for only fifteen minutes before his court appearance.

II. ANALYSIS

In considering the issue of whether a form waiver is a valid method of relinquishing constitutional rights to a jury trial and the privilege against self-incrimination, the court began its inquiry by reviewing the standards set forth in Boykin v. Alabama. That landmark case held that before a defendant may enter a plea of guilty, his waiver must be knowing and intelligent. The California Supreme Court reviewed the question of the voluntary character of the plea and the waiver of the privilege against compulsory self-incrimination. The Court held that acceptance of the petitioner's guilty plea under the circumstances of the case constituted reversible error.

2. Id. at 282, 666 P.2d at 982, 193 Cal. Rptr. at 540.
3. 395 U.S. 238 (1969). In Boykin, the defendant was represented by appointed counsel and pled guilty to five indictments for common law robbery. The judge asked no questions of the defendant and the defendant did not address the court. Defendant's counsel cursorily cross-examined. Defendant did not testify. He was found guilty and sentenced to death. The Supreme Court of the United States reviewed the question of the voluntary character of the plea and the waiver of the privilege against compulsory self-incrimination. The Court held that acceptance of the petitioner's guilty plea under the circumstances of the case constituted reversible error.

4. Id. at 242. The Court quotes language from Carnley v. Cochran, 369 U.S. 506 (1961), stating: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."
nia Supreme Court expanded upon the *Boykin* decision in the case of *In re Tahl*. The court stated that to insure the *Boykin* standard the record must contain *on its face* direct evidence that the accused was aware of the consequences of his giving up his constitutional rights. Further refinements of *Boykin* were made in *People v. Lizarraga*, when the court determined that the recitation of the constitutional rights to the defendant need not be in legalistic language, so long as it conveyed the essential character of the rights.

It is against this background and these standards that the court searched to determine if signing a written form would constitute a sufficient waiver of constitutional rights. The court looked to *Tahl* for approving language. In footnote 6, the *Tahl* court stated that “[w]hat is required is evidence that the particular right was known to and waived by the defendant. The explanation need not necessarily be by the court, although the waiver must be by the defendant.”

The court concluded that in felony cases which do not involve special circumstances which might indicate that a plea is otherwise involuntary, the waiver form is sufficient to meet the *Boykin-Tahl* test. And because the underlying purpose of *Boykin* and *Tahl* is to ensure that a defendant is aware of his rights, a defendant who has signed a waiver upon the competent advice of his attorney need not receive another recitation from a trial judge.

The standard set forth is that the judge must inquire as to whether the defendant read and understood the waiver and discussed it with his attorney. If the judge is not fully satisfied, he is

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5. 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969). *In re Tahl* was a proceeding in habeas corpus holding that exclusion of two jurors because of their voir dire replies was reversible error. The plea of guilty in this case did not have to adhere to the *Boykin* standard as the plea was entered prior to the effective date of *Boykin*. In what amounts to dicta, the court stated:

> It does mean that the record must contain *on its face* direct evidence that the accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant.

*Id.* at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584 (emphasis in original).

6.  Id.

7. 43 Cal. App. 3d 815, 118 Cal. Rptr. 208 (1974). *People v. Lizarraga* involved a prosecution for the sale of heroin. The court of appeal adequately advised defendant of the rights he was waiving by admitting a prior conviction even though he used none of the standard constitutional terminology. The court concluded that “the trial court's recital adequately comprehended all the rights actually involved in the waiver.” *Id.* at 821, 118 Cal. Rptr. at 213.

8.  Id.

9. 1 Cal. 3d at 133, 460 P.2d at 457, 81 Cal. Rptr. at 585.

10. 34 Cal. 3d at 285, 666 P.2d at 984, 193 Cal. Rptr. at 542.

11.  Id.
compelled to do further inquiry to ensure a knowing and intelligent waiver.

The second major holding of the court was that a “package deal” plea bargain is not inherently coercive, but it must be reviewed within the totality of the circumstances. The possibility of coerciveness in a plea bargain situation is not a new concern to the court. In *People v. West*, the supreme court sitting en banc with no dissent, found that:

> The greatest danger in the current practice lies in its secretiveness. . . . [T]he basis of the bargain should be disclosed to the court and incorporated in the record. We should exhum[e] the process from stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter.

In both *West* and the United States Supreme Court’s ruling in *Bordenkircher v. Hayes*, single plea bargains, although containing elements of coercion, were upheld.

The court recognized that “package deal” plea bargains present even greater potential for coercion. A defendant, for example, may fear that his co-defendant will attack him if he does not plead guilty. However, there is another side of the coin in which a “package deal” may be entered without undue force. The court concluded its balancing of these two possibilities and established a “totality of circumstances test.” Added insurance exists in the requirement that whenever a plea is taken pursuant to a “package

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12. Id. at 288, 666 P.2d at 986, 193 Cal. Rptr. at 544. The totality of circumstances test in examining the voluntariness of a guilty plea was determined by the court to be the prevailing view. The court relied upon United States v. Nuckols, 606 F.2d 566 (5th Cir. 1979); United States v. Tursi, 576 F.2d 396 (1st Cir. 1978); United States v. Bambulas, 571 F.2d 525 (10th Cir. 1978); Crow v. United States, 397 F.2d 294 (10th Cir. 1968); Johnson v. Wilson, 371 F.2d 911 (9th Cir. 1967); United States v. Glass, 317 F.2d 200 (4th Cir. 1963); Conley v. Cox, 138 F.2d 786 (8th Cir. 1943); and a number of state court decisions.
14. Id. at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393.
15. 434 U.S. 357 (1978). The *Bordenkircher* Court held that the due process clause of the fourteenth amendment was not violated when a prosecutor carried out a threat against a defendant to have him reindicted on more serious charges if he did not plead guilty to the offense with which he was originally charged. In this instance, the defendant was subject to such prosecution. "[T]his Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor’s interest at the bargaining table is to persuade the defendant to forgo his right to plead not guilty. . . . [T]he course of conduct engaged in by the prosecutor in this case . . . did not violate the Due Process Clause of the Fourteenth Amendment." Id. at 364-65.
16. 34 Cal. 3d at 287-88, 666 P.2d at 986, 193 Cal. Rptr. at 544.
17. Id. The court stated that the mandatory requirement of inquiry would pro-
deal” the court is required to inquire into the totality of the circumstances.\textsuperscript{18}

A “shopping list” of circumstances to be considered was presented: (1) the propriety of the inducement of the plea; (2) the factual and evidentiary basis for the guilty plea; (3) the nature and degree of coerciveness—including psychological pressures; (4) the defendant’s motive in pleading guilty—if it was the probability of conviction the defendant cannot be said to have been “forced,” “unless the coercive factors present had nevertheless remained a substantial factor in his decision.”\textsuperscript{19} The list is not presented as being exclusive and the court explained that a number of other factors may be relevant, e.g., age, whether defendant or prosecutor initiated the plea negotiations, and whether charges had already been pressed against a third party.\textsuperscript{20}

III. The Dissent

Justice Mosk did not agree that the form waiver meets the standards set out in \textit{Tahl}. He acknowledged that the court in \textit{Mills v. Municipal Court}\textsuperscript{21} allowed for “the realities of the typical municipal and justice court environment,” by permitting deviation from \textit{Tahl} as long as “the spirit of the constitutional principles” was respected. He argued, however, that the ramifications of a guilty plea in a felony matter are much too grave to permit a form plea. Justice Mosk predicted that “[i]t [would be] much too tempting for harried defense counsel, eager to conclude the case to get on with the next one, to instruct his client to ‘sign here, and tell the judge that you have been advised of your rights and understand them.’”\textsuperscript{22}

IV. Impact

The court’s decision that a signed waiver satisfies the \textit{Boykin-Tahl} requirement is a departure from the Federal Rules of Criminal Procedure, which require the trial court to personally admon-
ish a defendant of his constitutional rights before accepting a guilty plea. This decision does, however, resolve a conflict that has been existent in the appellate courts as to whether a waiver form may substitute for the court's admonishment. This decision specifically overrules the appellate decision of People v. Bell, and approves People v. Vidaurri.

While the court freed the trial court of responsibility regarding recitation of defendant's rights when the waiver form is involved, it added responsibility when a "package deal" plea bargain is involved. The trial court has a duty to conduct an inquiry into the voluntariness of the defendant's plea before accepting it. The role of the court in plea bargaining has long been a debated issue.

   (c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
      (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
      (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
      (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
      (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
      (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.


24. 118 Cal. App. 3d 781, 173 Cal. Rptr. 669 (1981). The Bell court held that when a not guilty plea is entered, the record must reflect that the defendant has been advised of his rights, and show express waivers of his enumerated constitutional rights.

25. 103 Cal. App. 3d 450, 163 Cal. Rptr. 57 (1980). The Vidaurri court upheld a conviction where the trial established that the defendant had knowingly and voluntarily waived his rights when he had signed a waiver form.

26. A diagnosis and recommendation as to what the court's role in plea bargaining should be is outlined in Ackley, Plain Talk About Plea Bargaining, 10 Pepperdine L. Rev. 39 (1982). Judge Ackley, Superior Court of Yolo County,
The duties of the court as elicited in this case clarify and add to the statutory duties of the court in accepting a plea bargain spelled out in California Penal Code section 1192.5.27

What some authorities have argued is that the court should not be involved in the plea bargaining negotiations at all because:

[Participation by the courts in negotiations with the criminally accused blurs, sometimes beyond recognition the prosecutorial function and the impartial arbiter function of the judiciary in an adversary process. Such participation erodes the concept of objective evaluation and independent consideration of just disposition after establishment of guilt.28]

However, any waiver of constitutional rights demands safeguards. In this instance the court has placed greater responsibility upon the defendant's attorney in obtaining a knowing and intelligent waiver, but has not completely precluded the court's inquiry. Further, the increased involvement of the court in accepting a "package deal" plea bargain seems well justified since such negotiations are highly suspect as being coercive upon the defendant.

recognizes that plea bargaining has become an integral part of the court system. However, "[t]he courts are not in a position to fully understand the true reasons for a plea agreement, and should be removed entirely from the plea bargaining process and returned to their proper role of disposition once the accused has been found criminally responsible to society by plea or by a finding of guilt."

27. CAL. PENAL CODE § 1192.5 (West 1982) provides:

Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, other than a violation of subdivision (2) or (3) of Section 261, Section 264.1, Section 286 by force, violence, duress, menace or threat of great bodily harm, . . . or Section 289, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.

Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on such plea to a punishment more severe than that specified in the plea and the court may not proceed as to such plea other than as specified in the plea.

If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in such case, the defendant shall be permitted to withdraw his plea if he desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for such plea.

If such plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available.

If such plea is withdrawn or deemed withdrawn, it may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commissions, boards, and tribunals.

Id.

28. Ackley, supra note 24, at 52.
D. Survivor of a suicide pact could be charged with aiding and abetting: In re Joseph G.

In re Joseph G., 34 Cal. 3d 429, 667 P.2d 1176, 194 Cal. Rptr. 163 (1983), was ultimately decided upon the facts of the case. Two teenage boys made a suicide pact. They drove off a cliff and the passenger died. The driver survived and was convicted of murder. Although under the common law the survivor of a suicide pact was guilty of murder, the court found under these facts such a pronouncement was inappropriate. First, in Joseph G., the court found that the trial court was convinced of the genuineness of the pact. Second, no potential for fraud was present because there was an equal chance for both of the boys to be killed in the automobile. Third, the suicide and the attempted suicide were committed simultaneously by the same act.

The court distinguished this case from the sparse case law relating to suicides where a conviction for murder had been sustained when one party agreed to murder the other and then kill himself.

American law does not punish for suicide because it is regarded as a mental illness. In most jurisdictions attempted suicide is also not punishable. However, there is culpability for aiding, abetting and advising in a suicide. As codified in CAL. PENAL CODE § 401 (West 1970): "Every person who deliberately aids, or advises, or encourages another to commit suicide, is guilty of a felony."

While the court indicated that, based on the facts of this case, the driver did attempt suicide, it could not be denied that the individuals also aided and abetted each other. At most, the court concluded, the defendant should have been charged with aiding and abetting his companion's suicide under CAL. PENAL CODE § 401.

E. Trial court has discretion when sentencing sex offenders to apply terms provided in Penal Code section 667.6(c) or 1170.1: People v. Belmontes.

In People v. Belmontes, 34 Cal. 3d 335, 667 P.2d 686, 193 Cal. Rptr. 882 (1983), the court had the opportunity to define guidelines for sentencing under CAL. PENAL CODE § 667.6(c) (West Supp. 1984). Section 667.6(c) provides in pertinent part:

In lieu of the term provided in Section 1170.1, a full, separate, and consecu-
tive term may be imposed for each violation of Subdivision (2) or (3) of Section 261, Section 264.1, subdivision (b) of Section 288, Section 289, or of committing sodomy or oral copulation in violation of Section 286 or 288a by force, violence, duress, menace or threat of great bodily harm whether or not the crimes were committed during a single transaction. If such term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time such person would otherwise have been released from imprisonment.

*Id.* (emphasis added).

The court held that this harsh sentencing provision may be used as an alternative to Section 1170.1. The court may, when sentencing for the listed sex offenses in 667.6(c), use its discretion in employing the harsh full consecutive terms prescribed or may apply the more lenient formula in 1170.1 which allows for serving a full principal term (which is the greatest term of imprisonment) plus enhancements. The term for each consecutive non-violent offense is one-third of the middle term for that offense and shall exclude enhancements for a violent offense. The term for a violent felony shall be one-third of the middle term and one-third of any enhancement.

Because the decision to use 667.6(c) is discretionary, it requires a statement of reasons by the court identifying the criteria which justify these harsher provisions. The court suggested a scenario that the trial court would first decide generally between concurrent and consecutive terms. If the court decides to sentence to consecutive terms and has stated its reasons it must then decide whether the consecutive terms should be under the scheme of 1170.1 or 667.6(c). If the latter is chosen, the reasons should be stated for the record. The court warned that the decision should be made carefully, as the legislative intent was that this severely punitive provision should be reserved for serious sex offenders.

Finally, the court recognized that because defendants are entitled to "informed discretion" when sentenced, *United States v. Tucker*, 404 U.S. 443 (1972), the holding that the trial court may elect to sentence either under 667.6(c) or 1170.1 should apply retroactively. The remedy for those defendants already sentenced and whose judgments are final is to seek a writ of habeas corpus, alleging the failure of the sentencing court to exercise discretion in determining whether to sentence under section 667.6(c) or section 1170.1.
F. California's first degree felony murder rule held to be statutory and constitutional, but its punishment may constitute "cruel and unusual" punishment; a standing crop may be the subject of a robbery or attempted robbery: People v. Dillon.

I. INTRODUCTION

In People v. Dillon, the California Supreme Court considered two issues which required extensive historical analysis. The first issue was whether a standing crop can be the subject of a robbery or attempted robbery. The second issue was whether the first degree felony murder rule is statutory, and if it is statutory, whether it is constitutional. After answering these questions in the affirmative, the court considered whether the penalty for first degree felony murder imposed in Dillon violated the state constitution as a "cruel and unusual" punishment.

The defendant, a 17 year old high school student, and his friends joined together to steal a marijuana crop that was being grown illegally in the hills near defendant's home. In the course of their attempt, the defendant shot and killed a man who was guarding the crop. The defendant was convicted of first degree felony murder and attempted robbery and sentenced to life im-

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2. Id. at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393.
3. Id.
4. Id.
5. The court also considered two preliminary matters. The court concluded that there was sufficient evidence to support the jury's verdict of attempted robbery. Id. at 456, 668 P.2d at 704, 194 Cal. Rptr. at 397. The court also held that the jury instructions pertaining to attempted robbery were a correct statement of the law of attempts. Id. at 453, 668 P.2d at 702, 194 Cal. Rptr. at 395.
6. Id. at 450, 668 P.2d at 700, 194 Cal. Rptr. at 393.
7. The defendant had visited the farm on previous occasions and knew that it was guarded by armed men. The defendant and his friends armed themselves with guns, sticks and knives, and also took along rope and strips of bedsheets to use to tie up the guards. Some of the boys wore masks. Id. at 451, 668 P.2d at 701, 194 Cal. Rptr. at 394.
8. After reaching the field of marijuana, the group divided into pairs. Someone in the group accidentally fired his shotgun and the defendant thought one of his friends had been shot. When one of the guards approached the defendant from the rear, the defendant panicked and shot the man nine times. Id. at 452, 482-83, 668 P.2d at 701, 723, 194 Cal. Rptr. at 394, 416.
prisonment in state prison.9

II. ROBBERY OF A STANDING CROP

The defendant argued that his conviction for attempted robbery and felony murder was improper since a standing crop of marijuana is realty and, therefore, cannot be the subject of a robbery.10 At common law, the crime of larceny was limited to the unlawful taking of personalty, and since crops and fixtures were considered to be realty they were not subject to larceny.11 The law of robbery took its definition of subject property from the law of larceny.12 Although the legislature has redefined crops and fixtures as personalty subject to larceny,13 the defendant contented that no change has been made in the common law rule as it relates to robbery.14

The court rejected the defendant's argument. First, the court stated that there was no reason to believe that the legislature, by only amending the common law rule pertaining to larceny, intended to apply the rule to robbery,15 especially when there was

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9. The trial court originally committed the defendant to the Youth Authority. However, in People v. Superior Court (Dillon), 115 Cal. App. 3d 687, 185 Cal. Rptr. 290 (1981), the court of appeal ruled that a minor convicted of first degree murder was ineligible for the Youth Authority. The defendant was then resentenced to life imprisonment in state prison, which, in light of the defendant's age was the only sentence possible under Penal Code section 190, 1978 Cal. Stat. 1981. 34 Cal. 3d at 486-87, 668 P.2d at 726, 194 Cal. Rptr. at 419.

10. 34 Cal. 3d at 456-57, 668 P.2d at 704-05, 194 Cal. Rptr. at 397.

11. Id. at 457, 668 P.2d at 705, 194 Cal. Rptr. at 398 (citing People v. Cummings, 114 Cal. 437, 440, 46 P. 284, 285 (1896)). Thus, if the thief severed the crops and immediately carried them away, there was no larceny because the property never became the owner's personalty. On the other hand, if a period of time elapsed between severance and asportation, the crop was deemed to have become the owner's personal property and its theft constituted larceny. 34 Cal. 3d at 457-58, 668 P.2d at 705, 194 Cal. Rptr. at 398.

12. 34 Cal. 3d at 459, 668 P.2d at 706, 194 Cal. Rptr. at 399. See People v. Butler, 65 Cal. 2d 569, 572-73, 421 P.2d 703, 706, 55 Cal. Rptr. 511, 514 (1967) ("robbery is but larceny aggravated by the use of force or fear to accomplish the taking").

13. CAL. PENAL CODE § 495 (West 1970) provides: "The provisions of this Chapter [dealing with larceny] apply where the thing taken is any fixture or part of the realty, and is severed at the time of the taking, in the same manner as if the thing had been severed by another person at some previous time." See also CAL. PENAL CODE §§ 487b, 487c (West Supp. 1984) (divides the theft of real property which is converted into personal property into grand and petty theft).

14. 34 Cal. 3d at 458, 668 P.2d at 706, 194 Cal. Rptr. at 399.

15. Id. at 459, 668 P.2d at 706, 194 Cal. Rptr. at 399. "To so argue is to presume the Legislature concluded that although the old rule was absurd as applied to thieves, it should nevertheless be maintained to exonerate robbers." Id. The court believed that a better explanation for the legislature's omission of robbery was simply the fact that when the statute was passed in 1872 there was "little rea-
no evidence "that there ever existed at common law an explicit doctrine regarding robbery of crops . . . ."\textsuperscript{16} Second, the court could find "no reasoned support for the continued application of the common law rule," and therefore declined to extend it to robbery.\textsuperscript{17} Thus, the court finally held that "a robbery within the meaning of [Penal Code] section 211\textsuperscript{18} is committed when property affixed to realty is severed and taken therefrom in circumstances that would have subjected the perpetrator to liability for robbery if the property had been severed by another person at some previous time."\textsuperscript{19}

III. FIRST DEGREE FELONY MURDER RULE IS STATUTORY

The defendant urged the court to abolish the first degree felony murder rule just as the Michigan Supreme Court had in \textit{People v. Aaron}.\textsuperscript{20} Although the court acknowledged the criticism which

\footnotesize{son to expect that robbers would eschew bank vaults in favor of barnyards, or that farmers would patrol their fields so assiduously that covetous criminals would need to resort to robbery to achieve their ends."} \textit{Id.}

16. \textit{Id. at 461-62, 668 P.2d at 707-08, 194 Cal. Rptr. at 400-01. The court considered decisions in other states and found cases where the rule had been abolished, e.g., Junod v. State, 73 Neb. 208, 102 N.W. 462 (1905); State v. Donahue, 75 Or. 409, 144 P. 755 (1914); or redefined, e.g., Garrett v. State, 213 Miss. 328, 56 So. 2d 809 (1952); or creatively applied so as to avoid an illogical result, e.g., Fuller v. State, 34 Ala. App. 211, 39 So. 2d 24 (1948). Furthermore, the rule has been abolished by statute in several states, see, e.g., Commonwealth v. Meinhart, 173 Pa. Super. 495, 98 A.2d 392 (1953); Williams v. State, 186 Tenn. 252, 209 S.W.2d 29 (1948), and eroded by statute in England, see 4 W. BLACKSTONE, COMMENTARIES* 233-34. 34 Cal. 3d at 460, 668 P.2d at 707, 194 Cal. Rptr. at 400.}

17. \textit{Id. at 461-62, 668 P.2d at 707-08, 194 Cal. Rptr. at 400-01. The court considered decisions in other states and found cases where the rule had been abolished, e.g., Junod v. State, 73 Neb. 208, 102 N.W. 462 (1905); State v. Donahue, 75 Or. 409, 144 P. 755 (1914); or redefined, e.g., Garrett v. State, 213 Miss. 328, 56 So. 2d 809 (1952); or creatively applied so as to avoid an illogical result, e.g., Fuller v. State, 34 Ala. App. 211, 39 So. 2d 24 (1948). Furthermore, the rule has been abolished by statute in several states, see, e.g., Commonwealth v. Meinhart, 173 Pa. Super. 495, 98 A.2d 392 (1953); Williams v. State, 186 Tenn. 252, 209 S.W.2d 29 (1948), and eroded by statute in England, see 4 W. BLACKSTONE, COMMENTARIES* 233-34. 34 Cal. 3d at 460, 668 P.2d at 707, 194 Cal. Rptr. at 400.}

18. \textit{CAL. PENAL CODE} § 211 (West 1970) provides: "Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." \textit{Id.}

19. 34 Cal. 3d at 462, 668 P.2d at 708, 194 Cal. Rptr. at 401. All of the justices concurred in this part of the court's opinion. \textit{Id. at 489, 490, 493, 494, 499, 502, 668 P.2d at 727, 728, 730, 731, 734, 737, 194 Cal. Rptr. at 420, 421, 423, 434, 437, 440.}

20. 409 Mich. 672, 299 N.W.2d 304 (1980). Michigan has not codified murder, malice or felony murder, but relies instead on the common law. Michigan does, however, have statutes which divide murder into two degrees and punishes each degree differently. \textit{MICH. COMP. LAWS ANN.} § 750.316 (West 1968) (MICH. STAT. ANN. § 28.548 (Callaghan 1982)) provides:

\textit{Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, or premeditated killing, or which is committed in the perpetration, or attempt to perpetrate arson, criminal sexual conduct in the first or third degree, robbery, breaking and entering of a dwelling, larceny of any kind, extortion, or kidnapping, is murder of the first degree, and shall be punished by imprisonment for life.}

\textit{Id. The Michigan statute is based on a Pennsylvania statute passed in 1794, the first legislation in this country to create different degrees of murder. The Penn-}
the rule has received, and admitted that the court itself has limited the application of the rule,\textsuperscript{21} it concluded that, unlike the Michigan felony murder rule, the first degree felony murder rule in California "is a creature of statute."\textsuperscript{22} Despite the fact that Michigan and California patterned their degree-fixing laws on the same Pennsylvania statute,\textsuperscript{23} the court found legislative intent to codify first degree felony murder in the history of California's Penal Code.\textsuperscript{24}

In 1850, the California Legislature adopted "An Act concerning Crimes and Punishments,"\textsuperscript{25} which contained the first criminal laws of California. Section 19 of the Act codified the common law definition of murder.\textsuperscript{26} Under section 21, murder had only one degree and was punishable by death.\textsuperscript{27} Section 25 codified the common law felony murder rule.\textsuperscript{28} In 1856, section 21 was amended to divide the crimes of murder into two degrees and impose different sentences based on the degree.\textsuperscript{29} Thus, "[w]hen a killing occurred in the commission of a felony, section 25 declared it to be

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\texttt{sylvania statute and the statutes of other states patterned after it, have been construed as nothing more than degree-fixing statutes. Commonwealth ex rel. Smith v. Myers, 438 Pa. 218, 224, 261 A.2d 550, 553 (1970) ("[I]t gives no aid to the determination of what constitutes murder in the first place"); Aaron, 409 Mich. at 719, 299 N.W.2d at 322 ("[T]he statute only serves to raise an already established murder to the first-degree level, not to transform a death, without more, into a murder." (emphasis in original)). The Aaron court concluded that since the Michigan felony-murder rule was not statutory, the court could abolish it, and it did. 409 Mich. at 733, 299 N.W.2d at 328-29.
\textsuperscript{21.} E.g., People v. Phillips, 64 Cal. 2d 574, 51 Cal. Rptr. 225 (1966) (court refused to apply second degree felony murder rule to crime of grand theft).
\textsuperscript{22.} 34 Cal. 3d at 465, 668 P.2d at 709, 194 Cal. Rptr. at 402.
\textsuperscript{24.} 34 Cal. 3d at 472, 668 P.2d at 715, 194 Cal. Rptr. at 408.
\textsuperscript{25.} 1850 Cal. Stat. 229.
\textsuperscript{26.} Id. § 19.
\textsuperscript{27.} Id. § 21.
\textsuperscript{28.} Id. § 25. Section 25 provided in pertinent part: "[W]here such involuntary killing shall happen in the commission of an unlawful act, which . . . committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder." Although the statute specified involuntary killings, the court construed the provision to apply to both voluntary and involuntary homicides. People v. Doyell, 48 Cal. 85, 94 (1874).
\textsuperscript{29.} 1856 Cal. Stat. 219 § 21 provided in pertinent part:
All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree. . . . Every person convicted of murder of the first degree, shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the state Prison for a term not less than ten years and which may extend to life.
The language of this statute was similar to the 1794 Pennsylvania statute, see
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murder; thereupon section 21 prescribed the degree of that murder according to the particular felony involved . . . .”

The Act of 1850 was repealed by the adoption of the Penal Code in 1872. Section 21 was replaced by Penal Code section 189, but section 25 was not reenacted. Defendant argued that Penal Code section 189 was intended to act only as a degree-fixing statute and was not intended to take the place of the old section 25.

Keedy, supra note 23, at 773, and was construed to be simply a degree-fixing measure. See, e.g., People v. Moore, 8 Cal. 90, 93 (1857).

30. 34 Cal. 3d at 466, 668 P.2d at 711, 194 Cal. Rptr. at 404. See People v. Doyell, 48 Cal. at 85 (court commented on the different effects of section 21 and 25).


32. CAL. PENAL CODE § 189 (West Supp. 1984) is essentially the same as it was when enacted in 1850 and presently provides in pertinent part:

> All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under Section 288, is murder of the first degree; and all other kinds of murders are of the second degree.


33. 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405. All the provisions of the 1850 Act which were not reenacted “ceased to be the law.” People v. Logan, 175 Cal. 45, 48, 164 P. 1121, 1122 (1917).

34. Four arguments were made to support this position:

(1) The legislature’s decision not to reenact the statutory felony murder rule indicates an intent to abolish the felony murder rule. See People v. Valentine, 28 Cal. 2d 121, 142, 169 P.2d 1, 14 (1946) (“It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law”).

(2) Since section 189 used almost precisely the same language as section 21, it should be interpreted to mean the same thing, i.e., to fix the degree of a murder. 34 Cal. 3d at 467, 668 P.2d at 712, 194 Cal. Rptr. at 405; see CAL. PENAL CODE § 5 (West 1970) which provides: “The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments.”

(3) The word “murder” used in section 189 should be defined as it is in section 187. CAL. PENAL CODE § 187(a) (West Supp. 1984) provides in pertinent part: “Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.” (emphasis added). “When a statute prescribes the meaning to be given to particular terms used by it, that meaning is generally binding on the courts.” People v. Western Airlines, Inc., 42 Cal. 2d 621, 638, 268 P.2d 723, 733 (1954).

(4) Since the word “murder” as used in the first part of section 189 includes “malice aforethought,” the same meaning should be used in the second part, which lists certain felonies. 34 Cal. 3d at 468, 668 P.2d at 713, 194 Cal. Rptr. at 406. See Stillwell v. State Bar, 29 Cal. 2d 119, 123, 173 P.2d 313, 315 (1946). (“[W]hen a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law.”)
In response, the Attorney General turned to two other sections of the Penal Code to show a contrary intent. First, Penal Code section 192 describes involuntary manslaughter as an unlawful killing "in the commission of an unlawful act, not amounting to felony." The Attorney General argued that this language implied that a different statute would classify a killing during the course of a felony to be murder. To prove that section 189 was just such a statute, the Attorney General turned to the legislative history of Penal Code section 455 dealing with arson. When the Penal Code was first adopted, section 455 omitted a section of the earlier arson statute which contained a felony murder rule applicable for arson. The Code Commission commented on the reason for the omission stating: "This provision is surplusage, for the killing in that case is in the perpetration of arson, and falls within the definition of murder in the first degree. -See section 189, ante." This language, according to the Attorney General, indicated that section 189 was intended to serve two functions: (1) making a killing during the course of one of the listed felonies the crime of murder; and (2) classifying that murder as first degree.

The court accepted the Attorney General's arguments by stating: "[A]lthough the balance remains close, we hold that the evi-

35. The Attorney General also relied on language in the California Code Commission's note to section 189, THE PENAL CODE OF CALIFORNIA 47 (1872), which appeared to indicate that any "killing" done in the perpetration of one of the enumerated felonies would be first degree murder. The court pointed out that when read in context, the language applied to the statute's use in fixing the degree of a murder, not to defining when a killing constitutes first degree murder. 34 Cal. 3d at 468-69, 668 P.2d at 713, 194 Cal. Rptr. at 406.

36. CAL. PENAL CODE § 192 (West Supp. 1984) provides in pertinent part:
   Manslaughter is the unlawful killing of a human being without malice. It is of three kinds:
   1. Voluntary—upon a sudden quarrel or heat of passion.
   2. Involuntary—in the commission of an unlawful act, not amounting to felony, or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. . . .
   3. Vehicular. . . .

(emphasis added). Except for the addition of vehicular manslaughter, section 192 is essentially the same as when it was adopted in 1872.

37. 34 Cal. 3d at 470, 668 P.2d at 714, 194 Cal. Rptr. at 407.


39. 34 Cal. 3d at 470, 668 P.2d at 714, 194 Cal. Rptr. at 407.

40. 1856 Cal. Stat. 132 § 5 provided in pertinent part: "[A]nd should the life or lives of any person or persons be lost in consequence of such burning as aforesaid, such offender shall be deemed guilty of murder, and shall be indicted and punished accordingly."

41. THE PENAL CODE OF CALIFORNIA 189 (1872); 34 Cal. 3d at 470, 668 P.2d at 714, 194 Cal. Rptr. at 407.

42. 34 Cal. 3d at 471, 668 P.2d at 714, 194 Cal. Rptr. at 407.
dence of present legislative intent thus identified by the Attorney General is sufficient to outweigh the contrary implications of the language of section 189 and its predecessors. Since the court concluded that the first degree felony murder rule was statutory, the court had no power to abolish the rule.

IV. FIRST DEGREE FELONY MURDER RULE IS CONSTITUTIONAL

The defendant's alternative attack on his conviction for first degree felony murder was the argument that the rule violated due process of law. The due process clause requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime." The defendant argued that the felony murder rule improperly raised a presumption of malice, a necessary element of the crime of murder.
The court rejected the defendant's reasoning. According to the court, the first degree felony murder rule does not presume malice, rather, malice is simply not an element of the crime of felony murder.\textsuperscript{48} Therefore, the rule does not operate to presume the existence of a necessary element of the crime and is not a violation of due process.\textsuperscript{49}

V. SENTENCE FOR FIRST DEGREE FELONY MURDER MAY VIOLATE CONSTITUTIONAL PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT

The court next focused its attention on the penalty prescribed for first degree felony murder. First degree murder was punishable by death or life imprisonment with or without possibility of parole at the time of the events in Dillon.\textsuperscript{50} No allowance was made in the case of first degree felony murder for the individual

\textsuperscript{48} "The 'substantive statutory definition' of the crime of first degree felony murder in this state does not include either malice or premeditation . . . ." 34 Cal. 3d at 475, 668 P.2d at 718, 194 Cal. Rptr. at 411. The court stated that it was misleading to speak of the felony murder rule as "presuming" malice, noting that "the 'conclusive presumption' is no more than a procedural fiction that masks a substantive reality, to wit, that as a matter of law malice is not an element of felony murder." \textit{Id.} at 475, 668 P.2d at 717, 194 Cal. Rptr. at 410.

\textsuperscript{49} \textit{Id.} at 476, 668 P.2d at 718, 194 Cal. Rptr. at 411. The court noted that the United States Court of Appeals for the First Circuit and ten states have come to the same conclusion. \textit{Id.} at 476 n.22, 668 P.2d at 718 n.22, 194 Cal. Rptr. at 411 n.22.

Based on its conclusion that the felony murder doctrine does not presume malice, the court dismissed two additional arguments put forward by the defendant: (1) that the statutory presumption was invalid, and (2) that the presumption violated the defendant's equal protection rights by treating him differently from persons charged with murder under section 187. \textit{Id.} at 476 & n.23, 668 P.2d at 718 & n.23, 194 Cal. Rptr. at 411 & n.23. In a separate concurring opinion, Chief Justice Bird commented on two issues which the court may later face in connection with the felony murder doctrine. First, she argued that second degree felony murder, since it is not based on statute, should be abolished by the court. \textit{Id.} at 494, 668 P.2d at 731, 194 Cal. Rptr. at 423 (Bird, C.J., concurring). Second, the Chief Justice suggested that there may be constitutional limitations on the state's ability to define substantive criminal law. Such limitations might require proof of malice in any definition of first degree murder. \textit{Id.} at 494-99, 668 P.2d at 731-34, 194 Cal. Rptr. at 424-27 (Bird, C.J., concurring). See Jeffries & Stephan, \textit{Defenses, Presumptions, and Burden of Proof in the Criminal Law}, 88 YALE L.J. 1325 (1978).

\textsuperscript{50} 34 Cal. 3d at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412. Former CAL. PENAL CODE § 190 (West 1970), provided in pertinent part: "Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life." See 1978 Cal. Stat. 1981. The 1978 death penalty initiative amended section 190 to read in pertinent part: "Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in the
culpability of the defendant. Due to this arbitrary disregard for individual circumstances, the court concluded that in some cases the penalty for first degree felony murder “may violate the prohibition of the California Constitution against cruel or unusual punishments.”

The central case in the court’s analysis was In re Lynch. In Lynch, the court established that a statutory penalty may violate the constitution “if, although not cruel or unusual, in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” One method of determining proportionality set out in Lynch was an examination of “the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society.” This analysis focuses on the “totality of the circumstances surrounding . . . the case at bar” and on the “particular person before the court.” Application of this concrete two part approach in cases since Lynch has established “that a punishment which is not disproportionate in the abstract is nevertheless constitutionally impermissible if it is disproportionate to the defendant’s individual culpability.”


51. 34 Cal. 3d at 477, 668 P.2d at 719, 194 Cal. Rptr. at 412. CAL. CONST. art. I, § 17 provides: “Cruel or unusual punishment may not be inflicted or excessive fines imposed.” See also U.S. CONST. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”).

52. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).

53. Id. at 424, 503 P.2d at 930, 105 Cal. Rptr. at 226. Applying this standard in Lynch, the court found an indeterminable life-maximum sentence given to a man convicted for his second offense of indecent exposure to be unconstitutionally excessive. Id. at 439, 503 P.2d at 940, 105 Cal. Rptr. at 236.

54. Id. at 425, 503 P.2d at 930, 105 Cal. Rptr. at 226.

55. 34 Cal. 3d at 479, 668 P.2d at 720, 194 Cal. Rptr. at 413.

56. Id. at 479, 668 P.2d at 721, 194 Cal. Rptr. at 414.

57. Id. at 480, 668 P.2d at 721, 194 Cal. Rptr. at 414. In In re Foss, 10 Cal. 3d 910, 519 P.2d 1073, 112 Cal. Rptr. 649 (1974), the court acknowledged the need for serious penalties for persons convicted of selling heroin, but concluded that barring the defendant in that case from parole for 10 years was excessive in light of his individual circumstances. In In re Rodriguez, 14 Cal. 3d 639, 537 P.2d 384, 122 Cal. Rptr. 532 (1975), the court upheld the statutory indeterminate life-maximum sentence for child molesting, but determined that the defendant’s incarceration for 22 years was excessive in the circumstances of that case. The court ordered the defendant to be released.

The court in this case also took note of Edmund v. Florida, 458 U.S. 782 (1982), in which the United States Supreme Court, applying the federal constitutional prohibition of cruel and unusual punishment, found a sentence of capital punishment
Applying *Lynch* to the facts of *Dillon*, the court concluded that the defendant's sentence of life imprisonment violated the state constitution and should be reduced to the punishment for second degree murder. The court characterized the defendant's actions as a "response to a suddenly developing situation that defendant perceived as putting his life in immediate danger." Although the court did not condone or excuse the killing, it did find mitigating factors, especially the defendant's immaturity and lack of any criminal record, which in the court's view compelled a more lenient sentence.

In separate opinions, Justices Richardson and Broussard disagreed with the majority's view of the killing and felt the sentence was not excessive in this case. The defendant's careful planning of the robbery and the almost inevitable confrontation with the men guarding the marijuana convinced these justices that the defendant was morally culpable of a crime for which life imprisonment was a valid penalty. For this reason, they dissented from the decision to decrease the defendant's sentence.

Justice Kaus also expressed disagreement with "the lead opinion's relatively benign view of defendant's crime." Nevertheless, he concurred in the result because he believed the trial judge given to a defendant convicted of first degree felony murder to be constitutionally excessive because he had no intent to kill. The Supreme Court stated that the defendant's "criminal culpability must be limited to his participation in the robbery, and his punishment be tailored to his personal responsibility and moral guilt." *Id.* at 501.

58. 34 Cal. 3d at 489, 668 P.2d at 727, 194 Cal. Rptr. at 420. Modification of the defendant's conviction to second degree murder makes the defendant eligible for the Youth Authority. *See supra* note 9.

59. *Id.* at 488, 668 P.2d at 727, 194 Cal. Rptr. at 420.

60. *Id.* An additional factor which the court considered important was the great disparity between the defendant's sentence and the penalties received by the other participants in the attempted robbery. *Cal. Penal Code* § 31 (West 1970) provides in pertinent part: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." Although the other youths were principals in the attempted robbery and homicide under section 31, none of them were convicted of homicide or sentenced to state prison. The one adult in the group received three years' probation and one year in county jail. Four defendants were given probation and sent home while another was detained in a juvenile education and training facility. The final member of the group received immunity for testifying against the others. 34 Cal. 3d at 488 & n.40, 668 P.2d at 727 & n.40, 194 Cal. Rptr. at 420 & n.40.

61. 34 Cal. 3d at 499-500, 668 P.2d at 735, 194 Cal. Rptr. at 428 (Richardson, J., concurring and dissenting).

62. *Id.* at 504, 668 P.2d at 738, 194 Cal. Rptr. at 431 (Broussard, J., concurring and dissenting).

63. *Id.* at 502, 504, 668 P.2d at 737-38, 194 Cal. Rptr. at 430-31 (Richardson & Broussard, JJ., concurring and dissenting).

64. *Id.* at 493, 668 P.2d at 730, 194 Cal. Rptr. at 423 (Kaus, J., concurring).
erred in responding to the jury's inquiry as to its ability to bring in a verdict for less than first degree murder. In Justice Kaus' view, the jury had the right to "nullify" the law if it found the law to be unjust in this case, but the trial judge incorrectly told the jury that, in fact, they were compelled to follow the law under any circumstances. The judge's instruction, in Justice Kaus' mind, justified the reduction of the defendant's sentence.

G. Prior conviction cannot be used both for sentence enhancement and for sentencing to higher term: People v. Fain.

The court in People v. Fain, 34 Cal. 3d 350, 667 P.2d 694, 193 Cal. Rptr. 890 (1983), upheld concurrent prison sentences. This was an application of CAL. PENAL CODE § 669 (West Supp. 1983), as it read in 1978, providing that punishment for a crime would run concurrently with life imprisonment from another crime. Even if one of the terms of imprisonment must be served in another state, the sentences would still be concurrent. In 1978, the legislature amended section 669 to grant the trial court discretion to impose consecutive sentences, but specifically provided that the change would apply only to crimes committed after January 1, 1979.

The court resolved the case's second issue by declaring that a prior conviction cannot be used as both an enhancement and a reason for sentencing to a higher term.

65. Id.
66. Justice Kaus argued that juries have a right to disregard the law when they feel that justice demands a legally unjustifiable verdict. The jury's immunity from sanctions for disregarding its instructions serves to protect the jury's right to "nullify" the law. Id. at 490-91, 668 P.2d at 728-29, 194 Cal. Rptr. at 421-22 (Kaus, J., concurring).
67. Justice Kaus did not believe that a jury should be told of its right to nullify prior to beginning deliberations because to do so might encourage nullification. But Justice Kaus did believe that when a jury feels compelled to ask if it may disregard the jury instructions that the judge must answer in the affirmative. Id. at 491-92, 668 P.2d at 729, 194 Cal. Rptr. at 422 (Kaus, J., concurring).
68. "That shoving the jury in the direction of nullification is something the trial court need not do does not mean that it is permitted to pressure the jury into stifling a spontaneous urge to nullify." Id. at 492-93, 668 P.2d at 730, 194 Cal. Rptr. at 423 (Kaus, J., concurring).

Justice Kaus' analysis was criticized in the court's opinion as opening the door to anarchy. Id. at 487 n.39, 668 P.2d at 726 n.39, 194 Cal. Rptr. at 419 n.39. Justice Kingsley's separate opinion also disagreed with Justice Kaus. In Justice Kingsley's view, the question of nullification was irrelevant to deciding the case and the court's opinion was applying the law, not ignoring it. Id. at 493-94, 668 P.2d at 730-31, 194 Cal. Rptr. at 423-24 (Kingsley, J., concurring).
Finally, the court found that before a defendant admits to a prior conviction he is entitled to be advised of the precise consequences of that admission. If it appears the defendant was prejudiced by the failure to reveal the consequences, the court will be required to set aside a finding of the truth of an allegation of a prior conviction.

H. Proposition 8 will not apply retroactively: People v. Smith.

I. INTRODUCTION

In People v. Smith, the California Supreme Court determined that Proposition 8 would not be applied retroactively. The issue arose when the defendant was arrested for possession of stolen property. He was taken to the police station for interrogation and given his Miranda rights. He refused to answer any questions. During the night he was taken to another county jail where he was again read his Miranda rights. The next morning he was interrogated about another robbery and he confessed. The trial court denied the defendant's motion to suppress that confession.

The question that had to be determined in this case was whether the court should apply the new section 28 to article 1 of the California Constitution, which was added by section 3 of the initiative known as Proposition 8. Section (d) of that article reads in pertinent part that “relevant evidence shall not be excluded in any criminal proceeding.” The confession that the defendant

1. 34 Cal. 3d 251, 667 P.2d 149, 193 Cal. Rptr. 692 (1983). The majority opinion was written by Justice Mosk with Chief Justice Bird and Justices Broussard, Reynoso, Grodin, and Gilbert (assigned by the Chairperson of the Judicial Council) concurring. A separate dissenting opinion was written by Justice Richardson.

2. At the June, 1982 primary election the California voters adopted “The Victim's Bill of Rights.” The measure appeared on the ballot as “Proposition 8.” Effectively, it added section 28 to Article I of the California Constitution and made several additions to the California Penal Code and the Welfare and Institutions Code.

3. The defendant had raised other issues at his suppression hearing including a motion to suppress the evidence seized in a parking lot at the time of arrest. The seizure in the parking lot involved taking evidence from the defendant's wallet, which the court found to be unlawful. It denied, however, the motion that the confession was illegally obtained.

4. CAL. CONST. art. I, § 28(d) reads as follows:
   Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.
was seeking to suppress would come into evidence under Proposition 8.

Before determining the specific issue of retroactivity, the court reviewed its ruling in Brosnahan v. Brown. In that case the court had concluded, by a narrow margin of four to three, that the Proposition 8 initiative did not violate the single subject rule. The issue that had been raised in Brosnahan was not that Proposition 8 was substantially unconstitutional, but that the way in which it was submitted to the electorate was constitutionally improper. The court answered specific constitutional challenges but warned that their opinion was limited to “only those principal, fundamental challenges to the validity of [Proposition 8] as a whole . . . .” The court had reserved the right to give direct interpretation of specific provisions until they came before the court. Such an interpretation was required in the Smith case, as the court came face to face with the question of retroactivity in applying Proposition 8.

II. THE MAJORITY RATIONALE

The court determined that Proposition 8 would apply only to prosecutions for crimes committed on or after its effective date of June 9, 1982, on the basis of three lines of rationale: (1) that the primary stated purpose of Proposition 8 is to deter, (2) that if reasonably possible, the courts must construe a statute to avoid doubts as to its constitutionality and if construed in any other way the statute might be considered ex post facto, and (3) practical considerations mandate that the statute not be applied retroactively.

The determination that Proposition 8 was meant as a deterrent

Id.

5. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
6. See 10 PEPPERDINE L. REV. 895 (1983) for a discussion of Brosnahan v. Brown. The court weighed the following constitutional challenges: (1) that the initiative raised more than one subject and violated the single subject requirement of the California Constitution; (2) that the initiative failed to disclose all of the provisions in the title, in violation of article 10, section 9 of the California Constitution; (3) that Proposition 8 impermissibly impaired essential government functions; and (4) that the provisions were so extensive that they constituted a revision, not a mere amendment. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).
7. Id. at 241, 651 P.2d at 277, 186 Cal. Rptr. at 33 (citing Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 239, 241 (1978)).
was based on the plain meaning of the statute. The court relied on the introductory language of the initiative which states that "[t]o accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives." 9

The court construed this language to mean that if the stated purpose of the proposition is deterrence, the voters must have intended the measure to only be applied prospectively. 10

The second consideration was that the courts must construe a statute or a provision of the constitution in a light most favorable to its constitutionality. 11 The greatest potential for a constitutional defect in Proposition 8 is if it were construed in such a way as to amount to an ex post facto law. 12

The court further indicated that there will not be an ex post facto violation if the change effected is merely procedural. However, an important consideration is that "[a]lteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form." 13 It became crucial for the court to determine whether Proposition 8 is procedural or substantive. An examination of the provisions indicated that it is both procedural and substantive. 14 As the court had observed in

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9. 34 Cal. 3d at 258, 667 P.2d at 152, 193 Cal. Rptr. at 695 (citing § 3 of Proposition 8).
10. The court suggested that:
A contrary inference is not compelled by the fact that section 28, subdivision (d) speaks of applying to "any criminal proceeding." (See fn. 2, ante.) When read in context—i.e., relevant evidence shall not be excluded "in any criminal proceeding, including pretrial and post conviction motions and hearings"—the phrase is plainly meant to ensure that section 28, subdivision (d) will operate not only in criminal trials but also in other stages of a prosecution in which evidence is offered, such as preliminary examinations, hearings on motions to set aside accusatory pleadings or suppress evidence, and sentencing proceedings. In addition, of course, the phrase serves the purpose of excluding civil cases from the scope of section 28, subdivision (d).

Id. at 259 n.3, 667 P.2d at 152 n.3, 193 Cal. Rptr. at 695 n.3 (emphasis in original).
11. Id. at 259, 667 P.2d at 152, 193 Cal. Rptr. at 695 (citing In re Kay, 1 Cal. 3d. 930, 464 P.2d 142, 83 Cal. Rptr. 686 (1970); Otsuka v. Hite, 64 Cal. 2d 596, 414 P.2d 412, 51 Cal. Rptr. 284 (1966)).
12. CAL. CONST. art. I, § 9 prohibits ex post facto laws. The general test for a law to be proclaimed as ex post facto is that it must apply to events occurring before its enactment and it must disadvantage the offender affected by it. Weaver v. Graham, 450 U.S. 24, 29 (1981).
13. Id. at 29 n.12.
14. Some of Proposition 8's provisions were clearly substantive, such as the clause enhancing the sentence of anyone convicted of a serious felony with a prior conviction of such a crime (CAL. CONST. art. I, § 28(f)). Purely procedural clauses include giving victims of crimes a right to restitution (CAL. CONST. art. I § 28(b)), and to appear at sentencing and parole hearings. There are, however, a number of provisions of Proposition 8 that present a closer question: "although procedural in
Brosnahan, the proposition was designed to strengthen both "procedural and substantive" safeguards for victims of crime. In order "to minimize multiplicity of litigation, to forestall inconsistency of results in the inevitable close cases, and in general to avoid doubts as to the constitutionality of this measure under the ex post facto clause, we construe Proposition 8 to apply only to criminal proceedings arising out of offenses committed on or after the date it took effect."16

Finally, these were the practical considerations that persuaded the court. The court acknowledged some sense of arbitrariness in establishing an effective date; however, if the date of finality of judgment was used as a date to determine applicability, then those defendants whose cases were on appeal might or might not be granted a reversal and a new trial based on the dispatch with which the appellate court acted on their cases.17 By not applying Proposition 8 retroactively, the court avoided consequences adverse to the administration of justice and the right of fair trial.

The court ultimately decided the Smith case under pre-Proposition 8 law. The court relied on the holding dictated in People v. Pettingill.18 In that case, the defendant was read his Miranda rights but refused to waive them. Two days later a detective from another county interviewed the defendant and again gave the defendant his Miranda rights. The defendant proceeded to confess to a number of burglaries. The court reversed that conviction on the grounds that the confession was obtained in violation of the privilege against self-incrimination. Once a defendant has asserted his privilege against self-incrimination, all police interrogations outward form, it is possible that in a particular case each may affect rights of the defendant that are sufficiently 'substantial' to require ex post facto protection." 34 Cal. 3d at 261, 667 P.2d at 154, 193 Cal. Rptr. at 697.

15. 32 Cal. 3d at 246, 651 P.2d at 280, 186 Cal. Rptr. at 36.
16. 34 Cal. 3d at 262, 667 P.2d at 154, 193 Cal. Rptr. at 697. See also People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979) (court restored the death penalty, and construed the legislation only to apply to crimes committed after its effective date).
17. 34 Cal. 3d at 262, 667 P.2d at 154-55, 193 Cal. Rptr. at 697-98.
18. 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978). In Pettingill, the Eureka Police arrested the defendant on a burglary charge. They read him his Miranda rights and he refused to waive those rights. Two hours later he was readvised of his Miranda rights and again he refused to talk. The defendant was transferred to the county jail. In the meantime, evidence was found connecting the defendant with a number of burglaries in the Santa Barbara area. A detective from that area came to Eureka to speak with the defendant. He read him his Miranda rights and the defendant confessed.

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tion must cease. 19

The court compared the Smith case to the Pettingill case 20 and determined that the confession obtained was taken in violation of the defendant’s privilege against self-incrimination. The tainted confession was offered into evidence and therefore the judgment was reversed.

III. THE DISSENTING OPINION

Justice Richardson, the sole dissenter in this case, indicated his strong conviction that Proposition 8 should have immediate effect. For Justice Richardson, the intent was clearly on the ballot that Proposition 8 represented a “vital” need for an immediate change. He stated that the decision not to make Proposition 8 retroactive “is imaginary, lacking any basis either in the history of Proposition 8 or in general law.” 21

According to Justice Richardson, the defendant’s confession would be admissible under the law as provided by Proposition 8. Proposition 8 demands that the federal standard be applied, and under Michigan v. Mosely, 22 the two Miranda warnings were separated by a significant period of time and the confessions of the defendant were admissible.

Justice Richardson also argued that there is no problem with ex post facto principles since California cases “have uniformly held that ex post facto principles are not violated by the retroactive application of a statute which merely alters evidentiary rules by permitting the admission of previously inadmissible or incompetent evidence, and which does not lessen the amount or measure of the proof previously necessary to convict.” 23 It follows that a con-

19. This rule is outlined in People v. Fioretto, 68 Cal. 2d 714, 441 P.2d 625, 68 Cal. Rptr. 817 (1968). The court in People v. Pettingill, 21 Cal. 3d at 242, 578 P.2d at 114, 145 Cal. Rptr. at 867, noted that: “the Miranda-Fioretto line of decisions is premised on the preception that ‘the setting of in-custody interrogation’ of a suspect without counsel is inherently coercive.”

20. The attorney general attempted to distinguish the cases on a factual difference. In Smith, the second interrogator stated he did not know that the defendant had been read his rights, and had declined to answer. However, the court determined that such a distinction would not make a difference. 34 Cal. 3d at 266, 667 P.2d at 157, 193 Cal. Rptr. at 700.

21. Id. at 273, 667 P.2d at 162, 193 Cal. Rptr. at 705.

22. 423 U.S. 96 (1975). In this case, the Court rejected the assertion that Miranda warnings create a per se proscription of an indefinite duration. The test is whether the defendant’s right to cut off questioning was “scrupulously honored.” In Mosely, as in this case, the defendant, after receiving his Miranda warnings, declined to discuss the robberies for which he was arrested. Two hours later he was interviewed by a different officer and confessed to an unrelated homicide. The Court considered two relevant facts: two hours was a significant period of time, and the officers ceased the questioning after the defendant first invoked his rights.

23. 34 Cal. 3d at 274, 667 P.2d at 163, 193 Cal. Rptr. at 706 (citing People v. Brad-
stitutional change in evidentiary principles also does not invoke ex post facto principles. An analysis of People v. Ward and People v. Bradford, both of which relied on Thompson v. Missouri, is supportive of Justice Richardson's conclusion. Both Ward and Bradford relied on the Thompson holding that if a statute does nothing more than broaden the base of evidence that is admissible in a criminal case, then there are no grounds upon which to hold the statute to be ex post facto. In other words, a "new law cannot permit a criminal conviction to be obtained with less evidence than was required when the act was committed, the new law properly may ease prior evidentiary restrictions, thereby permitting the admission of more relevant evidence than previously was allowed." For Justice Richardson, the majority did not properly analyze the intent of Proposition 8, nor did they fully comprehend the ex post facto argument.

IV. The Impact

This decision does not further qualify the constitutional parameters of Proposition 8 that the Brosnahan court suggested they would leave open for further decisions. In determining that it would not be applied retroactively, the court found Proposition 8 inapplicable and deferred any further determination of its scope.

24. 34 Cal. 3d at 274, 667 P.2d at 163, 193 Cal. Rptr. at 706.
25. 50 Cal. 2d 702, 328 P.2d 777 (1958). In Ward, the court considered whether evidence in aggravation or mitigation could be introduced during the penalty phase of a death penalty hearing. The amendment allowing in the defendant's jail and juvenile record had been passed after the offense occurred. The court allowed the evidence in, stating that there was no violation of ex post facto laws.
26. 70 Cal. 2d 333, 450 P.2d 46, 74 Cal. Rptr. 726 (1969). In this case the defendant's wife was allowed to testify over his objection. The provision in the Evidence Code allowing the testimony was adopted after the offense was committed.
27. 171 U.S. 380 (1899). In Thompson, a law passed by the legislature in Missouri provided that:
   Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute . . . .
   Id. at 380. This law was not considered to be ex post facto when applied to prosecutions for crimes committed prior to its passage.
28. Id. at 386-87.
29. 34 Cal. 3d at 275, 667 P.2d at 164, 193 Cal. Rptr. at 707 (emphasis in original).
30. 32 Cal. 3d at 241, 651 P.2d at 277, 186 Cal. Rptr. at 33.
or validity.\textsuperscript{31} It remains clear that section 28(d) or the Right to Truth-in-Evidence\textsuperscript{32} portion of Proposition 8 will have a tremendous impact on cases involving the exclusionary rule. California has precluded evidence that would have been admissible under federal constitutional law. Proposition 8 will disallow those independent state grounds and bring California law in line with the federal constitutional standards as interpreted by the United States Supreme Court.

\section{I. The Child Abuse Reporting Act requirements are met by a psychologist by making an initial report; an exception to the psychologist-patient privilege must be justified by strong evidence: People v. Stritzinger.}

\section{I. INTRODUCTION}

In \textit{People v. Stritzinger},\textsuperscript{1} the California Supreme Court addressed the scope of the psychotherapist-patient privilege under the Child Abuse Reporting Act.\textsuperscript{2} Stritzinger's 14 year old stepdaughter, Sarah, had been taken to a clinical psychologist, Dr. Walker, by her mother. During Sarah's counseling session she confided to Dr. Walker that she and her step-father had engaged in sexual activity.\textsuperscript{3} Dr. Walker reported the conversation\textsuperscript{4} to the

\begin{itemize}
\item[31.] \textsuperscript{34} Cal. 3d at 263 n.8, 667 P.2d at 155 n.8, 193 Cal. Rptr. at 698 n.8.
\item[32.] The Right to Truth-in-Evidence section provides:
\begin{quote}
Except as provided by statute hereafter enacted by a two-thirds vote of the membership in each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post-conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.
\end{quote}
\textsuperscript{CAL. CONST. art. I, § 28(d).}
\item[1.] \textsuperscript{34} Cal. 3d 505, 668 P.2d 738, 194 Cal. Rptr. 431 (1983). Justice Mosk authored the majority opinion in which Chief Justice Bird and Justices Broussard, Reynoso and Grodin concurred. Justice Kaus wrote a separate concurring and dissenting opinion. Justice Richardson dissented.
\item[2.] The Child Abuse Reporting Act is codified in \textit{CAL. PENAL CODE} §§ 11165-11174 (West 1982 & West Supp. 1983). Section 11171(b) states that “[n]either the physician-patient privilege nor the psychotherapist-patient privilege applies to information reported pursuant to this article in any court proceeding or administrative hearing.”
\item[3.] Sexual activity allegedly took place over a 15-month period and included various acts of fondling, mutual masturbation and oral copulation.
\item[4.] Section 11166(a) of the Penal Code (West 1982) states in pertinent part that:
\begin{quote}
any child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who has knowledge of or observes a child in his or her professional capacity or within the scope of his or her
\end{quote}
\end{itemize}
Child Welfare Agency that afternoon and the welfare agency notified the Sheriff's office. Dr. Walker related the substance of his conversation with Sarah and he also told the deputy sheriff that he had a forthcoming appointment with Stritzinger.

The deputy later called Dr. Walker and requested that he reveal his conversation with Stritzinger, indicating that Penal Code section 11171(b) provided an applicable exception to the psychotherapist-patient privilege. Dr. Walker then related his conversation with Stritzinger.

At the trial court Stritzinger sought to exclude Dr. Walker's testimony on the grounds that it violated the psychotherapist-patient privilege. The trial court held that the Child Abuse Reporting Act provided an applicable exception and allowed the testimony. On appeal the supreme court held that Dr. Walker had satisfied his statutory reporting obligation under the Child Abuse Reporting Act after his initial report. He was not required to reiterate his suspicions following his conversation with Stritzinger.

The trial court also ruled in a pretrial hearing that Sarah was not available as a witness due to mental illness or infirmity. The sole evidence presented on this issue was Sarah's mother's testimony.

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5. CAL. PENAL CODE § 11166(f) (West Supp. 1983) (county probation or welfare department must inform law enforcement agency of any reported instances of child abuse).

6. See supra note 2. Dr. Walker was also able to reveal his conversation with Sarah pursuant to Evidence Code section 1027 which provides:

There is no [psychotherapist-patient] privilege under this article if all of the following circumstances exist:

(a) The patient is a child under the age of 16.

(b) The psychotherapist has reasonable cause to believe that the patient has been the victim of a crime and that disclosure of the communication is in the best interest of the child.


7. CAL. EVID. CODE § 1014 (West Supp. 1984) states in pertinent part: "Subject to Section 912 and except as otherwise provided in this article, the patient, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between patient and psychotherapist . . . ."

8. See supra note 2.

9. 34 Cal. 3d at 514, 668 P.2d at 744, 194 Cal. Rptr. at 437.

10. Id. at 510, 668 P.2d at 741, 194 Cal. Rptr. at 434.
Sarah's preliminary hearing testimony was read to the jury. The supreme court held that the mother's testimony as to her daughter's mental condition was legally insufficient to support a finding of legal unavailability. As a result of the trial court's finding, the supreme court held that Stritzinger had been denied his federal and state constitutional right to confront witnesses against him.

II. THE CHILD ABUSE REPORTING LAW

In 1980, the California legislature reenacted the Child Abuse Reporting Act. The legislature had two major goals in mind: 1) "to foster cooperation between child protective agencies and other persons required to report," and more importantly 2) "to clarify the duties and responsibilities of those who are required to report child abuse."

The legislature made it clear that in no way did they expect that the new law would alter the 1976 decision of the California Supreme Court in *Landeros v. Flood*, which imposed civil liability for a failure to report child abuse.

On the other hand, the new law states in section 11172 that no one who reports child abuse or a suspected instance of child abuse shall be held civilly or criminally liable. California lagged behind many of the states in granting such immunity. However, there are strong policy considerations for granting statutory immunity. Among those considerations in regard to the medical

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11. CAL. EVID. CODE § 240(a)(3) (West 1966) (unavailability of declarant due to mental infirmity is exception to hearsay rule).
12. 34 Cal. 3d at 519-20, 668 P.2d at 748, 194 Cal. Rptr. at 441.
13. See supra note 2.
15. 17 Cal. 3d 399, 551 P.2d 389, 131 Cal. Rptr. 69 (1976).
16. 1980 CAL. STAT. 3425. The court sets out the standard of proof required to sustain an action against a physician for failure to report child abuse. The court adopted the standard that no physician can be convicted unless it is shown that it actually appeared to him that the injuries were inflicted upon the child. 17 Cal. 3d at 415, 551 P.2d at 397, 131 Cal. Rptr. at 77 (1976).
17. CAL. PENAL CODE § 11172(a) (West 1982) states in pertinent part:

No child care custodian, medical practitioner, nonmedical practitioner, or employee of a child protective agency who reports a known or suspected instance of child abuse shall be civilly or criminally liable for any report required or authorized by this article. Any other person reporting a known or suspected instance of child abuse shall not incur civil or criminal liability as a result of any report authorized by this article unless it can be proven that a false report was made and the person knew that the report was false.

Id.

18. The Model Act of child abuse reporting prepared by the Children's Bureau suggests qualified immunity from civil or criminal liability if the reports are made in good faith. While the states were not unanimous (in 1966) in following that recommendation, California made no reference to immunity until the 1980 Child Abuse Reporting Law was enacted.
profession is that "[i]n effect, the statutory immunity conferred by such statutes is a placebo for medical 'nervous Nellies.'"\textsuperscript{19} The statute seeks to enhance the cooperation of the medical profession in identifying and ultimately aiding abused children and their families.

III. ANALYSIS

The defendant, Stritzinger, asserted that the psychotherapist had violated the psychotherapist-patient privilege of the Evidence Code.\textsuperscript{20} The psychotherapist claimed he was acting pursuant to the Child Abuse Reporting Act and the exception it offers to that privilege.\textsuperscript{21} The court's analysis began with a thorough examination of the psychotherapist-patient privilege as it appears in the Evidence Code, and attempted to put the privilege within the perspective of the Child Abuse Reporting Act.

Statutory analysis usually begins with an examination of legislative intent.\textsuperscript{22} The court in this instance declined to proceed by this traditional approach and in the alternative surveyed the court's previous views of the privilege to discern its importance. The examination began with \textit{In re Lifschutz},\textsuperscript{23} a case in which the court actually rejected a psychiatrist's constitutional claims of a privilege not to disclose confidential information.\textsuperscript{24} However, Justice Mosk was impressed with the \textit{Lifschutz} court's recognition of the important role of psychiatry in modern society and that "an environment of confidentiality . . . is vitally important to the suc-

\textsuperscript{20} See supra note 7 and accompanying text.
\textsuperscript{21} See supra note 2 and accompanying text.
\textsuperscript{22} In a comment regarding the use of legislative history and the United States Supreme Court, one commentator has discerned that "while the legislative history is rarely the determinative factor in statutory construction, it has been assessed that no occasion for statutory construction now exists when the court will not look at the legislative history." Wald, \textit{Some Observations on the Use of Legislative History in the 1981 Supreme Court Term}, 68 IOWA L. REV. 195 (1983).
\textsuperscript{23} 2 Cal. 3d 415, 467 P.2d 557, 85 Cal. Rptr. 829 (1970).
\textsuperscript{24} The \textit{Lifschutz} court determined that the psychotherapist-patient privilege had its roots in our constitutional heritage. The court looked to Griswold v. Connecticut, 381 U.S. 479 (1965), and the penumbral rights, where zones of privacy are found. The court determined that "confidentiality of the psychotherapeutic session falls within one such zone." 2 Cal. 3d at 431-32, 467 P.2d at 562, 85 Cal. Rptr. at 839. However, the court determined that even if the psychotherapist-patient relationship rests on "constitutional underpinnings" all state "interference with confidentiality is not prohibited. \textit{Id.} at 432, 467 P.2d at 568, 85 Cal. Rptr. at 840.
cessful operation of psychotherapy." The court relied on Roberts v. Superior Court and Grosslight v. Superior Court to conclude that the psychotherapist privilege should be broadly construed in favor of the patient.

At this point in its analysis the court further elevated the privilege by delving into the constitutional aspects. Indeed, the court found the privilege as a right to privacy. While Stritzinger never alleged a denial of his constitutional rights, the court seemed to invite such a challenge.

The court continued the constitutional analysis by suggesting that the violation of the privilege could be overcome only by a compelling state interest. The alleged compelling state interest in this matter was the prevention and detection of child abuse as spelled out in the Child Abuse Reporting Act. Stritzinger did not, however, argue that the state's interest was less than compelling, therefore the court was not forced to make such a determination.

The court continued by examining the facts in this matter in light of the psychotherapist-patient privilege. Any exception to the privilege, the court said, would be construed narrowly. Clearly, the court gave great import to the privilege and any necessity for an exception must be justified with strong evidence. In the Stritzingers' case, the evidence of the need for an exception was not there. Dr. Walker had revealed his suspicion of child abuse after his interview with Sarah; no new facts were revealed.

25. 2 Cal. 3d at 422, 467 P.2d at 560-61, 85 Cal. Rptr. at 832-33.
26. 9 Cal. 3d 330, 508 P.2d 309, 107 Cal. Rptr. 309 (1973). The Roberts case involved the court's determination of whether a psychiatric record would be revealed under the patient-litigant exception. In this case the plaintiff had signed an insurance waiver to reveal medical records after she had been involved in an automobile accident. The court held such waiver did not apply to psychiatric records, and that signing an insurance waiver would only apply to medical records regarding injuries suffered in the accident.
27. 72 Cal. App. 3d 502, 140 Cal. Rptr. 278 (1977). The Grosslight case concerned a personal injury suit against a sixteen year old. She sought to invoke the psychotherapist-patient privilege to preclude the introduction of evidence that her parents were aware that she had a propensity for violence. The court extended the privilege to any communication by intimate family members to not only the psychotherapist but any other psychiatric personnel, such as secretaries who take history.
28. 34 Cal. 3d at 511, 668 P.2d at 742, 194 Cal. Rptr. at 435.
29. See supra note 24.
30. 34 Cal. 3d at 511-12, 668 P.2d at 742-43, 194 Cal. Rptr. at 435-36.
31. The court stated: "Defendant neither challenges the constitutionality of the child abuse reporting exception to the psychotherapist-patient privilege, nor argues that the state's interest in protecting children is less than compelling." Id. at 512, 668 P.2d at 743, 194 Cal. Rptr. at 436.
32. Id. at 513, 668 P.2d at 743, 194 Cal. Rptr. at 436.
after his interview with Stritzinger. The court concluded that under the Child Abuse Reporting Act Dr. Walker had fulfilled his obligation. The court weighed its conclusion with its original statement that it recognized the contemporary value of the psychiatric profession and speculated that if the doctor had to reveal the details of the abuse in subsequent therapy sessions “it[would be] impossible to conceive of any meaningful therapy.”

The second issue that the court considered is also one with constitutional dimensions. The trial court had declared Sarah legally unavailable due to mental incapacity. The sole witness to substantiate the child's condition was her mother. The trial court found this evidence of unavailability sufficient and therefore allowed Sarah's testimony from the preliminary hearing to be read to the jury. Did this action result in the denial of the defendant's constitutional right to confront his accuser?

There is no doubt that the right to confront an accuser is fundamental. The United States Supreme Court has, however, carved out an exception. In *Barber v. Page*, the court recognized that the sixth amendment would be satisfied if the witness is unavailable but had given testimony at previous judicial proceedings that was subject to the defendant's cross examination. In an application of the exception, the court first found that the fact that Stritzinger had chosen not to cross-examine at the preliminary hearing was not a waiver of that right.

Further, the court determined that the witness must be legally...
unavailable under the terms of Evidence Code section 1291. That may include a witness who is "unable . . . to testify at the hearing because of then existing physical or mental illness or infirmity." The court looked to this language and determined that the evidence must prove that not only is there an illness or infirmity but the condition makes it relatively impossible for the witness to appear. To satisfy this qualification "generally calls for expert opinion, with supporting reasons, as to the likely effect of the court appearance on the physical or mental health of the witness. The mother's understandably protective testimony was therefore insufficient as a matter of law for this critical purpose." Because the issue was of constitutional dimension the court found reversible error.

IV. THE DISSENTS

Justice Kaus, in a concurring and dissenting opinion, stated that on the issue of Dr. Walker's testimony he would concur on the inadmissibility, but for different reasons. However, on the question of lay testimony as to Sarah's unavailability he dissented.

Justice Kaus recognized that the psychotherapist privilege is couched in constitutional privacy considerations. The therapist must then make the patient aware before talking to him that the therapist has a statutory duty to report the contents of the therapeutic session, in order to satisfy this constitutional duty.

On the issue of unavailability, Justice Kaus found the case law abounding with instances where close acquaintances are competent to testify to a person's sanity. And while credibility of the witness in any particular case may be at issue, he takes exception

40. CAL. EVID. CODE § 1291 (West 1966) states in pertinent part that "[e]vidence of former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable . . . ."
42. 34 Cal. 3d at 518, 668 P.2d at 747, 194 Cal. Rptr. at 440.
43. Id. at 521, 668 P.2d at 749, 194 Cal. Rptr. at 442. A determination of reversible error is made by applying the test set out in Chapman v. California, 386 U.S. 18 (1967). The test provides that if held to be harmless error it must be held so beyond a reasonable doubt. Further the burden is on the "beneficiary of the error either to prove that there was no injury or to suffer a reversal of his erroneously obtained judgment." Id. at 24.
44. 34 Cal. 3d at 523, 668 P.2d at 751, 194 Cal. Rptr. at 444.
45. Justice Kaus considers the argument that his recommendation is really nothing more than a waiver is applicable to all privileges. However, he reasons, the duty to make the defendant aware does not in any way affect the duty of the therapist to comply with the Act. Id. at 524, 668 P.2d at 751, 194 Cal. Rptr. at 444-45.
46. See People v. Letourneau, 34 Cal. 2d 478, 211 P.2d 865 (1949); People v. Ninio, 133 Cal. 126, 190 P. 626 (1920); In re Coburn, 165 Cal. 202, 131 P. 352 (1913); People v. Delhantie, 163 Cal. 461, 125 P. 1066 (1912).
to the courts "extraordinary breadth" of pronouncement.\textsuperscript{47}

Justice Richardson dissented on both issues. He found that the exclusion to the psychotherapist privilege as expressed in the Child Abuse Reporting Act is explicit. "Dr. Walker [had] an affirmative duty to report to a child protective agency all known or suspected instances of child abuse, even though [he] may learn of such incidents through otherwise confidential communications with [his] patients."\textsuperscript{48}

As to the unavailability of the witness, Justice Richardson felt the trial court had acted within its discretion since Sarah had demonstrated at the preliminary hearing that she had some mental infirmity. She was an uncooperative witness who gave both ambiguous and contradictory answers.\textsuperscript{49} Additionally, at the preliminary hearing Sarah's mother had testified to her daughter's mental infirmity.\textsuperscript{50} On this basis Justice Richardson found that Sarah was legally unavailable within the meaning of California Evidence Code sections 240 and 1291.\textsuperscript{51}

\textbf{J. Assault with a deadly weapon is not a lesser offense included within robbery with use of a firearm; it was not improper to enhance a sentence due to prior convictions although robbery was not specifically listed in the statute; existence of "great bodily injury" is a question of fact: \textit{People v. Wolcott}.}

The California Supreme Court was asked to review a lower court's ruling which held that assault with a deadly weapon is not a lesser included offense of robbery enhanced by use of a firearm.\textsuperscript{1} The court was also asked to review a jury finding that one

\begin{itemize}
  \item \textsuperscript{47} 34 Cal. 3d at 526, 668 P.2d at 753, 194 Cal. Rptr. at 446.
  \item \textsuperscript{48} Id. at 527, 668 P.2d at 753, 194 Cal. Rptr. at 446.
  \item \textsuperscript{49} Id. at 528-29, 668 P.2d at 754, 194 Cal. Rptr. at 448.
  \item \textsuperscript{50} Id. at 529, 668 P.2d at 754, 194 Cal. Rptr. at 448.
  \item \textsuperscript{51} See supra notes 40 and 41 and accompanying text.
\end{itemize}

victim suffered "great bodily injury" as defined in Penal Code section 12022.7.2

Defendants Johnston and Wolcott conspired with each other in two separate robberies in 1979. The first involved an armed robbery of a bar. Wolcott pretended that the bartender shortchanged him $1 while Johnston secured the door and drew a handgun. The two robbers recovered between three and four hundred dollars from the register, locked the patrons of the bar in a large cooler, and escaped with the money.

A little over a month later, the defendants again pursued their criminal activities. This time they selected a small grocery store late at night. Johnston waited in a taxicab while Wolcott entered the store. While inside, a struggle ensued between Wolcott and the store owner. The owner lost his grip on the pistol, Wolcott intentionally fired, and the owner sustained wounds to his leg and arm.3 As the robbers fled, the police were notified and the robbers were apprehended after a brief gunbattle.

The jury found defendants guilty of robbery, attempted robbery, assault with a deadly weapon, false imprisonment, and intentionally inflicting great bodily injury with a firearm.4 On appeal, defendants contended that assault with a deadly weapon is a lesser included offense in a charge of robbery;5 the trial court erred in imposing an enhancement of three years for a prior prison term for a violent felony,6 and the victim in the latter robbery was not "intentionally inflicted [with] great bodily injury"

Any person who personally uses a firearm in the commission or attempted commission of a felony shall, upon conviction of such felony or attempted felony, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he or she has been convicted, be punished by an additional term of imprisonment in the state prison for two years, unless use of a firearm is an element of the offense of which he or she was convicted.

The additional term provided by this section may be imposed in cases of assault with a firearm . . . .


2. 34 Cal. 3d at 97, 665 P.2d at 523, 192 Cal. Rptr. at 751. Under California Penal Code section 12022.7, "[a]ny person who, with the intent to inflict such injury, personally inflicts great bodily injury on any person other than an accomplice in the commission or attempted commission of a felony shall . . . be punished by an additional term of three years . . . ." Defendant contended that, under the facts in this case, he did not inflict "great bodily injury."

3. 34 Cal. 3d at 96-97, 665 P.2d at 523, 192 Cal. Rptr. at 751. The jury determined that such harm constituted "great bodily injury" as described in the statute.

Id. at 106, 665 P.2d at 530, 192 Cal. Rptr. at 757.

4. Id. at 95, 665 P.2d at 523, 192 Cal. Rptr. at 750.

5. Id. at 96, 665 P.2d at 523-24, 192 Cal. Rptr. at 750-51.

6. Id. at 96, 665 P.2d at 524, 192 Cal. Rptr. at 751.
within the meaning of the Penal Code.\textsuperscript{7}

The trial judge gave Johnston a five year prison sentence for the robbery of the bar and a two year prison sentence for the "enhancement" finding.\textsuperscript{8} Wolcott received a three year sentence for attempted robbery of the grocery store and two years for use of a firearm.\textsuperscript{9} The judge added an additional three year term to Wolcott's sentence because the jury found that he had intentionally inflicted great bodily injury on the owner of the grocery store.\textsuperscript{10}

Defendants' first contention was that assault with a deadly weapon is a lesser included offense in robbery with an enhancement for use of a firearm. The court saw it differently: "An uncharged crime is included in a greater offense if either (a) the greater offense cannot be committed without committing the lesser, or (b) the language of the accusatory pleading encompasses all the elements of the lesser offense."\textsuperscript{11} The court went on to explain that "if a person points an unloaded gun at another, without any intent or threat to use it as a club or bludgeon, he does not commit . . . assault under Penal Code section 240 . . . ."\textsuperscript{12} On the other hand, robbery requires "[n]either an attempt to inflict violent injury, nor the present ability to do so . . . ."\textsuperscript{13} Rather, robbery is defined as: "the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."\textsuperscript{14} The "threat to inflict injury required for a robbery . . . need not be accompanied by the present ability to carry it out."\textsuperscript{15} The use of an unloaded gun, therefore, is sufficient to commit a robbery if it induces the victim to part with this belong-

\textsuperscript{7} Id.
\textsuperscript{8} Id. at 97-98, 665 P.2d at 523-24, 192 Cal. Rptr. at 752.
\textsuperscript{9} Id. at 98, 665 P.2d at 524, 192 Cal. Rptr. at 752.
\textsuperscript{10} Id. at 106-08, 665 P.2d at 530-32, 192 Cal. Rptr. at 757-59.
\textsuperscript{11} Id. at 98, 665 P.2d at 524, 192 Cal. Rptr. at 752 (citing People v. St. Martin, 1 Cal. 3d 524, 463 P.2d 390, 83 Cal. Rptr. 166 (1970); People v. Marshall, 48 Cal. 2d 394, 309 P.2d 456 (1957)).
\textsuperscript{12} 34 Cal. 3d at 99, 665 P.2d at 525, 192 Cal. Rptr. at 753 (quoting People v. Mosqueda, 5 Cal. App. 3d 540, 544, 85 Cal. Rptr. 346, 347-48 (1970)).
\textsuperscript{13} 34 Cal. 3d at 99, 665 P.2d at 525, 192 Cal. Rptr. at 753.
\textsuperscript{14} Id. at 99-100, 665 P.2d at 525, 192 Cal. Rptr. at 753. See CAL. PENAL CODE § 211.
\textsuperscript{15} 34 Cal. 3d at 100, 665 P.2d at 525, 192 Cal. Rptr. at 753. People v. Raner, 86 Cal. App. 2d 107, 194 P.2d 37 (1948) (the use of an unloaded gun was used to induce the victim to part with his property); People v. Gardner, 128 Cal. App. 2d 1, 274 P.2d 908 (1954) (the use of a toy gun in commission of robbery was sufficient to pull off the robbery).
ings. For the foregoing reasons, the court concluded, one could commit robbery without the ability or desire to inflict injury; assault requires a present ability to do so and, therefore, is not a lesser included offense.\textsuperscript{16}

As to Johnston's allegation that it was improper to enhance his sentence because of a prior conviction, the court stated that it is unnecessary for the statute to specifically list robbery; it was sufficient under the statute to use a firearm in commission of a crime.\textsuperscript{17} The court held that it was not improper under these circumstances to enhance defendant's sentence because of his prior convictions.\textsuperscript{18}

Wolcott's final contention on appeal was that, under the definition of the statute,\textsuperscript{19} he could not possibly have inflicted great bodily injury when he shot the grocery store owner. The owner received only minor injuries to his leg and arm and was released from the hospital the morning after the shooting. Under Penal Code section 12022.7, an additional three year term will be added to one's sentence where that person, in commission of a crime, "inflicts great bodily injury."\textsuperscript{20} Great bodily injury is defined by statute to mean "a significant or substantial physical injury."\textsuperscript{21}

The primary fact surrounding the shooting was that while the store owner struggled with defendant, Wolcott continually pulled on the trigger. The gun did not go off because the store owner was able to keep his finger wedged behind the trigger. When the store owner stumbled, he lost his grip on the pistol, Wolcott stepped back, and fired into the victim's leg. When the bullet hit, it shattered. Fragments of the bullet went deeper into the leg while others lodged in the victim's arm.\textsuperscript{22} The victim suffered great pain as a result thereof. The court stated the rule:

\begin{quote}
Whether the harm resulting to the victim of a robbery constitutes great bodily injury is a question of fact for the jury. . . . If there is sufficient evidence to sustain the jury's finding of great bodily injury, [the court is]
\end{quote}

\textsuperscript{16} 34 Cal. 3d at 100, 665 P.2d at 525-26, 192 Cal. Rptr. at 753-54.
\textsuperscript{17} Id. at 106-07, 665 P.2d at 528-29, 192 Cal. Rptr. at 756-57. Johnston contended that it was improper to increase the term of years of his sentence for robbery because robbery is not specifically listed as one of the crimes in Penal Code section 667.5. The court reasoned, however, that it was Johnston's use of a firearm that placed his conviction within the ambit of the statute. Penal Code section 667.5(c)(8) reads: "Any other felony in which the defendant inflicts great bodily injury on any person other than an accomplice . . . or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5." CAL. PENAL CODE § 667.5 \textsuperscript{8} (emphasis added).
\textsuperscript{18} 34 Cal. 3d at 102, 665 P.2d at 527, 192 Cal. Rptr. at 755.
\textsuperscript{19} CAL. PENAL CODE § 12022.7. See supra note 2.
\textsuperscript{20} Id.
\textsuperscript{21} 34 Cal. 3d at 108, 665 P.2d at 531, 192 Cal. Rptr. at 759.
\textsuperscript{22} Id. at 107, 665 P.2d at 530, 192 Cal. Rptr. at 758. See also supra note 2.
bound to accept it, even though the circumstances might reasonably be reconciled with a contrary finding.23

The court in the present case found that substantial evidence was introduced to support the finding that Wolcott had inflicted "great bodily injury."

The court affirmed both defendants' sentences as reasonable and proper. Chief Justice Bird, however, concurred and dissented in part.24

K. A defendant charged with first degree murder without special circumstances is entitled to 26 peremptory challenges under Penal Code section 1070: People v. Yates.

In People v. Yates,1 the supreme court reconsidered its past interpretations of Penal Code section 1070,2 which provides the defense and prosecution with twenty-six peremptory challenges if the offense charged is "punishable with death, or with imprison-

23. 34 Cal. 3d at 107, 665 P.2d at 529-30, 192 Cal. Rptr. at 757-58 (citing People v. Salas, 77 Cal. App. 3d 600, 143 Cal. Rptr. 755 (1978)).

24. 34 Cal. 3d at 110-13, 665 P.2d at 532-34, 192 Cal. Rptr. at 760-62. Chief Justice Bird dissented as to the enhancement part of the decision, stating: "enhancement allegations may not be considered in determining which uncharged offenses, if any, are necessarily included in the charged offense. In my view, such allegations should be treated as part of the accusatory pleading." Id. at 110, 665 P.2d at 532, 192 Cal. Rptr. at 760 (Bird, C.J., dissenting and concurring) (emphasis in original).

1. 34 Cal. 3d 644, 669 P.2d 1, 194 Cal. Rptr. 765 (1983). Justice Broussard wrote the majority opinion with Justices Mosk, Kaus, Reynoso and Grodin concurring. Chief Justice Bird wrote a concurring and dissenting opinion. Justice Richardson wrote a dissenting opinion.

The defendant was charged with first degree murder without special circumstances in connection with a robbery in which his partner shot and killed one of the victims. The defendant sought and was refused 26 peremptory challenges at trial. The defendant's counsel used 10 peremptory challenges and then renewed his request, indicating that at least 6 additional jurors were unsatisfactory. This request was also denied and the defendant was ultimately convicted of first degree murder. In this appeal, he claimed the trial court committed reversible error in denying him 16 additional challenges. The defendant also challenged the constitutionality of the felony murder rule, but the court rejected such an argument in People v. Dillon, 34 Cal. 3d 441, 668 P.2d 697, 194 Cal. Rptr. 390 (1983). See People v. Dillon, California Supreme Court Survey, 11 Pepperdine L. Rev. 831 (1984).

2. CAL PENAL CODE § 1070(a) (West Supp. 1984) states:

If the offense charged be punishable with death, or with imprisonment in the state prison for life, the defendant is entitled to 26 and the state to 26 peremptory challenges. Except as provided in subdivision (b), on a trial for any other offense, the defendant is entitled to 10 and the state to 10 peremptory challenges.

Id.
ment in the state prison for life . . . .

The court concluded that the indeterminate sentence for first degree murder without special circumstances was “life imprisonment” for purposes of section 1070.

The 1872 Penal Code included section 1070 in much the same form as it exists today. In People v. Clough, the supreme court concluded that section 1070 provides additional challenges only if the life sentence was mandatory. Subsequent cases continued to limit section 1070 to only those crimes with a mandatory life sentence.

In 1917, California adopted an indeterminate sentencing system in which several crimes were punished by indeterminate life terms. The courts refused to extend the meaning of section 1070 to cover these crimes and continued to utilize the Clough rule.

3. Id.
5. At that time the statute allowed 20 rather than 26 peremptory challenges.
6. 59 Cal. 438 (1881).
7. “We have reached the conclusion that it is only in capital cases, or cases in which a life sentence is in terms affixed by the Legislature as the punishment of the crime, that the defendant is entitled to twenty peremptory challenges.” Id. at 441 (emphasis in original).
8. See, e.g., People v. Harris, 61 Cal. 136 (1882). The rationale behind these decisions was the belief that section 1070 was designed “to allow greater protection to those few criminal defendants who, if convicted, were likely to receive the most severe penalties.” 34 Cal. 3d at 648, 669 P.2d at 3, 194 Cal. Rptr. at 767.
9. An indeterminate life term was phrased in terms of “no less than X years” or “X years to life.” Id. at 648-49, 669 P.2d at 3, 194 Cal. Rptr. at 767. The prisoner’s eventual release was determined by the parole board so it was possible for an indeterminate life prisoner to be paroled after only a few years. An express life prisoner was not eligible for parole until after serving seven years of his sentence. Id.
10. See, e.g., People v. Shaw, 237 Cal. App. 2d 606, 47 Cal. Rptr. 96, cert. denied, 384 U.S. 964 (1965) (“[T]he right to [additional] challenges is not available where the punishment for the offense charged is an indeterminate sentence that may be fixed at less than a life term.”); People v. Purio, 49 Cal. App. 685, 194 P.2d 74 (1920).
11. At the same time the courts were developing the Clough rule, another line of cases was created which reached contrary results under different circumstances. In In re Lee, 177 Cal. 696, 171 P. 938 (1918), an indeterminate sentence was held to be legally equivalent to a sentence for the maximum term, i.e., an indeterminate life sentence was considered a life term. Id. The Lee rule was used in People v. McNabb, 3 Cal. 2d 441, 45 P.2d 334 (1935), to determine if a prisoner serving a “not less than 5 years” sentence would receive the death penalty called for when a “life prisoner” committed assault with a deadly weapon. Id. The court ruled that he was serving a life sentence. Id. See In re Lynch, 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972) (indeterminate sentence treated as maximum term when determining whether sentence violates constitutional prohibition of cruel and unusual punishment).
In 1976, California switched to a determinate sentencing system. Thus, with few exceptions, all crimes carry determinate sentences; under Clough, those with express life sentences receive twenty-six peremptory challenges. The sentence for first degree murder without special circumstances is one of the few indeterminate penalties that remain. Prior to the 1978 death penalty initiative the penalty was a determinative life term. The initiative’s purpose in changing the sentence was to increase the amount of time that must be served before becoming eligible for parole. A side effect, however, was to place first degree murder without special circumstances outside the Clough standard and, in effect, take sixteen peremptory challenges away from defendants charged with this crime.

The court in this case realized that adherence to Clough would result in defendants in murder cases receiving fewer challenges than defendants charged with lesser crimes. Furthermore, although indeterminate sentences traditionally signified a lighter penalty, in this case the penalty was actually more severe than the previous determinate life term. The solution to the problem was to construe the term “imprisonment ... for life” in section 1070 to include “an indeterminate life sentence equal to or more severe than a determinate life term.” This would allow a defendant charged with murder without special circumstances to exercise twenty-six peremptory challenges.

The court faced a problem, however, in formulating this new interpretation of section 1070. In People v. Ralph, the court had decided that the Clough rule applied to Welfare and Institutions...
Code section 1731.5,18 which authorized commitment to the Youth Authority of any youthful offender “convicted of a public offense who . . . is not sentenced to death [or] life imprisonment.”19 Thus, youths sentenced to an indeterminate term were eligible for the Youth Authority. When the 1978 death penalty initiative changed the penalty for first degree murder without special circumstances from a determinate sentence to an indeterminate sentence, the question arose as to whether a youth convicted of first degree murder was now eligible for Youth Authority. In In re Jeanice D.,20 the supreme court ruled that such a youth was eligible for Youth Authority.21 In effect, the court determined that a sentence of “25 years to life” did not constitute “imprisonment for life.”

Section 1070, which was before this court in this case, used the same language as section 1731.5 which the court interpreted in Jeanice D. Nevertheless, the court refused to follow Jeanice D., and held that for purposes of section 1070 a sentence of “25 years to life” constitutes “imprisonment for life.” The court’s rationale was that such an interpretation was necessary to carry out the purpose of section 1070.22

The court’s decision was held to be prospective with the exception of the defendant and a defendant in a companion case.23 Thus, the trial court erred in denying the defendant twenty-six

18. CAL. WELF. & INST. CODE § 1731.5 (West Supp. 1983). See infra note 21 for discussion of recent amendment to this section.
19. Id. The court reasoned that a restitutive reading of “imprisonment for life” would enable more young defendants to benefit from rehabilitation in the Youth Authority. 24 Cal. 2d at 580-81, 150 P.2d at 403-04.
20. 28 Cal. 3d 210, 617 P.2d 1087, 168 Cal. Rptr. 455 (1980).
21. In response to the court’s decision in In re Jeanice D., the California legislature enacted an emergency statute amending section 1731.5 to exclude youths “convicted of first-degree murder, committed when that person was 18 years of age or older . . . .” CAL. WELF. & INST. CODE § 1731.5 (West Supp. 1983). See 1981 Cal. Stat. 476 § 2 (amendment is “necessary in order to prevent adults convicted of first degree murder from being prematurely released.”). The court made no mention of this amendment in its decision.
22. “We must take into account not only the language of the statutes, but the purpose of those enactments and the effect of our decision . . . .” 34 Cal. 3d at 651-52, 669 P.2d at 5, 194 Cal. Rptr. at 769.

Justice Richardson dissented in this case because of the court’s failure to follow Jeanice D., from which Justice Richardson had dissented. He criticized the majority for “the use of selective or ‘result-oriented’ adjudication which is not dependent upon the consistent application of recognized legal principles.” Id. at 657, 669 P.2d at 9, 194 Cal. Rptr. at 773 (Richardson, J., dissenting). Since both statutes use the same language to specify a person’s rights and disabilities when faced with “imprisonment for life,” Justice Richardson sees no reason to interpret the language inconsistently.
23. The court felt that retrials of all first degree murder cases in which only 10 peremptory challenges had been provided would “impose a great burden on the administration of justice” while providing little benefit since the prosecution in
peremptory challenges, a reversible error, and defendant is entitled to a new trial where he will be allowed twenty-six peremptory challenges.

L. The prosecution bears the burden of proving that it has made reasonable efforts to maintain contacts with informants and that its act of increasing the charges against the defendant was not in response to the defendant's exercise of his procedural rights: Twiggs v. Superior Court.

Actions by the prosecution can have a crippling effect on a defendant's ability to fully exercise his procedural rights and to achieve a fair trial. In Twiggs v. Superior Court, the supreme court considered two areas in which the prosecution bears the responsibility of conforming its actions with the dictates of justice; the prosecution's duty to inform the defendant of the location of material police informants; and the propriety of adding an enhancement to the original charges when a defendant refuses a plea bargain and exercises his right to a retrial.

Defendant was arrested when the police discovered heroin in his apartment during a probation condition search. He was charged with violating Health and Safety Code section 113512 and Penal Code section 1203.07. The information charging the defendant also contained an enhancement for a prior felony conviction under Penal Code section 667.5 subdivision (b).

those trials also had only 10 peremptory challenges. Id. at 653-54, 669 P.2d at 7, 194 Cal. Rptr. at 771.

Chief Justice Bird concurred in the court's opinion, but she dissented on this issue. She would have applied the decision to "all individuals whose convictions are not yet final on appeal." Id. The Chief Justice disagreed with the majority's view of the burden that retroactive effect would cause, and criticized the arbitrariness of applying the decision to these two defendants while excluding defendants similarly situated.


3. CAL. PENAL CODE § 1203.07 (West Supp. 1984) (prohibition of probation or suspension of sentence for conviction of possession for sale of one-half ounce or more of heroin).

4. CAL. PENAL CODE § 667.5(b) (West Supp. 1984), provides in pertinent part:
Defendant sought and was denied information concerning the identity and location of a police informant who had allegedly entrapped defendant. At trial, defendant asserted that his friend Larry Douglas had convinced defendant to keep the heroin for a short time and defendant was arrested before Douglas came back to claim the drugs. The jury was unable to reach a verdict and a mistrial was declared. Prior to the second trial, defendant, acknowledging that Douglas was the informant, again asked the court to have Douglas' current location revealed. The court ruled that the prosecution only had to reveal Douglas' last known address. This address proved to be of no help in locating Douglas.

The prosecution offered defendant a plea bargain at a pretrial conference preceeding the second trial. Defendant rejected the offer. Two or three days later, the district attorney made a motion to amend the information and add allegations of five additional prior felony convictions. Defendant argued against the motion, claiming it was in retaliation for defendant's decision to have a retrial. The trial court granted the motion after the district attorney explained that she waited until the prior convictions were confirmed before making her motion. Defendant appealed this decision and the decision regarding the informant.

The prosecution's duty to disclose an informant's identity was set forth in Eleazar v. Superior Court. The informant's "identity" must be revealed when he is a "material witness on the issue of guilt." The informant's "identity" consists of "all pertinent information which might assist the defense to locate him." If the

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5. Douglas allegedly claimed that his life was in danger and that he could not safely store the heroin in his own residence. He also offered defendant $1,000 to hold the drugs for a few days.
6. Addition of these prior convictions would add five years to defendant's sentence if convicted. See Cal. Penal Code § 667.5(b), supra note 4.
7. The court indicated that the prosecutor had not sought confirmation of the prior convictions and only discovered that they could be added when another prosecutor pointed them out during the pretrial conference involving another case. 34 Cal. 3d at 365, 667 P.2d at 1167, 194 Cal. Rptr. at 154.
prosecution fails in this duty the case is dismissed.\textsuperscript{11}

The court in \textit{Eleazar} required the prosecution to do more than simply reveal what information it had concerning the informant. Instead, the police and prosecution have a duty to undertake reasonable efforts to maintain contact with the informant so that he can be located at a later date.\textsuperscript{12}

In this case, the court decided that the prosecution had failed in its obligations, despite having provided the last known address of the informant. The proper standard which the trial court should follow consists of two parts, neither of which were followed here. First, full disclosure of all information the prosecution has concerning the informant's whereabouts should be made.\textsuperscript{13} Here, the trial court's order was limited to the informant's last known address. Second, if the information is insufficient to locate the informant, the prosecution must demonstrate that it made reasonable efforts to maintain contact.\textsuperscript{14} Such an inquiry was not made in this case.

The court also considered and accepted defendant's claim that the amendment of the information following defendant's decision to seek retrial raised a presumption of prosecutorial vindictiveness which the district attorney did not adequately rebut.

In \textit{Blackledge v. Perry},\textsuperscript{15} the United States Supreme Court held that bringing a more serious charge against a defendant because he asserts his statutory right to a trial de novo is prohibited by the due process clause.\textsuperscript{16} Furthermore, actual retaliatory intent was not important since the mere possibility of vindictiveness could effectively deter a defendant from exercising his constitutional rights.\textsuperscript{17} In this case, the court determined that the consid-

\textsuperscript{11} 1 Cal. 3d at 851, 464 P.2d at 44, 83 Cal. Rptr. at 588.
\textsuperscript{12} Id. at 852-53, 464 P.2d at 45, 83 Cal. Rptr. at 589.
\textsuperscript{13} 34 Cal. 3d at 367-68, 667 P.2d at 1168-69, 194 Cal. Rptr. at 155-56.
\textsuperscript{14} Id. at 366, 667 P.2d at 1168, 194 Cal. Rptr. at 155. Defendant cited \textit{People v. Frohner}, 65 Cal. App. 3d 94, 135 Cal. Rptr. 153 (1976), as the proper application of the \textit{Eleazar} rule. In \textit{Frohner}, the prosecution failed to keep track of an informant known to be a transient and the defense could not locate the informant for trial. The attorney general attempted to distinguish \textit{Frohner} by arguing that there was no indication in the present case that the informant was a transient. The court rejected this argument and held that reasonable efforts depend on the circumstances and in this case the prosecution failed to show that their efforts were reasonable. 34 Cal. 3d at 365, 667 P.2d at 1168, 194 Cal. Rptr. at 155.
\textsuperscript{16} 417 U.S. at 28-29.
\textsuperscript{17} Id. In \textit{Perry}, the defendant appealed from a misdemeanor conviction of as-
erations behind *Perry* were equally applicable to the situation where defendant asserts his right to a retrial following a mistrial. Allowing the enhancements at this stage might deter a defendant from exercising his rights; even if innocent he might plead guilty from fear that the prosecutor will retaliate if the defendant fails to accept the plea.18

Although a presumption of vindictiveness is not always proper,19 the court here held that “[u]nder the circumstances of this case, a strong presumption of vindictiveness is warranted by the timing of the amended information.”20 And furthermore, the heavy burden upon the prosecution to overcome the presumption was not met by the prosecutor’s explanation. The prosecution must show “that facts that would legitimately influence the charging process were not available when it exercised its discretion to bring the original charges.”21

The situation in this case contrasts with the plea negotiations in Bordenkircher v. Hayes, 434 U.S. 357 (1978). There, the Supreme Court held that a state prosecutor may seek reincidemt on more serious charges if the defendant pleads not guilty, so long as the prosecutor expressed his intentions during plea negotiations and the defendant was free to accept or reject the prosecutor’s offer. See People v. Rivera, 127 Cal. App. 3d 136, 179 Cal. Rptr. 384 (1981) (similar holding based on California Constitution). In this case, the enhancements were not part of the “give-and-take” of plea negotiations. Rather, the prosecution acted unilaterally to amend the information following defendant’s request for a retrial.

See also United States v. Burt, 619 F.2d 831 (9th Cir. 1980) (prima facie case of prosecutorial vindictiveness involves showing an increase in charges after the defendant exercises a statutory or constitutional right); United States v. Grove, 571 F.2d 450, 453 (9th Cir. 1978) (“[I]t is the appearance of vindictiveness, rather than vindictiveness in fact, which controls.”) (emphasis in original), United States v. Ruesga-Martinez, 534 F.2d 1367, 1369 (9th Cir. 1976) (“[T]he mere appearance of vindictiveness is enough to place the burden on the prosecution.”) (emphasis in original).

19. In United States v. Goodwin, 457 U.S. 368 (1982), and People v. Farrow, 133 Cal. App. 3d 147, 184 Cal. Rptr. 21 (1982), the courts refused to extend the presumption of vindictiveness to the pretrial setting for fear that prosecutorial discretion would be unduly hampered. The facts in this case, however, are more analogous to a postconviction setting.

20. 34 Cal. 3d at 374, 667 P.2d at 1173, 194 Cal. Rptr. at 160. The court added that it based its holding not only on United States Supreme Court precedent but also on the California Constitution. Id. at n.6. “A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws . . . .” CAL. CONST. art. 1, § 7. “The defendant in a criminal case has the right to . . . compel attendance of witnesses in the defendant’s behalf . . . and to be confronted with the witnesses against the defendant.” CAL. CONST. art. 1, § 15. “Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.” CAL. CONST. art. 1, § 24. See People v. Rivera, 127 Cal. App. 3d 136, 144, 179 Cal. Rptr. 384, 389 (1981) (exercise of independent review under California Constitution).

21. 34 Cal. 3d at 374, 667 P.2d at 1174, 194 Cal. Rptr. at 161.
The court returned the case to the trial court for a hearing to determine if the prosecution had additional information concerning the informant and whether reasonable efforts to maintain contact with the informant had been carried out. In addition, the trial court was to hold an evidentiary hearing in which the prosecution had to prove that it acted with no actual vindictiveness.

In his separate opinion, Justice Richardson concurred in the court's disposition of the case, but he dissented on the issue of presumption of vindictiveness. Justice Richardson accepted the prosecutor’s explanation for the timing of the amendments to the complaint and therefore felt that any presumption had been overcome.

M. Change of venue will be ordered when there is a reasonable likelihood a fair trial cannot be had:

In Williams v. Superior Court, 34 Cal. 3d 584, 668 P.2d 799, 194 Cal. Rptr. 492 (1983), the court had the opportunity to weigh the defendant's request for a change of venue in terms of the comprehensive standards outlined in Maine v. Superior Court, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968). The court in Maine quoted and adopted the Reardon Report to determine when a change of venue is properly required:

"A motion for a change of venue or continuance shall be granted whenever it is determined that because of the dissemination of potentially prejudicial material, there is a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. . . . A showing of actual prejudice shall not be required."

Id. at 383, 438 P.2d at 377, 66 Cal. Rptr. at 729 (citations omitted).
In order to discern the reasonable likelihood that a fair trial would not be received, the court in Williams examined five factors: 1) The nature and extent of publicity was considered. Williams and his brother had both been charged with the murder of a 22 year-old white woman. Williams is black. Their trials were

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22. See supra note 7 and accompanying text. Justice Richardson found further support for his position in United States v. Goodwin, 457 U.S. 368 (1982), and People v. Farrow, 133 Cal. App. 3d 147, 184 Cal. Rptr. 21 (1982), where the presumption of vindictiveness was not applied in a pre-trial situation. Justice Richardson would seem to equate the present case with the pre-trial situation rather than the post-trial context in Blackledge v. Perry.
severed and a two-year period elapsed between the arrest and William's trial. During that time over 159 items appeared on the newspaper or radio either about Williams or his brother, who was convicted and received the death penalty. 2) The size of the population was considered in that a major crime, such as murder with allegations of rape, robbery and kidnapping is likely to become embedded in the public consciousness. 3) The nature and gravity of the offense was considered and the seriousness of the alleged offenses weighed heavily in favor of defendant's motion for change of venue. 4) The status of the victim and the accused. In this case the victim's family had prominence in the community. Williams was from another county and of a minority race which had few representatives there. 5) The presence of political overtones was also considered. Defendant alleged that the prosecuting attorney had run for district attorney and that one of the defense attorneys had been a staunch supporter of his opponent. Weighing these circumstances, the court failed to find political overtones. The court held however, that the first four factors together pointed to a need for a change of venue for the defendant even though each factor alone might not be determinative.

Justice Mosk conurred with the majority, but supported an alternative that he felt California should adopt. Juries from other counties would be empanelled and moved to the county where the crime took place. Justice Mosk argued that under this plan witnesses would be more available and would not have to be transported and that counsel could attend other pressing public business in the recess hours. (See Use of Imported Juries Gains in Popularity, 68 A.B.A. J. 668 (1982)).

The other matter considered by the Williams court was the defendant's writ for capital funds under CAL. PENAL CODE § 987.9 (West 1984). The same issue arose and was treated more extensively in Sand v. Superior Court, 34 Cal. 3d 567, 668 P.2d 787, 194 Cal. Rptr. 480 (1983), which was heard the same day. Capital funds are for the payment of investigators, experts and others needed for the defense of a capital crime. The court has determined that they are only available when the death penalty is sought.

In the Williams case, the district attorney did not seek the death penalty and the court determined that the funds were therefore not available. The Sand case presented a similar situation. The prosecutor determined that he would not seek the death penalty. Furthermore, the court denied capital funds on the grounds that it was no longer a capital case because the death penalty could not be imposed.
The *Sand* court justified this decision by an investigation of the legislative intent of section 987.9. Most persuasive to the court was the fact that the statute was enacted simultaneously with the 1977 death penalty statute to ensure ancillary defense services because of the gravity of the punishment at risk. The court relied on case law to distinguish death penalty from life imprisonment cases as "capital offenses."

Chief Justice Bird dissented on this issue in both *Williams* and *Sand*. The Chief Justice was convinced that the legislature intended to make the benefits of section 987.9 available to any individual charged with murder whenever special circumstances are alleged. She argued that the legislature knew how to limit the funds by using the language "death penalty," but chose to use the word "capital cases." This broader term implies application to the special circumstance crimes with which the 1977 legislative enactments dealt. Chief Justice Bird also saw practical problems associated with this decision which include burdening the counties with expenses that could be devastating.

**N. Criminal defense counsel is under a duty to at least investigate potential mental defenses and other mitigations so that he may present an informed report and recommendation to his client: People v. Mozingo.**

In *People v. Mozingo*, 34 Cal. 3d 926, 671 P.2d 363, 196 Cal. Rptr. 212 (1983), despite substantial information indicating possible mental defenses, a criminal defense counsel did not investigate or advance a diminished capacity defense or an insanity plea. The death penalty was subsequently imposed on counsel's client following his convictions for first degree murder and rape. The court considered whether counsel's failure to investigate or present evidence of such defenses led to inadequate representation. The justices concluded that a reasonably competent attorney acting as a diligent advocate would have explored possible mental defenses and mitigating circumstances given the information at hand. Consequently, the judgment was reversed because counsel deprived his client of a potentially meritorious defense.

The court held that neither the client's refusal to consider an insanity plea nor the inconsistency of a diminished capacity defense with a denial of complicity were sufficient excuses for not examining such possibilities. The nature of a mental defense is
often beyond a client's comprehension, thus the defense counsel must attempt to explore the issue despite his client's objections or reluctance. See People v. Gauze, 15 Cal. 3d 709, 542 P.2d 1365, 125 Cal. Rptr. 773 (1975). Even if a diminished capacity defense conflicts with an alibi or general denial, defense counsel should examine the possible strength of a mental defense. See People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979). Counsel must investigate possible defenses so that he can make informed trial decisions and recommendations to his client as to potential causes of action.

The message of Mozingo is that the criminal defense attorney must not leave a stone unturned. He has a duty to study all possible defenses in order to represent his client adequately.

O. A criminal defendant in a capital case is entitled to have the jury consider sympathy when rendering its verdict and penal legislation is not retroactive without a provision to the contrary: People v. Easley.

In People v. Easley, 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983), the defendant was convicted of the capital offense of first degree murder and sentenced to death for the hired killing of two persons. Initially, the court unanimously affirmed the conviction. However, questions of error were subsequently raised as to jury instructions at the penalty phase of the defendant's trial. Upon a second review, the justices held that the trial court had erred and remanded the case for a new penalty trial.

The trial judge's first mistake was to direct the jury not to be influenced by pity or sympathy for the defendant in rendering its verdict. The court declared that it is reversible error to command the jury at the penalty phase of a capital case not to consider sympathy for the defendant in reaching its verdict. See People v. Robertson, 33 Cal. 3d 21, 655 P.2d 279, 188 Cal. Rptr. 77 (1982). The court further noted that the United States Supreme Court has established that it is the constitutional right of a defendant in a capital case to have the sentencing body consider any sympathy factor raised by the evidence before it. See Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Sympathy is a necessary element for a jury's moral assessment of whether a defendant should receive the death penalty.

The trial judge's second error was to instruct the jury under the wrong law. He utilized the 1978 death penalty law rather than the 1977 statute when the murders had been committed before the passage of the 1978 initiative. The court held that penal legislation is not retroactive without a declaration to the contrary. See
People v. Teron, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979). The court further stated that the principal drafters and proponents of the 1970 measure intended the initiative to be purely prospective in effect.

Two justices expressed views different from those above. Justice Mosk concurred but thought that jury consideration of sympathy would be detrimental to the defendant because it would arouse sentiment for the victim and his or her family instead of the defendant. Justice Richardson dissented, believing that only harmless error had been committed at the penalty trial and that judgments should not be reversed for slight procedural defects.

People v. Easley illustrates the reality that judges are not immune from human error. The practicing attorney should be aware of this fact and take measures to prevent such mistakes. The correctness of procedure in the courtroom is the responsibility of all learned participants.

P. Both the trial judge and the defense attorney have a duty to make certain that the criminal defendant receives effective and adequate assistance of counsel: People v. McKenzie.

I. INTRODUCTION

People v. McKenzie was a "bizarre case" in which both the trial judge and the appointed defense counsel failed to uphold their responsibility to protect the rights of a criminal defendant to adequate and effective assistance of counsel.1 The question for the court was whether reversal was appropriate given the fact that the defendant had been convicted under such circumstances.2 A majority of the justices concluded that such was the proper remedy because the "defendant was unquestionably deprived of the effective assistance of counsel."3

1. 34 Cal. 3d 616, 668 P.2d 769, 194 Cal. Rptr. 462 (1983). Justice Mosk delivered the majority opinion with Chief Justice Bird and Justices Broussard and Reynoso concurring. Justice Kaus, with Justice Richardson concurring, expressed a dissenting opinion. A second dissent was issued by Justice Haning who had been assigned by the Chairperson of the Judicial Council.

2. Id. at 623, 668 P.2d at 773, 194 Cal. Rptr. at 466. The defendant had been charged with numerous offenses.

3. Id. See In re Saunders, 2 Cal. 3d 1033, 1041, 472 P.2d 921, 926, 88 Cal. Rptr. 633, 638 (1970) ("The constitutional right to the assistance of counsel in a criminal case [citations omitted] includes the guarantee that such assistance be 'effective.'").
Initially, the defendant undertook to represent himself. However, at the preliminary hearing, he presented no evidence and asked no questions. After his arraignment and competency hearing, the defendant either refused to speak or failed to make an intelligible response when asked questions concerning his desires with regard to assistance of counsel or the entering of a plea. A public defender was then assigned to the case. Subsequently, the defendant's attorney moved both to have himself relieved and for a continuance because of the incomplete preliminary hearing and the defendant's failure to cooperate or communicate with him. The trial judge refused to relieve counsel because of the defendant's continued silence and denied the granting of a continuance even though he acknowledged counsel's dilemma. As a result, the defense counsel stated that he would not participate in the trial beyond appearing in court and sitting next to the defendant. During the trial, the public defender remained true to his pledge and the trial judge failed to take any action to correct the situation.

II. MAJORITY OPINION

Justice Mosk in writing for the majority declared that both the sixth amendment to the United States Constitution and the California Constitution guarantee criminal defendants the right to representation by counsel at trial. The constitutional right to counsel is the right to the effective assistance of counsel. Defense counsel is expected to perform as "a reasonably competent
attorney acting as a diligent, conscientious advocate."14 Also, the presiding trial judge has an implied duty to ensure that the defendant receives such assistance by counsel to the extent possible under the circumstances.15

A. The Judge's Failure to Fulfill His Duty

The majority stated that it is the obligation of the trial judge to safeguard the essential rights of the accused and the public's interest in the fair administration of criminal justice.16 To fulfill this responsibility, the trial judge is provided with both inherent and statutory authority to reasonably control all proceedings before him.17 This power includes all measures necessary to prevent any person from obstructing the administration of justice.18

The court found that the trial judge in the McKenzie case had failed to uphold this duty by allowing the defendant to proceed to trial without the assistance of counsel.19 The court concluded that "rather than promoting" justice, the trial court had actually "hindered" a fair determination of the issues on their merits.20

The court pointed to several options which the judge could have employed to rectify such a situation. First, the trial court can utilize its power to punish for contempt of court by ordering defense counsel to participate in the trial or face being held in contempt

15. 34 Cal. 3d at 626, 688 P.2d at 775, 194 Cal. Rptr. at 468.
16. Id. at 626-27, 688 P.2d at 775-76, 194 Cal. Rptr. at 468-69. See Glasser, 315 U.S. at 71; People v. Davis, 31 Cal. App. 3d 106, 110, 106 Cal. Rptr. 897, 899 (1973); Schwarzer, Dealing With Incompetent Counsel—The Trial Judge's Role, 93 HAYN. L. REV. 633, 635 n.12, 640 n.34 (1980).
17. 34 Cal. 3d at 626, 688 P.2d at 776, 194 Cal. Rptr. at 469. See Cooper v. Superior Court, 55 Cal. 2d 291, 301, 359 P.2d 274, 280, 10 Cal. Rptr. 842, 846 (1961); CAL. CIV. PROC. CODE § 128 (West Supp. 1984).
19. 34 Cal. 3d at 627, 688 P.2d at 776, 194 Cal. Rptr. at 469. Along with this finding, the justices stated that the defendant had not affirmatively waived his right to the aid of counsel because he remained silent on the matter. See Carnley v. Cochran, 369 U.S. 506, 516 (1962).
20. 34 Cal. 3d at 627, 688 P.2d at 776, 194 Cal. Rptr. at 469. The court also asserted that "[b]y permitting such a proceeding to go forward, the judge virtually assured an appeal, a reversal and a future retrial, thereby placing an unnecessary additional strain on an already overburdened judicial system." Id.
for refusal to do so.\textsuperscript{21} Second, the magistrate may warn the attorney that his conduct will be reported to the State Bar for disciplinary purposes if he fails to heed the court's order.\textsuperscript{22} Finally, the trial judge may relieve the defense lawyer of his duties in the case and then appoint substitute counsel to represent the defendant.\textsuperscript{23} With any of these procedures, the judge "retain[s] the obligation to supervise the performance of defense counsel to ensure that adequate representation is provided."\textsuperscript{24}

**B. The Derelictions of Counsel**

The majority found the public defender's refusal to participate at trial to be "doubly wrong."\textsuperscript{25} Counsel violated his statutory and ethical obligations as an attorney, and also effectively denied the defendant his right to counsel.\textsuperscript{26} The defense lawyer's conduct "was neither 'effective' nor 'assistance' in any sense of those terms."\textsuperscript{27}

The court declared that a lawyer has the responsibility "to represent his client zealously within the bounds of the law."\textsuperscript{28} When an attorney takes or is assigned to a case, he or she is obligated to represent the client to the best of his or her abilities and to serve with devotion and courage.\textsuperscript{29} This duty survives despite "uncom-

\textsuperscript{21} \textit{Id.} See \textit{In re Buckley}, 10 Cal. 3d 237, 514 P.2d 1201, 110 Cal. Rptr. 121 (1973); \textbf{CAL. CIV. PROC. CODE} §§ 128, 1209, 1211 (West 1982 & West Supp. 1984). However, this course of action is the "ultimate weapon" and must be used with great caution. 34 Cal. 3d at 627, 668 P.2d at 777, 194 Cal. Rptr. at 468. See Smith v. Superior Court, 68 Cal. 2d 547, 560, 440 P.2d 65, 73, 68 Cal. Rptr. 1, 9 (1968) ("must be exercised with great caution, lest it stifle the freedom of thought and speech so necessary to a fair trial under our adversary system.").

\textsuperscript{22} 34 Cal. 3d at 627 n.5, 668 P.2d at 777 n.5, 194 Cal. Rptr. at 469 n.5. See \textbf{CAL. BUS. & PROF. CODE} § 6103 (West 1974).

\textsuperscript{23} 34 Cal. 3d at 628-29, 668 P.2d at 777, 194 Cal. Rptr. at 470. Accord \textit{People v. Marsden}, 2 Cal. 3d 118, 123, 465 P.2d 44, 47, 84 Cal. Rptr. 156, 159 (1970); \textit{Mandell v. Superior Court}, 67 Cal. App. 3d 1, 4, 136 Cal. Rptr. 354, 355 (1977); \textbf{CAL. CIV. PROC. CODE} § 284 (West 1982). However, this substitution of attorneys is contingent upon the defendant not asserting his right to self-representation. 34 Cal. 3d at 629, 668 P.2d at 777, 194 Cal. Rptr. at 470. See \textit{Faretta}, 422 U.S. at 835. If the trial judge does decide to substitute counsel, it should be done with "great circumspection" and the court should delay the continuance so that the new attorney may have time to adequately prepare. 34 Cal. 3d at 629-30, 668 P.2d at 777, 194 Cal. Rptr. at 471. See \textit{Cannon v. Comm'n on Jud. Quals.}, 14 Cal. 3d 678, 697, 537 P.2d 898, 910-11, 122 Cal. Rptr. 778, 790-91 (1975); \textit{People v. Crovedi}, 65 Cal. 2d 199, 208, 417 P.2d 868, 874, 53 Cal. Rptr. 284, 290 (1966).


\textsuperscript{25} 34 Cal. 3d at 633, 668 P.2d at 780, 194 Cal. Rptr. at 473.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.} at 637, 668 P.2d at 783, 194 Cal. Rptr. at 476.


\textsuperscript{29} 34 Cal. 3d at 631, 668 P.2d at 778, 194 Cal. Rptr. at 472. See \textbf{CAL. BUS. & PROF.}
mon difficulty." It is unaffected by client noncooperation or court rulings which appear to be arbitrary or incorrect. The ethical prohibition against representation of a client without adequate preparation cannot be utilized to abandon the client and provide no assistance whatsoever. By reason of their position, attorneys have a duty to ensure order in the judicial system.

III. DISSenting OpINIONS

Justice Kaus, with Justice Richardson concurring in the dissent, expressed his dismay at the majority reversing the defendant's conviction. He stated that defendant's "bizarre" misconduct was willful and "his way of confessing guilt, securing a conviction, and getting [psychiatric] treatment." He further stated that a defendant has no duty to present a defense and has the right to dispense with constitutional safeguards. Justice Kaus thought the court should "honor his method" and affirm the conviction.

Justice Haning dissented because he concluded that the defendant had rejected the assistance of counsel through his act of remaining silent. The defendant, who had been in court

CODE § 6067 (West 1974); RULES OF PROFESSIONAL CONDUCT OF THE CALIFORNIA STATE BAR, rule 6-101(2) (West 1984).

30. 34 Cal. 3d at 631, 668 P.2d at 779, 194 Cal. Rptr. at 472.

31. Id. "The existence of these admittedly adverse conditions does not relieve counsel of the duty to act as a vigorous advocate and to provide the client with whatever defense he can muster." Id. See Sacher v. United States, 343 U.S. 1, 9 (1952) ("If the ruling is adverse, it is not counsel's right to resist it or to insult the judge—his right is only respectfully to preserve his point for appeal."); In re Grossman, 109 Cal. App. 625, 631, 283 P. 683, 685 (1930) ("It is the imperative duty of an attorney to respectfully yield to the rulings and decisions of the court, whether right or wrong."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(A) (1980); RULES OF PROFESSIONAL CONDUCT OF THE CALIFORNIA STATE BAR, rule 7-101 (West 1984).

32. 34 Cal. 3d at 631, 668 P.2d at 779, 194 Cal. Rptr. at 472. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 6-101(A) (2) (1980).

33. 34 Cal. 3d at 632-33, 668 P.2d at 780, 194 Cal. Rptr. at 473. See In re Buckley, 10 Cal. 3d at 254 n.21, 514 P.2d at 1211-12 n.21, 110 Cal. Rptr. at 131-32 n.21; CAL. BUS. & PROF. CODE §§ 6067, 6068 (West 1974).

34. 34 Cal. 3d at 637-38, 668 P.2d at 783-84, 194 Cal. Rptr. at 476-77 (Kaus, J., dissenting).

35. Id. at 638-39, 668 P.2d at 784, 194 Cal. Rptr. at 477 (Kaus, J., dissenting).


37. 34 Cal. 3d at 639, 668 P.2d at 784, 194 Cal. Rptr. at 477 (Kaus, J., dissenting).

38. Id. at 640, 668 P.2d at 785, 194 Cal. Rptr. at 478 (Haning, J., dissenting).
before, never objected to or complained of his attorney's conduct nor did he ever request the appointment of new counsel. Justice Haning stated that waiver of a right can be inferred from an act which is inconsistent with intent to enforce such a right and leads to a reasonable belief that the privilege is relinquished. He believed that the defendant's actions were inconsistent with an intent to enforce the right to counsel and that it was reasonable to conclude that such assistance had been waived.

IV. CONCLUSION

The McKenzie decision serves to reinforce the maxim that the judiciary closely guards an accused's right to effective assistance of counsel against neglect and outright disregard. The trial judge and the defense attorney are responsible for achieving and ensuring such aid to a defendant. The impact of McKenzie will be to reinforce such individuals that if they fail in their obligation, they shall be held accountable. The judge and the lawyer are the learned participants in the courtroom. Their special positions place a duty upon them to see that justice is done.

Q. Erroneous denial of the constitutional right to self-representation constitutes reversible error per se: People v. Joseph.

I. INTRODUCTION

In People v. Joseph, the court reaffirmed the firmly established principle that competent criminal defendants possess the constitutional right to represent themselves without the assistance of
counsel. However, the justices added a new and important element: a trial court commits reversible error per se when it erroneously denies this privilege.

The holding in Joseph is one of first impression in California. It arose when a trial judge refused to allow a criminal defendant charged with a capital offense to proceed pro se given the nature of the charge against him. Despite a timely request that was made both voluntarily and intelligently, the trial court concluded that neither adequate nor effective representation could be rendered by the defendant acting alone. Upon review, the California Supreme Court found that the defendant had been wrongfully stripped of his right to self-representation and such error required reversal as a matter of law.

II. MAJORITY OPINION

A. A Defendant's Right to Proceed Pro Se:

In writing for the majority, Chief Justice Bird recognized that a competent criminal defendant can waive assistance of counsel and represent himself during a criminal prosecution under the sixth and fourteenth amendments to the United States Constitu-

2. Id. at 943, 671 P.2d at 846, 196 Cal. Rptr. at 342. See Faretta v. California, 422 U.S. 806 (1975).

3. 34 Cal. 3d at 948, 671 P.2d at 850, 196 Cal. Rptr. at 346. A defendant's request to represent himself is termed a Faretta motion or a motion to proceed pro se.

4. Id. at 945-46, 671 P.2d at 848, 196 Cal. Rptr. at 344. Prior to the Joseph decision, the court had not taken a position on the issue of whether erroneous denial of a timely proffered Faretta motion compels reversal of a judgment. The question had been expressly reserved in People v. Windham, 19 Cal. 3d 121, 131 n.7, 560 P.2d 1187, 1193 n.7, 137 Cal. Rptr. 8, 14 n.7 (1977).

5. 34 Cal. 3d at 942, 671 P.2d at 846, 196 Cal. Rptr. at 342. The defendant was charged with murder while in the commission of a robbery. It was a capital case which entailed a possible penalty of death in California. See CAL. PENAL CODE § 190.2 (West Supp. 1984). The trial judge found that the defendant needed the assistance of counsel due to the fact that he faced a potential conviction for a capital offense. The defendant was ultimately convicted of first degree murder and sentenced to death even with the aid of an attorney.

6. 34 Cal. 3d at 942, 671 P.2d at 846, 196 Cal. Rptr. at 342. The defendant made the motion five months prior to trial and before any pretrial motions had been heard. He believed that he would present the best defense in his case. The majority found the defendant's waiver of counsel to be both knowing and intelligent. Id. at 944, 671 P.2d at 847-48, 196 Cal. Rptr. at 343-44.

7. Id. at 945-46, 671 P.2d at 848-49, 196 Cal. Rptr. at 344-45.
The courts will not force an attorney upon an unwilling defendant. The rights guaranteed under the sixth amendment are personal and an individual has the right to personally conduct his own defense.

To represent himself, a defendant need only proffer a timely motion to that effect and demonstrate that his election to do so is both voluntary and intelligent. Once these conditions are met, the trial court is obligated to grant the request and permit self-representation.

The trial court is limited in its scope of inquiry regarding a Faretta motion. The judge is only authorized to decide whether a defendant is competent to waive his constitutional right to counsel, and to make certain that the accused understands "the probable risks and consequences of his action." An individual's technical legal knowledge, the nature of the charge, and the imprudence of self-representation are all irrelevant in determining whether to grant or deny the motion. Error is present when the trial court ventures outside of its restricted investigation and rejects a motion to proceed without counsel based on prohibited considerations.

B. The Effect of Error:

The majority declared that the effect of erroneously denying an accused's right to proceed without counsel is reversible per se. The motivation underlying allowance of self-representation is re-

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8. Id. at 943, 671 P.2d at 846, 196 Cal. Rptr. at 342. See Faretta, 422 U.S. at 807; People v. Teron, 23 Cal. 3d 103, 113, 588 P.2d 773, 778, 151 Cal. Rptr. 633, 638 (1979).
10. See Faretta, 422 U.S. at 819.
11. 34 Cal. 3d at 943, 671 P.2d at 846, 196 Cal. Rptr. at 342. See Ferrel v. Superior Court, 20 Cal. 3d 888, 891, 576 P.2d 93, 95, 144 Cal. Rptr. 610, 612 (1978); People v. Windham, 19 Cal. 3d 121, 128, 560 P.2d 1187, 1191, 137 Cal. Rptr. 8, 12 (1977).
12. 34 Cal. 3d at 943, 671 P.2d at 847-48, 196 Cal. Rptr. at 343-44. See People v. Wilks, 21 Cal. 3d 460, 468, 578 P.2d 1369, 1373, 148 Cal. Rptr. 364, 369 (1978); Windham, 19 Cal. 3d at 128, 560 P.2d at 1191, 137 Cal. Rptr. at 12.
13. 34 Cal. 3d at 943, 671 P.2d at 847, 196 Cal. Rptr. at 343. See Teron, 23 Cal. 3d at 113, 588 P.2d at 778, 151 Cal. Rptr. at 638; Curry v. Superior Court, 75 Cal. App. 3d 221, 226-27, 144 Cal. Rptr. 884, 887 (1977).
14. 34 Cal. 3d at 943-45, 671 P.2d at 846-48, 196 Cal. Rptr. at 342-44. See Teron, 23 Cal. 3d at 113, 558 P.2d at 778, 151 Cal. Rptr. at 638; Windham, 19 Cal. 3d at 128, 560 P.2d at 1191, 137 Cal. Rptr. at 12.
15. 34 Cal. 3d at 939-45, 671 P.2d at 844-48, 196 Cal. Rptr. at 340-44. The court found that the defendant Joseph was competent, literate, understanding and had voluntarily requested the right to proceed pro se. The trial judge originally denied Joseph's motion because of the nature of the charge, a capital case. As a result, the lower court had erred and the defendant should have been allowed to represent himself. Id.
16. Id. at 948-49, 671 P.2d at 850, 196 Cal. Rptr. at 346.
spect for a defendant's freedom to choose between seeking the aid of an attorney or personally conducting his own defense.\textsuperscript{17} Per se reversal is the only means to ensure that this liberty is "scrupulously honored."\textsuperscript{18} A more lenient standard is untenable.\textsuperscript{19}

The court also found that a standard whereby errant rejections of proffered \textit{Faretta} motions were labelled and then treated as prejudicial or harmless error would only serve to undermine the privilege of being one's own counsel during criminal proceedings.\textsuperscript{20} Such a process would involve "an impossibly speculative comparison between the accused's undisclosed pro se strategy and that of counsel."\textsuperscript{21} Appellate courts cannot and should not delve into such an examination when fundamental rights are at stake.\textsuperscript{22}

### III. CONCURRING OPINIONS

Although both Justice Mosk and Justice Richardson concurred in the result of the decision, each expressed a concern that the majority may have extended the right to proceed pro se beyond its limitations and importance. They desired to maintain and protect the privilege but within permissible parameters.

Justice Mosk stated that the right to represent oneself at criminal proceedings is not "absolute."\textsuperscript{23} To support his position, he provided examples of several limitations to self-representation. First, a defendant charged with a capital offense cannot plead guilty over the objection of his attorney.\textsuperscript{24} Second, the accused in a capital case is not permitted to waive his right to appeal after

\begin{itemize}
  \item \textsuperscript{17} \textit{Id.} at 946, 671 P.2d at 848, 196 Cal. Rptr. at 344. \textit{See Faretta}, 422 U.S. at 834; United States v. Dougherty, 473 F.2d 1113, 1128 (D.C. Cir. 1972); People v. McDaniels, 16 Cal. 3d 156, 165, 545 P.2d 843, 848, 127 Cal. Rptr. 467, 472 (1978).
  \item \textsuperscript{18} 34 Cal. 3d at 946, 671 P.2d at 849, 196 Cal. Rptr. at 345. \textit{See People v. Freeman}, 76 Cal. App. 3d 302, 309-10, 142 Cal. Rptr. 806, 810 (1977).
  \item \textsuperscript{19} 34 Cal. 3d at 948, 671 P.2d at 850, 196 Cal. Rptr. at 346. The court found support for its holding in several decisions from federal courts and California courts of appeal adopting the reversible error per se standard. \textit{See} Bittaker v. Enomoto, 587 F.2d 400 (9th Cir. 1978), \textit{cert. denied}, 441 U.S. 913 (1979); Chapman v. United States, 553 F.2d 886 (5th Cir. 1977); \textit{Freeman}, 76 Cal. App. 3d 309-10, 142 Cal. Rptr. at 810; People v. Tyner, 76 Cal. App. 3d 352, 356, 143 Cal. Rptr. 52, 54 (1977).
  \item \textsuperscript{20} 34 Cal. 3d at 946, 671 P.2d at 849, 196 Cal. Rptr. at 345.
  \item \textsuperscript{21} \textit{Id.}
  \item \textsuperscript{22} \textit{Id.}
  \item \textsuperscript{23} \textit{Id.} at 948, 671 P.2d at 850, 196 Cal. Rptr. at 346 (Mosk, J., concurring).
  \item \textsuperscript{24} \textit{Id.} at 949, 671 P.2d at 850-51, 196 Cal. Rptr. at 346-47 (Mosk, J., concurring).
\end{itemize}
conviction. The state's interest in capital cases cannot be eliminated and a defendant does not possess "a blank check" concerning his defense at such proceedings. The court should be hesitant to "second guess" the trial court's judgment on the need for assistance of competent counsel in capital cases since the trial judge oversees the state's concern for fairness and accuracy.

Justice Richardson was concerned with the majority's per se rule. He observed that the United States Supreme Court has yet to expressly decide which standard is to be utilized in judging the effect of an erroneous denial of a Faretta motion. He stated that it is at least "arguable that a harmless error standard should be employed in some cases." As a result, Justice Richardson expressed his intention to wait for a decision from the highest court in the land on the issue.

IV. CONCLUSION

The impact of the Joseph decision within the California legal community will be significant. The importance of the privilege of self-representation was strongly reiterated and the new penalty for ignoring it is harsh: reversible error per se. Those involved in criminal adjudication will pay close attention to the teachings of Joseph; a mistake as to its application may mean the difference between conviction and freedom. Judges and

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25. *34 Cal. 3d* at 949, 671 P.2d at 851, 196 Cal. Rptr. at 347 (Mosk, J., concurring).


27. *Id.* at 950, 671 P.2d at 851, 196 Cal. Rptr. at 347 (Mosk, J., concurring).

28. *Id.* at 950-51, 671 P.2d at 851-52, 196 Cal. Rptr. at 347-49 (Richardson, J., concurring).

29. *Id.* at 950, 671 P.2d at 852, 196 Cal. Rptr. at 348 (Richardson, J., concurring).

30. *Id.* at 950, 671 P.2d at 852, 196 Cal. Rptr. at 348 (Richardson, J., concurring). Justice Richardson further illustrated that it might be beyond reasonable doubt to conclude that denial of self-representation was not harmless error if counsel was competent, evidence of culpability was great, and attorney and client did not disagree as to presentation of the defense, *Cf. Chapman v. California*, 386 U.S. 18 (1967) (the court held that before constitutional error can be declared harmless it must be harmless beyond a reasonable doubt. However, the prosecutor's comments to the jury and the trial court's instruction regarding defendant's failure to testify was not determined to be harmless).

31. *34 Cal. 3d* at 951, 671 P.2d at 852, 196 Cal. Rptr. at 348 (Richardson, J., concurring).
prosecutors will dread the decision. Defendants will hail it. However, the question remains whether the uneasiness of Justices Mosk and Richardson over the meaning of Joseph should be heeded. With automatic reversal as the penalty for error, judges and prosecutors may be more apt to permit ignorant and incompetent defendants to represent themselves. It is a formidable task for the unknowing and unsuspecting to do battle within the confines of the sometimes cold and inflexible walls of the courthouse. The ultimate significance of Joseph may be its inequitable result in certain cases.

R. If, in the process of contact between policeman and citizen, a reasonable person would believe that he was not free to leave, then the incident has exceeded the bounds of consensual encounter: Wilson v. Superior Court.

I. INTRODUCTION

In Wilson v. Superior Court, the court clarified the scope of and the requirements for various levels of police-citizen contact under the United States Constitution as applied to the predicament of entertainer “Flip” Wilson. The incident began when Wilson and his nephew were observed by narcotics agents upon their arrival at Los Angeles International Airport. The nephew made “eye contact” with one of the agents. Wilson and his nephew were followed by an officer as they proceeded down the concourse. Both peered back in the general direction of the detective and conversed with each other. The questioned confrontation occurred at Wilson’s car located just outside the terminal. The arresting officer approached the vehicle, identified himself as a

1. 34 Cal. 3d 777, 670 P.2d 325, 195 Cal. Rptr. 671 (1983). Justice Kaus wrote the opinion expressing the unanimous view of the court.
2. 34 Cal. 3d at 780, 670 P.2d at 327, 195 Cal. Rptr. at 673. The officers were at the airport to monitor flight arrivals from Miami, Florida for possible drug couriers.
3. Id. The arresting officer stated that the nephew’s “eye contact” was consistent with that of other persons he had arrested for drug trafficking. However, the agent also conceded that he had no objective basis for differentiating “eye contact of drug couriers from that of other persons.” Id. at 781, 670 P.2d at 327, 195 Cal. Rptr. at 673.
4. Id.
5. Id. No “eye contact” between agent and suspects was made at this time.
6. Id. The automobile was parked at the curb. Wilson and his nephew were met by Wilson’s wife and all three walked to the car. The nephew went to get
policeman, and inquired if he "might have a minute of" Wilson's time. Subsequently, the agent advised that he was conducting a narcotics investigation and had reason to believe Wilson was transporting drugs. Although disputed as to why and how, Wilson consented to a search whereupon hash oil and later cocaine were found in his belongings. The ensuing dispute was over whether Wilson had been unlawfully detained and whether the evidence obtained against him was the fruit of such illegality.

II. CASE ANALYSIS

The court began by explaining that police interaction with private citizens occurs in one of three categories or levels. First, and least intrusive, are "consensual encounters" where the confronted person's freedom is not restrained at all, i.e., he is free to leave or stay depending upon individual choice. No objective justification is required for such contact. Second are detentions or seizures which are limited in scope, duration, and purpose. Such encounters must be supported by "articulable suspicion" that the person stopped "has committed or is about to commit a crime." The last and most offensive confrontation between law enforcement and individuals is formal arrest or restraint comparable to arrest. It is lawful only when probable cause exists to arrest a person for a crime.

...
The court held that Wilson's contact with the police constituted both an illegal detention and a violation of Wilson's fourth amendment rights under the federal constitution. The court also determined that the evidence obtained from the search must be suppressed despite the fact of apparent consent.\footnote{17}

A. Lack of Any Articulable Suspicion

The justices found that the arresting officers did not have an objective, articulable justification for a detention of Wilson.\footnote{18} The court stated that no circumstance of the detectives' observations provided "a reasonable basis for distinguishing Wilson from the great bulk of passengers arriving at Los Angeles International Airport."\footnote{19} The nephew's "eye contact" with one of the agents and the fact that both Wilson and his nephew looked back down the concourse were the only activities proffered as suspicious.\footnote{20} If the court concluded that such circumstances justified a seizure, it would countenance the random and arbitrary detention of a large number of "innocent travelers."\footnote{21}

B. Not a Consensual Encounter

The court found that the narcotics detectives' conduct constituted a seizure of Wilson, not a consensual encounter with him, which was rendered unlawful through the failure to provide evidence of reasonable suspicion of criminal activity.\footnote{22} The standard...
for whether an individual has been seized within the meaning of the fourth amendment is "if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."23

The justices utilized "common sense" in concluding that Wilson did not feel at liberty to just leave the scene of his confrontation with the police.24 No reasonable person informed by a police officer that he is suspected of transporting narcotics feels free to simply leave the presence of the officer.25 Wilson knew that he was "the focus of the [arresting] officer's particularized suspicion because the agent had informed him that he was the subject of the investigation.26 Wilson surely could not have believed that he was free to elect to just drive away.27 As a result, he was illegally detained when he consented to the search of his baggage.28

III. CONCLUSION

The Wilson decision reflects the conviction that the police cannot operate from hunches or inarticulable suspicions to indiscriminately invade people's lives. Law enforcement officials cannot be permitted to detain or intrude on the privacy of individuals at whim. Without objective justification, the police can only engage citizens based on voluntary consent. If coercive influence or position of authority is used to transform such an encounter from one of willing cooperation to one of intimidation and involuntary cooperation then such method is condemned.

at 1324 ("He may not be detained even momentarily without reasonable, objective grounds for doing so.").
23. 34 Cal. 3d at 790, 670 P.2d at 333, 195 Cal. Rptr. at 679 (quoting Mendenhall, 446 U.S. at 554). The court indicated that at least six members of the present United States Supreme Court support the Mendenhall standard. Id. at 790 n.10, 670 P.2d at 333 n.10, 195 Cal. Rptr. at 679 n.10. See Royer, 103 S. Ct. at 1324, where an illustration of a consensual encounter with the police is provided, i.e., approaching a citizen in public and asking if he would be willing to answer some questions while the individual remains at liberty not to respond or listen and may go his own way. The fact that an officer identifies himself as a police officer does not convert the incident to a seizure.
24. 34 Cal. 3d at 790, 670 P.2d at 334, 195 Cal. Rptr. at 680.
25. Id.
26. Id. at 791, 670 P.2d at 334, 195 Cal. Rptr. at 680. See Williamson, The Dimensions of Seizure: The Concepts of "Stop" and "Arrest", 43 OHIO ST. L.J. 771, 802 (1982) ("a reasonable person examining the conduct of the officer is more likely to view the circumstances as a seizure when conduct or verbal activities of the police become more intrusive, that is, when they clearly are related to the investigation of specific criminal acts.").
27. 34 Cal. 3d at 791, 670 P.2d at 334, 195 Cal. Rptr. at 680.
28. Id. See United States v. Berry, 670 F.2d 583, 597 (5th Cir. 1982), where the court expresses concern over whether there is free and voluntary consent where a seizure has taken place.
S. **Sufficient exigency exists to conduct an on-the-scene warrantless search of a lawfully stopped automobile when the police have probable cause to believe that the vehicle contains contraband:** *People v. Superior Court.*

### I. INTRODUCTION

In *People v. Superior Court,* the court clarified and reaffirmed the teachings of *People v. Chavers,* by upholding the validity of an “on-the-scene” warrantless search of an automobile trunk. The court found justification for its decision in the traditional “automobile exception” to the general warrant requirement.

A private citizen discovered a pick-up truck which was missing parts and equipment. Suspecting that the vehicle was stolen, he reported its location to the California Highway Patrol who confirmed that the truck had been reported stolen. Subsequently, while driving by the pilfered truck’s location, two Sacramento County Police officers sighted a second vehicle which they believed might belong to the car thieves. When more officers arrived, they entered the premises and detained the defendant and another person. The police inspected the stolen truck and found:

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3. 35 Cal. 3d at 13, 671 P.2d at 864, 196 Cal. Rptr. at 359-60.

4. *Id.* See U.S. CONST. amend. IV; CAL. CONST. art. 1, § 13 (West 1983), which require the issuance of a warrant based on probable cause before a search and seizure may be conducted. This requirement is to protect the citizenry against unreasonable searches and seizures. *See also* Carroll v. United States, 267 U.S. 132 (1925), where the “automobile exception” was first established when the Court provided that police officers can stop and search a vehicle without a warrant if they have probable cause to believe the car is transporting contraband.

5. 35 Cal. 3d at 13-14, 671 P.2d at 864, 196 Cal. Rptr. at 360. The pick-up was found on abandoned property. The truck's battery, radio equipment, and mirrors were all missing. In addition, the hood was open and wires were dangling under the dashboard.

6. *Id.* at 14, 671 P.2d at 864, 196 Cal. Rptr. at 360.

7. *Id.* The Sacramento policemen had been informed of the stolen truck and its whereabouts. They had spotted a “black over blue” Oldsmobile sedan which was backed up to the garage housing the stolen truck.

8. *Id.* The two suspects walked out of the garage and the police placed them in nearby police cars while they conducted their investigation.
that it had indeed been stripped. Upon examining the defendant's car, the officers noticed tools but no automobile parts. Without securing consent from the defendant or a search warrant, a policeman removed the keys from the ignition and opened the trunk of the car. The missing parts from the stolen vehicle were discovered in the trunk.

Thereafter, a trial judge suppressed the evidence obtained in the search of the defendant's automobile trunk. He reasoned that sufficient exigent circumstances had not been shown to validate the warrantless search. The supreme court ruled that the trial court's decision was grounded on a misunderstanding of "the nature of the 'exigency' required to justify . . . [the] warrantless search" of an automobile, and concluded that the lower court had erred.

II. MAJORITY OPINION

The majority opinion was short in length but to the point. If the police have probable cause to believe that a lawfully stopped vehicle contains contraband, then they are justified in conducting an immediate on-the-scene warrantless search of the automobile without the presence "of any additional exigent circumstances." This holding necessarily implies that the lawful stopping or seizure of an automobile by itself presents sufficient exigent cir-

9. Id. The officers confirmed the observations of the citizen who had reported the location of the truck.
10. Id.
11. Id. He opened the trunk in search of the missing parts and equipment.
12. Id. A radiator, mirrors, a car radio and speakers were found in the trunk. At the time, they were believed to be the stolen truck's missing parts. The suspects were charged with vehicle theft and receiving stolen property. See CAL. VEH. CODE § 10851 (West Supp. 1984); CAL. PENAL CODE § 496 (West Supp. 1984).
14. 35 Cal. 3d at 14-15, 671 P.2d at 864, 196 Cal. Rptr. at 360. Thereafter, the prosecution sought a writ of mandate to compel the trial court to vacate its order. See CAL. PENAL CODE § 1538.5(o) (West Supp. 1984).
15. 35 Cal. 3d at 16, 671 P.2d at 865-66, 196 Cal. Rptr. at 361-62. The court indicated that it was reviewing the case in order to resolve a conflict in the court of appeal system. However, no further elaboration was provided on the matter. Id. at 15, 671 P.2d at 864-65, 196 Cal. Rptr. at 360-61.
16. Id. at 15, 671 P.2d at 865, 196 Cal. Rptr. at 361 (emphasis omitted) (quoting Chavers, 33 Cal. 3d at 469, 658 P.2d at 101, 189 Cal. Rptr. at 174); Wimberly v. Superior Court, 16 Cal. 3d 557, 563-68, 547 P.2d 417, 420-23, 128 Cal. Rptr. 641, 644-47 (1976). Probable cause is defined as the awareness of facts that would lead a person of "ordinary caution or prudence to believe, and conscientiously to entertain, a strong suspicion that the object of the search is in the particular place to be searched." See, e.g., People v. Hill, 12 Cal. 3d 731, 747-48, 528 P.2d 1, 14, 117 Cal. Rptr. 393, 406 (1974); People v. Dumas, 9 Cal. 3d 871, 885, 512 P.2d 1208, 1218, 109 Cal. Rptr. 304, 314 (1973).
cumstances to validate a warrantless search.\textsuperscript{17} However, the scope and character of such a search is qualified and restricted by the purpose for the search and the type of object sought within the car.\textsuperscript{18} In the defendant's case, defense counsel conceded the existence of probable cause to believe that the car trunk contained seizable evidence.\textsuperscript{19}

As in \textit{Chavers},\textsuperscript{20} the majority found their holding to be consistent with \textit{United States v. Ross}.\textsuperscript{21} \textit{Ross} authorizes police officers, who legally stop an automobile, to conduct a warrantless search of the vehicle to the extent that a magistrate could permit by warrant when there is probable cause to believe that contraband is concealed therein.\textsuperscript{22} It has been established that no constitu-

\textsuperscript{17} See \textit{Chavers}, 33 Cal. 3d at 467-68, 658 P.2d at 99, 189 Cal. Rptr. at 172 ("sufficient exigency 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.").

\textsuperscript{18} 35 Cal. 3d at 15, 671 P.2d at 865, 196 Cal. Rptr. at 361. See \textit{United States v. Ross}, 456 U.S. 798, 824 (1982), in which the Court stated:

The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. Just as probable cause to believe that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab.

\textit{Id.; Chavers}, 33 Cal. 3d at 470, 658 P.2d at 101, 189 Cal. Rptr. at 174 ("the scope and character of a vehicle search based on probable cause is limited by the reason for the search and the kind of object believed to be concealed. Probable cause to search for a stolen television set... would not justify a search of the glove compartment... ").

\textsuperscript{19} 35 Cal. 3d at 15-16, 671 P.2d at 865, 196 Cal. Rptr. at 361. Defendant's attorney focused his argument on the sufficiency of the exigent circumstances.

\textsuperscript{20} 33 Cal. 3d at 466-67, 658 P.2d at 98-99, 189 Cal. Rptr. at 171-72.


\textsuperscript{22} \textit{Ross}, 456 U.S. at 800. The \textit{Ross} Court also stated that a legal search "generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search." \textit{Id.} at 820-21. Although this statement was made in reference to the search of "fixed premises," the justices related its significance to automobile searches by asserting that a legitimate search of a vehicle extends to "every part of the vehicle that might contain the object of the search." \textit{Id. See} 2 W. LAFAVE, \textit{SEARCH AND SEIZURE} 152 (1978).
tional difference exists between holding a car while awaiting the issuance of a warrant and pursuing an immediate search of the vehicle without a warrant given probable cause to search.23 "[E]ither course is reasonable."24

The court ended its discussion by dismissing the fact that the arresting officers had not actually stopped the defendant's car on a public highway.25 The police were excused from obtaining a warrant prior to searching the automobile because they were unaware of the car's presence prior to arriving at the scene.26 The justices concluded that the prompt on-the-scene search of the vehicle without a warrant did not violate either the California or the federal constitutions.27


24. Chambers, 399 U.S. at 52. The majority also provided four reasons for permitting such a search:

(1) the ready mobility of automobiles, (2) the lesser expectation of privacy in their contents, (3) the significant administrative expense, delay and risk of loss of contents entailed in requiring the police either to secure all automobiles at the scene or tow all suspected vehicles to a securely maintained depot, and (4) the need for clear guidelines by which police may guide and regulate their conduct.

35 Cal. 3d at 16, 671 P.2d at 865, 196 Cal. Rptr. at 361. See Arkansas v. Sanders, 442 U.S. 753, 761, 769 n.14 (1979); Chavers, 33 Cal. 3d at 469-70, 658 P.2d at 100-01, 189 Cal. Rptr. at 173-74.

25. 35 Cal. 3d at 16, 671 P.2d at 865-66, 196 Cal. Rptr. at 361-62. The reader should recall that defendant's car was already parked in front of the garage housing the stolen truck when the police arrived. The "automobile exception" is usually associated with the stopping of a vehicle while in transit on a public street. See, e.g., Sanders, 442 U.S. at 760; United States v. Martinez-Fuerte, 428 U.S. 543, 561-62 (1976); Texas v. White, 423 U.S. 67, 68 (1975).

26. 35 Cal. 3d at 16, 671 P.2d at 865-66, 196 Cal. Rptr. at 361-62. But cf. Coolidge v. New Hampshire, 403 U.S. 443, 458-61 (1971), where the Court refused to validate the warrantless search of a automobile based upon the "automobile exception" when the subject vehicle was parked on private property. It was stated that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." Id. at 461-62. Also, Justice Marshall, in his Ross dissent, stated that he did not think the Ross decision applied to parked cars. See Ross, 456 U.S. at 828 n.1 (Marshall, J., dissenting).

However, the facts of the Coolidge case are distinguishable from those of the present case. In Coolidge, the police had known of the car's existence, its whereabouts and its probable role in the crime for a long period of time. Coolidge, 403 U.S. at 460. But in this case, the officers were not aware of the second vehicle's presence until they reached the situs of the search. 35 Cal. 3d at 14, 671 P.2d at 864, 196 Cal. Rptr. at 360.

The author utilizes a certain amount of license with regard to the following assertions. Although the defendant's car was motionless and on private property, the basic rationale provided by the court for warrantless searches of automobiles still applied to the search of the trunk. See supra note 24. It was still possible to move the car. The defendant's expectation of privacy had not increased. It would have caused delay and expense to wait for a warrant. Further, the court did provide clear guidelines for police action in a particular situation.

27. 35 Cal. 3d at 16, 671 P.2d at 866, 196 Cal. Rptr. at 362. As in the Chavers de-
III. CONCURRING OPINION

Justice Mosk concurred in the majority’s result, but as he perceived the situation, exigent circumstances were presented by the facts. The defendant was not under arrest at the time of the search; he was merely detained because the police had “no valid basis” upon which to arrest him before the search was conducted. If the officers had been required to obtain a warrant before their search, this would have necessitated the release of the defendant who would have quickly left the area never to be seen again.

IV. DISSENTING OPINION

Chief Justice Bird dissented, with Justice Reynoso concurring, because she believes that the California Constitution affords “greater protection” against warrantless automobile searches than does the federal constitution. She stated that the warrant requirement “is the cornerstone” in protecting citizens against unreasonable invasions of privacy.

The Chief Justice declared that the warrantless search of an automobile is only permissible when the situation supplies both probable cause for the search and separate exigent circumstances rendering the obtainment of a warrant either impossible or impractical. If no “actual exigency” exists, the police should not...
be allowed to search any portion of the vehicle before they secure a warrant. By requiring exigent circumstances other than probable cause to search at the time of the stop, warrantless searches will be conducted only "when there is a genuine need to do so." The Chief Justice asserted that this is a "fair," "clear and workable standard.”

V. CONCLUSION

The impact of the court's decision will be to reinforce the current status quo. The "automobile exception" to the warrant requirement is broad in scope. The courts have served notice that the very nature of the automobile and the circumstances surrounding its lawful seizure provide the urgency that necessitates a warrantless search. If law enforcement officials have probable cause to believe that contraband is contained within a vehicle, then they can search it immediately without further justification or formality. Reality and practicality demand such a result.

XIII. CRIMINAL PROCEDURE

A. Credit for time in custody prior to commencement of a prison term may be given: In re Atiles.

The California Supreme Court examined the availability of a credit for time in custody prior to commencement of a prison sentence in In re Atiles, 33 Cal. 3d 805, 662 P.2d 910, 191 Cal. Rptr. 452 (1983). Specifically, the court was asked to determine whether incarceration for a parole violation, based upon a crime committed during the parole period, could be used to reduce a subsequent prison sentence resulting from conviction of the crime committed by the defendant while on parole. In a close decision, the court held that the credit would be allowed to reduce the prison sentence.

The facts can be summarized briefly. In 1977, Rick A. Atiles was convicted of robbery and sentenced to prison. The following year, Atiles was released on parole. On May 3, 1979, while free on parole, he was arrested for robbery and sodomy, and a parole hold was placed on him. The Board of Prison Terms revoked Atiles' parole and ordered that he be returned to prison for a six-month period. Id.

At trial, Atiles pleaded guilty to the robbery committed while

34. 35 Cal. 3d at 18, 671 P.2d at 867, 196 Cal. Rptr. at 363.
35. Id. at 19, 671 P.2d at 867, 196 Cal. Rptr. at 363.
on parole, and was sentenced to a four-year term in prison. (This term included a one-year consecutive term for his original robbery conviction.) Atiles then petitioned for relief through a writ of habeas corpus asking that the six months he had served for the parole violation be credited to the new four-year term.

In considering Atiles' petition, the supreme court examined CAL. PENAL CODE § 2900.5 (West 1982), which provides in pertinent part:

(a) In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including . . . any time spent in a jail, . . . all days of custody of the defendant, . . . shall be credited upon his term of imprisonment. . . .

(b) For the purposes of this section, credit shall be given only where the custody to be credited is attributable to proceedings related to the same conduct for which the defendant has been convicted.

CAL. PENAL CODE § 2900.5 (West 1982).

The majority interpreted the limiting language of section 2900.5(b) literally and held that "[t]he conduct which led to his arrest and conviction on the new criminal charge also formed a basis for the parole hold and subsequent revocation proceedings. Thus his custody in the county jail was, literally, 'attributable to proceedings related to the same conduct for which the defendant [had] been convicted.'" Atiles was thus entitled to a six-month credit on his current prison term under the majority's interpretation of the statute.

The majority thus rejected the contention that the custody must be "attributable exclusively to the conduct underlying the term ultimately imposed," and thereby approved several recent California courts of appeal cases dealing with similar questions regarding parole. See In re Anderson, 136 Cal. App. 3d 472, 186 Cal. Rptr. 269 (1982); People v. Simpson, 120 Cal. App. 3d 772, 174 Cal. Rptr. 790 (1981); People v. Penner, 111 Cal. App. 3d 168, 168 Cal. Rptr. 431 (1980).

In his dissent, Justice Mosk, joined by Chief Justice Bird and Justice Richardson, rejected the majority's literal interpretation of CAL. PENAL CODE § 2900.5(b) (West 1982), and argued that to allow Atiles credit on his current term for time served for a parole violation would render the imposition of any sentence for parole violations meaningless.

The dissent's point is well taken, although the interpretation of the statute presents a close question of legislative intent. As the majority suggests, the legislature intended exactly what it stated,
and what was stated was broad enough to include credit for time served for a parole violation. However, on closer inspection, the allowance of such a credit would seem to "render . . . meaningless" the legislature's provisions for punishment of parole violations, as argued by the dissent. Under such contradictory interpretations, the dispute should be resolved by reading the statute providing for punishment for violations of parole and the statute granting credits for time served together. Assuming the legislature meant both to be effective, the statute granting a credit for time served should not be allowed to defeat or limit the statute imposing punishment for parole violations.

B. Requirement of registration as a sex offender may constitute cruel and unusual punishment: In re Reed.

In In re Reed, the California Supreme Court struck down a provision of the California Penal Code which required registration of a sex offender. The court held that, as a form of punishment, the requirement of registration constituted cruel and unusual punishment in violation of the California Constitution.

California Penal Code section 647(a) declares that a person "[w]ho solicits anyone to engage in or who engages in lewd or dissolute conduct in any public place or in any place open to the public or exposed to public view" is guilty of disorderly conduct, a misdemeanor. Section 290 of the California Penal Code requires the registration of persons convicted of certain sex offenses including section 647(a) offenses. Convicted individuals must register with the chief of police in the city in which they temporarily or permanently reside. Also, in the words of the court:

The registrant must furnish a written statement, fingerprints, and a photograph, which are forwarded to the Department of Justice. Each change of address must be reported within 10 days. Failure to register or re-register is a misdemeanor. The section applies automatically to the enumerated

2. Id. at 926, 663 P.2d at 222, 191 Cal. Rptr. at 664-65.
3. CAL. PENAL CODE § 647(a) (West Supp. 1983). In Pryor v. Municipal Court, 25 Cal 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979), the supreme court held that the phrase "lewd or dissolute" was impossibly vague. The court then construed the statute to prohibit public solicitation or conduct "which involves the touching of the genitals, buttocks, or female breast, for purposes of sexual arousal, gratification, annoyance or offense, by a person who knows or should know of the presence of persons who may be offended by the conduct." 25 Cal. 3d at 244, 599 P.2d at 639, 158 Cal. Rptr. at 332. See also In re Anders, 25 Cal. 3d 414, 599 P.2d 1364, 158 Cal. Rptr. 661 (1979); Note, Pryor v. Municipal Court, California's Narrowing Definition of Solicitation for Public Lewd Conduct, 32 HASTINGS L.J. 461, 474 (1980).
5. Id.
offenses, and imposes on each person convicted a lifelong obligation to register.

The registration requirement applies to some forms of sex-related offenses, but not to all. In addition to "lewd or dissolute" conduct specified in section 647(a), other offenses triggering registration are loitering in or about public toilets, procuring females under age 18 for prostitution, contributing to the delinquency of a minor, lewd or lascivious conduct with a child under age 14, oral copulation, indecent exposure, incest, sodomy, assault with intent to commit rape, sodomy or oral copulation, and forcible rape.

Those offenses not requiring registration include child pornography, statutory rape, bigamy, bestiality, lewdness in the presence of a child, a "peeping Tom" offense, pimping and pandering, and soliciting and engaging in prostitution.

The petitioner did not challenge the constitutionality of section 647(a) or the validity of his own conviction; instead, he contended that the requirement of registration for his offense constituted "cruel or unusual punishment" in violation of the California Constitution. Accordingly, the supreme court considered first

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6. 33 Cal. 3d at 919, 663 P.2d at 217, 191 Cal. Rptr. at 659 (discussing CAL. PENAL CODE § 290 (West Supp. 1984)). A person convicted of a misdemeanor may be excused from registering under CAL. PENAL CODE § 1203.4 (West Supp. 1984), but there is no method by which a misdemeanant who has been registered may "expunge the initial registration." 33 Cal. 3d at 919, 663 P.2d at 217, 191 Cal. Rptr. at 659.

25. 33 Cal. 3d at 918, 663 P.2d at 216-17, 191 Cal. Rptr. at 658-59.
26. Id. at 918, 663 P.2d at 217, 191 Cal. Rptr. at 659. See CAL. CONST. art. I, § 17 (West 1983).
whether the registration requirement was a form of “punishment.”

The test of this threshold question is found in the case of *Kennedy v. Mendoza-Martinez*, a case decided by the United States Supreme Court. The following factors were listed in aid of determining what constituted “punishment:”

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

The California Supreme Court applied these factors to the registration requirement and held that such registration was punitive.

Relying on Justice Tobriner’s opinion in *In re Birch*, and on *Kelly v. Municipal Court*, the supreme court found that the registration of certain sex offenders constituted an “affirmative disability or restraint.” While the “stigma” of a short jail sentence might eventually fade, “the ignominious badge” carried by a registered sex offender could “remain for a lifetime.” Also the registrant was subject to surveillance and could be hauled in for police lineups. These lineups, according to the court, involve, by definition, compulsion and restraint.

Even though registration of sex offenders was not historically regarded as “punishment,” this was held not to be dispositive of the issue. Justice Mosk, writing the majority opinion, noted that the *Mendoza-Martinez* factors were only “relevant considerations, not a checklist of absolute requirements.”

28. *Id.* at 168-69 (footnotes omitted).
29. 33 Cal. 3d at 920-22, 663 P.2d at 218-20, 191 Cal. Rptr. at 660-62.
32. 33 Cal. 3d at 920, 663 P.2d at 218, 191 Cal. Rptr. at 660.
33. *Id.* (citing *Birch*, 10 Cal. 3d at 321-22, 515 P.2d at 17, 110 Cal. Rptr. at 217) (emphasis omitted).
34. 33 Cal. 3d at 920, 663 P.2d at 218, 191 Cal. Rptr. at 660 (citing Kaus & Mallen, *The Misguiding Hand of Counsel—Reflections on “Criminal Malpractice,”* 21 U.C.L.A. L. Rev. 1191, 1222 (1974)). The surveillance and forced participation in police lineups drove Justice Mosk, who wrote the majority opinion, to remark parenthetically: “One is reminded of the closing scene of the classic film ‘Casablanca,’ in which, after a German officer is assassinated, the Vichy police inspector laconically gives the order to ‘round up the usual suspects.’” 33 Cal. 3d at 920 n.5, 663 P.2d at 218 n.5, 191 Cal. Rptr. at 660 n.5.
35. 33 Cal. 3d at 920, 663 P.2d at 218, 191 Cal. Rptr. at 660.
36. *Id.* at 921, 663 P.2d at 219, 191 Cal. Rptr. at 661.
Section 647(a) of the California Penal Code, as construed by the court in *Pryor v. Municipal Court*,37 requires lewd intent and specific touching. The registration requirement thus is invoked only "on a finding of scienter," the third factor listed in *Mendoza-Martinez*.38 The legislature also intended that the registration act as retribution and as a deterrent "by facilitating the apprehension of past offenders."39 The conduct to which registration applied was already a crime; thus, the fourth and fifth *Mendoza-Martinez* factors were satisfied.40

The court considered whether there was any "alternative purpose" to which the registration requirement was "rationally connected."41 It recognized that the legislature intended the registration to facilitate police investigations, but the court also noted that there was little evidence that the registration was effective in practice.42 At any rate, even if the requirement was arguably rationally connected to an alternative goal, this basis was outweighed by the fact that, here, the penalty of registration was "excessive in relation to the alternative purpose. . . ."43

After concluding that the registration requirement was a form of "punishment," the court proceeded to determine if the punishment was "cruel or unusual." Any determination of a valid or invalid form of punishment must be made in light of "the evolving standards of decency that mark the progress of a maturing society."44 The court reaffirmed its holding in *In re Lynch*45 that "[i]mplicit in the characterization of the constitutional prohibition as flexible and progressive is the notion that punishment

37. 25 Cal. 3d at 244, 599 P.2d at 639, 158 Cal. Rptr. at 332.
38. See supra notes 27-28 and accompanying text.
40. 33 Cal. 3d at 921-22, 663 P.2d at 219, 191 Cal. Rptr. at 661.
41. Id.
42. Id. at 922, 663 P.2d at 219, 191 Cal. Rptr. at 661-62. The registration of sex offenders does not seem to effectively assist the police in their investigations of crime. See id. at 922 n.7, 663 P.2d at 219-20 n.7, 191 Cal. Rptr. at 662 n.7. In the "Hillside Strangler" case, the computers produced "thousands" of suspects when the fingerprint evidence of the perpetrator was fed into the computer. Id.
43. Id. at 922, 663 P.2d at 220, 191 Cal. Rptr. at 662 (citing *Mendoza-Martinez*, 372 U.S. at 168) (emphasis added).
45. 8 Cal. 3d 410, 503 P.2d 921, 105 Cal. Rptr. 217 (1972).
may not be grossly disproportionate to the offense."\textsuperscript{46}

As propounded by the court in Lynch, three criteria may be used by the court when examining the punishment in light of the "proportionality standard." First, the court will examine "the nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." Second, the court will compare the penalty with those imposed for "more serious crimes." Third, the court will examine the penalty in light of penalties imposed by other jurisdictions for the same offense.\textsuperscript{47}

Considering the first facet of the above test, Justice Mosk and a majority of the court felt that, "[b]y contemporary standards, the offenses for which persons may be convicted under section 647(a) are relatively minor."\textsuperscript{48} The court also noted that, in the case where a "single undercover vice officer" is alone with the offender, "no one need be 'victimized' in the traditional criminal sense."\textsuperscript{49} Specifically, the court held that the petitioner's offense in the present case was minor: "Petitioner is not the prototype of one who poses a grave threat to society; nor does his relatively simple sexual indiscretion place him in the ranks of those who commit more heinous registrable sex offenses."\textsuperscript{50}

Second, the court noted that, as a rule, if a more serious offense is treated less harshly, the questioned penalty is "necessarily suspect."\textsuperscript{51} In this regard, Justice Mosk listed the offenses not warranting registration, and emphasized the fact that these offenses are perhaps more serious or as serious as the offense here in question.\textsuperscript{52} Moreover, serious offenses not related to sex such as robbery, burglary or arson do not require registration.\textsuperscript{53}

As a final consideration under the Lynch test, the court consid-

\textsuperscript{46}. 33 Cal. 3d at 923, 663 P.2d at 220, 191 Cal. Rptr. at 662.
\textsuperscript{47}. Id. (citing Lynch, 8 Cal. 3d at 425-29, 503 P.2d at 930-34, 105 Cal. Rptr. at 226-30).
\textsuperscript{48}. 33 Cal. 3d at 923, 663 P.2d at 220, 191 Cal. Rptr. at 662. The basis for this assumption appears to be the feelings of the majority of the California Supreme Court. Justice Mosk elicited some support for his position from the fact that, since 1975, homosexual acts are no longer criminal in themselves. See Stats. 1975, chs. 71 and 877 at 131 (1957). This should be balanced, however, by the legislative intent to prevent "lewd or dissolute" conduct.
\textsuperscript{50}. 33 Cal. 3d at 924, 663 P.2d at 220, 191 Cal. Rptr. at 663.
\textsuperscript{51}. Id. at 924, 663 P.2d at 221, 191 Cal. Rptr. at 664.
\textsuperscript{52}. Id. at 925, 663 P.2d at 221-22, 191 Cal. Rptr. at 664. The sex offenses not requiring registration are listed at supra notes 17-24 and accompanying text.
\textsuperscript{53}. Id. As Justice Mosk pointed out, "[a] felon convicted of such crimes [i.e., robbery, burglary, arson] may serve his time and be done with it; while a misdemeanor convicted of a nonviolent section 647(a) offense in a semi-private restroom . . . must carry the onus of sex offender registration for a lifetime." Id.
ered the laws of other jurisdictions regarding the registration of sex offenders. The court recognized that, currently, only five states, including California, required any kind of sex offender registration. Of these five, two states limited registration to felony sex offenses, and one, Massachusetts, requires one to notify the institution from which the offender is released. California's mandatory registration thus appeared relatively severe.

In conclusion, the majority held that the punishment imposed by mandatory registration for section 647(a) offenses was "out of all proportion to the crime of which petitioner was convicted." Thus, insofar as section 290 required the registration of persons convicted under section 647(a), it was void under article I, section 17 of the California Constitution.

Justices Kaus and Richardson each wrote dissenting opinions. Justice Kaus agreed "[a]s a matter of policy" with the majority, but felt that the registration of section 647(a) sex offenders was simply not "cruel or unusual" punishment under either the California Constitution or the United States Constitution. Any restriction or expansion of section 290 must be made by the legislative branch. In Justice Kaus' words: "Our power to hold laws invalid if they violate . . . constitutional precepts is simply not a general mandate to get rid of all punishments which, in our view, do not fit the crime."

Justice Richardson contended that the requirement of registration for lewd or dissolute conduct under section 647(a) was neither "cruel or unusual" nor "punishment" under the California Constitution. Challenging the majority's "assumption" that the registration requirement involved substantial "compulsion and restraint" for "relatively minor" offenses, Justice Richardson argued that "[n]one of these propositions is established by evidence" in the record. Furthermore, invoking a rule of construction, Justice

54. Id. at 925, 663 P.2d at 222, 191 Cal. Rptr. at 664. The five states are California, Ohio, Nevada, Alabama and Massachusetts.
55. Id. at 925-26, 663 P.2d at 222, 191 Cal. Rptr. at 664. The two states are Nevada and Ohio.
56. Id. at 926, 663 P.2d at 222, 191 Cal. Rptr. at 664.
57. Id.
58. Id. at 926, 663 P.2d at 222, 191 Cal. Rptr. at 664-65.
59. Id. at 926, 663 P.2d at 223, 191 Cal. Rptr. at 665 (Kaus, J., dissenting).
60. Id.
61. Id. at 927, 663 P.2d at 223, 191 Cal. Rptr. at 665 (Richardson, J., dissenting).
62. Id.
Richardson pointed out that legislation is presumed to be constitutional and must be upheld unless its invalidity "'clearly, positively and unmistakably' appears."63 Such a showing was not made here.

As to the majority's conclusion that the registration requirement involved substantial "compulsion and restraint," Justice Richardson answered that the registration involved "only the barest minimum intrusion or restriction upon personal freedom or privacy."64 Section 290 itself does not require the registrant's appearance at subsequent police lineups. The "compulsion and restraint" which the majority decried resulted only from factors *incidental* to the registration, such as the existence of probable cause to arrest or detain registrant for a suspected offense, or a probation condition requiring the offender to "cooperate" with the police.65

Moreover, Justice Richardson was troubled by the majority's characterization of section 647(a) offenses as "relatively minor." The offensive touching of the "genitals, buttocks or female breast for purposes of sexual arousal, gratification, annoyance or offense" is "frequently . . . the introductory or preparatory conduct to even more serious assaultive sex offenses."66 Justice Richardson stated that it was entirely feasible that many offenders convicted under section 647(a) had been stopped short of "aggravated sex offenses."67

Brushing aside the majority's concerns that persons convicted of other, similar offenses need not register, Justice Richardson answered that the legislature could rightly determine which offenses were more dangerous to society and legislate


64. 33 Cal. 3d at 927, 663 P.2d at 223, 191 Cal. Rptr. at 666 (Richardson, J., dissenting). The "command performances" at police lineups feared by the majority were without factual foundation according to Justice Richardson: "This frightening, but fictional, scenario is wholly unsupported by the record." *Id.* at 927-28, 663 P.2d at 224, 191 Cal. Rptr. at 666.

65. *Id.* at 928, 663 P.2d at 224, 191 Cal. Rptr. at 666 (Richardson, J., dissenting). Justice Richardson also noted that the record of registration was to be kept confidential, without exception for employers. *Id.* While recognizing that, under *CAL. LAB. CODE* § 432.7 (West Supp. 1983), an employer at a health care facility may require a prospective employee to state whether he had ever been arrested for a registrable offense, that section did not "require disclosure of *any* information registered under section 290." 33 Cal. 3d at 928, 663 P.2d at 224, 191 Cal. Rptr. at 666 (Richardson, J., dissenting).

66. *Id.* at 929, 663 P.2d at 224, 191 Cal. Rptr. at 667 (Richardson, J., dissenting).

67. *Id.*
accordingly, and that it was "well established that the Legislature need not regulate the whole of a field at once." He concluded also that the issue of whether or not the registration requirement was "effective" was a matter for the legislature, not the courts.

C. A motor home is not subject to the automobile exception to the search warrant requirement: People v. Carney.

In People v. Carney, 34 Cal. 3d 597, 668 P.2d 807, 194 Cal. Rptr. 500 (1983), the supreme court considered the application of the automobile exception to the warrantless search of a motor home. Although the court never defined "motorhome," it concluded that the vehicle in this case was more similar to a residence than an automobile because of its furnishings. Because of the furnishings of a residence, the defendant had a reasonable expectation of privacy greater than that accorded to the occupants of automobiles. Therefore, the court held "that a motorhome is fully protected by the Fourth Amendment and is not subject to the 'automobile exception.'"

D. Conflict exists whenever there is a reasonable possibility that prosecutorial discretion is not even-handed: People v. Connors.

In People v. Connors, 34 Cal. 3d 141, 666 P.2d 5, 193 Cal. Rptr. 148 (1983), the defendant while in a waiting room moments before his trial for armed robbery and burglary was to begin, wrestled the deputy sheriff's gun free and attempted an escape. The deputy district attorney assigned to the case entered the room and was fired upon. The district attorney was removed from the case and became a prosecution's witness at the subsequent trial which encompassed additional charges for the attempted escape. Counsel for the defendant moved to disqualify the entire county district attorney's office because of a potential conflict of interest. The

68. Id. (citing People v. Mills, 81 Cal. App. 3d 171, 180, 146 Cal. Rptr. 411, 416 (1978)).
69. 33 Cal. 3d at 928, 663 P.2d at 225, 191 Cal. Rptr. at 667 (Richardson, J., dissenting) (citing Werner v. Southern Cal. Assoc. Newspapers, 35 Cal. 2d 121, 131, 216 P.2d 825, 832-33 (1950)).
70. 33 Cal. 3d at 929-30, 663 P.2d at 225, 191 Cal. Rptr. at 667 (Richardson, J., dissenting).
trial court granted a motion to recuse the entire district attorney's office in regard to the escape charges on the grounds that the district attorney was a witness and a potential victim.

The supreme court affirmed, holding that a "conflict" under Cal. Penal Code § 1424 (West 1983) exists whenever there is a "reasonable possibility" that the district attorney's office may not exercise its discretion in an even-handed manner. Substantial evidence in this case indicated that the trial court's decision should not be disturbed, as it was in a better position than the appellate court to assess the likely effect of the shooting incident.

E. State may exercise its discretion in scheduling probation revocation hearings either before or after trial; Coleman "limited exclusionary rule" is adequate protection of the defendant: People v. Jasper.

In People v. Jasper, 33 Cal. 3d 931, 663 P.2d 206, 191 Cal. Rptr. 648 (1983), the California Supreme Court was asked to reconsider and disapprove People v. Coleman, 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975), "which permitt[ed] a probation revocation hearing to precede the trial of pending criminal charges on which revocation [was] based." In a close decision, the supreme court declined the offer.

While on probation arising out of a conviction for burglary, the defendant was arrested and charged with another burglary. A revocation of probation hearing was held before trial on that charge, and the court denied the defendant's motion to continue the hearing until the trial. At the revocation hearing, the defendant refused to testify or offer any evidence. Based on the transcript of the preliminary hearing of the burglary charge, the court found that the defendant had violated his probation, and sentenced him to prison.

The defendant appealed, contending that the court erred in denying a continuance. By such denial, the defendant argued that he was "improperly forced to choose between exercising his right to remain silent at the revocation hearing, thereby risking the revocation of his probation, and presenting a defense to revocation," which would provide the prosecution with pretrial discovery regarding the details of his defense to the burglary charge.

The majority of the supreme court acknowledged the "dilemma" which faces defendants during pretrial probation revocation hearings, but insisted that the "limited exclusionary rule" established in Coleman adequately protects such defendants. That rule prevents the prosecution from using the probationer's
testimony at the pretrial revocation hearing, or its fruits, in order
to gain an unfair advantage at trial.

As the supreme court further noted, the state may exercise its
discretion in scheduling revocation hearings either before or after
trial. The exclusionary rule in Coleman was established to insure
"that this scheduling discretion [would] not be influenced by the
illegitimate desire to gain an unfair advantage at trial."

As to the tension that exists between forcing a defendant to tes-
tify at the revocation hearing and incriminating himself at a later
trial, the majority held that the judicially declared exclusionary
rule existed "coextensive with the scope of the privilege against
self-incrimination" and thus gave the probationers "all the relief
to which they are constitutionally entitled." 33 Cal. 3d at 933-34,
663 P.2d at 207, 191 Cal. Rptr. at 649 (emphasis in original); see
also Ryan v. State, 580 F.2d 988, 993-94 (9th Cir. 1978); United
a marshalling of pertinent authority before concluding that it is
constitutional to conduct a revocation hearing before trial).

The majority also rejected the defendant's argument that recent
decisions limiting prosecutorial pretrial discovery procedures re-
quired the disapproval of Coleman. See, e.g., People v. Collie, 30
Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981); People v. Belton,
23 Cal. 3d 516, 591 P.2d 485, 153 Cal. Rptr. 195 (1979); Allen v. Supe-
rior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976).
These limits on prosecutorial pretrial discovery applied where the
prosecution sought to compel disclosure of incriminating
evidence. The majority of the supreme court stated that "a proba-
tioner's voluntary testimony or defense presented at a probation
revocation hearing cannot fairly be characterized as a 'compelled
disclosure' within the scope of the foregoing cases." Furthermore,
the Coleman exclusionary rule was held to give the defendant ade-
quate protection in any event.

In its conclusion, the majority emphasized that the scheduling
of the revocation hearing remained in the reasonable discretion of
the trial court. Cf. CAL. PENAL CODE § 1203.2(a) (West 1982) (giv-
ing the court the right to secure the arrest of a person on proba-
tion). Despite the defendant's and amicus curiae's complaints
that it was "routine practice" for the San Francisco Superior
Court to schedule all probation revocation hearings before trial,
the supreme court found that evidence of an abuse of discretion in this case did not exist.

In a separate dissenting opinion, Chief Justice Bird argued that the "dilemma" facing a probationer at a pretrial revocation hearing, i.e., whether to testify or to remain silent, effectively "compelled" the probationer to testify or to risk revocation of his probation. Furthermore, the "extent of discovery provided to the state in a pretrial revocation hearing vastly exceeds the scope of discovery" allowed for the actual trial on the charge. In a pretrial revocation hearing, the prosecution is able to obtain the names of defense witnesses and is given "pretrial access to the substance of their testimony as well as the opportunity to cross-examine them." The Chief Justice concluded that the state constitutional privilege against self-incrimination required revocation proceedings to be held after a criminal trial on related charges.

In a separate dissenting opinion, in which Justice Reynoso concurred, Justice Broussard declined to go as far as Chief Justice Bird. Instead, he contended that the supreme court should establish guidelines regarding the scheduling of revocation hearings. Thus, Justice Broussard urged that "absent good cause or waiver by the probationer, the revocation proceeding [should] be held after trial as a matter of course. Under such a rule, the prosecutor, rather than the probationer, would incur the burden of convincing the trial court that sufficient reasons exist to reverse the procedure."

The court noted that Jasper's probation revocation hearing preceded the recent adoption, in June, 1982, of section 28, subdivision (d), to article I of the California Constitution. This new provision appears to repeal the type of state-imposed exclusionary rule laid down in the Coleman decision. Thus, as Justice Broussard pointed out in his dissent, "the majority opinion in this case [will be] useless in the immediate future." 33 Cal. 3d at 944, 663 P.2d at 215, 191 Cal. Rptr. at 657 (Broussard, J., dissenting).

F. A warrantless "accelerated booking search" violates the California Constitution; when defendant makes a motion which includes Penal Code sections 995 and 1538.5, the superior court should follow specific guidelines designed to avoid conflicting provisions of the statutes: People v. Laiwa.

I. INTRODUCTION

In People v. Laiwa,1 the supreme court rejected the prosecu-

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1. 34 Cal. 3d 711, 669 P.2d 1278, 195 Cal. Rptr. 503 (1983). Justice Mosk wrote
tion's argument that a warrantless search was justified as an "advance booking search." The court also took the opportunity to discuss the conflicts which arise from compound motions to suppress evidence and to dismiss the information as not being based on reasonable or probable cause. While calling for legislative action, the court proposed procedures for superior courts to follow the majority opinion with Chief Justice Bird and Justices Broussard and Reynoso concurring. Justice Richardson filed a separate dissent and Justice Kaus also filed a separate dissent in which Justice Richardson concurred.

2. CAL. CONST. art. I, § 13 provides that:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

U.S. CONST. amend. IV provides that:

The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

A warrantless search is per se unreasonable unless it is shown to come within one of a few "carefully circumscribed . . . exceptions." People v. Dalton, 24 Cal. 3d 850, 855, 598 P.2d 467, 470, 157 Cal. Rptr. 497, 500 (1979).

3. CAL. PENAL CODE § 1538.5(a) (West Supp. 1984) provides in pertinent part:

A defendant may move . . . to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:

(1) The search or seizure without a warrant was unreasonable.
(2) The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

4. CAL. PENAL CODE § 995 (West Supp. 1984) provides in pertinent part:

'The indictment or information shall be set aside by the court in which the defendant is arraigned, upon his or her motion, in either of the following cases:

(1) If it is an indictment:
   (A) Where it is not found, endorsed, and presented as prescribed in this code.
   (B) That the defendant has been indicted without reasonable or probable cause.
(2) If it is an information:
   (A) That before the filing thereof the defendant had not been legally committed by a magistrate.
   (B) That the defendant had been committed without reasonable or probable cause.

5. 34 Cal. 3d at 722, 669 P.2d at 1284, 195 Cal. Rptr. at 509 ("Because legislative reconsideration has not been forthcoming, this often litigated area of our criminal law remains unsatisfactory both in principle and in practice.").
in handling compound motions.6

II. "ACCELERATED BOOKING SEARCHES"

The defendant was arrested for being under the influence of a narcotic.7 At the time of the arrest the arresting police officer searched a bag which the defendant had in his possession and discovered a cigarette containing phencyclidine (PCP).8 Based on this discovery, the defendant was also charged with the crime of possession of PCP.9 Evidence of the PCP cigarette was admitted at the preliminary hearing over the defendant's motion to suppress.10 The defendant next filed a compound motion to suppress the evidence under Penal Code section 1538.511 and to dismiss the information under Penal Code section 995.12 The superior court granted the motion13 and the People appealed.

The supreme court limited its consideration of the search's validity to the issue of its justification as an "advanced booking search."14

6. See infra note 36 and accompanying text.
7. The defendant was observed acting strangely and the arresting officer became suspicious that the defendant might be under the influence of phencyclidine (PCP). The officer tested the defendant for eye movements identified with persons under the influence of PCP. When the test proved positive, the defendant was placed under arrest and his hands were handcuffed. A tote bag which the defendant had in his possession was taken away from him. The evidence was unclear as to when the defendant was placed in the officer's patrol car. 34 Cal. 3d at 715, 669 P.2d at 1280, 195 Cal. Rptr. at 505.

CAL. PENAL CODE § 647 (West Supp. 1984) provides in pertinent part: "Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: . . . (f) [w]ho is found in any public place under the influence of . . . any drug . . . in such a condition that he is unable to exercise care for his own safety or the safety of others. . . ."

8. At the preliminary hearing, the officer testified that he conducted the search "for inventory purposes." 34 Cal. 3d at 716, 669 P.2d at 1280, 195 Cal. Rptr. at 505.

9. CAL. HEALTH & SAFETY CODE § 11377 (West Supp. 1984) (punishment not to exceed one year in county jail or state prison for unauthorized possession of certain controlled substances, including PCP).

10. The magistrate at the preliminary hearing ruled that the search was justified as an "accelerated booking search" since the cigarette would have been discovered during the later routine booking search. 34 Cal. 3d at 716, 669 P.2d at 1280, 195 Cal. Rptr. at 505.
11. See supra note 3.
12. See supra note 4.
13. The superior court stated that it granted the defense motion based on People v. Pace, 92 Cal. App. 3d 199, 154 Cal. Rptr. 811 (1979), in which a search of a defendant's lunch box after his arrest was not justified as a search incident to arrest since the lunch box had been reduced to the exclusive control of the arresting officers. 34 Cal. 3d at 716, 669 P.2d at 1280, 195 Cal. Rptr. at 505.
14. The court stated that the only justification given by the prosecution, both at the preliminary hearing and in the appellate brief, was that the search was an "accelerated booking search." Id. at 724-25, 669 P.2d at 1286, 195 Cal. Rptr. at 511. See Lorenzana v. Superior Court, 9 Cal. 3d 626, 640-41, 511 P.2d 33, 43-44, 108 Cal. 904
The prosecution relied on *People v. Bullwinkle*\(^{15}\) to support their position that an "advanced booking search" is valid. In *Bullwinkle*, the court of appeal stated:

> Where it is shown that a suspect would have been jailed and thus subject to a booking search\(^{16}\) the fact that a thorough search of the booking type occurs prior to the actual booking process does not render the search illegal, since no additional or greater intrusion on the privacy of the suspect is involved.\(^{17}\)

Since the defendant in this case had been placed under arrest and would have been subjected to a booking search,\(^{18}\) the prosecution argued that the evidence obtained in the search by the arresting officer should not have been suppressed.

The supreme court rejected this argument and held "that the so-called 'accelerated booking search' is not a permissible exception to the warrant requirement of article I, section 13, of the California Constitution."\(^{19}\)

The court based its holding on three factors. First, the court rejected the argument that an "accelerated booking search" is no

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\(^{15}\) 105 Cal. App. 3d 82, 164 Cal. Rptr. 163 (1980).

\(^{16}\) A booking search is justified by the need to protect jail safety and to inventory the prisoner's property. 34 Cal. 3d at 726, 669 P.2d at 1287, 195 Cal. Rptr. at 512. See also People v. Maher, 17 Cal. 3d 196, 200-01, 550 P.2d 1044, 1048, 130 Cal. Rptr. 508, 512 (1976) (citing cases which uphold practice of booking searches).

\(^{17}\) 105 Cal. App. 3d at 87, 164 Cal. Rptr. at 166. See also People v. Longwill, 14 Cal. 3d 943, 948, 538 P.2d 753, 756, 123 Cal. Rptr. 297, 300 (1975) ("[w]here the arrestee is validly subject to a search during a jailhouse booking process, he may also be subject to a 'field' or accelerated booking search."); People v. Barajas, 81 Cal. App. 3d 999, 1009, 147 Cal. Rptr. 297 (1978) (when a suspect is to be booked "it is permissible for the officers to conduct a contraband search prior to arrival at the jail facility.").

\(^{18}\) The arresting officer testified at the preliminary hearing that it was standard procedure to book and "strip-search" anyone arrested for being under the influence of narcotics. 34 Cal. 3d at 716, 669 P.2d at 1280, 195 Cal. Rptr. at 505.

\(^{19}\) Id. at 728, 669 P.2d at 1288, 195 Cal. Rptr. at 513. The court expressly disapproved *People v. Bullwinkle*, 105 Cal. App. 3d 82, 164 Cal. Rptr. 163 (1980), and *People v. Longwill*, 14 Cal. 3d 943, 538 P.2d 753, 123 Cal. Rptr. 297 (1975), to the extent those cases upheld "accelerated booking searches." 34 Cal. 3d at 728, 669 P.2d at 1288, 195 Cal. Rptr. at 513. See supra note 2 for text of CAL. CONST. art. I, § 13.
greater invasion of privacy than a regular booking search. In the
court's view, a "thorough search of the booking type" held in pub-
lic at the time of arrest posed a greater danger of intrusion and
embarrassment than a similar search conducted "in the relatively
sequestered milieu of the property room of a police station."

The court's second reason for rejecting the "accelerated book-
ing search" was the lack of any legitimate purpose for the
search. A routine booking search promotes jail safety and al-


20. 34 Cal. 3d at 725, 669 P.2d at 1287, 195 Cal. Rptr. at 512.
21. Id. at 726, 669 P.2d at 1287, 195 Cal. Rptr. at 512. The court cites Terry v.
Ohio, 392 U.S. 1, 16-17 (1968), in which the United States Supreme Court discussed
the dangers of intrusion inherent in a "patdown" search, as support for its posi-
tion. The Court failed to consider, however, the fact that a full-body search is al-
ready justified as a search incident to arrest. Chimel v. California, 395 U.S. 752
(1969). The Terry decision deals with permissible searches when the police do not
have probable cause to arrest; when, as here, the defendant has been lawfully ar-
rested, the police have the right to fully search him and the area within his reach.

Allowing an immediate search of containers in the defendant's possession
seems unlikely to create any greater indignity or embarrassment than is created
by a full body search of the defendant carried out in public at the time of arrest.
22. 34 Cal. 3d at 726-27, 669 P.2d at 1287-88, 195 Cal. Rptr. at 512-13.
23. Id. See supra note 16.
24. 34 Cal. 3d at 726-27, 669 P.2d at 1287-88, 195 Cal. Rptr. at 512-13. Officers are
"unlikely to have the time or incentive to meticulously catalog everything they
find, or the means of furnishing him with formal receipts, or facilities such as
property bags and storage lockers for safeguarding each of his effects." Id. at 726,
669 P.2d at 1287, 195 Cal. Rptr. at 512.
25. Id.
26. Id. People v. Superior Court (Kiefer), 3 Cal. 3d 807, 812-13, 478 P.2d 449,
451, 91 Cal. Rptr. 729, 731 (1970), was cited by the court as stating the scope of such
a search. The search may be made:

(1) for instrumentalities used to commit the crime, the fruits of that
crime, and other evidence thereof which will aid in the apprehension or
conviction of the criminal; (2) for articles the possession of which is itself
unlawful, such as contraband or goods known to be stolen; and (3) for
weapons which can be used to assault the arresting officer or to effect an
escape.

Id. The court does not indicate why the search in this case was not valid under
purpose number 2 above except for the earlier statement that the court was limit-
ing its discussion to the use of an "accelerated booking search," supra note 14 and
accompanying text. See also supra note 21 for discussion of the search incident to
arrest doctrine and its application to this case.

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the legitimate purposes of a booking search do not justify an "accelerated booking search."  

A fear of possible abuse of "accelerated booking searches" was the final factor in the court's decision. The court proposed the situation where an officer would search someone arrested for a "minor but bookable" offense for the sole purpose of discovering evidence that would allow more serious charges to be brought against the defendant. The court did not say, however, why such an occurrence would violate the defendant's rights any more than the booking search at which the contraband would ultimately be discovered. Assuming the initial arrest was valid, as it was in this case, the evidence against the defendant will be found and he will be charged for the more serious crime; from the defendant's point of view, it is irrelevant when the search takes place since the results are the same.

Since the court determined that the evidence of the PCP cigarette was gained through an illegal search, and without that evidence there was no basis for holding the defendant to answer, the court affirmed the superior court's order dismissing the information.

Justice Richardson dissented from the court's decision, arguing that the search should be upheld as a valid search incident to a lawful arrest. In his view, the prosecution had not relied on the "accelerated booking search" as the only justification for the search. For that reason, Justice Richardson examined the search in light of New York v. Belton, and concluded that the search in this case was reasonable.

27. 34 Cal. 3d at 727, 669 P.2d at 1288, 195 Cal. Rptr. at 513. Cf. People v. Smith, 103 Cal. App. 3d 840, 163 Cal. Rptr. 332 (1980) (search of inventoried property after the booking process has ended requires a warrant).
28. 34 Cal. 3d at 727-28, 669 P.2d at 1288, 195 Cal. Rptr. at 513.
29. Id. at 728-29, 669 P.2d at 1289, 195 Cal. Rptr. at 514-15 (Richardson, J., dissenting).
30. Id. at 728-31, 669 P.2d at 1289-90, 195 Cal. Rptr. at 514-15 (Richardson, J., dissenting).
31. See supra note 14 and accompanying text for the majority's opinion on this point.
32. 453 U.S. 454 (1981). In Belton, a police officer arrested four men in a car stopped for a traffic violation when he discovered evidence of marijuana. After removing the prisoners from the car, the officer searched the interior of the vehicle, including the zippered pocket of a jacket in which he discovered cocaine. The United States Supreme Court upheld the search as a valid search incident to a lawful arrest, despite the fact that the prisoners had exited the vehicle and the jacket was in the officer's exclusive control. Id. at 460-62 & n.5.
In a dissent joined by Justice Richardson, Justice Kaus argued that “accelerated booking searches” are a well established exception to the warrant requirement and should not be disapproved in this case. He compared the “accelerated booking search” to the inevitable discovery doctrine and concluded that “the exclusion of evidence which the police would invariably have discovered a few minutes later in the course of the booking process serves no constitutionally significant purpose.”

III. Problems Related to Compound Motions Under Penal Code Sections 1538.5 and 995

Although not a factor in this case, the court devoted considerable time in its decision to the procedural problems that arise from compound motions to suppress evidence under Penal Code section 1538.5 and to dismiss the information under Penal Code section 995. These problems arise in the context of appellate review of rulings on the motions and the correct procedure to follow in seeking appellate review.

In deciding a motion under section 1538.5, the superior court acts as a finder of fact, but it is only a reviewing court when passing judgment on a magistrate’s ruling on a motion under section 995. Thus, when an appellate court reviews a 1538.5 motion it “must uphold the superior court’s express or implied findings if they are supported by substantial evidence,” but when reviewing a 995 motion it “disregards the ruling of the superior court and directly reviews the determination of the magistrate holding the defendant to answer.”

When a compound motion is made which relies on stipulations to the record from the preliminary hearing, the superior court is faced with the dilemma of considering the same evidence “as a

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33. 34 Cal. 3d at 731-32, 669 P.2d at 1290-91, 195 Cal. Rptr. at 515-16 (Kaus, J., dissenting).
34. See People v. Superior Court (Tunch), 80 Cal. App. 3d 665, 671-82, 164 Cal. Rptr. 795, 799-805 (1978) (extensive discussion of the inevitable discovery doctrine and cases which have applied it).
35. 34 Cal. 3d at 732, 669 P.2d at 1291, 195 Cal. Rptr. at 516 (Kaus, J., dissenting).
36. In this case, the court determined that the superior court had only ruled on the section 995 portion of the motion and the People’s appeal was limited to that ruling. Thus, there were no conflicts with section 1538.5. Id. at 724, 669 P.2d at 1286, 195 Cal. Rptr. at 511.
37. See supra note 3.
38. See supra note 4.
39. 34 Cal. 3d at 718, 669 P.2d at 1281, 195 Cal. Rptr. at 506.
trier of fact under section 1538.5 and as a reviewing court under section 995."

Because the superior court's approach is necessarily different under each role, the court "may be compelled to rule the identical search good under one branch of the motion and bad under the other." When a superior court does decide a compound motion, it often fails to distinguish which part of the motion the court is ruling upon. This poses difficulties for the appellate court since the level of review it must use depends on which part of the motion was granted or denied. The parties also face problems since their opportunity to seek review depends on the particular motion which was decided.

42. 34 Cal. 3d at 718, 669 P.2d at 1282, 195 Cal. Rptr. at 507.
43. Id. at 719, 669 P.2d at 1282, 195 Cal. Rptr. at 507. See, e.g., People v. Cagle, 21 Cal. App. 3d 57, 60, 98 Cal. Rptr. 348, 349 (1971) (superior court denied motion to set aside information under section 995 but granted a simultaneous motion to suppress under section 1538.5). One device used by superior courts to avoid such a situation is to consider the compound motions as two separate motions; first deciding whether to suppress the evidence under section 1538.5 and then determining if there is no probable cause without the evidence for purposes of section 995. However, in using this technique the superior court must limit its decision on the 995 motion to that of a reviewing court, see supra note 39 and accompanying text.
44. 34 Cal. 3d at 719, 669 P.2d at 1282, 195 Cal. Rptr. at 507. See infra note 51 and accompanying text.
45. If the superior court denies the compound motion, the defendant must file two separate writ petitions, or a compound petition for two writs, if he wishes a full review of the ruling. CAL. PENAL CODE § 999a (West Supp. 1984) requires that a petition for writ of prohibition to review the denial of the 995 motion must be filed within 15 days. CAL. PENAL CODE § 1538.5(i) (West Supp. 1984) allows 30 days to seek review through an extraordinary writ of mandate or prohibition.

If the superior court grants the compound motion, the prosecution has a remedy of appeal on the order setting aside the information pursuant to section 995. CAL. PENAL CODE § 1238(a)(1) (West 1982) ("An appeal may be taken by the people from . . . [a]n order setting aside the indictment, information, or complaint."). To review the decision on the 1538.5 part of the motion the people must use a petition for writ, CAL. PENAL CODE § 1538.5(o) (West Supp. 1984) ("[w]ithin 30 days after a defendant's motion is granted . . ., the people may file a petition for writ of mandate or prohibition. . . .") unless the superior court has dismissed the action on its own motion before the writ is sought, CAL. PENAL CODE § 1385 (West 1982) ("[t]he judge or magistrate may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed"), in which case the prosecution's only remedy is to appeal that dismissal. CAL. PENAL CODE § 1538.5(j) (West Supp. 1984) ("[t]he people may seek appellate review as provided in subdivision (o), unless the court prior to the time such review is sought has dismissed the case pursuant to Section 1385."); CAL. PENAL
The courts of appeal have adopted several procedures to deal with the confusion caused by compound motions, none of which are totally satisfactory. The court in this opinion set forth some guidelines which it hoped would help the situation until legislative action could be taken.

The court first suggested that when a superior court grants the section 1538.5 motion that it consider dismissing the case pursuant to Penal Code section 1385, rather than ruling on the 995 motion. If the superior court does not decide to dismiss, the court urged that any decision on the 995 motion be delayed until after the prosecution seeks or waives appellate review of the suppression order. Finally, the court stated that a superior court which chooses to rule immediately on both parts of the compound motion should “scrupulously [distinguish] between its different functions on each motion.”

The final point the court makes concerns the prosecution's abil-
ity to seek review of an order granting both motions. A 1538.5 motion is generally reviewable by writ and a 995 motion by appeal, but since the two motions should be considered together when they were granted simultaneously, the court concluded that “the People may seek immediate review of both rulings by means of a single petition for writ of mandate or prohibition.”53

G. Trial judge’s failure to weigh probative value of evidence against prejudicial danger may warrant reversal: People v. Leonard.

In People v. Leonard, 34 Cal. 3d 183, 666 P.2d 28, 193 Cal. Rptr. 171 (1983), the defendant was convicted of two counts of armed robbery after the guilty plea of a coarrestee was admitted into evidence over defendant’s objection. The robbery occurred when a young couple, after returning from dinner, were saying goodnight. Two men approached the couple, demanded their money and jewelry, and after hitting the young lady, fled. Within an hour, the police arrested two men at a bus station, whom the couple later identified as the robbers. The suspects did not have a gun on them at the time of arrest and the stolen items were never recovered.

At trial, the young lady’s description of the robbers materially differed from the actual physical makeup of the defendants. When the defendant objected to his coarrestee’s admission, the prosecution explained that the admission was “crucial” to its case. In denying the defendant’s motion made pursuant to CAL. EVID. CODE § 352 (West 1966), it appeared that the trial judge did not consider whether the admission was more probative than prejudicial. When a section 352 objection is raised, “the record must affirmatively show that the trial judge did in fact weigh prejudice against probative value.” In People v. Leonard, the court reasoned that “the probative value of the coarrestee’s guilty plea is questionable at best.”

Using the test enunciated in People v. Watson, 46 Cal. 2d 818, 836, 299 P.2d 243, 255 (1956), the court determined that the trial judge’s failure to weigh the evidence was serious enough to warrant reversal, because in the present case “[t]he prejudicial effect

52. Id. See supra note 45.
53. Id. at 724, 669 P.2d at 1286, 195 Cal. Rptr. at 511.
of Johnson's guilty plea . . . is clearly substantial and far outweighs any probative value the evidence might have."

H. Good faith suspicion not enough for detention: People v. Loewen.

In People v. Loewen, 35 Cal. 3d 117, 672 P.2d 436, 196 Cal. Rptr. 84 (1983), the court reaffirmed California law that established adequate reason for a detention. The totality of the circumstances of Loewen was analyzed in terms of the standards announced in People v. Leyba, 29 Cal. 3d 591, 629 P.2d 961, 174 Cal. Rptr. 867 (1981); and In re Tony C., 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978). Tony C. held that a detention is appropriate for the purpose of resolving ambiguous circumstances and determining whether the activity is legal or illegal. Tony C. precludes, however, any investigation which is based on mere curiosity, rumor or hunch. Leyba, however, would not exclude a detention as illegal if an officer is uncertain as to the nature of the criminal activity. These principles must be weighed with an inquiry into the subjectivity with which the officer must initially entertain his suspicion and the fact that it must be objectively reasonable for him to do so. This demand is found in People v. Superior Court (Kiefer), 3 Cal. 3d 807, 827, 478 P.2d 449, 462, 91 Cal. Rptr. 729, 742 (1970).

The officer's reasons for detention in Loewen failed to pass muster under these confirmed standards. The officer had stopped a truck because he thought it belonged to an acquaintance of another person he had stopped for a traffic violation. The party stopped for the traffic violation explained that he was waiting for a friend driving a yellow truck. When a yellow truck went by and did not stop, the officer pursued the truck. The officer's suspicions that the truck might be involved in criminal activity were based on four factors. These factors, in totality, failed to present adequate grounds for detention: (1) the area the parties were initially observed in had had an increase in crime, but since a high crime area does not equal an activity of an individual, it failed to present a reasonable suspicion of crime; (2) the traffic violator appeared nervous, but nervousness in the presence of a police officer does not furnish a reasonable basis for detention; (3) the similarity between the truck that passed and the truck the detained traffic violator said he was waiting for, was no reason to believe that it was engaged in any criminal activity; and (4) the manner in which the occupants of the truck reacted as they passed the officer, i.e., the parties failed to focus on the officers; since what was going on was a routine traffic violation, this innocent gesture must be interpreted with the actor's true intent.
A good faith suspicion by an officer that criminal activity may be afoot remains an inadequate reason for detention. In *Loewen*, none of the officer's four reasons satisfied the well-established test set forth in *Tony C*. The conclusion of the court was settled by Justice Mosk who wrote, "four times zero equals zero."

I. The government has an affirmative duty to preserve and disclose a urine sample used to revoke defendant's probation: *People v. Moore*.

The primary issue presented in *People v. Moore*, 34 Cal. 3d 215, 666 P.2d 419, 193 Cal. Rptr. 404 (1983), was whether the government had an affirmative duty "to preserve and disclose a urine sample when that sample is used as the basis for revocation of [the defendant's] probation." Justice Broussard, writing for the majority, ruled that such a duty existed. The court held that "evidence material to the issue of the guilt or innocence of the accused" must be preserved by the government, even in the absence of a request by the defendant, until at least a hearing has been conducted. Relying primarily on *United States v. Bryant*, 439 F.2d 642 (D.C. Cir. 1971), and *People v. Hitch*, 12 Cal. 3d 641, 527 P.2d 361, 117 Cal. Rptr. 9 (1974), and, the California Supreme Court held "that the government had a duty to show that it had used 'rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation.'"

If the evidence is *material*, therefore, the government has a duty to preserve it in the spirit of fundamental fairness. In the instant case, the urine sample was not only material, it was the *only* evidence advanced by the government. Since, however, the sample was destroyed after 90 days, but prior to trial, the case was dismissed.
J. Separate and independent counsel must initially be appointed for co-defendants; only if, after investigation, counsel feels joint representation is warranted can that fact be communicated to the court and defendants be given the opportunity to waive separate counsel. People v. Mroczko.

In People v. Mroczko, the California Supreme Court ruled that when a court appoints counsel in criminal matters, it must initially select separate and independent counsel for each indigent defendant. Only after a full investigation and consultation with their clients may counsel communicate with the court that they feel, in the interest of justice, the clients would best be served by joint representation. Then, if it is determined that joint counsel will be appointed, each defendant will have been fully advised by counsel who is not “hobbled” by a conflict. The defendant's waiver will thus be knowing and intelligent.

The adoption of this rule grew out of the court's long-held concern that single counsel representing co-defendants may result in inherent conflict. The Mroczko case presents a glaring conflict of interest as well as a complete lack of knowing and intelligent waiver.

In this case, a prison inmate was found strangled by a coathanger. Fellow inmates Mroczko and Brindle were charged with the murder. The prosecution relied on six inmate witnesses who implicated another inmate, Hall. One attorney was appointed to represent Mroczko, Brindle, Hall and another witness, Young. At municipal court, the prosecutor challenged the ap...

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1. 35 Cal. 3d 86, 672 P.2d 835, 197 Cal. Rptr. 52 (1983). The opinion was written by Justice Kaus who expressed the unanimous view of the court.
2. Id. at 115-16, 672 P.2d at 853, 197 Cal. Rptr. at 70. This is the rule of the United States Court of Appeals, District of Columbia Circuit, as was announced in the case of Ford v. United States, 379 F.2d 123 (D.C. Cir. 1967). The appointment of separate counsel was seen to be in conformity with the Criminal Justice Act, 18 U.S.C. § 3006A(b) (1982), which states that “the court shall appoint separate counsel for defendants having interests that cannot properly be represented by the same counsel.” (emphasis added).
3. Protecting the constitutional right to effective counsel was of paramount concern to the court in this case. Precautions to ensure that the defendant's waiver is knowing and intelligent cannot be stressed enough. The court noted that research done with respect to the Ford rule reveals that few defendants are likely to choose joint representation once they have been made aware of the pitfalls. See Tague, Multiple Representations and Conflicts of Interest in Criminal Cases, 67 Geo. L.J. 1075, 1116-17 (1979).
4. What emerges from the record is that the inmates were generally unreliable. The court, in a footnote, described the record as “murky,” stating “the transcript reveals that prison life is fraught with animosities and alliances motivated in ways that the uninitiated could scarcely imagine.” 35 Cal. 3d at 96 n.8, 672 P.2d at 840 n.8, 197 Cal. Rptr. at 57 n.8.
5. Separate counsel was originally appointed at the arraignment. Carsel Cor-
pointment of a single counsel and suggested that a knowing and intelligent waiver had not been made. The court inquired of the defendants if they felt a conflict existed and they said they knew of no conflict. The prosecutor raised the issue again in pretrial conferences, strongly urging that counsel could not possibly be without conflict since he was representing potential witnesses, Hall and Young, as well as the defendants. Further, the prosecutor also indicated that the defendants had been offered different pleas. At yet another opportunity, the prosecutor elaborated on the problems of multiple defense, stating that (1) it might be difficult for defense counsel to protect each defendant's interest equally, (2) that representation of Hall could limit the defense counsel's ability to attack credibility, and (3) the plea bargains that were offered could not be negotiated because of the dual role of co-defendant's counsel. The court inquired as to whether the defendants waived and they indicated they would assume any risk of conflict. The trial judge did offer to appoint separate counsel for discussing plea bargains, but defense counsel objected. The prosecutor then sought a writ of mandate in the court of ap-
peal ordering separate counsel. The court of appeal issued the writ, directing a new waiver hearing. The result was that both defendants waived.10

The court began its analysis with the seminal case of *Cuyler v. Sullivan*,11 in which the United States Supreme Court held that multiple representation of criminal defendants is not per se violative of constitutional guarantees of effective assistance of counsel. However, the court acknowledged, where there has not been a knowing and intelligent waiver, the courts have struck down convictions because they have found a conflict of interest between defendants.12

Even if there has been a waiver, the court suggested that it may be rejected. This has been true in the federal courts,13 and Federal Rule of Criminal Procedure 44(c)14 is in accord with this line of cases. The California Supreme Court held similarly in *Maxwell v. Superior Court* when it stated that:

> the mere possibility of a conflict does not warrant pretrial removal of competent counsel in a criminal case over defendant's informed objection, . . . [however,] we do not deprive the trial court of power to act when an actual conflict materializes during the proceedings, producing an obviously deficient performance. Then the court's power and duty to insure fairness and preserve the credibility of its judgments extends to recusal even when an informed defendant, for whatever reason, is cooperating in coun-

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10. The court of appeal held that "a conflict of interest arose from [the inconsistent plea] offer which prevents the public defender from effectively representing the client to whom the offer was made." [citation omitted] It concluded that the trial court failed clearly to inform the defendants that their lawyer had a present conflict of interest. A proper waiver, the Court of Appeal noted, "requires that the plea bargain offered by [the prosecution] be stated for the record so that the resulting conflict of interest may be adequately described and discussed."

*Id.* at 102, 672 P.2d at 844, 197 Cal. Rptr. at 61.

11. 446 U.S. 335 (1980). The sixth amendment imposed no duty on the trial court to inquire as to whether there was a conflict under the facts of this case. Further, the Supreme Court held that the burden is on the defendant to demonstrate that an actual conflict adversely affected the adequacy of representation.


14. FED. R. CRIM. P. 44(c) provides:

(c) JOINT REPRESENTATION. Whenever two or more defendants have been jointly charged pursuant to Rule 8(b) or have been joined for trial pursuant to Rule 13, and are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law, the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of his right to the effective assistance of counsel, including separate representation. Unless it appears that there is good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

*Id.*
The court also recognized that in every case of multiple representation there is a strong likelihood that one of the defendant's interests will be adversely affected. This basic premise has been recognized and stated by the American Bar Association in terms that a lawyer should only consider representing more than one co-defendant in the most unusual circumstances and then only after careful investigation to determine that there is no possibility of conflict.

The trial court, then, assumes a weighty burden when it seeks to appoint counsel for the indigent defendant. The supreme court has put upon the trial judge "the burden of assuring that its appointment does not result in a denial of effective counsel because of some possible conflict."

Further, the California Supreme Court suggested that the whole issue of determining a knowing and intelligent waiver is loosely constructed and interpreted in various forms of inquiry. The waivers in the Mroczko case were fatally flawed because they

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15. 30 Cal. 3d 606, 619 & n.10, 639 P.2d 248, 256 & n.10, 180 Cal. Rptr. 177, 185 & n.10 (1982) (emphasis added; footnote omitted). In the Maxwell case, the supreme court found that the trial court had erroneously dismissed defendant's counsel when it learned that the defendant's counsel had a contract to exploit the defendant's life story. The court found the defendant had knowingly and intelligently waived any conflict and granted a writ of mandate ordering the trial court to vacate its order discharging defendant's retained counsel and to reinstate his attorneys.

16. 35 Cal. 3d at 103, 672 P.2d at 845, 197 Cal. Rptr. at 62. This position resulted from reliance on a number of law review articles, including: Greer, Representation of Multiple Criminal Defendants: Conflicts of Interest and the Professional Responsibilities of the Defense Attorney, 62 MINN. L. REV. 119, 136 (1978); Lowenthal, Joint Representation in Criminal Cases: A Critical Appraisal, 64 VA. L. REV. 939, 952 (1978); and Tague, supra note 3, at 1077.

17. 35 Cal. 3d at 104, 672 P.2d at 845, 197 Cal. Rptr. at 62 (citing ABA Standards, Defense Function (1974) standard 3.5(b) at 123).

18. People v. Cook, 13 Cal. 3d 663, 671, 532 P.2d 148, 153, 119 Cal. Rptr. 500, 505 (1975). In Glasser v. United States, 315 U.S. 60, 71 (1942), the Supreme Court stated:

Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused... The trial court should protect the right of an accused to have the assistance of counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.

315 U.S. at 71 (quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938)).

19. 35 Cal. 3d at 110, 672 P.2d at 850, 197 Cal. Rptr. at 67.
were couched in language speculating about potential conflicts rather than the actual conflicts that existed. Additionally, defense counsel eventually asserted that no conflict existed. An attorney also has an affirmative duty to determine whether a conflict exists and to report such conflict to the court. An attorney who represents two defendants in a criminal matter is in the best position, both professionally and ethically, to determine when or if a conflict of interest exists. Lay persons (those on trial) cannot be expected to understand the potential risks involved in joint representation.

Failure to discover a conflict or to obtain a knowing and intelligent waiver will result in reversal. To overcome this risk, the court adopted the Ford rule, providing each defendant with separate counsel from the beginning of the proceedings. Any joint representation will only occur after the attorneys have fully investigated the case and consulted with their clients.

The goal of this new rule is to maximize the defendant's sixth amendment rights. Separate counsel will assure that the defendants' interests are as fully protected as possible.

One commentator has weighed the economic impact of the Ford rule and suggested that while it may entail some additional expenses by government, it may also lead to savings since "obtaining a valid waiver can be a lengthy process and does not insulate the judgment from appellate review." The court is convinced that beyond providing better representation, there will be an elimination of useless expenditure of judicial resources to sort out conflicts both at trial and appeal.

K. An arrest based solely on a recalled warrant is made without probable cause: People v. Ramirez.

In People v. Ramirez, 34 Cal. 3d 541, 668 P.2d 761, 194 Cal. Rptr. 454 (1983), the supreme court held that an arrest based solely on an outstanding bench warrant subsequently discovered to have been recalled was made without probable cause despite the ar-

20. Id. at 110-11, 672 P.2d at 850, 197 Cal. Rptr. at 67.
22. 35 Cal. 3d at 111-12, 672 P.2d at 850-51, 197 Cal. Rptr. at 67-68; see also Wood v. Georgia, 450 U.S. 261 (1981).
23. See supra note 2.
24. Tague, supra note 3, at 1116-17. "[I]t seems to be a rare appeal in a criminal case where two defendants are jointly tried and represented by one attorney, that the question of separate representation does not become an issue." People v. Baker, 268 Cal. App. 2d 254, 260, 73 Cal. Rptr. 758, 763 (1968).
25. 35 Cal. 3d at 116 n.33, 672 P.2d at 854 n.33, 197 Cal. Rptr. at 71 n.33. See Tague, supra note 3, at 1122-30, for a full discussion of the advantages of the Ford rule.
resting officer’s good faith belief in the warrant’s validity. In reaching this decision, the court elected to disapprove People v. Marquez, 237 Cal. App. 2d 627, 47 Cal. Rptr. 166 (1965), and instead follow federal law.

The court clarified its holding in two ways. First, the court clearly stated that it was not “requiring [an] officer . . . to anticipate a subsequent court ruling on the validity of an ordinance,” but only requiring that information which an arresting officer uses as the basis for probable cause to arrest be correct. Second, the court was not abrogating the “collective knowledge” rule but was “imposing on law enforcement the responsibility to disseminate only accurate information.”

L. The sufficiency of sentence enhancement allegations may be challenged by a motion to set aside an information: People v. Superior Court (Mendella).

The California Supreme Court was asked in People v. Superior Court (Mendella), 33 Cal. 3d 754, 661 P.2d 1081, 191 Cal. Rptr. 1 (1983), to decide whether the sufficiency of the evidence to support a sentence enhancement allegation could be challenged by a motion to set aside an information under CAL. PENAL CODE § 995 (West Supp. 1984). The court held that such a motion was proper.

Briefly, the facts are these: Brion Ward went to defendant’s house to retrieve some belongings of defendant’s former girlfriend. Ward, assuming defendant not to be home, let himself in with a key provided by defendant’s former girlfriend. Defendant discovered Ward, and, producing a sword with a two-and-a-half foot blade, ordered Ward to get out. Ward backed towards the door, trying to reason with the defendant, but as Ward neared the doorstep, defendant drove forward with the sword, penetrating Ward’s chest and lung. Ward thereafter required hospitalization.

Defendant was charged with assault with a deadly weapon under CAL. PENAL CODE § 245(a) (West Supp. 1984); no enhancement for great bodily injury was charged in the complaint under CAL. PENAL CODE § 12022.7 (West 1982). Defendant claimed it was an accident and that he simply wanted to “push [Ward] back,” intending to “scare Ward off but not to injure him.”

When the information was filed in superior court, there was added to the original assault charge an allegation that defendant intentionally inflicted great bodily injury. Defendant then moved to
dismiss this allegation. Two grounds for dismissal were advanced: first, "there was insufficient evidence adduced at the preliminary hearing to support the enhancement and the allegation should therefore be dismissed" under CAL. PENAL CODE § 995 (West Supp. 1984) (this section provides in part that the "information must be set aside" upon a defendant's motion if it is found that "the defendant had been committed without reasonable or probable cause."). Alternatively, defendant argued that an enhancement which was not charged in the original complaint may not be added after the preliminary hearing under section 739 of the Penal Code. That section provides in pertinent part:

When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney . . . to file . . . an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed.


Defendant contended that the above section authorized the district attorney to charge only "offenses;" an "enhancement" was not an "offense." Consequently, the district attorney could not charge enhancements under Section 739. The superior court granted defendant's motion on this second ground.

Initially, the supreme court took note of People v. Superior Court (Grilli), 84 Cal. App. 3d 506, 148 Cal. Rptr. 740 (1978), in which an appellate court held that an enhancement, not being an "offense," was not subject to review under CAL. PENAL CODE § 995. However, the supreme court also recognized that the Grilli holding had been criticized in recent cases, and took this opportunity to disapprove Grilli. See Ramos v. Superior Court, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982).

Justice Mosk, writing the opinion, in which all the justices concurred, observed that the statute itself did not distinguish between "offenses" and "enhancements." Although it could be argued that an "enhancement" was not strictly an "offense," Justice Mosk stated that review of enhancement allegations under CAL. PENAL CODE § 995 was necessary in order to protect a defendant's due process rights.

Both the preliminary hearing and the section 995 motion are designed to "operate as a judicial check on the exercise of prosecutorial discretion." The purpose of the preliminary hearing is "to weed out groundless or unsupported charges of grave offenses and to relieve the accused of the degradation and expense of a criminal trial." Jennings v. Superior Court, 66 Cal. 2d 867, 880, 428 P.2d 304, 312, 59 Cal. Rptr. 440, 448 (1967); Jaffe v. Stone, 18 Cal. 2d 146, 150, 114 P.2d 335, 338 (1941); People v. Brice, 130 Cal. App.
Similarly, the section 995 motion is designed to "eliminate unnecessary trials and to prevent accusatory bodies such as grand juries from encroaching on the right of a person to be free from prosecution for crime unless there is some rational basis for entertaining the possibility of guilt." People v. Sigal, 249 Cal. App. 2d 299, 305, 57 Cal. Rptr. 541, 545 (1967); accord, Greenberg v. Superior Court, 19 Cal. 2d 319, 121 P.2d 713 (1942). Justice Mosk therefore concluded: "To allow the prosecution to indiscriminately charge enhancements without subjecting such allegations to judicial scrutiny under a section 995 motion is to undermine the procedural rights guaranteed to the defendant by the preliminary hearing process."

Allowing the prosecution to charge enhancements without subjecting these enhancements to a preliminary review overlooks the impact upon the defendant because of the prosecution strengthened position with regard to plea bargaining. The supreme court noted that "even a single enhancement . . . can have a significant impact on the number of years to which a defendant may ultimately be sentenced." See, e.g., CAL. PENAL CODE § 12022.8 (West 1982) (additional five years).

Justice Mosk also drew support from recent cases which upheld the availability of a section 995 motion to attack the sufficiency of the evidence to support similar allegations. Ghent v. Superior Court, 90 Cal. App. 3d 944, 153 Cal. Rptr. 720 (1979) (special circumstance allegation); see also Ramos v. Superior Court, 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982); Jones v. Superior Court, 123 Cal. App. 3d 160, 76 Cal. Rptr. 430 (1981); Page v. Superior Court, 90 Cal. App. 3d 959, 153 Cal. Rptr. 730 (1979). These cases emphasize that the supreme court is determined not to adopt a narrow construction of the term "offense" as used in CAL. PENAL CODE §§ 871 and 995. Moreover, by enacting the determinative sentencing law, the legislature withdrew allegations that could increase punishments from the definitions of the substantive offenses and placed them in distinct sections, which are now known as "enhancements." See Cassou & Taughers, Determinate Sentencing in California: The New Numbers Game, 9 PAC. L.J. 5, 23, 31 (1978). The legislature did not intend to "deprive the defendant of any procedural rights" by enacting the determinative sentencing law.

The supreme court further held that the superior court's narrow reading of CAL. PENAL CODE § 739 regarding the absence of the

The prosecution may amend the information under section 739 after the preliminary hearing “to charge any offense shown by the evidence adduced at the preliminary hearing provided the new crime is transactionally related to the crimes for which the defendant has previously been held to answer.” *People v. Manning*, 133 Cal. App. 3d 159, 165, 183 Cal. Rptr. 727, 730 (1982). Justice Mosk held that the complaint had been properly amended in the present case. Furthermore, because the magistrate had previously rejected defendant's contention that he did not intend to inflict great bodily harm, Justice Mosk held that the evidence was sufficient to support the enhancement allegation under CAL. PENAL CODE § 12022.7 (West 1982).

XIV. DELINQUENT, DEPENDENT & NEGLECTED MINORS

*Timely notice of appeal is sufficient to obtain appellate review of alleged errors arising before or during the process of a minor's admission of allegations in a juvenile court petition: In re Joseph B.*

*In re Joseph B.*, 34 Cal. 3d 952, 671 P.2d 852, 196 Cal. Rptr. 348 (1983), presented the court with a simple but important issue. The justices were called upon to decide whether a minor who admits the truth of a juvenile court petition must secure a certificate of probable cause as required by section 1237.5 of the California Penal Code to be entitled to appellate review of any errors committed before or during the process. The court held that such was not required.

Section 1237.5 provides that a defendant convicted upon a guilty or nolo contendere plea, or whose probation is revoked because of an admitted violation may not appeal the judgment unless he ob-
tains and files a certificate of probable cause. CAL. PENAL CODE § 1237.5 (West 1982). This section does not apply to minors. It pertains to defendants; juveniles charged with juvenile court law violations are not defendants since a determination of juvenile wrongdoing is not a criminal conviction.

Section 800 of the California Welfare and Institutions Code governs juvenile appeals. CAL. WELF. & INST. CODE § 800 (West 1972). Its only requirement to perfect a juvenile appeal is the timely filing of notice of appeal. The same condition is stated in rule 39(b) of the California Rules of Court. CAL. R. CT. 39(b) (West 1984). No distinction is made between contested adjudications and judgments based on admissions to a petitioner's allegations. If the legislature had desired a certificate of probable cause for a juvenile appeal, it would have so specified.

In re Joseph B. reaffirms the established maxim that in the eyes of the law juvenile offenders are different than adult criminal defendants. Minors are accorded special treatment. To demand a certificate of appeal would serve to thwart this policy by tacking on another step and causing delays in the process. Juvenile appeals take precedence over all other cases in the California judicial system.

XV. EDUCATION

Education Code section 44956, providing hiring preferences for laid off teachers, does not limit a school district's discretion to determine competency, so long as the standards are applied even-handedly: Martin v. Kentfield School District.

In Martin v. Kentfield School District, 35 Cal. 3d 294, 673 P.2d 240, 197 Cal. Rptr. 570 (1983), the supreme court considered an appeal from a denial of a petition for a writ of mandamus directing the school district to hire the plaintiff. The plaintiff claimed that the school district had violated Education Code section 44956(a), which gives a preferred right of reappointment to laid off teachers who are certificated and competent to fill the open teaching position. See CAL. EDUC. CODE § 44956 (West Supp. 1984). The school district has discretion to establish competency requirements, but the statute compels the district to apply the same requirements to both continuing and laid-off employees.

The court concluded that the requirement established by the
school district in this case, middle school teaching experience, was valid, but the record did not indicate whether the require-
ment was applied even-handedly to the plaintiff and to continuing
teachers. Thus, the court remanded the case to the trial court for
a determination of whether the school district applied different
criteria to the plaintiff than it had to continuing teachers.

XVI. EMPLOYEE BENEFITS

Judges and judicial pensioners entitled to interest
on salary and pension increases earlier declared to
be owed to them: Olson v. Cory.

In Olson v. Cory, 35 Cal. 3d 390, 673 P.2d 720, 197 Cal. Rptr. 843
(1983), the supreme court considered an appeal, by judges and ju-
dicial pensioners, of an order denying their motion for a determi-
nation that no substantial controversy existed as to their right to
interest on salary and pension increases granted them in Olson v.
Cory, 27 Cal. 3d 532, 636 P.2d 532, 178 Cal. Rptr. 568 (1980) (Olson
I). Although the court determined that the trial court’s order was
not appealable, the court treated the appeal as a petition for a
writ of mandate, thereby reaching the merits of the case.

In Olson I, the court had held that certain judges and judicial
pensioners had been wrongfully denied salary and pension in-
creases by an unconstitutional statutory amendment. For pur-
poses of insuring payment of the plaintiffs’ attorney fees, the trial
court, at the plaintiffs’ request, later issued an order limiting the
payment of back salaries and pensions to 75 percent of the
amount owed. At the same time, the plaintiffs moved for a deter-
mation that no substantial controversy existed concerning their
rights to statutory interest on the retroactive salary and pension
payments. The trial court denied the motion.

Plaintiffs’ claim was based on CAL. CIV. CODE § 3287(a) (West
1970) which provides:

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, except during such time as the debtor is prevented by law,
or by the act of the creditor from paying the debt. This section is applica-
able to recovery of damages and interest from any such debtor, including
the state or any county, city, city and county, municipal corporation, pub-

district, public agency, or any political subdivision of the state.

The defendants argued that the salary and pension claims were
not “damages certain,” and alternatively that the defendants had
been “prevented by law” from paying the plaintiffs and thus owed
no interest.

The court held that the uncertainty in this case had been one of
law, not of facts, and therefore the amount owed to the plaintiffs was one of two readily calculable amounts, thus fulfilling the certainty requirement.

The court also concluded that the state could not claim that it was prevented by law from paying the plaintiffs when the state was responsible for enacting the invalid statute. Furthermore, since the legislature could have made the payments, it was irrelevant that the state Controller might have been legally prohibited from making the payments.

The court further held that the right to interest was not affected by the fact that the judicial pensions were paid out of a special state fund and the municipal court judges' salaries were paid out of county funds. In both instances it is the exclusive power of the legislature to prescribe the salaries. Finally, the court stated that the defendants were "prevented by law" from paying the 25 percent set aside for attorney's fees; therefore, as to that amount, the defendants had no obligation to pay interest.

XVII. EQUAL PROTECTION

CC&Rs of a non-profit homeowners' association prohibiting residence of those under eighteen years of age is discrimination under the Unruh Civil Rights Act: O'Connor v. Village Green Owners Association.

In O'Connor v. Village Green Owners Association, 33 Cal. 3d 790, 662 P.2d 427, 191 Cal. Rptr. 320 (1983), the California Supreme Court held that a provision in the covenants, conditions and restrictions (CC&Rs) of a nonprofit homeowners' association which prohibited the residency of anyone under eighteen years of age constituted discrimination prohibited by the Unruh Civil Rights Act (CAL. CIV. CODE § 51 (West 1982)). Section 51 provides in relevant part: "All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, or national origin are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."

While the Unruh Act does not specifically prohibit age discrimination, the court, relying on its interpretation of the Act in In re Coz, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970), found that the list of particular bases of discrimination was "illustrative
rather than restrictive." The scope of the Unruh Act was thus held to be broad enough to preclude age discrimination.

O'Connor expanded the application of the Unruh Act to include a nonprofit homeowners' association. In Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982), the supreme court struck down a similar blanket age restriction in an apartment complex. As a place of "accommodation," the apartment complex fit within the definition of a "business establishment" and thus the age discrimination was unlawful under the Unruh Act. Similarly, in O'Connor, the supreme court found that the condominium owners' association had "sufficient businesslike attributes to fall within the scope of the act's reference to 'business establishments of every kind whatsoever.'" The "businesslike attributes" included the association's duties to employ a professional property management firm, obtain insurance for the benefit of all owners, maintain and repair all common areas and facilities, to establish and collect assessments from all owners, and to adopt and enforce rules and regulations for the common good. In performing these "customary business functions which in the traditional landlord-tenant relationship rest on the landlord's shoulders," the association's "overall function" was found to be the protection and enhancement of the project's economic value. The homeowners' association was thus held to be a "business establishment" within the meaning of the Unruh Act, and the blanket age discrimination was unlawful.

O'Connor and the cases concerning similar issues illustrate the supreme court's skepticism toward any "questionable" restriction in housing. As an active court, the California Supreme Court has shown a remarkable adeptness in construing the Unruh Act to prohibit age discrimination in both public and private housing. The holding and reasoning of O'Connor may ultimately present further questions, particularly in the area of private housing arrangements.

XVIII. FAMILY LAW

A. A foster home may include the home of a relative; termination of parental rights need not be followed by adoption; termination findings need only be supported by clear and convincing evidence: In re Laura F..


The facts can be summarized briefly. In 1976, the three children
of Della H. were removed from her care after several investigations for neglect. Two of the children, Laura F. and Tammy F., were placed in foster homes with nonrelatives. The third child, Stacy H., was placed in the home of his paternal aunt and uncle. In 1979, the state initiated proceedings under Cal. Civ. Code § 232(a)(7) to terminate the parental rights of Della H.

At that time, section 232(a) provided in pertinent part:

An action may be brought for the purpose of having any person under the age of 18 years declared free from the custody and control of either or both of his parents when such person comes within any of the following descriptions:

(7) Who has been cared for in one or more foster homes . . . under the supervision of the juvenile court, the county welfare department or other public or private licensed child-placing agency for two or more consecutive years, providing that the court finds by clear and convincing evidence that return of the child to his parent or parents would be detrimental to the child and that the parent or parents have failed during such period, and are likely to fail in the future, to do the following:

(i) Provide a home for the child;
(ii) Provide care and control for the child; and
(iii) Maintain an adequate parental relationship with the child.

Physical custody of the child by the parent or parents for insubstantial periods of time during the required two-year period will not serve to interrupt the running of such period.


Section 232 was amended to read, effective September 13, 1982, pursuant to section 232(a)(7), that only twelve months in a foster home are required for termination of parental rights. Also, there is a new requirement that the court determine whether reasonable services have been offered to aid the parents to overcome their problems.

The superior court granted the order terminating Della's parental rights and Della appealed contending: (1) the order of the superior court was improper as to Stacy because section 232(a)(7) required that a "foster home" be the home of a nonrelative; (2) the evidence was insufficient to support the judgment; (3) the county did not offer Della sufficient help to regain her children; (4) the court did not employ the proper standard of proof; (5) the court erred in failing to appoint counsel for the children.

The majority of the supreme court rejected Della's contentions. All members of the court agreed that a "foster home" for purposes of Cal. Civ. Code § 232(a)(7) included the home of a relative. By so defining "foster home," the court rejected the narrow definition established by an appellate court in In re Antonio F., 78
Cal. App. 3d 440, 114 Cal. Rptr. 466 (1978). The court in *Antonio F.* had held that a "foster home" was "care other than in the home of a parent or relative." In rejecting this definition, the supreme court noted that the legislature had recently expressed its intent that the underlying purpose of the statute was to "serve the welfare and best interests of the child." Cal. Civ. Code § 232.6 (West 1982). To apply the strict definition here would be to disregard the child's best interests.

The majority of the court also rejected the contention that parental rights could be terminated only upon a finding that the child would be adopted after the termination of such rights. Justice Kaus, writing the majority opinion, noted that, first, the statute did not impose such a requirement, and second, the termination of parental rights "can only be a plus" to allow the child to become eligible for adoption. In short, the court held that the evidence supported the judgment of the trial court.

Justice Kaus also noted that due process in a termination of parental rights proceeding requires only that the findings under any provision of Cal. Civ. Code § 232 be made on the basis of "clear and convincing evidence," not "proof beyond a reasonable doubt." He noted that this rule had been announced in *In re Angelia P.*, 28 Cal. 3d 908, 623 P.2d 198, 171 Cal. Rptr. 637 (1981), and later adopted by the United States Supreme Court in *Santosky v. Kramer*, 455 U.S. 745 (1982).

In her concurring and dissenting opinion, Chief Justice Bird agreed with the majority that a "foster home" for purposes of the statute includes the home of a relative, but argued that two of the children, Laura and Tammy, should not be permanently separated from their mother "without some showing of adoptability." According to the Chief Justice, the facts showed that there was "a long, caring, and nonabusive—albeit deficient—relationship between the girls and their natural mother, Della." The legislature would not have intended that this relationship be severed without at least some showing of adoptability.

Section 232.6 of the Cal. Civ. Code (West 1982), expresses the intent of the legislature in providing for the termination of parental rights. That purpose is "to serve the welfare and best interests of a child by providing the stability and security of an adoptive home when those conditions are otherwise missing" from the child's life. The Chief Justice noted that under the recently enacted section 366.25 of the Welfare and Institutions Code, the juvenile court could order parental termination proceedings only if "the minor is adoptable." Cal. Welf. & Inst. Code § 366.25(d)(1) (West Supp. 1984). In summation, Chief Justice Bird contended
that “[w]here, as in the present case, the natural parent has not abused the child, an inadequate parent is clearly preferable to no parent at all and is more consistent with the legislative scheme.”

B. Extrinsic fraud, including failure by a spouse to disclose community assets, may constitute a proper ground for setting aside dissolution awards: *In re Marriage of Modnick.*

The issue facing the supreme court in *In re Marriage of Modnick* was whether failure to disclose community assets constituted extrinsic fraud, thus allowing the court to set aside the dissolution orders, and, if so, whether the doctrine of laches barred relief in this instance. In an opinion written by Chief Justice Bird, with a concurrence by Justice Mosk, the supreme court held that the facts showed the existence of extrinsic fraud, that the judgments should be set aside, and that the doctrine of laches did not bar Marilyn’s suit for relief.

During marital dissolution proceedings, Zelig Modnick failed to disclose the existence of $15,000 in community funds. His wife, Marilyn, became aware of the concealed funds only after the interlocutory judgment had been filed. She thereupon filed a motion to set aside the interlocutory judgment on the ground of a fraud, but, through the assurances given her by her husband that he would make a fair settlement, Marilyn failed to pursue her legal action. A final judgment of dissolution was entered at Zelig’s request and the interlocutory judgment and property agreement incorporated therein became final. Marilyn still had not received the money from Zelig, and again filed a motion to set aside the interlocutory and final judgments on the ground of extrinsic fraud. The trial court denied her motion, and Marilyn appealed. On appeal, Zelig contended that the doctrine of laches barred Marilyn from seeking to set aside the dissolution judgments.

Chief Justice Bird first recited the law that “extrinsic fraud is a proper ground for setting aside an alimony award and property settlement incorporated into a dissolution decree.” She also

2. *Id.* at 903-04, 663 P.2d at 190, 191 Cal. Rptr. at 632.
3. *Id.*
5. *Id.* at 904, 663 P.2d at 191, 191 Cal. Rptr. at 633. See also Kulchar v. Kulchar,
noted that "the failure of one spouse to disclose the existence of community property assets constitutes extrinsic fraud." 6

The basis for these rules stems from the duty of each spouse to inform the other of the existence of community assets. The origins of the duty are two-fold: first, each spouse stands in a confidential relationship with the other; 7 second, a fiduciary relationship exists between spouses regarding the control of community property. 8

Failure to disclose the existence of a community asset must be distinguished from a misrepresentation of the value of that asset. In the latter case, unless one spouse has concealed the existence of material facts concerning the value of the property, a property settlement will not be set aside. 9 Moreover, in In re Marriage of Connolly, 10 the California Supreme Court held that a husband, even though a fiduciary, had no duty to disclose facts which would eventually affect the value of stock owned by the community. 11

However, in Modnick, since the husband had failed to disclose the existence of community assets, an action to set aside the property settlement agreement on the ground of extrinsic fraud was proper.

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8. 33 Cal. 3d at 905, 663 P.2d at 191, 191 Cal. Rptr. at 633. See Boeseke, 10 Cal. 3d at 844, 849-50, 519 P.2d at 161, 112 Cal. Rptr. 401, 403-05 (1974); Vai, 56 Cal. 2d at 337-38, 364 P.2d at 252-53, 15 Cal. Rptr. at 76-77; Jorgensen, 32 Cal. 2d at 21, 193 P.2d at 733.

9. 33 Cal. 3d at 905, 663 P.2d at 191, 191 Cal. Rptr. at 633.


11. The fact not disclosed was that the stock would soon be offered at public sale at a price higher than its current value. Id. at 597, 591 P.2d at 914, 153 Cal. Rptr. at 426. The court noted that the wife knew of the existence of the stock, and the "husband did not conceal material facts from [her]." Id. at 599, 591 P.2d at 916, 153 Cal. Rptr. at 428. The public offering was a matter of public record; this information was therefore available to his wife and "ascertainable" by her or her attorney. Id. at 594, 591 P.2d at 912, 153 Cal. Rptr. at 424. See generally Miller v. Bechtel Corp., 33 Cal. 3d 868, 863 P.2d 177, 191 Cal. Rptr. 619 (1983); Boeseke, 10 Cal. 3d 844, 519 P.2d 161, 112 Cal. Rptr. 401 (1974).
Zelig challenged this by asserting the defense of laches. He contended that Marilyn did not exercise due diligence in seeking relief after discovering the fraud, greatly to Zelig’s prejudice.\footnote{12} He maintained that it would be burdensome to account for the funds since they had been acquired “seven to ten years ago.”\footnote{13}

The court found this “prejudice” to Zelig resulting from Marilyn’s delay to be “minimal, at most,” and, by examining the analogous statute of limitations,\footnote{14} concluded that Marilyn’s suit was timely. The facts showed that Marilyn had filed her first motion to set aside the property settlement agreement eight months after she discovered the fraud. Her second motion was filed two years after discovery. Only when Zelig promised to make a fair settlement of the matter did Marilyn withdraw her motion. The court held that “[u]nder these circumstances, the doctrine of laches does not preclude Marilyn’s claim of extrinsic fraud. Marilyn was reasonably diligent in seeking relief following her discovery that Zelig had hidden community property assets from her.”\footnote{15}

Noting that a divorce decree is divisible in California,\footnote{16} the court set aside the property settlement agreement and left that part of the divorce decree terminating the marital relationship intact.\footnote{17}

Marilyn also advanced a secondary argument seeking to set aside the final decree of dissolution. In effect, she contended that she and Zelig had reconciled after entry of the interlocutory judgment of dissolution, thereby destroying the right to a final decree.\footnote{18} The court dismissed this argument, finding that, while the parties had lived together on an intermittent basis after entry of the interlocutory judgment, the record showed that they did not

\footnote{12} 33 Cal. 3d at 908, 663 P.2d at 193-94, 191 Cal. Rptr. at 635-36.
\footnote{13} Id. at 908, 663 P.2d at 194, 191 Cal. Rptr. at 636.
\footnote{14} Id. at 908-09, 663 P.2d at 194, 191 Cal. Rptr. at 636. The court looked to CAL. CIV. PROC. CODE § 338(4) (West Supp. 1984), which provides a three year period for an action for relief on the ground of fraud. The statutory period begins to run after the aggrieved party discovers “facts constituting the fraud.” Id.
\footnote{15} Id. at 910, 663 P.2d at 195, 191 Cal. Rptr. at 637.
\footnote{16} Id. (citing Lopez v. Lopez, 63 Cal. 2d 735, 737-38, 408 P.2d 744, 745-46, 48 Cal. Rptr. 136, 137-38 (1965)).
\footnote{17} 33 Cal. 3d at 910, 663 P.2d at 195, 191 Cal. Rptr. at 637. The extrinsic fraud in this case did not affect the parties' personal status. Id.
intend to reunite as husband and wife.\textsuperscript{19} Reconciliation, as a matter of law, necessary to destroy the right to a final decree of divorce, must be “unconditional and contemplate a complete restoration of all marital rights.”\textsuperscript{20} Finding that the evidence sufficiently rebutted Marilyn’s claim that she and Zelig had reconciled, the court refused to set aside the final decree of dissolution.\textsuperscript{21}

**XIX. GOVERNMENT/TORT LIABILITY AND IMMUNITY**

**A. Prior holding that a city may not bring a malicious prosecution action against a person who brought an unsuccessful false imprisonment suit based upon both federal and state constitutional grounds: City of Long Beach v. Bozek.**

In a memorandum decision, the California Supreme Court considered the basis for its prior holding in *City of Long Beach v. Bozek*, 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982). In that case, the California Supreme Court held that a city could not bring a malicious prosecution action against a person who had brought an unsuccessful suit for false imprisonment and other torts arising out of police conduct. The California Supreme Court reasoned that allowing a city to maintain such an action would impermissibly chill the right to petition the government for redress of grievances.

The case went to the United States Supreme Court, which granted a petition for writ of certiorari in the case, vacated the judgment and remanded the case to the California Supreme Court “to consider whether its judgment is based upon federal or state constitutional grounds, or both.” *City of Long Beach v. Bozek*, 103 S. Ct. 712 (1983).

The California Supreme Court responded in a memorandum decision, *City of Long Beach v. Bozek*, 33 Cal. 3d 727, 661 P.2d 1072, 190 Cal. Rptr. 918 (1983). It certified that its prior decision was based on both the first amendment to the United States Constitution and article I, section 3 of the California Constitution. Finding the latter provision an independent ground of support for the judgment, the court deemed it unnecessary to modify its prior de-

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\textsuperscript{19} Id. at 912-13, 663 P.2d at 196-97, 191 Cal. Rptr. at 638-39. The court admitted that there was evidence of a “close relationship” between Zelig and Marilyn, but found no intention to “permanently reunite as husband and wife.” Id. at 912, 663 P.2d at 196, 191 Cal. Rptr. at 638.

\textsuperscript{20} Id. at 911, 663 P.2d at 196, 191 Cal. Rptr. at 638 (citing Kelley v. Kelley, 272 Cal. App. 2d at 382, 77 Cal. Rptr. at 360).

\textsuperscript{21} 33 Cal. 3d at 912-13, 663 P.2d at 196-97, 191 Cal. Rptr. at 638-39.
cision, and reiterated the opinion in its entirety. The court ordered that the remittitur be issued forthwith.

B. The sovereign immunity provided by section 831.2 of the California Government Code does not extend to injuries suffered by nonusers on adjacent property: Milligan v. City of Laguna Beach.

I. INTRODUCTION

In Milligan v. City of Laguna Beach, the court considered whether the government was liable to land owners for damage sustained by felled eucalyptus trees growing on adjoining public property. The plaintiffs alleged that the trees were maintained in a dangerous condition. The city asserted a defense that section 831.2 of the California Government Code provided immunity to public entities for harm caused by natural conditions of unimproved public property. The majority determined that such immunity applied only to users of the governmental property and not to nonusers owning adjacent property. This holding restricted the application of section 831.2.

II. CASE ANALYSIS

A. The Majority

In interpreting the scope of section 831.2, Justice Broussard stated that the intent of the legislature was the controlling question. A statute is applied in conformity with "legislative direc-

2. Id. at 831, 670 P.2d at 1122, 196 Cal. Rptr. at 39. Several eucalyptus trees growing on city property fell on an adjacent private residence. Id.
3. Id. See CAL. GOV'T CODE § 835 (West 1980). This provision states that a public entity is liable for injury proximately caused by the dangerous condition of its property if the risk of injury is reasonably foreseeable.
4. 34 Cal. 3d at 831, 670 P.2d at 1122, 196 Cal. Rptr. at 39. See CAL. GOV'T CODE § 831.2 (West 1980) ("Neither a public entity nor a public employee is liable for an injury caused by a natural condition of any unimproved public property, including but not limited to any natural condition of any lake, stream, bay, river or beach."). The trial court concluded that this section did prevent recovery from the City of Laguna Beach. 34 Cal. 3d at 830-31, 670 P.2d at 1122, 196 Cal. Rptr. at 39.
5. Id. at 831, 670 P.2d at 1122, 196 Cal. Rptr. at 39.
6. Id. See, e.g., Valley Circle Estates v. VTN Consol., Inc., 33 Cal. 3d 604, 608,
tion” and speculation defers to “expressed legislative purpose.” Consequently, the court found that the enacting body intended section 831.2's governmental immunity to be the condition placed upon the public in return for the benefit of using public property.  

Section 831.2 contains no express language concerning nonusers on adjacent property. As a result, the measure of immunity is assessed by the legislative committee's comment. The majority determined that the legislative policy contained in the comment was clear. Public use of governmental property is desirable; however, without immunity, public agencies might foreclose such use because of the cost of making the property safe and paying for tort damages. Therefore, some of the expense should be shifted to the public in the form of governmental immunity because the advantages bestowed on the citizenry through their enjoyment of public property compensates for this burden. The legislative intent did not concern harm sustained by adjacent landowners from natural conditions on government land. The plaintiffs in Milligan did not receive reciprocal benefit in the use of public property; therefore, the fairness in shifting the burden was not present. The court stated that the natural condition immunity is applied in accordance with the statute and that it is not implemented when application does not further the legislative act's expressed purpose. Hence, immunity does not exist where liability originates with injury occurring to nonusers or adjacent property.

7. 34 Cal. 3d at 831, 670 P.2d at 1122, 196 Cal. Rptr. at 39.
8. Id. at 833, 670 P.2d at 1123-24, 196 Cal. Rptr. at 40-41. See 2 SEN. J., Reg. Sess. 1891 (1963) (“it is not unreasonable to expect persons who voluntarily use unimproved public property in its natural condition to assume the risk of injuries arising therefrom as a part of the price to be paid for benefits received.”).
10. 34 Cal. 3d at 832, 670 P.2d at 1123, 196 Cal. Rptr. at 40. See Baldwin v. California, 6 Cal. 3d 424, 481 P.2d 1121, 99 Cal. Rptr. 145 (1972) (design immunity under section 830.6 of the California Government Code is inapplicable where conditions change after approval of the design). See also CAL. GOV'T CODE § 830.6 (West 1980).
11. 34 Cal. 3d at 833, 670 P.2d at 1124, 196 Cal. Rptr. at 41.
12. Id. See 2 SEN. J., Reg. Sess. 1891 (1963) (“It is desirable to permit the members of the public to use public property in its natural condition. . . . But the burden and expense of putting such property in a safe condition and the expense of defending claims for injuries would probably cause many public entities to close such areas to public use.”).
13. See supra note 8. It is part of the price to be paid for the privilege.
14. 34 Cal. 3d at 833, 670 P.2d at 1124, 196 Cal. Rptr. at 41.
15. Id.
16. Id. at 832, 670 P.2d at 1123, 196 Cal. Rptr. at 40.
17. Id. at 833, 670 P.2d at 1124, 196 Cal. Rptr. at 41.
The readiness of the majority to limit governmental immunity under section 831.2 can best be explained by public policy that has guided judicial interpretation of such exemptions. In California, where governmental negligence is present, immunity is the exception while liability is the rule. The judiciary does not have the authority to "casually" impose governmental immunity. If the legislators do not expressly provide otherwise, individuals will be compensated for their injuries caused by willful or negligent acts because of the strong public policy favoring such a result.

Finally, the majority defined their holding by stating that while section 831.2’s "natural condition immunity may be applicable when the decayed tree limb falls on a user of the governmental property, it is not applicable when the limb injures adjacent property or persons on adjacent property because there is no danger that the governmental agency will close the property to use."

B. Concurring Opinion

Justice Kaus concurred in the result, however, he thought that the issue of section 831.2’s immunity as it related to nonusers of public property was “irrelevant.” The section applies only when harm results from natural conditions present on government land. He asserted that the eucalyptus trees were “an artificial condition” since they were not native to California and man had planted them. As a result, section 831.2 did not apply to the

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18. Id. at 832 n.2, 670 P.2d at 1123 n.2, 196 Cal. Rptr. at 40 n.2. See Baldwin, 6 Cal. 3d at 435, 491 P.2d at 1128, 99 Cal. Rptr. at 152.
19. See Mirskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 219, 359 P.2d 457, 462, 11 Cal. Rptr. 89, 94 (1961) (“when there is negligence, the rule is liability, immunity is the exception.”).
22. 34 Cal. 3d at 834, 670 P.2d at 1124, 196 Cal. Rptr. at 41.
23. Id. at 835, 670 P.2d at 1125, 196 Cal. Rptr. at 42 (Kaus, J., concurring).
24. Id. See supra note 4.
25. Id. at 835, 670 P.2d at 1125, 196 Cal. Rptr. at 42 (Kaus, J., concurring). The parties had stipulated that eucalyptus trees are not native to California and that plaintiff's expert would testify that the trees were planted by man. See Coates v. Chinn, 51 Cal. 2d 304, 308, 332 P.2d 289, 291-92 (1958) (eucalyptus trees constituted a nonnatural or artificial condition). See also RESTATEMENT (SECOND) OF TORTS § 363 comment b (1965) (planted trees represent artificial condition).
facts of the case.26

C. The Dissent

Justice Richardson dissented, stating that the defendant city was immune from liability under section 831.2.27 He stated that the section’s exemption from liability extended “to any injury caused by a natural condition of unimproved public property, whether or not the injury was received on public or private property or during the course of a non-public use.”28 If the legislature’s intent was to limit immunity under the section, it would have expressly provided for such a restriction.29

Justice Richardson gave several reasons for this conclusion. First, language providing for immunity only when public property was used at the time of the injury for an unintended purpose was specifically deleted from the section.30 Second, other sections of the California Government Code impose liability on public entities when dangerous conditions create substantial risk of injury on either public or adjacent land.31 Section 831.2 is an exception to the rule of liability for dangerous conditions and it should be construed in the same manner as the liability provisions.32 Finally, section 831.2 was enacted before a public or private landowner had a duty to guard against injury to persons outside his or her premises from dangerous natural conditions. Therefore, the legislature saw no need to specifically exempt government from liability to adjacent property owners.33 Justice Richardson concluded that section 831.2 provides “absolute immunity” from injury on either public or adjacent property.34

III. Conclusion

In Milligan, the court held that sovereign immunity provided by

26. 34 Cal. 3d at 836, 670 P.2d at 1126, 196 Cal. Rptr. at 43 (Kaus, J., concurring).
27. Id. at 836, 670 P.2d at 1126, 196 Cal. Rptr. at 42 (Richardson, J., dissenting).
28. Id. at 836-37, 670 P.2d at 1126, 196 Cal. Rptr. at 43 (Richardson, J., dissenting) (emphasis in original).
29. Id. at 837, 670 P.2d at 1126, 196 Cal. Rptr. at 43 (Richardson, J., dissenting).
32. 34 Cal. 3d at 837, 670 P.2d at 1126-27, 196 Cal. Rptr. at 43-44 (Richardson, J., dissenting).
33. Id. at 837-38, 670 P.2d at 1127, 196 Cal. Rptr. at 44 (Richardson, J., dissenting). See Sprecher v. Adamson Cos., 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981). This case placed a duty on property owners to convert dangerous natural conditions threatening injury to persons outside the premises.
34. 34 Cal. 3d at 837, 670 P.2d at 1126-27, 196 Cal. Rptr. at 43-44 (Richardson, J., dissenting).
section 831.2 was inapplicable to damage sustained as a result of
the natural condition of unimproved public property if the injured
party was an adjacent landholder who did not use the government
land. The court concluded that neither the language nor the ex-
pressed legislative purpose of the statute included immunity for
such injury. The *Milligan* decision illustrates that governmental
immunity is strictly construed in California. The goal of compen-
sating wronged parties is favored and will prevail unless the
lawmakers clearly establish otherwise.

C. **Highway patrolman stopping to aid injured or
stranded motorist has no affirmative duty to secure
information or preserve evidence:** *Williams v. State
of California.*

In *Williams v. State of California,* the California Supreme
Court was asked to consider “whether the mere fact that a high-
way patrolman comes to the aid of an injured or stranded motor-
ist creates an affirmative duty to secure information or preserve
evidence for civil litigation between the motorist and third par-
ties.” The majority held that “stopping to aid a motorist does
not, in itself, create a special relationship which would give rise to
such a duty.”

The plaintiff, Della Williams, was a passenger in an automobile
when a piece of heated brake drum from a passing truck smashed
through the windshield and struck her in the face. Highway pa-
trolmen arrived within minutes, but did not seek identification of
the witnesses to the accident, or examine the piece of brake
drum, or seek to identify and pursue the truck. Plaintiff brought
suit against the state, alleging that by stopping to help her, the pa-
trolmen had “assumed the responsibility of investigating the acci-
dent.” The failure to properly investigate the accident was
alleged to be a violation of duty, by which plaintiff lost her oppor-
tunity for a remedy when the patrolmen failed to identify the per-
son who injured her.

The state moved for judgment on the pleadings on the ground

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1. 34 Cal. 3d 18, 664 P.2d 137, 192 Cal. Rptr. 233 (1983).
2. *Id.* at 21, 664 P.2d at 138, 192 Cal. Rptr. at 234.
3. *Id.*
4. *Id.* at 21-22, 664 P.2d at 138, 192 Cal. Rptr. at 234.
5. *Id.* at 21, 664 P.2d at 138, 192 Cal. Rptr. at 234.
6. *Id.* at 21-22, 664 P.2d at 138, 192 Cal. Rptr. at 234.
that a police officer is immune for his discretionary acts under principles of governmental immunity.\textsuperscript{7} The court granted the state’s motion and the plaintiff appealed.

The supreme court reversed, stating that “[o]nce again the immunity cart has been placed before the duty horse.”\textsuperscript{8} The question is not one initially of governmental immunity, but of duty. If the plaintiff has not shown that a duty of due care was in fact owed, the court need not even reach the question of immunity.\textsuperscript{9}

As the supreme court stated in Davidson v. City of Westminster:\textsuperscript{10}

Conceptually, the question of the applicability of a statutory immunity does not even arise until it is determined that a defendant otherwise owes a duty of care to the plaintiff and thus would be liable in the absence of such immunity.\textsuperscript{11}

Thus, the court turned to the question of whether any duty of care was owed in this case. Citing general principles of tort law, the court noted that, in the absence of a “special relationship,” one who does not create a peril is under no legal obligation to take affirmative action to assist or protect another.\textsuperscript{12} Also, a “volunteer,” one who has no initial duty to act, but who assumes that duty, is under a duty to exercise due care in performance and is liable if “(a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other’s reli-

\textsuperscript{7} CAL. GOV’T CODE §§ 820.2, 820.25 (West 1980). Section 820.2 provides:

Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

CAL. GOV’T CODE § 820.2 (West 1980).

Section 820.25 provides:

(a) For purposes of Section 820.2, the decision of a peace officer, as defined in Sections 830.1 and 830.2 of the Penal Code, or a state or local law enforcement official, to render assistance to a motorist who has not been involved in an accident or to leave the scene after rendering assistance, upon learning of a reasonably apparent emergency requiring his immediate attention elsewhere or upon instructions from a superior to assume duties elsewhere, shall be deemed an exercise of discretion.

(b) The provision in subdivision (a) shall not apply if the act or omission occurred pursuant to the performance of a ministerial duty. For purposes of this section, “ministerial duty” is defined as a plain and mandatory duty involving the execution of a set task and to be performed without the exercise of discretion.

CAL. GOV’T CODE § 820.25 (West 1980).

\textsuperscript{8} 34 Cal. 3d at 22, 664 P.2d at 139, 192 Cal. Rptr. at 235.

\textsuperscript{9} Id. at 22-23, 664 P.2d at 139, 192 Cal. Rptr. at 235.

\textsuperscript{10} 32 Cal. 3d 197, 649 P.2d 894, 185 Cal. Rptr. 252 (1982).

\textsuperscript{11} Id. at 201, 649 P.2d at 896, 185 Cal. Rptr. at 254.

\textsuperscript{12} 34 Cal. 3d at 23, 664 P.2d at 139, 192 Cal. Rptr. at 235 (citing RESTATEMENT (SECOND) OF TORTS § 314 (1965)); 4 WITKIN, SUMMARY OF CALIFORNIA LAW, TORTS § 554 at 2821 (8th ed. 1974).
The supreme court held that these general principles apply to law enforcement personnel in carrying out “routine traffic investigations,” and that the “state highway patrol has the right, but not the duty, to investigate accidents.” Likewise, a law enforcement officer has no affirmative duty to come to the aid of a stranded motorist.

In the absence of a “special relationship” between the state highway patrol and members of the public generally, no duty was held to exist. However, the court held, “when the state, through its agents, voluntarily assumes a protective duty toward a certain member of the public and undertakes action on behalf of that member, thereby inducing reliance, it is held to the same standard of care as a private person or organization.” Where there is no showing of reliance, there is no recovery.

The “special relationship” between a law enforcement officer and a member of the public was established by the conduct of the officer in Mann v. State of California. In that case, it was the...
plaintiff's "dependence" on the officer that caused his detrimental reliance. Highway patrolmen had stopped to help a stranded motorist. After calling a tow truck, the officers left. They did not wait for the tow truck or place flares around the stalled vehicle. The plaintiffs were injured when a passing car sideswiped the stranded vehicle. The court in that case held that when the officers stopped to investigate and took affirmative steps to assist the stranded motorist, the injured parties were lulled into a false sense of security and did not seek further assistance, thereby relying to their detriment on the protective conduct of the officers.

The supreme court examined the holding in Mann, where the police officer had undertaken to assist a stranded motorist, and compared it to another appellate court decision, Clemente v. State of California, where a police officer was held liable for failure to investigate the source and cause of an accident. In Clemente, a motorcyclist allegedly struck and injured a pedestrian. The police officer arrived at the scene, and questioned the motorcyclist. However, the officer neglected to obtain the identity of the motorcyclist; the motorcyclist subsequently left the scene.

The court of appeal found that a relationship of "dependence" was created when the police officer stopped to assist the injured plaintiff. This "dependence" imposed a duty upon the officer to secure the identity of the motorcyclist, which duty was breached by the officer's failure to do so.

However, the holding in Clemente was contrary to another appellate court decision, Winkelman v. City of Sunnyvale, a case involving facts similar to those in Clemente. In Winkelman, the court failed to find that a special relationship was created when the police officers stopped to assist the plaintiff. The court also noted that "whatever detriment [Winkelman] suffered by reason of the involvement of the driver of the pickup truck had already occurred when that vehicle drove away from the scene." The court thus found that the plaintiff had not relied to her detriment.

20. 70 Cal. App. 3d at 776-77, 139 Cal. Rptr. at 84.
21. Id. at 780, 139 Cal. Rptr. at 86.
23. Id. at 376-77, 161 Cal. Rptr. at 801.
24. Id. at 379-80, 161 Cal. Rptr. at 802.
26. In Winkelman, the plaintiff was struck from behind by a pickup truck. The pickup was gone when police arrived. However, a short time after the accident, the driver of the pickup reported to officers at the Department of Public Safety that he had been possibly involved in an accident. The Department failed to obtain the identity of the pickup driver and let him go. Id. at 511, 130 Cal. Rptr. at 691.
27. Id.
on any acts of the police officers.\(^\text{28}\)

The supreme court in *Williams* recognized that *Clemente* and *Winkelman* were irreconcilable, and resolved the conflict in favor of *Winkelman*.\(^\text{29}\) Finding no allegations that the conduct of the patrolmen warranted reliance by the plaintiff which might require the officers to investigate, and finding no assurances given by the officers to undertake such an investigation, the supreme court held that the plaintiff had failed to establish a duty of care owed by the state.\(^\text{30}\)

While the majority adopted the view that the existence of a duty of due care was a question of fact, Justice Mosk, in a concurring and dissenting opinion, argued that such a duty exists, but that governmental immunity barred suit in this case.

Justice Mosk contended that the duty to investigate may be "inferred" from the comprehensive statutory powers delegated by the legislature to highway patrol officers.\(^\text{31}\)

Despite the existence of this "duty" to investigate, Justice Mosk felt that the immunity granted by the legislature when discretion of a public employee is involved barred the plaintiff's recovery in

\(^{28}\) Id. at 512, 130 Cal. Rptr. at 691.

\(^{29}\) 34 Cal. 3d at 27-28 \& n.9, 664 P.2d at 143 \& n.9, 192 Cal. Rptr. at 239 \& n.9.

\(^{30}\) Id. at 27-28, 664 P.2d at 142-43, 192 Cal. Rptr. at 238-39. The court stated: The officers did not create the peril in which plaintiff found herself; they took no affirmative action which contributed to, increased, or changed the risk which would have otherwise existed; there is no indication that they voluntarily assumed any responsibility to protect plaintiff's prospects for recovery by civil litigation; and there are no allegations of the requisite factors to a finding of special relationship, namely detrimental reliance by the plaintiff on the officers' conduct, statements made by them which induced a false sense of security and thereby worsened her position.

\(^{31}\) Id. at 27-28, 664 P.2d at 143, 192 Cal. Rptr. at 239.

The supreme court offered to let the plaintiff amend the complaint to state a cause of action. *Id.*

\(^{31}\) Id. at 29-30, 664 P.2d at 143-44, 192 Cal. Rptr. at 239-40 (Mosk, J., concurring and dissenting). Among the powers and duties delegated to the highway patrol are: "full responsibility and primary jurisdiction for the administration and enforcement of [all laws regulating the operation of vehicles and the use of the highways], and for the investigation of traffic accidents, on all state highways." *Id.* at 29, 664 P.2d at 144, 192 Cal. Rptr. at 240 (quoting *Cal. Veh. Code* § 2400 (West Supp. 1984)); highway patrol cars may be equipped to transport injured persons, *Cal. Veh. Code* § 2406 (West 1971); highway patrolmen gather, tabulate and analyze accident reports, and may investigate the cause and control of accidents, *Cal. Veh. Code* §§ 2407, 2408 (West 1977); each highway patrolman is authorized to investigate accidents resulting in personal injury and may gather evidence for the purpose of prosecuting persons guilty of violating any law which produces or contributes to the accident, *Cal. Veh. Code* § 2412 (West 1977).
this case. The patrolman's primary concern here was for the safety of the plaintiff, and he could not be faulted for choosing to aid the plaintiff, thereby foregoing the immediate investigation of the cause of the accident.

Chief Justice Bird found both a "special relationship" resulting from the patrolmen's assistance given to the plaintiff, and a lack of any immunity barring plaintiff's suit. In her dissenting opinion, the Chief Justice recognized the "general rule" that a person does not have an affirmative duty to assist or protect another unless a "special relationship" is found. However, she noted that "[t]he evolving trend of negligence law is to increase the number of situations in which an affirmative duty will be imposed 'by expanding the list of special relationships which will justify departure from' the general rule of nonliability." This was such a situation in which the court should find that a special relationship had been created.

In urging the court to impose a duty to aid or protect when there exists "any relation of dependence or of mutual dependence," the Chief Justice found that the plaintiff had sufficiently pleaded facts which evidenced the creation of a special relationship between herself and the highway patrolmen. Thus, the plaintiff was "completely dependent upon the investigating highway patrol officers to protect her from foreseeable harm following the accident."

Chief Justice Bird then proceeded to explain that section 820.2 of the California Government Code indeed provided immunity for the "discretionary" acts of public employees, but that the term had been denied its literal meaning in Johnson v. State of California. There it was held that section 820.2 supplied immunity for a public entity's "basic policy decision," but that "subsequent

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32. 34 Cal. 3d at 30, 664 P.2d at 144, 192 Cal. Rptr. at 240. See Cal. Gov't Code § 820.2 (West 1980); supra note 7 and accompanying text.
33. 34 Cal. 3d at 30, 664 P.2d at 144, 192 Cal. Rptr. at 240 (Mosk, J., concurring and dissenting).
34. 34 Cal. 3d at 31, 664 P.2d at 145, 192 Cal. Rptr. at 241 (Bird, C.J., dissenting).
35. Id. (Bird, C.J., dissenting) (citing Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 435, n.5, 551 P.2d 334, 343, n.5, 131 Cal. Rptr. 14, 23, n.5 (1976)).
36. 34 Cal. 3d at 31, 664 P.2d at 145, 192 Cal. Rptr. at 241 (emphasis added by the court) (quoting Restatement (Second) of Torts § 314 A, comment b (1965)) (Bird, C.J., dissenting).
37. 34 Cal. 3d at 33, 664 P.2d at 146-47, 192 Cal. Rptr. at 242-43 (Bird, C.J., dissenting).
ministerial actions in the implementation of that basic decision" were beyond the reach of section 820.2 and therefore subject to case by case adjudication.40

The Chief Justice argued that the patrol officers' negligence did not involve "basic policy decisions;" instead, when the officers chose to investigate the accident, their "performance of that investigation was purely ministerial" and beyond the grant of immunity in section 820.2.41

XX. JUDICIAL PERFORMANCE

A. Municipal court judge publicly censured for ordering appearances under false pretenses, jailing without legal cause or procedure, and altering previously rendered judgment without notice to party: In re Youngblood.

The California Supreme Court, in a memorandum decision, In re Youngblood, 33 Cal. 3d 788, 662 P.2d 108, 191 Cal. Rptr. 171 (1983), publicly censured a municipal court judge. "Judge Youngblood on one occasion ordered persons to appear before him under false pretenses and [ordered that one of them be jailed] without legal cause or compliance with applicable procedure." On another occasion, the judge presided in a case involving Pacific Telephone at a time when he himself was involved in litigation with Pacific Telephone. Judge Youngblood then altered the previously rendered judgment in the case in which he was presiding without notifying Pacific Telephone, and threatened to jail telephone company employees if plaintiff's service was interrupted because of the case.

B. Superior court judge censured for multiple indiscretions; judge's misdemeanor conviction constituted separate, independent ground from commission's recommendation: Roberts v. Commission on Judicial Performance.

Roberts v. Commission on Judicial Performance, 33 Cal. 3d 739, 661 P.2d 1064, 190 Cal. Rptr. 910 (1983), concerned the public censure of a superior court judge. The Commission on Judicial Per-

40. Id. at 797, 447 P.2d at 362, 73 Cal. Rptr. at 250.
41. 34 Cal. 3d at 34, 664 P.2d at 147, 192 Cal. Rptr. at 243 (Bird, C.J., dissenting).
formance (Commission) heard testimony on eight instances of misconduct and recommended the censure of Judge Harry R. Roberts.

The instances of misconduct included the threatening of a district attorney who told the judge that he would appeal the granting of a motion to suppress in a criminal case. The judge told the district attorney that he was "going to see that [the district attorney] lose this case big." Judge Roberts then approached the defendant's counsel and told him that "[y]ou'd better win this or I won't grant another motion for you."

A hearing on the writ was held before the Third Appellate District court, which granted the district attorney's petition for mandate. Judge Roberts, angry at the decision, telephoned the presiding judge of the appellate court and told him the decision was wrong. He also stated that if the appellate court did not change its decision, the matter would be appealed to the supreme court.

In a child neglect proceeding, the Commission found that Judge Roberts "improperly acted as an advocate, prejudged issues, abusively curtailed the presentation of evidence, and treated witnesses, litigants and an attorney in a rude, intimidating and demeaning manner." He approached one attorney and told her that it would be a "disservice" to her client to appeal his decision, and "threatened to report her to the State Bar if she advised her client to appeal."

When a newer associate of the attorney was assigned to try a felony case, Judge Roberts accused her, in chambers, of being incompetent to represent the defendant. The attorney was reduced to tears at the judge's "loud and angry manner."

The judge was also convicted of violating CAL. PENAL CODE § 148 (West Supp. 1984) (resisting, delaying or obstructing a public officer). The charges arose when the judge's son was stopped on suspicion of driving while intoxicated. The judge was also in the car as a passenger. When the officers tried to conduct a field sobriety test, the judge, shouting obscenities, tried to intervene. Judge Roberts was asked to reenter the car, but he refused. Still shouting obscenities, the judge told the officers that they did not know "who he was," and identified himself as a judge. The officers continued their test, and the judge, infuriated, grabbed one of the officers and wrestled him to the ground. The judge was arrested.

The Commission found that the judge's actions in the above instances constituted either "wilful misconduct in office or conduct prejudicial to the administration of justice which brings the judi-
cial office into disrepute.” See Cal. Const., art. VI, § 18(c) (West Supp. 1983). The judge's actions were also found to violate Cal. Gov’t Code § 68070.5(b) (West Supp. 1984) (forbidding communications between the judge hearing a petition for review and the judge named as a party respondent), and Canon 3(A)(4) of the Code of Judicial Conduct (forbidding ex parte communications concerning pending matters). The Commission recommended public censure.

The supreme court adopted the Commission's recommendation in a decision by the court, with Justice Mosk dissenting. The court reviewed the Commission's findings and found that the Commission's conclusions were justified.

The court also noted that the judge's misdemeanor conviction constituted an independent and sufficient ground for sustaining the Commission's recommendation. The judge admitted the conviction but argued that neither the Commission nor the supreme court should consider the factual circumstances underlying the conviction. However, the court noted that one of the commissioners had announced that evidence of the facts underlying the conviction, together with the conviction itself, would be considered in the hearing and Judge Roberts failed to timely object to the dual use of the evidence. The supreme court announced that “it is entirely appropriate for the commission or its masters to examine the facts and circumstances underlying a misdemeanor conviction in determining whether the offense calls for discipline.” The judge would not be permitted to limit the scope of inquiry “merely by stipulating that a judgment of conviction had been entered.”

The judge's final argument was that the Commission's apparent practice of making public its recommendations when it submitted the matter to the supreme court was improper. By doing so, according to Judge Roberts, the case had been prejudged and Roberts had in effect been improperly “censured” before the supreme court was given a chance to sanction such discipline. The court held that Rule 902(a) of the Rules of Court permitted public disclosure of any recommendation when “a record is filed by the Commission in the Supreme Court.” See also Rule 902(b). The Commission had properly followed the required procedure, and, if any change in the Rules was to be made, it should be made by the Judicial Council, not the supreme court.

In his dissent, Justice Mosk attacked the Commission's use of
Rule 902(a), which allowed public disclosure of any recommendation. In effect, according to Justice Mosk, Judge Roberts had been publicly censured twice. Also, under the California Constitution, only the supreme court can retire, censure or remove a judge. Cal. Const. art. VI, § 18(c) (West Supp. 1984). The Commission has only the power to “privately admonish a judge.” Id. Justice Mosk urged that the purpose of Rule 902 was to insure confidentiality; the Commission should not be allowed to defeat the purpose of the law by its indiscretion. In order to discourage similar commission conduct in the future, Justice Mosk would have dismissed these proceedings.

XXI. JUVENILE LAW

The court will enforce an implied stipulation under the “tantamount stipulation” doctrine that a subordinate hearing officer was acting as a judge if two conditions are met: In re Mark L.

In In re Mark L., 34 Cal. 3d 171, 666 P.2d 22, 193 Cal. Rptr. 165 (1983), a fourteen-year-old juvenile pleaded no contest to burglary charges before a temporary commissioner (officer); was subsequently declared a ward of the state; and released in his parents' custody. Once the commissioner's temporary assignment terminated, a juvenile court judge ordered a rehearing pursuant to his own motion. The judge reversed the commissioner's disposition and directed that the juvenile be placed with the California Youth Authority for 90 days to receive diagnostic evaluation. The supreme court reinstated the commissioner's disposition.

It was held that the juvenile court judge was without jurisdiction to order a rehearing. Both the defendant and the district attorney expected the disposition to be final. Further, the district attorney's conduct was deemed to be a stipulation that the commissioner was acting as a temporary judge. The district attorney initiated the proceedings, willingly appeared before the commissioner, and raised no objections during the proceedings. Therefore, under the “tantamount stipulation” doctrine, the court will enforce an implied stipulation that the subordinate judicial officer was acting as judge if (1) the parties' common intent was that the subordinate officer could hear the case, and (2) he was performing functions that could only be performed by a judge.

XXII. LABOR LAW

A. PERB has exclusive jurisdiction over school district's complaint for damages against non-certified teachers' unions inducing strikes: El

In *El Rancho Unified School District v. National Education Association*, the California Supreme Court was asked to consider whether the Public Employees Relations Board (PERB) has exclusive jurisdiction over a school district's complaint for damages against noncertified teachers' unions which induce employee strikes.\(^1\)

The PERB is empowered by the Education Employment Relations Act (EERA)\(^3\) to enforce the provisions of that Act and to hear complaints involving unfair labor practices.

The dispute involved a teachers' strike called for and led by four unions.\(^4\) At the time of the strike, none of the unions were certified or recognized as the exclusive representative of the school district's employees as required by EERA.\(^5\) The school district filed a complaint with PERB claiming that the unions had violated provisions of EERA during the strike.\(^6\) The district maintained that the unions had engaged in threatening coercive and intimidating behavior toward its teachers in violation of section 3543.6 subdivision (b) of EERA.\(^7\) This conduct was alleged to interfere with the teachers' right to choose their own representative regarding employee-employer relations.\(^8\) The school district also

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2. Id. at 952, 663 P.2d at 896, 192 Cal. Rptr. at 125.
4. Named as defendants were the National Education Association (NEA), the NEA's affiliates (California Teachers Association and the El Rancho Education Association), the California Federation of Teachers (CFT), and CFT's affiliate (the El Rancho Federation of Teachers).
5. CAL. GOV'T CODE § 3543.3 (West 1980).
6. 33 Cal. 3d at 949, 663 P.2d at 894, 192 Cal. Rptr. at 124.
7. CAL. GOV'T CODE § 3543.6(b) (West 1980) provides: "It shall be unlawful for an employee organization to: . . . interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [EERA]."
8. Section 3543 provides in relevant part:
   Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative . . . , no em-
charged that the unions had attempted to cause the district to violate EERA by compelling the district to negotiate with a union that was not certified as the employees’ exclusive representative.9

The school district’s first unfair practice claim was dismissed by PERB, and the district appealed.10 While this appeal was pending, the school district filed a civil action in superior court, seeking actual damages of $1.1 million and punitive damages of $10 million.11 The complaint charged the unions with unfair labor practices in violation of the EERA.12

The unions demurred to the complaint on the ground that the court lacked jurisdiction of the subject matter of the dispute. Essentially, the unions contended that EERA vested exclusive jurisdiction over charges involving unfair labor practices in PERB.13

Final ruling on the demurrer was stayed pending resolution of a case involving similar issues. That case, San Diego Teachers Association v. Superior Court,14 reached the California Supreme Court in 1979, and the court held that PERB had exclusive jurisdiction over a school district’s action to enjoin an allegedly illegal strike.15 However, the court limited its holding to actions seeking an injunction against strikes,16 and the unions in El Rancho ultimately persuaded the trial court to sustain their demurrer.17

On appeal, the court of appeal reversed, holding that PERB did

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9. CAL. GOV’T CODE § 3543.6(a) (West 1980) provides: “It shall be unlawful for an employee organization to: (a) Cause or attempt to cause a public school employer to violate Section 3543.5.”

Section 3543.5 provides in pertinent part: “It shall be unlawful for a public school employer to: (a) . . . interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by [EERA].” CAL. GOV’T CODE § 3543.5 (West 1980).

Section 3543.3 provides: “A public school employer . . . shall meet and negotiate with and only with representatives of employee organizations selected as exclusive representatives . . . .” CAL. GOV’T CODE § 3543.3 (West 1980).

10. 33 Cal. 3d at 949, 663 P.2d at 894, 192 Cal. Rptr. at 124.

11. Id.

12. Id. at 949-50, 663 P.2d at 894, 192 Cal. Rptr. at 124.

13. Id. at 950, 663 P.2d at 894-95, 192 Cal. Rptr. at 124-25. The unions strengthened their argument by reference to section 3541.3(i) of EERA which authorizes PERB “[t]o investigate unfair practice charges or alleged violations” of EERA. CAL. GOV’T CODE § 3541.3(i) (West 1980). Furthermore, section 3541.5 provides that “[t]he initial determination as to whether . . . charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of [the act], shall be a matter within the exclusive jurisdiction of [PERB].” CAL. GOV’T CODE § 3541.5 (West 1980).


15. Id. at 14, 593 P.2d at 847, 154 Cal. Rptr. at 902.

16. Id.

17. 33 Cal. 3d at 952, 663 P.2d at 896, 192 Cal. Rptr. at 126.
not have "jurisdiction over the Union's strike activity because there was no arguable basis on which the strike could be found to constitute an unfair practice under EERA."\(^{18}\)

The supreme court granted the unions' petition for review of the superior court's decision. As noted above, the court was asked to determine whether PERB had exclusive jurisdiction of a school district's tort suit for damages brought against noncertified employee unions for alleged unfair labor practices. The court held that PERB had exclusive jurisdiction.\(^{19}\)

Chief Justice Bird wrote the majority opinion, and Justices Richardson and Grodin each wrote separate concurring opinions. The Chief Justice began by noting the similarities between EERA and the National Labor Relations Act (NLRA),\(^{20}\) and the court's reasoning in *San Diego Teachers* that "the principles defining the preemptive reach of the NLRA are generally applicable in determining the scope of PERB's preemptive jurisdiction under EERA."\(^{21}\)

"[U]nder the federal preemption doctrine, the National Labor Relations Board (NLRB) is held to have exclusive jurisdiction over activities arguably protected or prohibited by the NLRA."\(^{22}\) The unions contended, first, that their activity arguably constituted activity prohibited by EERA. Section 3543.6(b) states that it is unlawful for a union to "interfere with, restrain, or coerce employees because of their exercise of rights guaranteed [them] by [EERA]."\(^{23}\) Paradoxically, the unions argued that PERB might find that the unions induced the teachers to strike in derogation of their right to represent themselves.\(^{24}\)

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\(^{18}\) *Id.*. The school district had amended its complaint by eliminating an allegation that the unions had "coerced" the teachers into participating in the strike. *Id.* at 951-52, 663 P.2d at 896, 192 Cal. Rptr. at 126.

\(^{19}\) *Id.* at 961, 663 P.2d at 902, 192 Cal. Rptr. at 132.


\(^{21}\) 33 Cal. 3d at 953, 663 P.2d at 897, 192 Cal. Rptr. at 127 (citing *San Diego Teachers*, 24 Cal. 3d at 12, 593 P.2d at 845-46, 154 Cal. Rptr. at 900-01). *See also* Public Employment Relations Board v. Modesto City Schools Dist., 136 Cal. App. 3d 881, 890-91, 186 Cal. Rptr. 634, 639-40 (1982).


\(^{23}\) CAL. GOV'T CODE § 3543.6(b) (West 1980), *see supra* note 7 and accompanying text.

\(^{24}\) 33 Cal. 3d at 954, 663 P.2d at 898, 192 Cal. Rptr. at 128. CAL. GOV'T CODE
The supreme court agreed. The test of "coercion" adopted by PERB is any activity which, under the circumstances, "may reasonably tend to coerce or intimidate employees in the exercise of their rights," regardless of whether the coercion was successful or not. Thus, the court found that PERB had jurisdiction.

The unions also contended that their activities arguably violated EERA by causing or attempting to cause the school district to violate the act. Section 3543.5(d) prohibits a public school employer from "contribut[ing] financial or other support" to a union. The unions argued that by causing the school district to "negotiate" with the noncertified unions, the unions had caused the school district to "support" the noncertified unions in violation of section 3543.3.

The supreme court accepted the assumption underlying this contention—that the "representation rights afforded noncertified unions are not equivalent to the representation rights afforded exclusive representatives." Under the statutory scheme, only exclusive representatives are given the power to meet and "negotiate" with employers. By causing the school district to negotiate with noncertified representatives, the unions had induced the district to violate EERA.

Completing her analysis regarding PERB's jurisdictional pre-

§ 3543 (West 1980) reserves to the employee the right to choose his or her own representative. See supra note 8.


26. 33 Cal. 3d at 954, 663 P.2d at 898, 192 Cal. Rptr. at 128.

27. Id. at 955, 663 P.2d at 898, 192 Cal. Rptr. at 128. See CAL. GOV'T CODE § 3543.6(a) (West 1980).

28. CAL. GOV'T CODE § 3543.5(d) (West 1980).

29. 33 Cal. 3d at 955, 663 P.2d at 898, 192 Cal. Rptr. at 128. See CAL. GOV'T CODE § 3543.3 (West 1980).

30. 33 Cal. 3d at 955, 663 P.2d at 898, 192 Cal. Rptr. at 128. An exclusive representative is given the right to "meet and negotiate" with public school employers. CAL. GOV'T CODE § 3543.3 (West 1980); a noncertified representative has only the "right to represent" employees until an exclusive representative is chosen. CAL. GOV'T CODE § 3543.1(a) (West 1980). PERB, construing this "right to represent," has concluded that noncertified representatives possess a "lesser" right of representation than that given to exclusive representatives. 33 Cal. 3d at 955, 663 P.2d at 898, 192 Cal. Rptr. at 128 (citing Professional Engineers in California Government (PECG)) PERB Dec. No. 118-S; 4 PERC ¶ 11045 (Mar. 19, 1980) (interpreting similar "right to represent" in provisions of the State Employer-Employee Relations Act, CAL. GOV'T CODE § 3512-3524 (West Supp. 1983)).

31. 33 Cal. 3d at 955-56, 663 P.2d at 898-99, 192 Cal. Rptr. at 128-29. The Chief Justice looked to federal court interpretations of section 8(a)(2) of NLRA (29 U.S.C. § 158(a)(2)) to support the general rule that "the extension to a minority union of representation rights beyond those to which it is statutorily entitled constitutes unlawful support." Id. at 956, 663 P.2d at 899, 192 Cal. Rptr. at 129 (citing, e.g., Garment Workers v. NLRB, 366 U.S. 731, 738 (1961); Pick-Mt. Laurel Corp. v. NLRB, 625 F.2d 476, 482 (3d Cir. 1980)).
emption, Chief Justice Bird rejected the school district’s assertion that its civil action presented issues broader than the issues it could present to PERB. The school district contended that PERB was concerned only with unfair labor practices and that only a civil court could take fair cognizance of the larger issues of harm to the school district and the public. The Chief Justice noted that, first, the initial issue was still the legality of the strike; second, there was not disparity between public and PERB interests.

Finding the “arguably prohibited” branch of the preemption doctrine satisfied, the Chief Justice addressed the “arguably protected” aspect of that doctrine. The unions advanced the argument that PERB had jurisdiction of this matter because it involved strike activities which were “arguably protected” by the EERA. Specifically, the unions drew on case law construing the NLRA, by analogy, which establishes the principle that a strike which is otherwise unlawful may be found protected “if undertaken in response to employer unfair practices.”

The Chief Justice agreed, finding that while the EERA does not provide express protection for employees’ “economic strikes,” the act would allow, implicitly, strikes to protest “unfair practices” of the employer. Support for this was found in the provisions of the EERA which declared it unlawful for a public school employer to “[d]eny to employee organizations rights guaranteed to them by [the act].” Because the act guaranteed to the employees the right to interact with noncertified unions, a strike to pro-

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32. 33 Cal. 3d at 957, 663 P.2d at 899-900, 192 Cal. Rptr. at 129-30.
33. Id. The court had addressed a similar issue in San Diego Teachers, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979), and held that “PERB’s responsibility for administering the EERA requires that it use its power . . . in ways that will further the public interest in maintaining the continuity and quality of educational services.” Id. at 11, 593 P.2d at 845, 154 Cal. Rptr. at 900; see supra note 14. It is noteworthy that EERA contains no provision prohibiting strikes by public school employees. The protection of public interests by PERB is thus made a large concern.
34. 33 Cal. 3d at 957-58, 663 P.2d at 900, 192 Cal. Rptr. at 130. See, e.g., Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 278 (1956).
35. 33 Cal. 3d at 958, 663 P.2d at 900, 192 Cal. Rptr. at 130.
36. CAL. GOV’T CODE § 3543.5(b) (West 1980). “Employee organizations” under the EERA include both exclusive representatives and noncertified representatives. CAL. GOV’T CODE § 3540.1(d) (West 1980). Conceivably, the school district could have interfered with the rights of its employees to act within noncertified unions. See also Lamphere Schools v. Lamphere Fed’n of Teachers, 400 Mich. 104, 252 N.W.2d 818 (1977).
test the school district's possible interference with that right may have been "arguably protected" by the EERA, and thus within PERB's exclusive jurisdiction.\textsuperscript{37}

The purpose of the EERA, as stated by the \textit{San Diego Teachers Association} court, is to "foster constructive employment relations."\textsuperscript{38} According to Chief Justice Bird, the act allowed PERB to provide a "full and effective" remedy.\textsuperscript{39} PERB can assist in mediating labor disputes; it can seek injunctive relief, and can bring contempt actions for violation of an injunction.\textsuperscript{40}

Thus, EERA was held to divest the "superior courts of jurisdiction to entertain a school district's complaint for damages arising out of a teachers' strike led by noncertifed unions."\textsuperscript{41} Specifically, PERB was held to have "exclusive initial jurisdiction to determine whether such a strike is an unfair practice and what, if any, remedies should be pursued."\textsuperscript{42}

In his concurring opinion, Justice Richardson stressed that public employees' strikes are illegal in California, and argued that PERB should not have exclusive jurisdiction over illegal public strikes.\textsuperscript{43} Justice Richardson noted that EERA itself does not explicitly grant such exclusive jurisdiction, and asked for clarification from the legislature.\textsuperscript{44}

Justice Grodin's separate concurring opinion was an answer to Justice Richardson's opinion. Justice Grodin challenged the purported "central legal principle" of Justice Richardson's argument that public employees' strikes are "illegal" in California. That legal principle has been "substantially undermined" by the enactment of EERA which made public employee participation in unions, together with the negotiation of wages and working conditions, a statutory right of all public employees.\textsuperscript{45}

\textsuperscript{37} 33 Cal. 3d at 959, 663 P.2d at 901, 192 Cal. Rptr. at 131.
\textsuperscript{38} 24 Cal. 3d at 13, 593 P.2d at 846, 154 Cal. Rptr. at 901 (referring to CAL. GOV'T CODE § 3540 (West 1980)).
\textsuperscript{39} 33 Cal. 3d at 961, 663 P.2d at 902, 192 Cal. Rptr. at 132.
\textsuperscript{40} \textit{Id}.
\textsuperscript{41} \textit{Id}.
\textsuperscript{42} \textit{Id}.
\textsuperscript{43} \textit{Id.} at 961-62, 663 P.2d at 903, 192 Cal. Rptr. at 133 (Richardson, J., concurring).
\textsuperscript{44} \textit{Id.} at 962, 663 P.2d at 903, 192 Cal. Rptr. at 133 (Richardson, J., concurring).
\textsuperscript{45} \textit{Id.} at 962-64, 663 P.2d at 903-04, 192 Cal. Rptr. at 133-34 (Grodin, J., concurring).
B. Dismissal of striking employees without a hearing violates the Meyers-Milias-Brown Act; city must provide reasonable procedural safeguards for dismissal of employees: International Brotherhood of Electrical Workers v. City of Gridley.

In 1974, the City of Gridley [city] passed two resolutions: one making city employee strikes unlawful and the other permitting an exclusive bargaining representative “to meet and confer” with the city on the employees’ behalf. The employees selected a union to represent them and it negotiated a three year contract with the city. Near the end of that three years, the union and the city entered negotiations for a second agreement. This time, however, the parties reached an impasse and eighteen of the city’s twenty-five employees went on strike. The city first dismissed the union as the employees’ representative; then it notified the employees that failure to “return to their next regular shift” would result in a discharge of their jobs. The following day, a Saturday, the one employee scheduled to work failed to appear. The city chose to discharge all eighteen employees despite union pleas. The trial court upheld the city’s actions, but the supreme court reversed.

In holding for the employees, the court stated that dismissal of striking employees without a hearing or procedural safeguards was inconsistent with the Meyers-Milias-Brown Act (MMBA) (CAL. GOV’T CODE §§ 3500-3511) (West 1980 & Supp. 1984). That Act was designed “to encourage communication and improve relations between local governments and their employees.” 34 Cal. 3d at 197, 666 P.2d at 962, 193 Cal. Rptr. at 520. The court went on to say that it is necessary for local governments to provide reasonable procedural safeguards for dismissal of employees. Because there was a local ordinance prohibiting city employees from striking and because eighteen employees were discharged without the requisite hearing, the court reversed the trial court and remanded for further findings consistent with its holding.


In Partee v. San Diego Chargers Football Company, 34 Cal. 3d 378, 668 P.2d 674, 194 Cal. Rptr. 367 (1983), the California Supreme
Court determined that California’s antitrust law as expressed in CAL. BUS. & PROF. CODE §§ 16700-17101 (West 1964) (The Cartwright Act) did not apply to the National Football League. The court resolved the issue by relying upon Flood v. Kuhn, 407 U.S. 258 (1972). In Flood, the Court found state antitrust laws inapplicable to nationally organized baseball teams on the grounds of preemption and an unreasonable burden on interstate commerce. The California Supreme Court found that the national uniformity required in baseball is likewise required by football and that the burden on interstate commerce outweighs the state interests in applying state antitrust laws. Application of the Cartwright Act would therefore be in conflict with the commerce clause. The policies claimed to be in violation of the Cartwright Act but followed by the National Football League were allowed.

Justice Reynoso took exception to the majority opinion and concluded that neither the commerce clause nor preemption preclude state antitrust regulation. His first argument was that the state Cartwright Act and the federal Sherman Anti-Trust Act are parallel, and in harmony. Therefore, when state law does not conflict or is not found to be hostile to federal antitrust enforcement, it should be applied. Secondly, Flood was not controlling here because in Flood, state antitrust regulation would have conflicted with federal law.

Expanding the first argument, Justice Reynoso relied on R.E. Spriggs Co. v. Adolph Coors Co., 37 Cal. App. 3d 653, 112 Cal. Rptr. 585 (1974). The court noted in Coors that the legislative intent of the Sherman Act was to supplement, not preempt state antitrust enforcement. Justice Reynoso conceded that, if an activity is exclusively interstate, the commerce clause precludes state regulation. But when that interstate commerce has significant local impact, state law should apply. If an activity is both inter- and intra-state it falls into a penumbral zone, subject to both state and federal authority. The state may therefore regulate interstate anticompetitive activity subject to three limitations of the commerce clause: (1) the activity is exclusively interstate commerce and is without an intrastate aspect or a local nexus; (2) regulation of the activity imposes an undue burden upon or discriminates against interstate commerce; or (3) regulation of the activity conflicts with federal law or policy.

As to the second argument, Justice Reynoso distinguished Flood because it was really an assault on baseball’s long standing exemption from antitrust laws. He then discerned that baseball can be distinguished from football as the latter cannot claim any national policy supporting self-regulation. Further, football does
not require exclusive federal regulation in order to achieve uniformity vital to national interests. The *Flood* case then, must be limited to baseball due to its focus on the unique historic development of that sport.

The court must apply a balancing test in determining any burden an activity might have on interstate commerce. In this case, California's interest in preventing unfair trade practices within its borders must be balanced against the alleged burden on football's interstate operations and its need for nationally uniform antitrust regulation. Justice Reynoso balanced this in the light of knowledge that the court has rarely held that the commerce clause preempts an entire field from regulation and then only when a lack of national uniformity would impede the flow of interstate goods. Justice Reynoso declared that there must be a strong presumption against preemption where state regulation seeks to protect the vital interests of state citizens.

D. *The legislature intended a broad reading of section 3543.2 of the Education Employment Relations Act as to matters subject to union negotiation: San Mateo City School District v. Public Employment Relations Board.*

*San Mateo City School District v. Public Employment Relations Board*\(^1\) involved two disputes between public school districts and their teachers concerning certain employment matters. The San Mateo Elementary Teachers Association (SMETA) submitted proposals regarding instruction duty time, preparation time and rest time allocations during the school day. The school district insisted that these matters were not subject to negotiation under the Education Employment Relations Act (EERA),\(^2\) and unilaterally allocated duty time, preparation time and rest time.\(^3\)

The teachers' union brought the matter to the Public Employees Relations Board (PERB), which found the matters "within the scope of representation" under the EERA.\(^4\) PERB thus concluded that the school district had committed an unfair labor

3. 33 Cal. 3d at 854, 663 P.2d at 525, 191 Cal. Rptr. at 802. The school district had twice unilaterally adopted policy changes which extended the length of the instructional day. *Id.*
4. *Id.* *See* CAL. GOV'T CODE § 3543.2 (West 1980).
practice by refusing to negotiate with the union on these matters. From this decision the school district petitioned for review.5

In a separate dispute involving similar issues, the supreme court heard an appeal by the Healdsburg Union High School, the Healdsburg Union School Districts, and the California School Employees Association. Each sought review of a PERB decision finding that the Healdsburg Districts had committed unfair labor practices by refusing to negotiate certain items in employment contracts.6

The EERA7 establishes a system of collective bargaining for public school employees educating students in grades kindergarten through 14.8 The act requires public school employers to meet and negotiate with the exclusive representative of its employees, and defines the matters which are within the “scope of representation,” i.e., which matters are subject to negotiation.9

PERB is authorized by the act to administer the EERA,10 and is specifically empowered to determine whether a particular item is “within or without the scope of representation.”11

Subdivision (a) of California Government Code section 3543.2 provides: “The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment . . . .”12 The act lists specific matters which are negotiable,13 and states:

6. 33 Cal. 3d at 853, 663 P.2d at 525, 191 Cal. Rptr. at 802. The disputed items were included in a 107-page form contract and involved articles on discrimination, organizational rights, job representatives, employee expenses, bargaining rights upon change in school districts, hiring, promotion, classification and abolition of positions, layoffs and reemployment, disciplinary actions, working conditions, training, contracting and bargaining. Id. at 854 & n.2, 663 P.2d at 525-26 & n.2, 191 Cal. Rptr. at 802-03 & n.2.
8. 33 Cal. 3d at 855, 663 P.2d at 526, 191 Cal. Rptr. at 803.
10. CAL. GOV'T CODE § 3541.3 (West 1980).
11. CAL. GOV'T CODE § 3541.3(b) (West 1980).
13. “Terms and conditions of employment” mean:

[Health and welfare benefits as defined by [Gov't Code] Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security . . . , procedures for processing grievances . . . , and the layoff of probationary certificated school district employees. . . . In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. . . .

CAL. GOV'T CODE § 3543.2(a) (West Supp. 1983).
All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.\(^\text{14}\)

The supreme court noted the tension between the broad language concerning the negotiability of "matters relating to" wages, hours of employment, and terms and conditions of employment, and the restrictive language of the reservation of matters not listed to the employer.\(^\text{15}\)

PERB relied on the expansive language to find the matters in dispute subject to negotiation. To determine whether such matters are within the scope of representation even though not specifically listed in the EERA, PERB had adopted a three-part test:

[A] subject is negotiable even though not specifically enumerated if (1) it is logically and reasonably related to hours, wages or an enumerated term and condition of employment, (2) the subject is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective negotiations is the appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not significantly abridge his freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the District's mission.\(^\text{16}\)

Justice Reynoso, writing the opinion for a unanimous court, noted that PERB's broad interpretation of section 3543.2 was the interpretation intended by the legislature. If the legislature had desired, it could have drafted a more specific, extensive statute. By including broad language concerning matters subject to negotiation, however, the legislature "purposely left these determinations to the PERB's expertise."\(^\text{17}\)

Support for this reasoning could be found in the history of public school employer-employee legislation. The former law, the Winton Act,\(^\text{18}\) provided a very broad scope of representation, and even was held to include formulation of educational policy.\(^\text{19}\) The EERA was enacted in 1975 to curtail this very broad scope of rep-

\(^{14}\) \(\text{Id.}\)

\(^{15}\) 33 Cal. 3d at 857, 663 P.2d at 527, 191 Cal. Rptr. at 804. The restrictive language the court refers to is the phrases "shall be limited to" and "terms and conditions of employment."

\(^{16}\) \(\text{Id.}\) at 858, 663 P.2d at 528, 191 Cal. Rptr. at 805 (citing Anaheim Secondary Teachers Ass'n v. Anaheim Union High Sch. Dist., PERB Dec. No. 177 at 4-5 (1981)).

\(^{17}\) 33 Cal. 3d at 858, 663 P.2d at 528, 191 Cal. Rptr. at 805 (quoting Anaheim Secondary Teachers Ass'n, at 4-5).


\(^{19}\) 33 Cal. 3d at 860-61, 663 P.2d at 529-30, 191 Cal. Rptr. at 806-07. \textit{See} San Juan
presentation. However, though the language of the EERA is more restrictive than that in the Winton Act, "the EERA also expresses a legislative determination that the process of collective negotiations furthers the public interest by promoting the improvement of personnel management and employer-employee relations within the public school systems."20 The court announced that PERB had adopted a valid method for determining the negotiability of items not specifically listed in section 3543.2, and that method was consistent with the intent of the legislature. However, because the two cases were decided on possibly different grounds, the PERB decisions at issue were annulled and remanded.21

XXIII. LABOR RELATIONS

The Agricultural Labor Relations Board may disregard the uncontradicted testimony of an employer and infer antiunion motive from circumstantial evidence: Rivcom Corporation v. Agricultural Labor Relations Board.

In Rivcom Corporation v. Agricultural Labor Relations Board, 34 Cal. 3d 743, 670 P.2d 305, 195 Cal. Rptr. 651 (1983), the supreme court reviewed an Agricultural Labor Relations Board decision that Rivcom committed unfair labor practices by refusing to hire the workers of its predecessor. Rivcom raised numerous issues on appeal; all of the major arguments rested on a challenge to the sufficiency of the evidence.

The court followed standard procedure and granted broad deference to the Board's conclusions in determining if the Board's decision was supported by substantial evidence. The court concluded that the Board was entitled to infer an antiunion motive from circumstantial evidence despite Rivcom's witnesses' uncontradicted testimony that Rivcom's actions were for legitimate business reasons. Such an inference was justified by the Board's power to assess the credibility of witnesses; in this case the Board determined the testimony to be "superficial, unfounded, and contradictory." Thus, the Board's judgment was upheld as being supported by the evidence, despite its circumstantial nature.

20. 33 Cal. 3d at 862, 663 P.2d at 531, 191 Cal. Rptr. at 808. See CAL. GOV'T CODE § 3540 (West 1980).

21. 33 Cal. 3d at 866-67, 663 P.2d at 534, 191 Cal. Rptr. at 811.
XXIV. PENSION AND PROFIT-SHARING

A. The legislature never intended retired legislators to have double recovery under two California Government Code sections providing increases in retirement benefits; no impairment of contract rights: Allen v. Board of Administration.

In Allen v. Board of Administration, 34 Cal. 3d 114, 665 P.2d 534, 192 Cal. Rptr. 762 (1983), the court was asked to interpret CAL. GOV'T CODE §§ 9359, 9360.9 (West 1980 & West Supp. 1984). Plaintiffs had been state legislators during the 1963-1965 legislative term. They sought a writ of mandate to compel the Legislators' Retirement System to recalculate their retirement allowances, while ignoring the state's constitutional limitations prohibiting the use of post-1966 legislative salary increases for legislators who retired prior to 1967. See CAL. GOV'T CODE § 9359.1(a) (West Supp. 1984). Another Code section provides for retirement benefit increases whenever current legislator salaries are increased. See CAL. GOV'T CODE § 9360.9 (West 1980). Both provisions were in effect while plaintiffs were in office. Plaintiffs therefore asserted that they were entitled to benefits under both provisions; thus, failure to recalculate their benefits would result in impairment of contracts under the contract clauses of the federal and state constitutions.

In vacating the writ of mandate, the supreme court reasoned that a double recovery was never contemplated by the legislature, and to permit such a recovery would provide plaintiffs with a windfall. The court cautioned, however, that any modification of vested pension rights must be reasonable, bear a material relation to the successful operation of the pension fund, and be accompanied by comparable new advantages.

B. City retained right to monitor disability of police officer and reinstate officer to light duty although officer had received medical disability retirement pension: Winslow v. City of Pasadena.

In Winslow v. City of Pasadena, 34 Cal. 3d 66, 665 P.2d 1, 192 Cal. Rptr. 629 (1983), a motorcycle police officer had suffered from lung ailments and received a medical disability retirement pension. Three years later, in 1979, the Retirement Board called the officer back to duty as a desk officer, which was deemed safe by the po-
lice department physician. The motorcycle officer appealed the decision claiming that the city's action constituted a change in policy that impaired his vested pension rights.

At the Board hearing, it was determined that the officer was capable of performing "light work." The Board recommended the officer be assigned to desk duty which "include[d] training, answering emergency calls for service, operating the information desk," and so forth. *Id.* at 68, 665 P.2d at 1, 192 Cal. Rptr. at 629. The officer contended that requiring an ex-motorcycle officer to take a desk job after receiving pension benefits constituted a change in policy which infringed upon his vested rights. The court, relying on the strong public policy to employ handicapped persons, coupled with the Board's granting Winslow "service-connected disability retirement . . . 'until further order of the Retirement Board,'" held that no change in City policy occurred. Not only did the City retain authority to "monitor and reinstate" employees receiving disability, but Winslow "was able to perform the duties of a desk officer." *Id.* at 71, 665 P.2d at 3, 192 Cal. Rptr. at 631. Therefore, Winslow's reinstatement was proper and "appropriate." *Id.*

XXV. PROFESSIONAL NEGLIGENCE

Psychologist's negligent failure to warn a potential victim of a threat to that person made by the psychologist's patient constitutes professional negligence, and the victim's child who suffered injury as a result of the attack has a cause of action against the psychologist: *Hedlund v. Superior Court.*

I. INTRODUCTION

When a therapist determines, or should determine, that his patient poses a threat to a third party, the therapist has a duty to exercise reasonable care to protect the third party. This duty was first recognized in *Tarasoff v. Regents of the University of California.*\(^1\) Whether a breach of the duty to warn is ordinary negligence or professional negligence, and whether the duty extends to others who might be injured if the threat is carried out were the

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1. 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976) ("When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger.").

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issues before the supreme court in *Hedlund v. Superior Court*. The plaintiff, LaNita Wilson, was injured when a patient in the defendants' care shot her. LaNita's son, Darryl, who was with her at the time of the shooting, suffered emotional injuries and psychological trauma as a result of the attack. LaNita sued the defendants, alleging that they knew of the potential danger to her but failed to warn her of the danger. Darryl's claim alleged that he was a foreseeable victim of any attack on his mother and therefore the defendants' duty to warn extended to him. The defendants' demurrer was overruled and they sought a writ of mandate from the supreme court to compel dismissal of the action.

II. NATURE OF THE DUTY TO WARN

The defendants' demurrer to LaNita's claim was based on Code of Civil Procedure section 340(3), which establishes a one-year statute of limitations for personal injury suits based on ordinary negligence. The defendants contended that the statute of limitations barred LaNita's suit since she filed her original complaint more than a year after she was attacked. LaNita contended, however, that the defendants had committed "professional negligence" and, under Code of Civil Procedure section 340.5, she had

2. 34 Cal. 3d 695, 669 P.2d 41, 194 Cal. Rptr. 805 (1983). Justice Grodin wrote the majority opinion with Chief Justice Bird and Justices Kaus and Broussard concurring. Justice Mosk wrote a dissenting opinion in which Justices Richardson and Reynoso concurred.

3. CAL. CIV. PROC. CODE § 340(3) (West Supp. 1984) provides in pertinent part: "[w]ithin one year... [a]n action for... injury to or for the death of one caused by the wrongful act or neglect of another. . . ."

4. The attack occurred on April 9, 1979, and the original complaint was filed on November 12, 1980. 34 Cal. 3d at 700, 669 P.2d at 42-43, 194 Cal. Rptr. at 806-07.

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

   In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. . . .

   For the purposes of this section:

   (1) "Health care provider" means any person licensed or certified pursuant to Division 2 (commencing with section 500) of the Business and Professions Code. . . .

   (2) "Professional negligence" means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital.

Id.
a three year period in which to commence the action. The central issue, then, was whether a breach of the duty to warn created in *Tarasoff* constituted professional negligence for purposes of section 340.5.6

The definitions of “health care provider” and “professional negligence” were added to section 340.5 as part of the Medical Injury Compensation Reform Act.7 The defendants were licensed psychologists and therefore were health care providers under section 340.5.8 The defendants’ alleged failure to warn LaNita constituted professional negligence only if their failure to act was “in the rendering of professional services . . . provided that such services are within the scope of services for which the provider is licensed. . . .”9 The defendants took the position that “only acts in the course of diagnosis or treatment resulting in injury to the patient” constituted professional negligence.10 Therefore, the defendants contended, a breach of a duty to a non-patient third party would only be ordinary negligence since no professional service was being rendered to him.11

The court noted, however, that section 340.5 does not limit its

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6. 34 Cal. 3d at 700-01, 669 P.2d at 43, 194 Cal. Rptr. at 807. The defendants argued that the *Tarasoff* requirement of “reasonable care” indicated that a breach of the duty to warn constitutes ordinary negligence, but the court stated that the question was not considered in *Tarasoff* and further investigation into the meaning of section 340.5 was necessary to resolve the question. *Id.*


10. 34 Cal. 3d at 702, 669 P.2d at 44, 194 Cal. Rptr. at 808. The defendants admitted that any injury to a patient proximately caused by a negligent diagnosis would constitute “professional negligence.” *Id.*

11. *Id.* The defendants cited *Tresemer v. Barke*, 86 Cal. App. 3d 656, 150 Cal. Rptr. 384 (1978), in support of their position. In that case, the court of appeal discussed a complaint alleging injury as a result of a physician’s failure to warn a former patient of the dangers involved with the use of a Dalkon Shield intrauterine device. To the extent the cause of action was for common negligence, “[t]he statute of limitations of section 340.5 would not apply even though the basic ‘injury’ resulted from a medical treatment for it is a separate duty to act which is involved.” *Id.* at 672, 150 Cal. Rptr. at 394. The court here distinguished *Tresemer* on the grounds that the plaintiff in that case was not barred by the statute of limitations under section 340(3); therefore, the statement concerning section 340.5 was dictum. Furthermore, the court distinguished between the duty in *Tresemer*, which was based on a past professional relationship, while this case revolved around the defendants’ current professional relationship with the man who attacked LaNita. 34 Cal. 3d at 703, 669 P.2d at 44, 195 Cal. Rptr. at 808.
application to "patients." The court next turned to the nature of the Tarasoff duty. Tarasoff requires the therapist to diagnose and predict potential danger and then to warn the third party. A cause of action arises if the therapist is negligent in either his diagnosis, or his failure to warn. "Diagnosis of 'psychological problems and emotional and mental disorders' is a professional service for which a psychologist is licensed." Thus, a breach of the duty to diagnose and predict the danger would constitute professional negligence. Since a professional service is part of the overall duty, the court concluded that a failure to warn third persons is professional negligence.

III. DUTY TO FORESEEABLE Bystanders

Darryl's complaint alleged that, because of his close relationship to his mother, it was foreseeable that any attack on her might injure him as well. Based on that fact, Darryl alleged that the defendants' duty to warn LaNita extended to him, and by failing to warn her, the defendants became liable for the injuries suffered by Darryl. The defendants' demurrer argued that no duty was owed to Darryl since no threat had been made against him and therefore Darryl had no cause of action for negligence.

12. 34 Cal. 3d at 703, 669 P.2d at 45, 194 Cal. Rptr. at 809. See supra note 5.
13. 34 Cal. 3d at 703, 669 P.2d at 45, 194 Cal. Rptr. at 809.
14. Id.
15. Id. See CAL. BUS. & PROP. CODE § 2903 (West Supp. 1984) (the practice of psychology includes: "diagnosis, prevention, treatment, and amelioration of psychological problems and emotional and mental disorders of individuals and groups.").
16. 34 Cal. 3d at 704, 669 P.2d at 45, 194 Cal. Rptr. at 809. "The diagnosis and the appropriate steps necessary to protect the victim are not separate or severable, but together constitute the duty giving rise to the cause of action." Id.

The court viewed its holding as being consistent with, and in furtherance of, the legislative purpose behind the Medical Injury Compensation Reform Act, 1975 Cal. Stat. 3949. Including actions based on a failure to warn within the meaning of "professional negligence" results in the application of other statutes adopted as part of the reform act. See, e.g., CAL. BUS. & PROP. CODE § 6146 (West Supp. 1984) and CAL. CIV. CODE § 3333.2 (West Supp. 1984) (both place limits on attorney contingent fees and recovery of noneconomic loss); CAL. CIV. CODE § 3333.1 (West Supp. 1984) (allows for a reduction in damages to reflect payments from collateral sources). The purpose behind the reforms was to reduce "health care costs by reducing the dollar amounts of judgments" for professional negligence. 34 Cal. 3d at 704, 669 P.2d at 45, 194 Cal. Rptr. at 809. This purpose would be frustrated in the case of a breach of the duty to warn if the breach was not classified as "professional negligence." Id. at 704, 669 P.2d at 45-46, 194 Cal. Rptr. at 809-10.
17. Id. at 705, 669 P.2d at 46, 194 Cal. Rptr. at 810.
18. Id. Darryl's complaint raised no statute of limitations issue since the ac-
The court avoided a consideration of possible liability to all bystanders and concluded instead that, because of his relationship to LaNita, the risk of harm to Darryl was foreseeable as a matter of law.\textsuperscript{19}

The court based its holding on \textit{Dillon v. Legg},\textsuperscript{20} in which a mother was held to be a reasonably foreseeable victim of emotional trauma when, in her presence, a driver negligently ran over and killed her child.\textsuperscript{21} The court reasoned that “[i]t is equally foreseeable” when a mother is injured as a proximate cause of the therapist's failure to warn her, “that her young child will not be far distant and may be injured or, upon witnessing the incident, suffer emotional trauma.”\textsuperscript{22} Thus, Darryl was a reasonably foreseeable plaintiff and had a cause of action for negligence.\textsuperscript{23}

\section*{IV. Dissenting Opinion}

The dissent criticized the majority opinion for perpetuating “the myth that psychiatrists and psychologists inherently possess powers of clairvoyance to predict violence.”\textsuperscript{24} The focus of this criticism was the majority's statement that “a negligent act occurs ‘when the therapist has, or should have diagnosed dangerousness.’”\textsuperscript{25} The dissent argued that psychology has not developed
to the point at which accurate predictions of future violence can be made. The dissent would limit Tarasoff to situations where the psychologist actually knows that violence may occur.

Based on this limited view of Tarasoff, the dissent concluded that the issue was "whether the failure to warn after actual knowledge is malpractice or simple negligence." The dissent concluded that the failure to warn is simple negligence "[s]ince it is not the medical care or treatment of a patient that is involved, but a species of civilian duty that has arisen to a third party. . . ."

XXVI. TAXATION OF FOREIGN CORPORATIONS

A foreign mail order insurance corporation utilizing independent contractors within California maintains sufficient contacts to be subject to taxation by the state: Illinois Commercial Men's Association v. State Board of Equalization.

Illinois Commercial Men's Association v. State Board of Equalization, 34 Cal. 3d 839, 671 P.2d 349, 196 Cal. Rptr. 198 (1983), illustrated the susceptibility of foreign corporations engaged in business within a state to taxation by that state. The court considered whether foreign insurers soliciting business by mail from outside California were subject to state taxation on collected gross premiums if they utilized independent contractors within the state to furnish services incident to the acceptance of applications and the administration of claims. By applying standards established by the United States Supreme Court, the justices concluded that imposition of such taxation was lawful under the due process clause of the fourteenth amendment to the United States Constitution.

A state's ability to tax a foreign corporation is measured by the

26. Id. at 709-10, 669 P.2d at 49, 194 Cal. Rptr. at 813 (Mosk, J., dissenting). See also People v. Burnick, 14 Cal. 3d 306, 325-28, 535 P.2d 352, 365-67, 121 Cal. Rptr. 488, 501-03 (1975) (discussion of the literature in the field of psychology which indicates the inability to predict violence).

27. 34 Cal. 3d at 709-10, 669 P.2d at 49, 194 Cal. Rptr. at 813 (Mosk, J., dissenting). Justice Mosk wrote a concurring and dissenting opinion in Tarasoff in which he argued that the duty to warn should only arise if the therapist actually knows of the danger to the third party. 17 Cal. 3d at 452, 551 P.2d at 354, 131 Cal. Rptr. at 34 (Mosk, J., concurring and dissenting).

28. 34 Cal. 3d at 710, 669 P.2d at 49, 194 Cal. Rptr. at 813 (Mosk, J., dissenting).

29. Id. at 710, 669 P.2d at 49-50, 194 Cal. Rptr. at 813-14 (Mosk, J., dissenting).
extent and nature of the contacts between the two and the benefits conferred on the business entity by the state. "[S]ome definite link, some minimum connection" must exist between the sovereign and the foreign corporation before an imposition of a tax is justified. *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753, 756 (1967). The state must bestow some benefit for which it can seek return. *Id.* This standard applies equally to all foreign business concerns. A state's special interest in the business of insurance and its regulation does not compel a more lenient standard for taxation of foreign insurers. The authority to regulate a business does not necessarily constitute the power to tax it.

The court recognized that contact between seller and state limited to common carrier or mail service is insufficient to properly impose a tax. However, the maintenance of offices, solicitors, agents, or property within a state will permit a tax assessment. Consequently, the court found that the use of independent contractors with offices in California to perform investigation and settlement services on behalf of foreign insurers constitutes enough contact to allow state taxation of premiums received by the insurers. Such independent contractors are undeniably agents of the foreign insurers because investigation and settlement of claims is an integral and crucial aspect of the insurance business. Since their agents maintain offices in California, the insurers receive the protection and benefit of the state's laws through their agents. The label of independent contractor does not warrant a foreign corporation's immunity from state taxation because such would lead to a deluge of tax avoidance if it made the constitutional difference. *Scripto, Inc. v. Carson*, 362 U.S. 207, 211 (1960).

The court held that a state has broad discretion in selecting an apportionment formula for taxation of a foreign corporation's business. To overturn an assessment, the taxpayer must prove by clear and cogent evidence that income attributed to the state is out of all appropriate proportions to business transacted in that state or that it leads to a grossly distorted result. A tax based on total sales made within a state is not invalid despite the fact that some activity, even if major, occurs in other jurisdictions.

The *Illinois Commercial* decision reaffirms the proposition that corporations are usually subject to taxation in jurisdictions other than the state of their incorporation. Today's economy dictates the necessity of interstate commerce. A corporation must draw its profits from several sources. Furthermore, if one of those conduits is a state where contact is established and benefits are derived, the corporation will be made to return some of its gain in
the form of taxes despite its attempt to keep entanglement to an absolute minimum.

XXVII. WORKERS' COMPENSATION

A. While employer has initial control over injured employee's medical treatment, failure to provide proper treatment alternatives gives control to the employee: Braewood Convalescent Hospital v. Workers' Compensation Appeals Board.

In *Braewood Convalescent Hospital v. Workers' Compensation Appeals Board*, 34 Cal. 3d 159, 666 P.2d 14, 193 Cal. Rptr. 157 (1983), the Workers' Compensation Appeals Board (WCAB) awarded applicant compensation for the cost of participating in a self-procured weight reduction program in Durham, North Carolina after sustaining serious back and elbow injuries while in the employ of Braewood Convalescent Hospital. The award included compensation for the injury, cost of the program, and applicant's costs for future participation. Braewood Convalescent Hospital and its workers' compensation carrier (hereinafter collectively referred to as employer) sought an annulment of the WCAB decision.

Applicant, while employed as a cook for employer, slipped and seriously injured his back and elbow. Both his personal physician and employer's physicians recommended weight reduction as a substantial part of applicant's treatment. Applicant had been chronically overweight most of his life, and at the time of his injury weighed 422 pounds. Because previous weight reduction programs had proved ineffective, applicant chose the Durham program because he considered it to be the "number one obesity clinic in the world." While at the clinic, applicant lost 175 pounds. Upon his return to California, applicant sought to be reimbursed from his employer.

On appeal from the WCAB award, employer contended that it should not pay for applicant's self-procured, out-of-state weight reduction program because it was unreasonable to leave California and further, employer had not consented to the Durham program.

It is true that an employer has initial control and authority over an injured employee's medical treatment. "Thus, while employer initially had the right to direct applicant to a specific program, that right was lost as a result of employer's failure to act by iden-
tifying and offering such an alternative program. At that point applicant acquired the right to choose for himself which program he reasonably might undertake." As a result, applicant was also entitled to recover his costs while participating in the program which not only worked, but was recommended as a necessary part of applicant's treatment.

B. A finding by the Bureau of Rehabilitation that an injured employee is not entitled to rehabilitation benefits constitutes "good cause" to reopen his permanent disability proceeding, provided the Bureau's decision has been appealed: LeBoeuf v. Workers' Compensation Appeals Board.

In LeBoeuf v. Workers' Compensation Appeals Board, the supreme court considered whether a decision by the Bureau of Rehabilitation (Bureau) that an injured employee is not eligible for rehabilitation benefits constitutes "good cause" to reopen permanent disability proceedings under Labor Code section 5803. The court ruled that it was, so long as the Bureau's decision was first appealed.

Petitioner developed an anxiety neurosis as a result of being attacked while working as a bus driver. His condition prevented him from returning to work, so he filed a claim for workers' compensation benefits, including permanent disability benefits. Following a series of hearings at which conflicting evidence was submitted, the workers' compensation judge determined that pe-

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1. 34 Cal. 3d 234, 666 P.2d 989, 193 Cal. Rptr. 547 (1983). Chief Justice Bird wrote the majority opinion with Justices Mosk, Kaus, Broussard, Reynoso, and Sims (assigned by the Chairperson of the Judicial Council) concurring. Justice Richardson wrote a concurring and dissenting opinion.

2. CAL. LAB. CODE § 5803 (West Supp. 1984) provides that:
   The appeals board has continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of this division, and the decisions and orders of the rehabilitation unit established under Section 139.5. At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.
   This power includes the right to review, grant or regrant, diminish, increase, or terminate, within the limits prescribed by this division, any compensation awarded, upon the grounds that the disability of the person in whose favor the award was made has either recurred, increased, diminished, or terminated.

Id. (emphasis added).


4. At the first hearing a psychiatrist testified that petitioner was "not employable in any capacity," but another psychiatrist testified that petitioner "was not
petitioner's condition was permanent and stationary\(^5\) and resulted in a sixty percent permanent disability.\(^6\) The Workers' Compensation Appeals Board (WCAB) denied petitioner's request for a reconsideration of the permanent disability rating.\(^7\)

During the process of determining petitioner's permanent disability, his employer filed the necessary reports with the Bureau\(^8\) for a determination of petitioner's eligibility for vocational training benefits.\(^9\) Following the decision of the workers' compensa-

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\(^5\) "immobilized from the standpoint of gainful employment." 34 Cal. 3d at 238, 666 P.2d at 990-91, 193 Cal. Rptr. at 548-49.

\(^6\) Based on the testimony from the first hearing, a workers' compensation rating specialist determined that petitioner was 60 percent permanently disabled. Petitioner and his employer objected to this rating and a second hearing was held where a Dr. Dansker, a rehabilitation counselor, testified that petitioner had little chance of getting another job given his mental condition. A letter from Dr. Dansker to petitioner's attorney was also introduced. In that letter, Dr. Dansker stated that the evidence concerning petitioner's condition indicated that he would be unable to compete in the open job market. Id. at 238, 666 P.2d at 991, 193 Cal. Rptr. at 549.

\(^7\) A final hearing was eventually held in which another rehabilitation consultant testified that petitioner had several job possibilities despite his mental condition. Id.

\(^8\) "[T]he right to permanent disability does not arise until the applicant's condition becomes permanent and stationary..." Manning v. Workmen's Comp. Appeals Bd., 10 Cal. App. 3d 655, 658, 89 Cal. Rptr. 76, 78 (1970).

\(^9\) Under CAL. LAB. CODE § 4658 (West Supp. 1984), a 60 percent permanent disability entitled petitioner to two-thirds of his average weekly earnings for 311 weeks. A 100 percent disability rating would have provided benefits for life.

\(^7\) The court of appeal and the supreme court also denied petitions for a writ of review. 34 Cal. 3d at 239 n.4, 666 P.2d at 992 n.4, 193 Cal. Rptr. at 550 n.4.

\(^8\) CAL. ADMIN. CODE tit. 8, R. 81 (1983) (§ 10004(a)) provides in pertinent part:

The employer shall report disability status to the Bureau, on forms prescribed for that purpose:

1. Immediately upon knowledge that the employee is unlikely to be able to return to his or her usual and customary occupation, or to his or her occupation at the time of injury, on a permanent basis; or

2. Immediately following 180 days of total disability for cases not previously reported under (1) above.

\(^9\) See also CAL. LAB. CODE § 139.5 (West Supp. 1984) (statute establishing Rehabilitation Bureau).

\(^9\) CAL. ADMIN. CODE tit. 8, R. 79 (1983) (§ 10003(c)) provides in pertinent part:

"Qualified Injured Worker" means an employee:

1. The effects of whose injury, whether or not combined with the effects of a prior injury or disability, if any, permanently preclude, or are likely to preclude the employee from engaging in his or her usual and customary occupation or the position in which he or she was engaged at the time of injury; and

2. Who can reasonably be expected to return to suitable gainful employment through the provision of vocational rehabilitation services.
tion judge and after considering the letter from Dr. Dansker, the Bureau concluded that petitioner was not a qualified injured worker and therefore was ineligible for vocational rehabilitation benefits.

Petitioner did not appeal the Bureau's decision but instead sought to reopen the compensation proceedings pursuant to Labor Code section 5803. He argued that the Bureau's finding constituted "good cause" to increase his permanent disability rating. The petition to reopen was denied by the workers' compensation judge and later by the WCAB.

In determining whether the Bureau's decision constituted "good cause" under section 5803, the court was guided by a rule of liberal construction. The court also considered numerous cases that found "good cause" to be established by "newly discovered evidence," "subsequent clarification of the applicable law," and a "factor or circumstance unknown at the time the original award or order was made which renders the previous findings and award inequitable."
The court concluded that a decision of the Bureau can constitute "good cause" since a permanent disability rating is designed to reflect an injured employee's condition subsequent to any vocational rehabilitation. The vocational rehabilitation an employee receives will affect his ability to compete in the job market. A permanent disability rating is based in part on the injured employee's inability to compete for new jobs. "Similarly, the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account. . . ." The Bureau's decision constituted new evidence of petitioner's condition which was not considered in determining his permanent disability rating. Thus, the prior rating was ineq-
uitable since it failed to reflect the fact that petitioner was ineligible for vocational rehabilitation and therefore might have difficulty competing for jobs.\textsuperscript{24}

The court went on, however, to add a caveat to its decision. Since the legislature provided for vocational rehabilitation with the intent to make injured workers as competitive as possible,\textsuperscript{25} a worker who is denied rehabilitation by the Bureau should appeal that decision before seeking to reopen his permanent disability hearing.\textsuperscript{26} Requiring an appeal "ensures that an injured employee will not be deprived of the opportunity to receive [rehabilitation] benefits unless both the Bureau and the WCAB concur that the worker is unqualified."\textsuperscript{27} Thus, an injured worker that is denied rehabilitation benefits must appeal\textsuperscript{28} that decision before his permanent disability rating may be reconsidered.\textsuperscript{29}

The court's holding in this case was prospective only.\textsuperscript{30} However, the court did allow the petitioner to appeal the Bureau's decision within 20 days of the courts' decision becoming final.\textsuperscript{31}

Justice Richardson, in his separate opinion, concurred in the court's holding that the Bureau's decision had to be appealed before the permanent disability rating could be reconsidered. He

\textsuperscript{24} Cal. 3d at 244, 666 P.2d at 995, 193 Cal. Rptr. at 553 (emphasis in original). The evidence used to reach that determination was irrelevant. \textit{Id.}

\textsuperscript{25} \textit{Id.} at 245-46, 666 P.2d at 996-97, 193 Cal. Rptr. at 554. The court also points out that the WCAB allows \textit{employers} to challenge a prior permanent disability determination if the employee completes a vocational rehabilitation program since the employee may now be better able to compete in the job market. \textit{Id.} at 243-44, 666 P.2d at 995, 193 Cal. Rptr. at 553; \textit{e.g.,} Tangye v. Henry C. Beck & Co., 43 Cal. Comp. Cases 3, 8 (1978) ("[T]he burden is on the [employer] to show that a change in permanent disability has resulted from rehabilitation."). It seems equitable to allow an \textit{employee} to challenge a prior determination because he could not complete vocational rehabilitation. 34 Cal. 3d at 244, 666 P.2d at 995, 193 Cal. Rptr. at 553.

\textsuperscript{26} 34 Cal. 3d at 244, 666 P.2d at 995-96, 193 Cal. Rptr. at 553. \textit{See supra} note 19.

\textsuperscript{27} \textit{Id.} at 244, 666 P.2d at 995-96, 193 Cal. Rptr. at 554. The appeal also increases the chances that a worker whose permanent disability rating was \textit{correct} will receive vocational rehabilitation that he is entitled to. \textit{Id.} at 244-45, 666 P.2d at 996, 193 Cal. Rptr. at 553-54.

\textsuperscript{28} \textit{See supra} note 12.

\textsuperscript{29} \textit{See supra} note 12.

\textsuperscript{30} Only workers whose qualifications for rehabilitation benefits have not been decided by the Bureau at the time of this decision may apply the new procedure. \textit{Id.} at 246, 666 P.2d at 997, 193 Cal. Rptr. at 555. When a new ruling might cause a significant number of workers' compensation cases to be reopened the court will often declare its ruling to be prospective only. \textit{Id.} at n.13. \textit{See, e.g.,} Atlantic Richfield Co. v. Workers' Comp. Apps. Bd., 31 Cal. 3d 715, 727-28, 644 P.2d 1257, 1263-64, 182 Cal. Rptr. 778, 785 (1982).

\textsuperscript{31} 34 Cal. 3d at 246, 666 P.2d at 997, 193 Cal. Rptr. at 555. \textit{See supra} note 12.
dissented, however, from what he considered to be an “unnecessary discussion of the merits of the potential motion for reopening which might be made” if the appeal was unsuccessful.\(^{32}\)

Justice Richardson interpreted the WCAB’s decision rejecting the motion to reopen as primarily relying on the petitioner’s failure to appeal. For this reason, the majority’s discussion of “good cause” was premature.\(^{33}\) The appropriate action, according to Justice Richardson, was to “reaffirm the requirement that an appeal of an adverse Bureau decision must be taken and remand the case for that purpose.”\(^{34}\)

C. *If the requirements of a two-part test are met, an employee may be entitled to workers’ compensation benefits for an injury sustained during treatment of a preexisting disease: Maher v. Workers’ Compensation Appeals Board.*

In *Maher v. Workers’ Compensation Appeals Board*, 33 Cal. 3d 729, 661 P.2d 1058, 190 Cal. Rptr. 904 (1983), a unanimous court held that an employee is entitled to workers’ compensation benefits for an injury sustained during treatment for a disease existing prior to employment if the treatment is required as a condition for continued employment.

Petitioner, Carol Maher, was hired as a nurse’s assistant at a hospital. All prospective hospital employees were required to take a physical examination. Included in the physical examination is a test for tuberculosis. The results of the tuberculosis test showed that the petitioner “had been exposed to and might have contracted the disease prior to her employment.” She was told that she would have to undergo treatment in order to continue working at the hospital.

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32. 34 Cal. 3d at 246, 666 P.2d at 997, 193 Cal. Rptr. at 555 (Richardson, J., concurring and dissenting).
33. *Id.* at 247, 666 P.2d at 997-98, 193 Cal. Rptr. at 555-56 (Richardson, J., concurring and dissenting).
34. *Id.* at 247, 666 P.2d at 998, 193 Cal. Rptr. at 556 (Richardson, J., concurring and dissenting). Although he believed that the majority’s discussion of the merits was dictum, Justice Richardson did present his own discussion of the merits. He concluded that the Bureau’s decision may not have constituted “good cause” since “the original determination of partial disability did not rely on any expectation that petitioner would successfully undertake rehabilitation, and . . . the Bureau’s determination that petitioner was ineligible for its services rests upon the same information which was considered by the judge who determined the degree of permanent disability. . . .” *Id.* at 249, 666 P.2d at 999, 193 Cal. Rptr. at 557.
Maher agreed to take treatment through the county health department. However, in a severe reaction to the medication, Maher became dizzy and nauseous, and eventually her left side became partially paralyzed. As a result, the hospital terminated her employment, finding that Maher could no longer perform her duties.

Maher then filed a workers' compensation claim for disability arising out of her employment. The hospital contested the claim, arguing that Maher’s claim “did not arise out of or in the course of her employment.” 33 Cal. 3d at 732, 661 P.2d at 1059, 190 Cal. Rptr. at 905; see CAL. LAB. CODE § 3600 (West Supp. 1984).

Both prongs of the test must be satisfied. First, the injury must occur “in the course of the employment.” This usually refers to the time, place and circumstances under which the injury arises. See 2 Hanna, California Law of Employee Injuries and Workers’ Compensation (2d ed. 1982), § 9.01(1)(b). State Compensation Insurance Fund v. Industrial Accident Commission, 194 Cal. 28, 227 P. 168 (1924), held that an employee acts within the course of his employment when he performs a duty “imposed upon him by his employer and one necessary to perform before the terms of [his] contract [are] mutually satisfied.” Id. at 35, 227 P. at 170 (emphasis omitted) (quoting Hackley-Phelps-Bonnell Company v. Industrial Accident Commission, 165 Wis. 586, 162 N.W. 921 (1917)).

Here, all parties agreed that Maher was required to undergo treatment as a condition of the performance of her employment contract. The first prong of the test was thus satisfied.

The more difficult question was whether Maher’s injury arose “out of” her employment. To be considered as “arising out of” her employment, an injury must “occur by reason of a condition or incident of [the] employment.” Employers Mutual Liability Insurance Company v. Industrial Accident Commission, 41 Cal. 2d 676, 679, 263 P.2d 4, 6 (1953). In other words, there must be some “causal connection” between the employment and the injury. See Kimbol v. Industrial Accident Commission, 173 Cal. 351, 353, 160 P. 150, 151 (1916).

The court noted that the “question as to whether an injury which has been caused by an employer—required medical treatment for a preexisting, nonindustrial injury meets this standard appears to be one of first impression” in California. Nevertheless, the court felt that the second prong of the test had been satisfied.

Two lines of cases had developed in California. The first required the presence of an “industrial injury” as a prerequisite. In Ballard v. Workmen’s Compensation Appeals Board, 3 Cal. 3d 832, 478 P.2d 937, 92 Cal. Rptr. 1 (1971), an employee suffered an injury in an industrial accident. To treat her, doctors prescribed medica-
tion. When the employee became addicted to the drugs, she applied for disability compensation benefits and was allowed to receive them. It was held that a sufficient causal connection existed between the disability and the employment by virtue of the "industrial injury" which demanded medical treatment.

A second line of cases disregards the "industrial injury" prerequisite and awards compensation benefits where an employee "submits to an inoculation or a vaccination at the direction of the employer and for the employer's benefit" and an adverse reaction causes disability. 33 Cal. 3d at 734-35, 661 P.2d at 1061, 190 Cal. Rptr. at 907 (emphasis omitted); see also Roberts v. U.S.O. Camp Shows, Inc., 91 Cal. App. 2d 884, 205 P.2d 1116 (1949). The Maher court chose to apply this reasoning.

The hospital countered by citing decisions in sister states which held that compensation should be denied "where injury occurred as a result of medical testing or innoculations administered by the employer in conformance with state health requirements." Maher, 33 Cal. 3d at 736-37, 661 P.2d at 1062, 190 Cal. Rptr. at 908. See, e.g., Industrial Commission v. Messinger, 116 Colo. 451, 181 P.2d 816 (1947); Smith v. Seamless Rubber Company, 111 Conn. 365, 150 A. 110 (1930); King v. Arthur, 245 N.C. 599, 96 S.E.2d 846 (1957). It was argued that because the legislature had mandated medical treatment for the protection of the public, it could not properly be called a "requirement of the employment." 33 Cal. 3d at 737, 661 P.2d at 1062, 190 Cal. Rptr. at 908.

The court answered that only the tuberculosis "patch test" was required under state law, and the plaintiff's injury did not result from the patch test but from the treatment for the tuberculosis. The court acknowledged that "[i]f petitioner had suffered an injury as a direct result of the patch test, she could have been denied compensation under the cases cited by respondents." Id. Here, the hospital required treatment of the tuberculosis as a condition of continued employment. Thus, it was her employment that "required petitioner to undergo the treatment and suffer the injury. California law does not require that employment be the sole cause of an injury, only that it be a concurrent or contributory cause." Id. See also Employers Mutual Liability Insurance Co. v. Industrial Accident Commission, 41 Cal. 2d at 680, 263 P.2d at 6. The court also stressed that the rule urged by the hospital had not been adopted in California.

In conclusion, the supreme court held that the employee in this
case was required to undergo treatment for a nonindustrial illness as a condition of continued employment, and that such treatment was to the benefit of the employer and caused further injury to the employee. In light of this, together with the legislative mandate "to construe the Workers' Compensation Act liberally in favor of awarding benefits," CAL. LAB. CODE § 3202 (West 1971), the court held the petitioner's injury to be compensable.

D. WCAB Form 15 release found not to cover release from survivors' death benefits by virtue of the Board's continued failure to modify the form to be more comprehensible: Sumner v. Workers' Compensation Appeals Board.

This case involved the widow of an employee of Pfizer, Inc. who, during his employment, was exposed to high dust levels which partially caused his death. Charles B. Sumner was a packer and loader for Pfizer. He was also a heavy smoker. In 1978, he experienced chest pains, coughing, and other signs of a respiratory ailment. He underwent a medical examination which revealed pulmonary emphysema; his doctor advised him to stop smoking and Sumner did so in January, 1979. Because only half of his disease was attributable to his work environment, Pfizer offered Sumner a $15,000 settlement. This was rejected by Sumner on the advice of a superintendent at Pfizer's Victor Valley plant. A second offer for $25,000 was made by Pfizer; this time the offered settlement was accepted after the Pfizer representative assured Sumner that the employer would offer no more. Sumner died on March 23, 1980.

The $25,000 settlement and accompanying release form made no mention that the agreement would bar the widow's claim for death benefits—the discussions involved Sumner's injuries only. The release form was the Workmen's Compensation Appeals Board's standard form 15.1 The WCAB affirmed the settlement on December 12, 1979.


Upon approval of this Compromise Agreement by the Workers' Compensation Appeals Board or a Referee, and payment in accordance with the provisions hereof, said employee releases and forever discharges said employer and insurance carrier from all claims and causes of action, whether now known or ascertained, or which may hereafter arise or develop as a result of said injury, including any and all liability of said employer and said insurance carrier and each of them to the dependents, heirs, executors, representatives, administrators or assigns of said employee.

Id. (emphasis added).
Sumner's widow alleged that the release as to death benefits was neither knowing nor voluntary. The primary assertion by the widow was "that form 15 of the WCAB, which is used for compromises and releases, is a contract of adhesion which must be interpreted as not covering death benefits."

The issues raised by Sumner's widow were not new. Thirteen years earlier in Johnson v. Workmen's Compensation Appeals Board, the court examined the WCAB's form 15 and determined that:

The board can, and should, devise a form for compromise and release of disability claims which (1) notifies the applicant of the consequences of the release in clear and non-technical language, and (2) does not compel the release of death benefits when the parties and the referee lack sufficient information to weigh the desirability of releasing these benefits and the adequacy of the compensatory consideration.

The WCAB, however, ignored the court's proposal and continued, in essence, to use the same form as it did in Johnson. Sumner is a direct result of the WCAB's failure to modify form 15.

After Sumner's death, his widow filed a claim against Pfizer for death benefits. Pfizer asserted that the compromise and release form was a bar against Mrs. Sumner's claims for death benefits. At the WCAB hearing, the judge expressed his reservations concerning "the continued use of form 15 in light of [the] decision in Johnson," but denied Mrs. Sumner's claim. The judge added that

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2. It was proven at trial that no mention was made "that the execution of the compromise and release agreement would bar applicant's claim for death benefits if her husband died." 33 Cal. 3d at 968, 663 P.2d at 536, 191 Cal. Rptr. at 813. The agreement provided for $25,000 in payments plus all future medical expenses. Id.
3. Id. at 971, 663 P.2d at 538, 191 Cal. Rptr. at 815. An ancillary argument made by Mrs. Sumner was that "no consideration was paid for the release of death benefits." Id. at 971 n.5, 668 P.2d at 538 n.5, 191 Cal. Rptr. at 815 n.5. However, the court believed this argument had no merit.
4. 2 Cal. 3d 964, 471 P.2d 1002, 88 Cal. Rptr. 202 (1970). The court in Johnson held for the WCAB. However, the Johnson court expressed its deep concern respecting the continued use of form 15. Justice Tobriner wrote the majority opinion. See 33 Cal. 3d at 967, 663 P.2d at 535, 191 Cal. Rptr. at 812.
5. 2 Cal. 3d at 974, 471 P.2d at 1008, 88 Cal. Rptr. at 208.
6. 33 Cal. 3d at 967, 663 P.2d at 535, 191 Cal. Rptr. at 812.
7. In the 13 years since Johnson was decided, the WCAB has failed to comply with our directive. Instead, it continues to use basically the same compromise and release form (form 15) which we criticized in that case. Such a form was used in [Sumner as well], and was held by the WCAB to bar entitlement to death benefits by the petitioner. . . .
8. Id. at 969, 663 P.2d at 537, 191 Cal. Rptr. at 814. The workers' compensation judge, in denying Mrs. Sumner's claim, explained that:
the supreme court’s concern over paragraph 11 is well founded, nevertheless, since it could not be held as a matter of law “that the settlement was based upon inadequate consideration or induced by fraud or mutual mistake, he refused to set the settlement aside.”

Mrs. Sumner’s primary claim was that form 15 of the WCAB is a contract of adhesion, and as such should be interpreted as not covering death benefits. The court had addressed this issue in Johnson and rejected it; the worker claimant was protected from an unknowing release of all death benefits before the settlement becomes final only upon approval by a workers’ compensation referee. “This inquiry by the referee should carry out the legislative objective of ‘protecting workmen who might agree to unfortunate compromises because of economic pressure or lack of competent advice.’” However, the WCAB failed to follow the court’s directives that continued use of form 15 “creates a risk that the rights of dependents will be released without the proper attention and analysis of the parties or the referee.”

The court reasoned that because its directives in Johnson to modify form 15 had been ignored, coupled with evidence that the decedent entered into the compromise and release without benefit of independent counsel, but rather upon advice by employer’s representative, that the release was ineffective as to death benefits.

“The criticism of the Supreme Court [in Johnson] seems well founded and Paragraph 11, read by a layman (or even many attorneys) fails to give sufficient language and warning that execution of the document releases the applicant’s [Mr. Sumner’s] dependents from any claim for death benefits,’ . . . since it could not be said as a matter of law that the settlement was based upon inadequate consideration or induced by fraud or mutual mistake, he refused to set the agreement aside.”

Id. 9. Id.
10. Id.
11. Johnson v. Workmens’ Comp. Apps. Bd., 2 Cal. 3d at 973, 471 P.2d at 1007, 88 Cal. Rptr. at 207 (quoting Chavez v. Industrial Acc. Comm’n, 49 Cal. 2d 701, 702, 321 P.2d 449, 450 (1958)). The applicant in Sumner, as in Johnson, contended that her husband, in executing the compromise and release, did not know he was releasing his wife’s claim to death benefits and did not intend such a result. See 33 Cal. 3d at 971, 663 P.2d at 538, 191 Cal. Rptr. at 815.
12. 33 Cal. 3d at 972, 663 P.2d at 539, 191 Cal. Rptr. at 816. It was the legislative intent that the referee protect “workmen who might agree to unfortunate compromises because of economic pressure or lack of competent advice.” Id. at 971, 663 P.2d at 538, 191 Cal. Rptr. at 815.
13. Id. at 972, 663 P.2d at 539, 191 Cal. Rptr. at 816. The court thus reasoned: Accordingly, we declare, in light of the WCAB’s procrastination and the demonstration in this case . . . [citation omitted] that the risk we anticipated in Johnson is far from fanciful, that we will no longer accept form 15—or any form which does not conform to the Johnson directive—as precluding inquiry into whether a release of death benefits was knowing and voluntary.
The court outlined the minimum requirements which must be met before a compromise and release form as to death benefits will be deemed knowing and voluntary. There must be (1) notice of the consequences of signing such a release, (2) in "clear and non-technical language," (3) with attention of the parties and referee directed toward the compromise of death benefits, and (4) which permits the parties to "weigh the desirability of releasing these benefits and the adequacy of the compensatory consideration."

The court thus held:

The board's continued use of current form 15, in light of our decision in Johnson, is impermissible, and any compromise and release executed on this form after the finality of this decision, which does not conform to the Johnson mandate, shall not be deemed to cover death benefits. The order of the WCAB in this case denying applicant's claim as barred by the compromise and release is annulled and applicant allowed to proceed with her claim in accordance with this opinion.

E. Psychiatric injury resulting from employer's investigation of employee arises out of and in the course of the employment: Traub v. Board of Retirement.

Is an employer's investigation and dismissal of an employee, on the basis of misconduct outside the scope of employment, the cause of a service-connected disability when the alleged misconduct is not proved and the dismissal is set aside? In Traub v. Board of Retirement, 34 Cal. 3d 793, 670 P.2d 335, 195 Cal. Rptr. 681 (1983), the supreme court concluded that such a disability was service-connected and, therefore, the employee was entitled to a higher retirement allowance.

The court stated that if the charges against the plaintiff had been upheld, he would not be entitled to a disability pension, but since the charges were unsubstantiated, psychological stress resulting from the investigation justified a service-connected disability pension.

Id.
14. Id.
15. Id. at 974, 663 P.2d at 540-41, 191 Cal. Rptr. at 817-18.
F. The statutory duty to inform an employer of settlement rests solely with the employee where the tortfeasor is unaware of the employer's potential claim and the principles of equitable subrogation bar double recovery: Board of Administration of the Public Employees' Retirement System v. Glover.

In Board of Administration of the Public Employees' Retirement System v. Glover, 34 Cal. 3d 906, 671 P.2d 834, 196 Cal. Rptr. 330 (1983), the court reaffirmed established maxims of equity and subrogation as applied to California statutes governing workers' compensation. An injured public employee, Lavallee, was awarded disability retirement benefits by PERS. She was informed that any settlement with the party responsible for her injuries statutorily required Public Employees' Retirement System's (PERS) notice and consent. She subsequently settled with tortfeasor Glover in full and executed a general release in his favor without notifying PERS. Glover acted without knowledge of PERS' involvement. PERS brought suit against Glover alleging that it did not receive the statutorily mandated notice, the settlement was invalid and it was entitled to subrogation rights. The justices found this remedy to be untenable.

The court declared that the only duty to inform rested with employee Lavallee and her failure to do so did not penalize Glover. Sections 3859(a) and 3860(a) of the California Labor Code provide that no settlement or release is valid without both employer and employee notice and consent. CAL. LAB. CODE §§ 3859(a), 3860(a) (West 1971). These provisions protect both employer and employee by preventing either from recovering at the expense or disadvantage of the other. Employee Lavallee knew of PERS' potential claim while Glover did not. She stood to be unjustly enriched by recovering twice for the same injury if she neglected to advise PERS of the agreement. To relieve Lavallee of her duty to report her recovery or impose it on Glover would have conflicted with a fundamental concept in law: one may not profit from their own wrong at the expense of another. CAL. CIV. CODE § 3517 (West 1970).

The court denied relief on PERS' subrogation claim because Glover would have been subjected to duplicate liability and double recovery which are barred by the principles of equitable subrogation. Sections 3859(b) and 3860(b) of the California Labor Code establish an employee's right to settle unilaterally while preserving the employer's right to proceed against the tortfeasor for sums paid to the employee as compensation for harm caused by the wrongdoer. CAL. LAB. CODE §§ 3859(b) & 3860(b) (West
This enables an employee to segregate his damage claim from his employer's right to reimbursement and to settle without jeopardizing his employer's right to subrogation. However, this exception to the consent and notice requirements (see Cal. Lab. Code §§ 3859(a) & 3860(a) (West 1971)) is limited. The employee's separate settlement is free from the employer's claim only when recovery excludes amounts already accounted for as compensation benefits paid by the employer. Employee Lavallee did not separate her settlement claim from benefits already paid by PERS. She settled Glover's total liability. Sections 3859(b) and 3860(b) were thus inapplicable. PERS only had a derivative right of subrogation dependent upon Lavallee's primary right against Glover. See Cal. Lab. Code § 3852 (West 1971). And since she had no further rights against Glover, PERS was without recourse. A defendant can be liable for the consequences of his or her tort only once.

The moral of Glover is that tenets of equity and fairness exist even within a statutory framework. Relief for an unknowing tortfeasor from the consequences of an invalid settlement is a necessary complement to the rule of subrogation prohibiting both double recovery and double liability. However, the Glover court did state that the employer can pursue the employee in such situations. Finally, advice for future employers providing compensation was tendered: require the employer to identify the tortfeasor and give the wrongdoer prompt notice of the reimbursement claim.

XXVIII. ZONING

A. Public interest organizations must exhaust administrative remedies and may not challenge reasonableness of a filing fee for the first time on appeal: Sea & Sage Audubon Society v. Planning Commission.

The plaintiffs in Sea & Sage Audubon Society v. Planning Commission, 34 Cal. 3d 412, 668 P.2d 664, 194 Cal. Rptr. 357 (1983), sought to reverse the city council's approval of a development project. The city's motion for summary judgment was granted because the plaintiffs had failed to comply with the appeal process provided by local ordinance. On appeal, the plaintiffs argued for
the first time that they should be excused from exhausting all administrative remedies.

The court consented to decide only those arguments which were pure questions of law related to matters of public policy. First, the plaintiffs were not excused from the exhaustion of remedies requirement simply because they were public interest organizations; they were actively engaged in the hearing process and knew the appeals procedure so they were required to file an administrative appeal. Second, the city council had never addressed the plaintiff's specific legal challenge so an appeal would not necessarily have been futile. Finally, the court ruled that the city was authorized to collect an appeals fee. Despite a strong dissent in opposition to the filing fee, the court rejected plaintiff's contention that the fee was unreasonable. Reasonableness, said the court, is an issue of fact which could not be considered for the first time on appeal.

B. A grandfather clause in the Subdivision Map Act applies to all ordinances authorized by the Act, even if the ordinance is also authorized by other statutes: Shelter Creek Development Corporation v. City of Oxnard.

In Shelter Creek Development Corporation v. City of Oxnard, 34 Cal. 3d 733, 669 P.2d 948, 195 Cal. Rptr. 361 (1983), the supreme court addressed the application of a grandfather clause found in an amendment to the Subdivision Map Act (CAL. GOV'T CODE §§ 66410-66499.58 (West 1983 & West Supp. 1984) which became effective on January 1, 1980, and added stock cooperatives to the definition of "subdivision." The Subdivision Map Act grants local agencies the "authority to control the design and improvement of subdivisions of five or more units." The amendment to the Act contained a grandfather clause exempting conversions to stock cooperatives which had applied for a public report prior to July 1, 1979. The plaintiffs made such an application on August 18, 1978, and argued that this relieved them from obtaining a special use permit required by a city ordinance adopted on April 1, 1980. The city claimed that the ordinance was passed pursuant to the authority granted by statutes other then the Subdivision Map Act. The court rejected the city's argument because "the regulation of such conversions following the effective date of the amendment . . . must necessarily also have been effected under the provisions of the [Subdivision Map Act]."

The dissenting justices pointed out that "[t]he majority's holding effectively gives to a developer, whose project satisfies the
prerequisites for application of the grandfather clause, free rein to evade all local regulation of stock cooperative conversions;" a result which the legislature probably did not intend.

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