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The California Supreme Court Survey
A Review of Decisions:
January 1982 - June 1982

The California Supreme Court Survey is a brief synopsis of recent decisions of the supreme court. The purpose of the survey is to supply the reader with a basic understanding of the issues involved in the decisions, as well as to serve as a starting point for researching any of the topical areas.

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I. ATTORNEYS

A. An attorney client fee arrangement may create a valid lien on the process of a judgment: Cetenko v. United California Bank

In Cetenko v. United California Bank, the California Supreme Court was presented with the question of whether a prior lien on a judgment in favor of an attorney for legal fees takes precedence over a subsequent judgment creditor’s lien perfected under the provisions of the California Code of Civil Procedure section 688.1. The court decided that the attorney’s lien would prevail.

In November 1976, Francis Schwartz, an attorney, and Dr. Roman Cetenko, his client, entered into a written agreement whereby Schwartz would represent Cetenko in an action to establish ownership of a parcel of real property. The agreement further provided that Cetenko would pay Schwartz an hourly rate for services rendered plus costs. Although it was agreed that most of the fees would be deferred until a recovery had been obtained in the action, any fees owed by Cetenko at that time would become a lien upon the recovery. Arlene Schaefer, a creditor of Cetenko, recovered a judgment against him in March 1977. In July 1979, she was granted a lien on the proceeds of any judgment Cetenko would recover in the action filed by Schwartz. Cetenko recovered $31,848.28 in the action handled by Schwartz. Schwartz filed a motion seeking release of the entire proceeds to him for payment of services rendered.

In analyzing the case before it, the court stated that a lien may be created by contract. The court further explained that multiple

1. 30 Cal. 3d 528, 638 P.2d 1299, 179 Cal. Rptr. 902 (1982). The majority opinion was written by Justice Mosk, with Chief Justice Bird and Justices Richardson, Newman, Kaus, Broussard and Tobriner concurring.
2. Id. at 530, 638 P.2d at 1300, 179 Cal. Rptr. at 903.
3. Schaefer had loaned $8,000 to Cetenko in 1976, secured by a promissory note. When Cetenko failed to repay the loan, Schaefer filed suit and recovered a judgment against Cetenko for $8,000. Id.
4. In support of the motion, Schwartz submitted a copy of a statement given to Cetenko. The statement reflected an amount due Schwartz of $47,683.73 for legal services and costs. The statement was accompanied by a declaration that the judgment was the only source from which fees could be satisfied because Cetenko had represented that he was unable to pay the fees. Id. at 531, 638 P.2d at 1301, 179 Cal. Rptr. at 904.
5. In support of this statement the court cited CAL. CIV. CODE § 2881 (West 1974), which provides in pertinent part: “A lien is created: 1. [b]y contract of the parties. . . .”
liens imposed upon the same property have priority according to time of creation with those created first having the highest priority.\textsuperscript{6} Therefore, determining whether the contract between Schwartz and Cetenko, being prior to the Schaefer lien, created a valid lien on the proceeds of the judgment would establish who should receive their payment.

The court noted that a lien may be created by an express or implied agreement.\textsuperscript{7} Therefore, since the parties had agreed by contract to secure payment of fees with a lien,\textsuperscript{8} Schwartz had a valid lien on any judgment he obtained for Cetenko. Applying the rule of priority in section 2897 of the Civil Code,\textsuperscript{9} the court held that Schwartz's lien prevailed since it was created prior to Schaefer's.

As the court pointed out, public policy requires the result in Cetenko,\textsuperscript{10} since to hold otherwise might deprive persons with meritorious claims of legal representation because of their inability to pay legal fees. If an attorney's claim for a lien on the judgment based on a contract for fees earned in an action cannot prevail over the lien of a subsequent judgment creditor, attorneys might be discouraged from taking meritorious claims from clients without sufficient funds to pay fees in advance. Certainly justice is better served by this decision.

\begin{itemize}
\item \textsuperscript{6} \textit{CAL. CIV. CODE} § 2897 (West 1974), states: "Other things being equal, different liens upon the same property have priority according to the time of their creation. . . ."
\item \textsuperscript{7} 30 Cal. 3d at 531, 638 P.2d 1301, 179 Cal. Rptr. at 904. See Haupt v. Charlie's Kosher Mkt., 17 Cal. 2d 843, 112 P.2d 627 (1941), where the court recognized the existence of a lien created by a written contract. See also Bartlett v. Pacific Nat'l Bank, 110 Cal. App. 2d 683, 244 P.2d 91 (1952), where the court framed the question of finding an implied contract to create a lien as, "whether or not the parties have contracted that the lawyer is to look to the judgment he may secure as security for his fee." \textit{Id.} at 689, 244 P.2d at 94.
\item \textsuperscript{8} Schaefer argued that a contract for an hourly fee which is to constitute a lien on the judgment is unconscionable as a matter of law. Schaefer claimed this was because the fee and costs may consume the entire judgment recovered.
\item The court responded that the fairness of a fee and a lien securing it must be determined at the time of contracting. The court stated that there was nothing "inherently unfair" about paying an attorney an hourly fee for his services. 30 Cal. 3d at 532, 638 P.2d at 1301, 179 Cal. Rptr. at 904.
\item \textsuperscript{9} See supra note 6.
\item \textsuperscript{10} 30 Cal. 3d at 535, 638 P.2d at 1304, 179 Cal. Rptr. at 907.
\end{itemize}
II. CIVIL PROCEDURE

A. Frivolous appeals: In re Marriage of Flaherty

In re Marriage of Flaherty\(^1\) presented the California Supreme Court with the question of what constitutes a frivolous appeal.\(^2\) While California statutes currently provide authority for appellate courts to impose additional damages on lower court judgments and sanctions on attorneys involved in appeals found to be taken for reasons of harassment or delay,\(^3\) there is no uniform standard provided in either California statutes or case law which outlines the instances when such impositions should be made.\(^4\) In Flaherty, the supreme court considered a compilation of prior cases to determine what constitutes a frivolous appeal.

In its opinion, the court initially noted that the lack of a definitive standard establishing the elements of a frivolous appeal\(^5\) has a tendency to impede the effectiveness of the judicial process. The court recognized that the absence of a clear standard made the successful evaluation by an attorney of the propriety and viability of a potential appellate action unpredictable\(^6\) and thus in-

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1. 31 Cal. 3d 637, 646 P.2d 179, 183 Cal. Rptr. 508 (1982). The majority opinion was authored by Chief Justice Bird and was joined by Justices Mosk, Richardson, Kaus, and Broussard. Justice Newman concurred and dissented in part.

2. See generally, Kallay, The Dismissal of Frivolous Appeals by the California Courts of Appeal, 54 CAL. ST. B.J. 92 (1979) (hereinafter cited as Kallay). Commentators have on occasion drawn attention to the difficulty of defining "frivolous" in the context of an appeal. . . . Below the surface lurks the question whether the courts, unguided by statute, rule or clear precedent, have the right to deny a litigant access to the appellate process to which he is entitled by statute. Id. at 92. (footnote omitted).

3. See CAL. CIV. PROC. CODE § 907 (West 1980). The statute provides: "When it appears to the reviewing court that the appeal was frivolous or taken solely for delay, [the court] may add to the costs on appeal such damages as may be just." Other statutory authority provides for the disposition of frivolous appeals. See Kamine, Frivolous Appeals, 47 CAL. ST. B.J. 307 (1972). "[T]he courts have a great deal of inherent power drawn from the common law to control their proceedings. This is not only to preserve dignity and decorum, but also to further the orderly administration of justice." Id. at 307. This power is in the California Code of Civil Procedure. See CAL. CIV. PROC. CODE § 128. See, e.g., Cantillon v. Superior Court, 150 Cal. App. 2d 184, 187, 309 P.2d 890, 893 (1957). See also CAL. R. CT. 26(a).

Where the appeal is frivolous or taken . . . solely for the purpose of delay or where any party has been guilty of any other unreasonable infraction of the rules governing appeals, the reviewing court may impose upon offending attorneys and parties such penalties, including the withholding or imposing of costs, as the circumstances of the case and the discouragement of like conduct in the future may require.

Id.

4. 31 Cal. 3d at 646, 636 P.2d at 185, 183 Cal. Rptr. at 514.

5. Id. "Neither the Rules of Court nor the statutes provide any guidance as to the definition of a frivolous appeal. . . . [T]he published opinions fail to provide a clear definition of the concept 'frivolous.'" Id.

6. Id. at 647, 646 P.2d at 186, 183 Cal. Rptr. at 515. "The strong public policy in favor of the peaceful resolution of disputes in the courts requires that attorneys
hibited attorneys in fulfilling their duty to vigorously pursue their client's interests through appeals. Confronted with the lack of any standard by which to determine the frivolity of an appeal, attorneys are wedged between a duty to their client to diligently pursue any meritorious claims and a duty to refrain from submitting and prosecuting appeals that are devoid of merit.

To resolve these competing interests and to ensure the vigorous advocacy of clients' interests, the court set forth a two-pronged test to enable attorneys to successfully determine when an appeal would be valid. The standard articulated by the court would look to both subjective and objective factors in determining whether a specific appeal is taken frivolously. The subjective-standard interprets the motive of the appellant and his or her counsel in submitting the appeal. The actions and conduct of the attorney may be used as factors in determining the good or bad faith of the petitioner in bringing an appeal.

not be deterred from pursuing legal remedies because of a fear of personal liability."

7. Id. "If the issue which the attorney is called upon to decide is fairly debatable, then under his oath of office, he is not only authorized but obligated to present and urge his client's claim upon the court." Id. (citing Murdock v. Gerth, 65 Cal. App. 2d 170, 179, 150 P.2d 488, 493 (1944)).

8. Id. See also Kirsh v. Duryea, 21 Cal. 3d 303, 309, 578 P.2d 935, 936, 146 Cal. Rptr. 218, 222 (1978). "An attorney is often confronted with clashing obligations imposed by our system of justice. An attorney has an obligation not only to protect his client's interests but also to respect the legitimate interests of fellow members of the Bar, the judiciary, and the administration of justice." Id.


10. 31 Cal. 3d at 649, 646 P.2d at 186-87, 183 Cal. Rptr. at 515-16.


12. 31 Cal. 3d at 649. Quoting Simon v. Bemis Bros. Bag Co., 131 Cal. App. 2d 378, 382, 280 P.2d 528, 530 (1955) the court said, "the court [in Simon] rejected a claim that an appeal was frivolous, noting that counsel presented his argument in a 'courteous and gracious' manner and seemed to believe 'fervently' that he might succeed on the merits." See also, Richmond v. Dofflemeyer, 105 Cal. App. 3d 745,
standard uses the reasonable person test to measure the substantive merits and validity of the appeal. If the appeal is submitted upon patently unmeritorious grounds, then it is frivolous and a waste of our already limited judicial resources. The court felt that the combined use of these two standards would safeguard the policies behind both discouraging frivolous appeals and allowing speculative yet good faith appeals to go forward.

Penalizing the appellant who files an appeal in bad faith discourages such conduct, yet does not affect those appeals that can be shown to be taken for the purposes of receiving hearings on unresolved and viable issues. Thus, in the words of the court:

an appeal should be held to be frivolous only when it is prosecuted for an improper motive — to harass the respondent or delay the effect of an adverse judgment — or when it indisputably has no merit — when any reasonable attorney would agree that the appeal is totally and completely without merit.

Because the statutes allowing sanctions against attorneys conducting frivolous appeals are summary and discretionary, the court included in its analysis an instruction as to the manner in which the newly formulated standard defining frivolous appeals should be judicially applied. Observing the due process concerns attached to the individual's property right of pursuing a chosen profession, the court held that sanctions which are

164 Cal. Rptr. 727 (1980) (good faith of attorney shown where issues were a case of first impression).

13. 31 Cal. 3d at 649, 646 P.2d at 186-87, 183 Cal. Rptr. at 515-16. The objective test is an extension of a previously utilized standard known as the "mere glance" test. See Id. at 650 n.6, 646 P.2d at 187 n.6, 183 Cal. Rptr. at 516 n.6. See also, Kallay, supra note 2 at 95-96; Crook v. Crook, 184 Cal. App. 2d 745, 751, 7 Cal. Rptr. 892, 896 (1960) ("An appeal is 'frivolous' where the lack of merit is apparent from a mere glance at the record.") But see, People v. Sumner, 262 Cal. App. 2d 409, 415, 69 Cal. Rptr. 15, 19-20 (1968).

14. The language of the court in describing this standard is ambiguous. It is difficult to ascertain the standard by which the "reasonable man" may be measured. Is he an attorney? Is he an attorney specializing in the particular field in question? See, Kallay, supra note 2 at 92. "The judge of a trial court would be severely chastised were he to dismiss a case on the sole and express grounds that no reasonable lawyer would have brought it or, alternatively, that any person would agree that the case was without merit." Id. at 96.

15. Id. See generally, Oberman, Coping with Rising Caseload II: Defining the Frivolous Civil Appeal, 47 BROOKLYN L. REV. 1057 (1981).

16. 31 Cal. 3d at 650-51, 646 P.2d at 187-88, 183 Cal. Rptr. at 516-17.

17. Id. at 650, 646 P.2d at 187, 18 Cal. Rptr. at 516.

18. Id.


20. 31 Cal. 3d at 654, 646 P.2d at 190, 183 Cal. Rptr. at 519.

21. Id. There is a constitutionally protected right to pursue a chosen profession. See Endler v. Schutzbank, 68, Cal. 2d 162, 169, 436 P.2d 297, 302, 65 Cal. Rptr.
based upon the professional conduct of an attorney are only valid if the constitutional requirements of prior notice and hearing are satisfied.\textsuperscript{22} Additionally, the court felt that mandating those requirements would foreclose a potential scenario wherein an attorney is victimized by judicial sanctions resulting not from patent misconduct, but from mere overzealous advocacy.\textsuperscript{23} Further, adherence to procedural due process considerations will ensure that the new standard determining the existence of a frivolous appeal is not arbitrarily or capriciously applied to otherwise meritorious cases in the venting of judicial anger.

While divergent views may exist,\textsuperscript{24} it would appear that the decision of the supreme court in \textit{Flaherty} will provide useful and well-reasoned guidelines for the determination of the existence of frivolous appeals, while simultaneously protecting the professional interest of attorneys in proposing unique interpretations of the law on appeal without fear of unwarranted judicial reprisal. The two-pronged design of the test provides a broad basis for determining the legitimacy of appeals without inhibiting the legitimate vigorous exercise of the right of appeal. At the same time it provides adequate protection for parties who are the object of harassing or oppressive appellate actions and also relieves the appellate courts from the burden of dealing with unmeritorious claims.

\textbf{B. Class actions are available in arbitration proceedings involving adhesion contracts: Keating v. Superior Court}

In a decision that is the first of its kind in the nation,\textsuperscript{1} the California Supreme Court, in \textit{Keating v. Superior Court}, made the

\textsuperscript{22} 31 Cal. 3d at 654, 646 P.2d at 190, 183 Cal. Rptr. at 519.

\textsuperscript{23} "Such power in the trial court [to grant sanctions upon the court's discretion], unfettered and unbridled, without appropriate safeguards and guidelines, could lead to the imposition of sanctions not for misconduct but for forceful advocacy." \textit{Id.} at 653, 646 P.2d at 189, 183 Cal. Rptr. at 518 (quoting Baugess v. Paine, 22 Cal. 3d 626, 639, 586 P.2d 942, 949, 150 Cal. Rptr. 461, 468 (1978)).

\textsuperscript{24} "I do not agree that 'holding a hearing' is prerequisite to penalizing counsel for a frivolous appeal." \textit{Id.} at 654, 646 P.2d at 190, 183 Cal. Rptr. at 519 (citation omitted) (Newman, J., dissenting).

\textsuperscript{1} Keating v. Superior Court of Alameda County, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982).
class action procedure available in arbitration proceedings. Of no
less import, the court also decided that the Federal Arbitration
Act2 did not compel the arbitration of claims alleging violations of
California's Franchise Investment Law.3 Keating promises to
have profound impact on the way disputes arising out of contracts
of adhesion will be resolved.

I. FACTUAL SETTING

Five individual franchised operators4 of 7-Eleven convenience
stores filed actions against their franchisor, Southland Corpora-
tion, alleging a variety of tortious and statutory offenses including
fraud, oral misrepresentation, breach of contract, breach of fiduci-
ary duty, and violation of the Franchise Investment Law (FIL).5
The franchisees complained of alleged misrepresentations made
by Southland as to how the franchise fees would be computed,
what the income of the stores would be, and how losses from
shoplifting would be accounted for.6 Southland filed an answer to
each complaint, raising plaintiff's failure to arbitrate their claims
as an affirmative defense. However, Southland did not seek to
compel arbitration of the claims until Richard D. Keating filed his
class action against Southland.

Keating filed his claim on behalf of approximately 800
franchised 7-Eleven store operators in California alleging the
same misconduct as was alleged by the individual plaintiffs, ad-
ding a count that Southland's accounting procedures were "unfair
and inaccurate."7 Southland, a Texas corporation, removed the
class action to federal court on the basis of diversity of citizenship
jurisdiction,8 and filed an answer and counter-claim to Keating's

3. CAL. CORP. CODE §§ 31000-31516 (West 1982).
4. One of the original complainants settled with Southland before the case
came to the supreme court on appeal.
5. The franchisees sued specifically for breach of the disclosure require-
ments. See CAL. CORP. CODE §§ 31110-31125 (West 1982).
6. Under the standardized agreement signed by each 7-Eleven franchisee,
Southland agreed to provide each franchisee with a license to use certain federally
registered trademarks, a lease or sublease of the store building which Southland
either owned or leased itself, and the financing for the store inventories along with
advertising and merchandising assistance. The franchisee was to operate the
store, supply Southland with bookkeeping data, make bank deposits with receipts
from the store's operation, and pay Southland a fixed percentage of the store's
profits. The agreement contained an arbitration clause requiring any dispute aris-
ing out of the agreement to be submitted for arbitration. Richard D. Keating, who
later filed a class action against Southland, was told of the arbitration clause and
received a pamphlet prepared by the American Arbitration Association describing
the arbitration procedure.
7. 31 Cal. 3d at 592, 645 P.2d at 1195, 183 Cal. Rptr. at 363.
complaint. Southland later amended its answer raising the class’s failure to arbitrate its grievances with Southland as an affirmative defense. The franchisees petitioned for a remand to the state courts, and the federal court complied. Southland then petitioned the state court to compel arbitration in all of the pending cases.

The trial court stayed its ruling on Southland’s petition because the franchisees had moved to coordinate their actions. The Judicial Council granted the motion on the condition that “substantially” amended complaints be filed demonstrating the similarities among the actions. The trial court then granted Southland’s petition, compelling arbitration of all claims except for the FIL count. The court, however, refused to consider the franchisee’s request for class certification, forcing them to proceed individually to arbitration.

Southland appealed from the order to arbitrate in that it required judicial resolution of the FIL claims. The plaintiffs also petitioned for a writ of mandate or prohibition from the order to arbitrate. Plaintiffs contended the arbitration clause of the franchise agreement was not arbitrable because the agreement was adhesive. They argued that alleged FIL violations were not arbitrable and that Southland had waived its right to arbitration. The franchisees then asserted that, in the event the issues were found to be arbitrable, arbitration proceed on a class-wide basis. The supreme court easily disposed of the adhesion and waiver claims, and proceeded to consider whether the FIL claims were

9. The remand of the action was that complete diversity did not exist because of the presence of California defendants. 31 Cal. 3d at 618, 645 P.2d at 1212, 183 Cal. Rptr. at 380.

10. CAL. CIV. PROC. CODE §§ 404-404.8 (West 1982).

11. In order to coordinate separate actions, each action must share a “common question of fact” which is “predominating and significant to the litigation.” CAL. CIV. PROC. CODE §§ 404, 404.1 (West 1982).

12. The opinion from the court of appeals was reversed by the supreme court. See Keating v. Superior Court of Alameda County, 167 Cal. Rptr. 481 (1980), rev’d, 31 Cal. 3d 584, 645 P.2d 1192, 183 Cal. Rptr. 360 (1982).

13. The supreme court agreed with the plaintiffs that the contract was adhesive in that it was prepared by the party with the stronger bargaining position and was imposed on the weaker party on a “take it or leave it” basis. Contracts of adhesion, however, are not unenforceable as such. Even though the plaintiffs were forced to waive their right to a jury trial in the event of a dispute, they were sufficiently advised of the arbitration provision so as to know what they were doing when they signed the agreement.

Concerning the waiver claims, the court decided to uphold the trial court’s determination that Southland had not waived the arbitration provision by delaying
arbitrable, and whether the arbitration of any of the claims could proceed as a class action.

II. ARBITRABILITY OF FRANCHISE INVESTMENT LAW CLAIMS

Justice Grodin\textsuperscript{14} decided that the FIL claims were not arbitrable because a provision in the FIL itself prohibited parties to a franchise agreement from waiving court trial and judicial review of claims arising under the FIL.\textsuperscript{15} The section cited by Justice Grodin, however, does not mention court trials in its general prohibitory language. But Grodin analogized the non-waiver provision of the FIL to section 14 of the Securities Act of 1933\textsuperscript{16} which, with nearly identical language, forbids waiving "compliance with any provision of this subchapter or of the rules and regulations of the Commission [Securities and Exchange Commission]." Grodin cited \textit{Wilko v. Swan},\textsuperscript{17} in which the United States Supreme court permitted a customer to sue his brokerage firm for alleged misrepresentations in the sale of securities even though the customer had signed a margin agreement with the firm requiring arbitration of disputes. The Supreme Court decided that, absent judicial review of claims arising out of the 1933 Act, securities investors would lose valuable rights because the "effectiveness of the statute 'is lessened in arbitration as compared to judicial proceedings.'"\textsuperscript{18}

Justice Grodin then turned to legislative history and determined that California intended the non-waiver provision of the FIL to be interpreted in accord with \textit{Wilko v. Swan}.\textsuperscript{19} Grodin looked for support of this proposition in the nearly identical language of the FIL and the Securities Act of 1933. Further, Grodin inferred that their purposes also were identical: "protecting investors through preinvestment disclosure statements."\textsuperscript{20} Citing lan-

\begin{footnotesize}
\begin{itemize}
\item[14.] Justice Grodin, a court of appeals justice, sat by designation of the chairperson of the Judicial Council.
\item[15.] Section 31512 of the Corporations Code provides: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void." \textsc{Cal. Corp. Code} § 31512 (West 1982).
\item[17.] 346 U.S. 427 (1953).
\item[18.] 31 Cal. 3d at 596, 645 P.2d at 1199, 183 Cal. Rptr. at 367.
\item[19.] \textit{Id.} at 597, 645 P.2d at 1199, 183 Cal. Rptr. at 367.
\item[20.] Justice Grodin compared the identical definitions of "sale," "misrepresentations by omission," the burden of proving due diligence, the provision for injunction, and the liability of control persons in the two acts. \textit{Id.} at 597 n.8, 645 P.2d at 1199 n.8, 183 Cal. Rptr. at 367 n.8.
\end{itemize}
\end{footnotesize}
guage from Belridge Farms v. Agricultural Labor Relations Board,21 Grodin determined that when California legislators pattern their legislation after federal legislation on similar matters, they intend for the California law to be given a similar interpretation. Justice Grodin also reviewed the history leading up to the adoption of the Franchise Relations Act,22 noting a preliminary report prepared by the Assembly Committee on Finance, Insurance and Commerce which specifically analogized the FIL to the Securities Act of 1933. The report explained that the FRA would deem arbitration more acceptable in the context of "franchise relationships already established," in that judicial review would be more available for FRA violations than FIL violations because of more detailed provisions for civil liability, administrative regulation, and criminal liability.23

After establishing that the legislature intended for the non-waiver provision of the FIL to be interpreted as preventing the waiver of judicial remedies, the court had to overcome Southland's argument that the Federal Arbitration Act (FAA) preempted state legislation in that area. Southland argued that section two of the FAA24 established a "general principle of arbitrability which preempts any state law or policy restricting of arbitration." Justice Grodin reasoned that Congress, in enacting the FAA, intended to overcome state-wide prejudice against arbitration.25 Yet, as he pointed out, California had since expressed its support for arbitration as a reasonable means of conflict reso-

22. CAL. BUS. & PROF. CODE §§ 20000-20043 (West 1982).
23. CAL. CORP. CODE §§ 31300, 31400, 31410 (West 1982).
24. 9 U.S.C. § 2 (1976) reads in part: "A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Id.

Justice Grodin read the Federal Arbitration Act as interrelated with the presence of interstate commerce. Interstate commerce was evident because the 7-Eleven franchise agreement was between California residents and a Texas corporation, involved the use of federally registered trademarks, and contemplated a "continuing business relationship between the parties across state lines." 31 Cal. 3d at 592, 645 P.2d at 1196, 183 Cal. Rptr. at 364.

25. There was a certain amount of judicial hostility against arbitration when it was in its infancy. Justice Grodin reasoned that the Federal Arbitration Act was adopted in 1925 in order to combat this hostility and specifically to protect arbitration provision in interstate contracts in any judicial forum.
lution. Any exception to the general principle of arbitrability would not reflect "hostility toward arbitration, nor . . . an obstacle to the . . . enforcement of arbitration agreements in a manner consistent with federal law." It would only reflect California's opinion that public interest would best be served by maintaining access to the courts for rights and remedies created by the legislature. He thought it "highly improbable" that Congress, through the FAA, intended to "override state policies of that nature."26

Although the FAA did not compel exclusivity of application by its own terms, Justice Grodin could find no evidence that Congress had preempted the field of "franchise investor regulation" as it had other fields.27 He cited with approval the test for preemption established by the United States Supreme Court in *Merrill Lynch, Pierce, Fenner & Smith v. Ware.*28 Further, Justice Grodin determined that, since California had "manifested a strong policy of protecting its [franchise investors] from ... undesirable economic pressures affecting the [franchise] relationship" through a "regulator scheme" patterned after federal regulation, California law should be allowed to co-exist with federal law to the extent that it protected the investor more fully.29

### III. Availability of Class Action Procedures in Arbitration

In order to establish the availability of class action procedures in arbitration proceedings, Justice Grodin had to overcome a strong constitutional objection raised by Justice Richardson in dissent. He was also forced to acknowledge the fact that other states, as well as previous California courts,30 had expressly rejected the position that Grodin would take.

The rationale behind the court's decision to make class actions available in arbitration was to prevent the party with the stronger bargaining position from shielding himself against class-wide res-

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27. 31 Cal. 3d at 602, 645 P.2d at 1202, 183 Cal. Rptr. at 370.
28. Id.
29. Id. at 602-03, 645 P.2d at 1203, 183 Cal. Rptr. at 371. Justice Grodin cited, as an example, the field of labor relations. In addition, the Federal Arbitration Act did not enact substantive law which was not intrinsic to a federally regulated field.
31. 31 Cal. 3d at 371, 645 P.2d at 1203, 183 Cal. Rptr. at 371. Justice Grodin noted, however, that the applicability of the Federal Arbitration Act was not in question in *Ware*, so that the holding would not be controlling. He argued, however, that the policy enunciated by the court in *Ware* strongly supported the rejection of Southland's position.
olution of disputes arising out of the agreement by merely inserting a provision for arbitration.\textsuperscript{33} Yet in the case of contracts of adhesion, class-wide resolution makes more sense because of the uniformity of the contracts and the similarity of interest among the participants. Because claims in such situations would likely be small, large corporate defendants could effectively immunize themselves from complaints by making each plaintiff proceed individually.

Justice Grodin readily acknowledged, however, the lack of authority for his position.\textsuperscript{34} Yet he could infer authority by analogizing to a similar procedure already accepted in arbitration: that of consolidation. Justice Grodin stated that the federal courts, without specific authorization in the FAA, have allowed consolidated actions to proceed in arbitration.\textsuperscript{35} Even state courts have agreed to consolidated arbitration proceedings without express statutory authorization.\textsuperscript{36} He then noted section 1281.3 of the California Code of Civil Procedure, which provides for consolidated arbitration proceedings even where all are not parties to the same agreement and only one party has had a voice in choosing the arbitrator.\textsuperscript{37}

Justice Richardson, however, accused the court of overstepping its constitutional bounds at this point. He admitted that section 1281.3 provided for consolidated actions in arbitration, but refused to consider that as controlling without considering the institutional history of the section. It was enacted as a result of \textit{Atlas Plastering, Inc. v. Superior Court}.\textsuperscript{38} In this case, a subcontractor

33. 31 Cal. 3d at 609, 645 P.2d at 1207, 183 Cal. Rptr. at 375.
34. \textit{Id.} at 610, 645 P.2d at 1208, 183 Cal. Rptr. at 376.
35. Because Rule 81(a)(3) of the Federal Rules of Civil Procedure makes the rules applicable in situations where the statute in question does not provide a specific procedural course, and because the Federal Arbitration Act does not so provide, federal courts are authorized, using Rule 42(a), to provide for consolidated arbitration proceedings.
36. Justice Grodin referred to New York's position that in the absence of statutory authority, New York courts can regulate the method of the enforcement of contracts, and cited a number of state court decisions in accord. \textit{See} 31 Cal. 3d 611-12, 645 P.2d at 1208, 183 Cal. Rptr. at 376 and cases cited therein.
37. \textit{CAL. CRV. PROC. CODE} § 1281.3 (West Supp. 1982). Section 1281.3 permits consolidation of separate arbitration proceedings when: 1) the same parties have separate arbitration proceedings between themselves or one of them has a separate proceeding with a third party, or 2) the disputes arise from the same transaction or series of related transactions, and there is a common issue or issues of law or fact creating the possibility of conflicting decisions if each claim were to be arbitrated separately.
had attempted to consolidate arbitration proceedings between himself and several other subcontractors, but because they had not contractually agreed on consolidated arbitration proceedings, and because there was no statutory provision at that time for consolidation of actions in arbitration, the court would not allow consolidation. The California legislature enacted section 1281.3 to remedy the problem presented in *Atlas*, but this was too late to help the subcontractors. In a similar vein, Justice Richardson argued that without an express agreement between the parties, or statutory authority, the court was bound to follow the example of the *Atlas* court and refuse plaintiffs' request for class-wide arbitration.

Justice Grodin, on the other hand, believed that the policies favoring class actions outweighed those of enforcing the parties' contractual agreement requiring arbitration. While he admitted that class arbitration would entail a "greater degree of judicial involvement than is normally associated with arbitration," he could not see how that heightened involvement would unreasonably burden the arbitration proceeding to the extent of making it inefficient. In this respect, he rejected the New York Appellate Division's determination in *Harris v. Shearson Hayden Stone, Inc.* Passing on the identical issue, the court denied class-wide arbitration to two customers of the defendant brokerage firm who were suing for defendant's breach of fiduciary duty in the handling of their commodities account. Plaintiffs' class was deemed merely "putative," and the court held the policy favoring arbitration as controlling.

Justice Grodin continued by stating that the benefits of class-wide arbitration would be greater than those of consolidated arbitration, and would require no greater intrusion on the contractual relationship of the parties. He admitted that class-wide arbitration would require greater judicial supervision of the arbitration proceedings, yet he felt that in the unique situation of an adhesion contract, class-wide arbitration might provide even greater


40. Id. at 613, 645 P.2d at 1209, 193 Cal. Rptr. at 377. Justice Grodin admitted that the court's involvement would entail determinations regarding certification and notice to the class, along with a measure of "external supervision" to ensure the adequate representation of absent class members in the probable event of a settlement. It would be difficult, according to Justice Grodin, for the court not to intrude on the merits of the dispute or the conduct of the proceedings. This difficulty would threaten to make the proceedings more complex, costly, and delayed.

41. Id.

42. 82 A.D.2d 87, 441 N.Y.S.2d 70 (1981).

43. See supra note 39 and accompanying text.
efficiency than that associated with individual arbitration. Justice Grodin urged, however, that fairness to the individual franchisees alone would be reason enough for adopting a tightly-tailored rule in favor of class action.

IV. IMPACT

The impact of the court's determination of the preemption issue is difficult to assess at this point. Counsel for the defendant have indicated that an appeal to the United States Supreme Court is a certainty because of the California Supreme Court's resolution of federal law. Justice Richardson disagreed with Justice Grodin's interpretation of Wilko v. Swan, and concluded that the non-waiver provision of the FIL "impermissibly conflicts with the Federal Arbitration Act" and must be held void under the supremacy clause. Justice Grodin's discussion of the application of the FAA was unnecessary in view of his ultimate decision to make class-wide arbitration available. Assuming that his main purpose was to prohibit Southland from avoiding class-wide resolution of its franchisee's claims, this was accomplished by the court's opinion, and all of the claims would be arbitrated as a class. Justice Grodin's opinion may tempt the United States Supreme Court to consider the non-federal issue of class-wide arbitration due to the court's hostility towards class actions evidenced by its recent cases.

Justice Grodin did not order the superior court to certify Keating's class. The court merely remanded with instructions to consider a number of factors in making a decision whether to certify the class or not. In making his decision, Judge Kroninger was instructed to consider factors he would normally consider when presented with a request for class certification. In addition, the court instructed him to consider the special aspects of arbitration and the extent to which judicial supervision might unreasonably impede the arbitration proceedings. Judge Kroninger was also to consider consolidation as an alternative. Finally, Southland's in-

44. 31 Cal. 3d at 613, 645 P.2d at 1209, 183 Cal. Rptr. at 377. Justice Grodin characterized adhesion contracts as not providing a "normal" arbitration setting.
45. Id.
47. 31 Cal. 3d at 615, 645 P.2d at 1211, 183 Cal. Rptr. at 379. See U.S. Const. art. VI, § 2.
48. 31 Cal. 3d at 613-14, 645 P.2d at 1209-10, 183 Cal. Rptr. at 377.
terests were to be considered and a determination made concern-
ing whether its legitimate interests might be prejudiced by class-
wide arbitration. Southland was to be provided the option of re-
mainin in court if Judge Kroninger determined that the class
should be certified.

Thus, the impact of *Keating v. Superior Court* portends to be
rather narrow. The trial judge's determination of class certifi-
tion will still be tested by the narrow abuse of discretion stan-
dard. Class-wide arbitration will probably not extend beyond the
narrow bounds of *Keating's* obviously sympathetic factual back-
ground. However, the California Supreme Court's expression of
its support for the much-maligned class action is worthy of notice.
If the United States Supreme Court decides not to disturb the
court on its class-action decision, it might set the stage for other
states to follow California's lead.

**III. CONSTITUTIONAL LAW**

**A. “The Victim's Bill of Rights”: Brosnahan v. March Fong Eu**

*Brosnahan v. Eu*¹ presented the Supreme Court of California
with the question of whether an initiative measure² should have
been placed on the ballot of the June, 1982 primary election.

In *Brosnahan*, the petitioners³ sought to prevent the respon-
dent Secretary of State from placing on the ballot of the June,
1982 primary election an initiative measure, the substance of
which related to “Criminal Justice.” The initiative was entitled
“The Victims’ Bill of Rights.” It was the petitioners’ contention
that the respondent failed to comply with certain statutory provi-
sions which determine whether an initiative should be placed on
the ballot. The petitioners further contended that the proposed
measure was unconstitutional because it contained more than
one subject, a violation of the California Constitution⁴ and that it
amounted to a “revision” of the Constitution rather than an
“amendment.”

The proponents of “The Victims’ Bill of Rights” presented to
the appropriate officials petitions containing 663,409 signatures.
The appropriate number of valid signatures to allow the measure

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¹. 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982). The opinion was written
by the court.

². CAL. CONST. art. II, § 8(a) reads: “The initiative is the power of the electors
to propose statutes and amendments to the Constitution and to adopt or reject
them.”

³. The petitioners in this case are electors in various counties throughout the
State of California. 31 Cal. 3d at 3, 641 P.2d at 201, 181 Cal. Rptr. at 101.

⁴. CAL. CONST. art. II, § 8(d) provides: “An initiative measure embracing
more than one subject may not be submitted to the electors or have any effect.”

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to be placed on the ballot was 553,790. Based on random sampling, the respondent determined that the petitions contained 108.76 percent of the number of signatures required for the initiative to be placed on the ballot, short of the 110 percent required by the California Elections Code section 3520(g). Section 3520(g) requires that local election officials verify each signature when the 110 percent figure is not reached. Nevertheless, the respondent ultimately determined that the 108.75 percent valid signatures on the petitions constituted substantial compliance with the requirements of the Elections Code to qualify the measure for the June, 1982 ballot without verifying each signature. Therefore, a writ of mandate was issued by the trial court directing the respondent to place the measure on the June, 1982 ballot. The present petition was then filed with the supreme court.

In deciding the case, the court noted that the legislature passed, and the Governor signed, an urgency measure which would allow an initiative petition to be placed on an election ballot if the number of valid signatures on the initiative petition was more than 105 percent of the number of qualified voters needed. Based on this urgency measure, the court determined that "The Victims' Bill of Rights" should be placed on the ballot of the June, 1982 primary election.

The court decided not to consider the constitutional issues raised by the petitioners, stating that constitutional and other challenges to ballot propositions should be reviewed after an election unless there is a clear showing that the proposition is invalid.

5. 31 Cal. 3d at 3, 641 P.2d at 200, 181 Cal. Rptr. at 100. This number is determined by reference to Cal. Const. art II § 8(b) which provides:

An initiative measure may be proposed by presenting to the Secretary of State a petition that sets forth the text of the proposed statute or amendment to the Constitution and is certified to have been signed by electors equal in number to 5 percent in the case of a statute, and 8 percent in the case of an amendment to the Constitution, of the votes for all candidates for Governor at the last gubernatorial election.

6. Cal. Elec. Code § 3520(g) (West Supp. 1982) reads as follows:

If the certificates received from all county clerks by the Secretary of State total more than 110 percent of the number of qualified voters needed to find the petition sufficient, the petition shall be deemed to qualify as of the date of receipt by the Secretary of State of certificates showing the petition to have reached such 110 percent, and the Secretary of State shall immediately so notify the proponents and the county clerks.

7. 31 Cal. 3d at 4, 641 P.2d at 201, 181 Cal. Rptr. at 101. The Secretary of State was required to have received such information on or before January 28, 1982. Id.

8. Id. This was because the petitions contained 108.76 percent of the number of signatures required for a place on the ballot, and only 105 percent was required.
This prevents the disruption of the electoral process.9

B. A private party is immune from governmental civil suits for malicious prosecution: City of Long Beach v. Bozek

Resolving a question of first impression, the California Supreme Court ruled in City of Long Beach v. Bozek1 that a governmental entity may not maintain a civil action for the tort of malicious prosecution against a private party.2 The court articulated its rationale for the existence of an absolute privilege against civil liability for citizens who bring suit against the government in constitutional terms.3 The decision held that to allow governmental entities the right to sue citizens who seek civil redress against the government or its agents was an infringement of the constitutionally protected first amendment right of petition.4 Additional

9. Id. Justice Mosk, in his concurring and dissenting opinion, believed that the court was required to decide the constitutional challenges to the initiative measure before it was placed on the election ballot. He stated, "[i]f it is determined that the electorate does not have the power to adopt the proposal in the first instance or that it fails to comply with the procedures required by law to qualify for the ballot, the measure must be excluded from the ballot." Id. at 6, 641 P.2d at 202, 181 Cal. Rptr. at 102.

Justice Mosk believed that the urgency statute, which would be applicable only to this initiative, would be taxing to the privileges and immunities granted to the citizens of the state because of the preferential treatment proffered to the proponents of this measure. Id. at 5, 641 P.2d at 202, 181 Cal. Rptr. at 102. He also believed that it failed to meet the standard set by CAL. CONST. art. II, § 8 (d) which prohibited initiatives embracing more than one subject. Id. at 11, 641 P.2d at 205-06, 181 Cal. Rptr. at 105-06. Although proponents of the measure argued that the initiative dealt only with "protection of the public from criminal activity," Justice Mosk stated that he could not characterize the provisions of the initiative as "so related and interdependent as to constitute a single scheme" or "auxiliary and promotive" of one another." Id. at 10, 11, 641 P.2d at 205, 206, 181 Cal. Rptr. at 105, 106.

1. 31 Cal. 3d 527, 645 P.2d 137, 183 Cal. Rptr. 86 (1982). The majority opinion was written by Justice Mosk, joined by Justices Newman, Broussard, and Chief Justice Bird. A dissenting opinion was filed by Justice Kaus which was joined by Justice Richardson.

2. The underlying action in this case was originally brought by Bozek, the respondent. The complaint was filed against the City and two City police officers for false arrest, negligent hiring, assault, and battery. The case was tried by a jury which found for the City and the two officers. The City then filed a complaint against Bozek for malicious prosecution was then filed. 31 Cal. 3d at 530, 645 P.2d at 138, 183 Cal. Rptr. at 97.

3. Id. at 532, 645 P.2d at 139, 183 Cal. Rptr. at 88. "[S]ignificant countervailing factors mitigate against allowing governmental agencies to sue for malicious prosecution. Foremost among these is the constitutionally guaranteed right to petition the government for the redress of legitimate grievances. (U.S. CONST., 1st Amend.; CAL. CONST., art. I, § 3)." Id.

4. Id. at 532-36, 645 P.2d at 139-42, 183 Cal. Rptr. at 88-92. See, e.g., United States v. Cruikshank, 92 U.S. 542, 552 (1875). "The very idea of a government, republican in form, implies the right on the part of its citizens to meet peaceably for consultation in respect to public affairs and to petition for redress of grievances."
ally, it was the opinion of the court that alternate remedies available to the government sufficient non-chilling recourse against those citizens who abuse the right of judicial redress by initiating bad faith tort actions against the government.\footnote{5}

In opposition, a well reasoned dissent\footnote{7} opined that the bar against civil actions for malicious prosecution brought by the government was indistinguishable from a bar of the same nature upon a similar action brought by a private party,\footnote{6} a constitutionally impermissible restriction.\footnote{8} Thus, the dissent presented the argument favoring an unrestricted right of petition as a foil against a similarly grounded argument of the majority. Additionally, the dissent urged that the juxtaposition of the unrestricted

\textit{Id.; Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 79 (1872).} “[T]he right to peaceable assembly and petition for redress of grievances... are rights of the citizen guaranteed by the Federal Constitution.” \textit{Id. See also E. Brown, Scope of the Right to Petition: Need for Regulation of Right, 8 U.C.L.A. L. REV. 728 (1961).}

5. The government had statutory remedies available to it in the underlying action which would have provided sufficient recourse against civil actions not brought in good faith \textit{See, e.g., Cal. Crv. Proc. Code § 128.5 (West Supp. 1982), (providing for the recovery of expenses where the plaintiff against the government engages in tactics not based on good faith which are frivolous and cause unnecessary delay.) Cal. Crv. Proc. Code § 1021.7 (West Supp. 1982) (providing for an award of reasonable attorney’s fees to the defendant where the court finds that a complaint regarding a peace officer’s performance of duties was not filed or maintained in good faith or with reasonable cause); Cal. Pen. Code § 72 (West Supp. 1982) (providing for criminal prosecution of individuals filing false claims).}

6. \textit{Id. at 539, 645 P.2d at 143, 183 Cal. Rptr. at 92.}

In order to avoid the chilling effect upon the constitutional right of petition which would result if we were to allow municipalities to maintain actions for malicious prosecution, we conclude the best course is to defer to the legislatively provided remedy. . . . The availability of such [remedies] provide[s] an adequate deterrent to unwarranted lawsuits without unduly infringing upon the right of petition.”

\textit{Id. at 539, 645 P.2d at 143, 183 Cal. Rptr. at 92. (Kaus, J., dissenting).}

8. \textit{Id. at 539, 645 P.2d at 143, 183 Cal. Rptr. at 92.}

First and somewhat paradoxically, the majority’s constitutional analysis rests on an improperly narrow conception of the scope of the constitutional right to petition, implicitly assuming that while defendant Bozek’s initial lawsuit against the city represented an exercise of that right which must not be ‘chilled,’ an ordinary lawsuit between two private parties is not similarly protected by the right of petition.”

\textit{Id. (emphasis in original).}

9. \textit{Id. at 540, 645 P.2d at 144, 183 Cal. Rptr. at 93.}

private right of redress with existing civil and criminal statutory remedies allowing the prosecution of citizens for initiating frivolous civil actions or submitting fraudulent representations to law enforcement officials is a refutation of the absolute nature of any privilege against governmental suit for malicious prosecution.

The majority opinion noted the two-fold underlying policies justifying the actions of malicious prosecution. First, malicious prosecution suits are allowed as impedements to the filing of baseless and harassing lawsuits, and second, they provide the victims of such proceedings with reimbursement of both their monetary and emotional expenses incurred in conducting their defense. Where a non-individual such as the government is the victim of an allegedly malicious prosecution, only the former of the two policy justifications can fully apply. In Bozeck, the court declared, however, that the recovery of litigation expenses incurred in defense of actions prosecuted in bad faith, even in absence of personal damage could be sufficient justification in and of itself for allowing civil malicious prosecution lawsuits. Therefore, allowing a governmental entity the right to bring a civil action against a citizen for malicious prosecution would not violate the policies supporting the existence of such an action.

The majority ultimately concluded, however, that the mere ability of the government to bring a malicious prosecution claim against a citizen seeking judicial redress for illegal government actions is an impermissible chilling of the right of petition. Analogizing, the court stated that because defamation actions brought by citizens against the government are absolutely privileged on

10. See supra note 5.
11. See 31 Cal. 3d at 535-36, 645 P.2d at 141-42, 183 Cal. Rptr. at 90-91. The policy supporting an absolute privilege for criticism of the government is to allow free communication of ideas, a concept at the core of first amendment liberties. . . . We thus accord substantial weight to the need to protect the right of petition as a factor counterbalancing the tort policies which favor recognition of the city's cause of action.”
Id. See also infra notes 18-19 and accompanying text.
12. 31 Cal. 3d at 539, 645 P.2d at 143, 183 Cal. Rptr. at 92.
13. Id.
14. It would be unrealistic to hold that a faceless entity such as the government could incur damages arising from emotional distress. “Admittedly, a government entity's interest in protecting its reputation is minimal, and it is not capable of suffering emotional distress.” 31 Cal. 3d at 531, 645 P.2d at 138, 183 Cal. Rptr. at 87.
15. Id. at 531, 645 P.2d at 139, 183 Cal. Rptr. at 88. “From the time we first recognized that a tort action for malicious prosecution would lie for wrongful institution of civil proceedings, it has been clear that compensation for expenses of defending a suit is persuasive justification for permitting a malicious prosecution action to proceed.”
Id.
the basis of first amendment considerations, so too is the right of petition.\textsuperscript{17} The dissent distinguished the supporting authority cited by the majority, noting that the precedent set forth consists of cases where a petition of redress was brought against another private party, not the government.\textsuperscript{18} It is the opinion of the dissent that if a citizen is absolutely immune from governmental prosecution for bad faith litigation, the citizen must also be immune from a similar action initiated by a private party.\textsuperscript{19} As the dissent correctly indicates, that conclusion is inconsistent with the currently effective rules of law. Thus, the majority opinion, although valid when viewed as an unsupported \textit{extension} of the first amendment right of petition, would seem to require a more thorough analysis to be valid on the basis of existing law. For the present, however, \textit{City of Long Beach v. Bozeck} establishes the rule that California citizens are absolutely privileged against governmental suits for malicious prosecution.

\textbf{C. Absolute privilege for reporting news events and discharging official duties as relates to the media and public officials: Kilgore v. Younger}

In \textit{Kilgore v. Younger},\textsuperscript{1} the plaintiff appealed from a judgment dismissing his action to recover damages for alleged defamation, intentional infliction of emotional distress, and invasion of privacy by various news media defendants and past Attorney General of California, Evelle J. Younger.\textsuperscript{2}

The Organized Crime Control Commission delivered a report to Mr. Younger on May 2, 1978. The report contained a list of persons, including Kilgore, suspected of involvement in a wide vari-

\textsuperscript{17} 31 Cal. 3d at 534-35, 645 P.2d at 141, 183 Ca. Rptr. at 90.
\textsuperscript{18} See supra note 9.
\textsuperscript{19} 31 Cal. 3d at 540, 645 P.2d at 144, 183 Cal. Rptr. at 93. "[I]f the simple fact that one has a constitutional right to bring a lawsuit immunizes an individual from tort liability for maliciously abusing that right, then all malicious prosecution actions would be unconstitutional, not only those actions brought by a governmental entity." \textit{Id.} Although statutes have supplemented those remedies already existing, they do not appear to have supplanted the common law remedies for malicious prosecution. \textit{See generally} Comment, \textit{Groundless Litigation and the Malicious Prosecution Debate: A Historical Analysis}, 88 \textit{Yale L.J.} 1218, 1237 (1979); Comment, \textit{Liability for Proceeding with Unfounded Litigation}, 33 \textit{Vand. L. Rev.} 743, 771-73 (1980).

\textsuperscript{1} 30 Cal. 3d 770, 640 P.2d 793, 180 Cal. Rptr. 657 (1982).
\textsuperscript{2} \textit{Id.} at 774, 640 P.2d at 795, 180 Cal. Rptr. at 659.
ety of organized criminal activity in California. On the same day, Mr. Younger and two Commission members held a press conference and distributed copies of the report to members of the news media. At that time, Mr. Younger announced that he adopted the report. On May 2, 1978 in the Los Angeles Herald Examiner, and on May 3, 1978 in the Los Angeles Times, the plaintiff was identified by name as being among the ninety-two persons included in the Commission's report. The newspaper articles, however, did not tie plaintiff to any specific organized criminal activity.

Regarding the defamation action against the media defendants, the court held that publications were privileged under California Civil Code section 47(5) because the articles were a "fair and true" report of a public proceeding. The court held that plaintiff's second cause of action for intentional infliction of emotional distress was also subject to the privilege of California Civil Code section 47(5).

3. The criminal activities allegedly involved were: bookmaking, labor racketeering, loan sharking, extortion, theft, fraud, dealing in narcotics, drugs and stolen property, arson, prostitution, pornography, and murder. Id.

4. This is significant because Kilgore alleged that the newspaper reports were misleading in that they wrongfully implied that he was involved in all the criminal activities mentioned in the Commission's report.

Applying the standard enunciated in Handelsman v. San Francisco Chronicle, 11 Cal. App. 3d 381, 387, 90 Cal. Rptr. 188, 191 (1970) that "the publication is to be measured by the natural and probable effect it would have on the mind of the average reader," the California Supreme Court in Kilgore found that the average reader would not interpret the articles to suggest that Kilgore was involved in all the criminal activities. Rather, the average reader would understand that he was "connected in some fashion with organized crime." 30 Cal. 3d at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661. See also MacLeod v. Tribune Publishing Co., 52 Cal. 536, 343 P.2d 36 (1959).

5. CAL. CIV. CODE § 47 (West 1982) provides:
A privileged publication or broadcast is one made... [b]y a fair and true report of (1) the proceedings of a public meeting, if such meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

Id.

6. 30 Cal. 3d at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661. The media defendants also claimed that they were protected by the qualified privilege of CAL. CIV. CODE § 47(4) (West 1982), which provides that "[a] privileged publication or broadcast is one made... [b]y a fair and true report in a public journal, of (1) judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course (sic) thereof..." The court rejected this contention, stating that "[i]t cannot be gainsaid that as far as the press was concerned, the news conference was a legally convened public meeting for a lawful purpose to which the public — by way of the media — had been invited." 30 Cal. 3d at 776, 640 P.2d at 796, 180 Cal. Rptr. at 660.

7. Id. at 777, 640 P.2d at 797, 180 Cal. Rptr. at 661. See Lerette v. Dean Witter Organization, Inc., 60 Cal. App. 3d 573, 131 Cal. Rptr. 592 (1976) where the plaintiff's cause of action for intentional infliction of emotional harm was not allowed. In Lerette, the court stated that, "no such cause of action, based upon the defamatory nature of a communication which is itself privileged under the defamation laws, can be permitted." Id. at 579, 131 Cal. Rptr. at 596.
Since plaintiff's name and alleged criminal activity were contained in the report released by the Attorney General of California, they became matters of public record. Therefore, the court held that there can be no liability for invasion of privacy, on the part of the media defendants, when they are publicizing information about the plaintiff that is technically already public.8

The court found that Mr. Younger's publication was privileged under California Civil Code section 47(1),9 because he was a public official discharging an official duty.10 The court noted that the "official immunity accorded government officers is to avoid the 'chilling effect' which the fear of damage suits would have on the energetic performance of the public's business."11

The decision in Kilgore v. Younger reinforces the notion that the media should be free to print material concerning matters which are in the public domain. It also allows public officials to pursue their duties vigorously without fear that they will be subject to liability for actions within the scope of their duty.

D. School districts may voluntarily desegregate schools in accordance with the State Board of Education Regulations: McKinney v. Board of Trustees

Legislation is powerless to eradicate racial instincts or to abolish distinctions based upon physical differences, and the attempt to do so can only result in accentuating the difficulties of the present situation. If the civil and political rights of both races be equal one cannot be inferior to the other civilly or politically. If one race be inferior to the other socially, the constitution of the United States cannot put them upon the same plane.1

This excerpt is the Supreme Court's declaration of the "sepa-

8. 30 Cal. 3d at 778, 640 P.2d at 797, 180 Cal. Rptr. at 661. In Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 494-95 (1975), it was stated that "the prevailing law of invasion of privacy generally recognizes that the interests in privacy fade when the information involved already appears on the public record."

9. CAL. CIV. CODE § 47(1) (West 1982) provides that "[a] privileged publication or broadcast is one made — [i]n the proper discharge of an official duty."

10. 30 Cal. 3d at 782, 640 P.2d at 800, 180 Cal. Rptr. at 664.

11. Id. The court in Hancock v. Burns, 158 Cal. App. 2d 785, 323 P.2d 456 (1958) recognized a similar need when it stated:

If government, operating through the individuals who form it, is afforded immunity from private suit only when its actions are beyond any question, and loses that immunity upon mere allegation of improper motives or unlawful acts in a complaint seeking damages, then those persons who form government are subject to the threat of personal liability in any matter in which their discretion is exercised.

Id. at 792, 323 P.2d at 460.

rate but equal” doctrine espoused in *Plessy v. Ferguson*\(^2\) in 1896. This doctrine was denounced in the case of *Brown v. Board of Education*,\(^3\) where the Supreme Court declared “that in the field of public education the doctrine of ‘separate but equal’ has no place. Separate educational facilities are inherently unequal.”\(^4\)

Later, in *Brown v. Board of Education*,\(^5\) the Supreme Court considered the manner in which to implement desegregation in public schools. The Court stated that “[s]chool authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles.”\(^6\)

It was precisely this duty which the California Supreme Court undertook in *McKinney v. Board of Trustees*:\(^7\) the review of a school board's plan for desegregation. Previously, in *Crawford v. Board of Education*,\(^8\) the California Supreme Court had declared that “[i]n California, all public school districts bear an obligation under the state constitution to undertake reasonably feasible steps to alleviate school segregation, regardless of the cause of such segregation.”\(^9\)

Additionally, in *Crawford*, the court outlined general procedures a school board must follow in designing and implementing a scheme for desegregation. After this decision, the California State Board of Education (CSBE) further delineated the mandate in *Crawford* by promulgating specific regulations for school boards to employ.\(^10\) The CSBE set up five criteria to consider in deciding whether a school is segregated.

1. The racial and ethnic composition of each school in the district by numbers and percentages, including changes which have occurred in the racial and ethnic composition of each school in the preceding five years, as compared with such data for the district as a whole.
2. Data on the racial and ethnic composition of the administrative, certificated and classified staff at each school.
3. The attitudes of the community, administration and staff as to whether each school is a ‘minority’ or ‘non-minority’ school.

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2. 163 U.S. 537.
4. Id. at 495.
6. Id. at 299 (emphasis added).
7. 31 Cal. 3d 79, 642 P.2d 460, 181 Cal. Rptr. 549 (1982). (The majority opinion was written by Justice Mosk, with Justices Richardson, Broussard, and Pacht concurring. Justice Tobriner wrote a separate concurring opinion in which Chief Justice Bird concurred. Justice Newman filed a separate dissenting opinion).
9. Id. at 301-02, 551 P.2d at 42, 130 Cal. Rptr. at 738.
10. 31 Cal. 3d at 86, 642 P.2d at 463, 181 Cal. Rptr. at 552; see also CAL. ADMIN. CODE §§ 90-101 (West 1982).
The quality of the buildings and equipment;

(5) [T]he organization of, and participation in, extracurricular activities.¹¹

In the present case, the Oxnard Union High School District (OUHSD) under the supervision of the Board of Trustees (Board), set up a twenty-two member advisory committee to review the five criteria to determine which, if any, of the five high schools in the district were segregated.¹² After making a determination, the committee reviewed staff-prepared proposals for desegregation. The public was also allowed to prepare and present proposals, similar to those presented by appellant McKinney. The advisory committee selected the staff-prepared Proposal III, and the Board, after holding public hearings, adopted Proposal III over those which were submitted by appellant McKinney.¹³

It was before the public hearing that this action originated. Appellants sought to enjoin the public meeting and the implementation of Proposal III on three grounds: (1) that the Board incorrectly determined which schools were segregated and did not adequately assess community perceptions of which schools were segregated; (2) that the Board did not comply with notice requirements; and (3) that the Board did not provide for sufficient public input in the desegregation process.¹⁴ After the trial court refused to grant the injunction, the appellants sought relief at the supreme court.

Justice Mosk first considered the impact of the 1979 initiative measure Proposition 1, the so-called "anti-busing" amendment to the California Constitution, in the present case.¹⁵ Since the de-

¹¹ CAL. ADMIN. CODE § 93(b) (1982).

¹² The five high schools are Camarillo, Channel Islands, Hueneme, Oxnard and Rio Mesa. Channel Islands and Oxnard were found by the advisory committee to be segregated. 31 Cal. 3d at 87-88, 642 P.2d at 463, 181 Cal. Rptr. at 552-53.

¹³ Overall there were four proposals submitted which were OUHSD staff-prepared, and three proposals submitted by McKinney. The advisory committee and the Board selected staff-prepared Proposal III, which went into effect to eliminate segregation in September 1979. Id. at 88, 642 P.2d at 464, 181 Cal. Rptr. at 553.

¹⁴ Id. at 90, 642 P.2d at 465, 181 Cal. Rptr. at 554. Thus, plaintiffs, by their charges, alleged violations of CAL. ADMIN. CODE §§ 93, 98 & 96 (West 1975), respectively.

¹⁵ 31 Cal. 3d at 85, 642 P.2d at 462, 181 Cal. Rptr. at 551.

[N]o court . . . may impose . . . any obligation . . . with respect to the use of pupil school assignment or school transportation, except to remedy a specific violation . . . that would also constitute a violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution unless a federal court . . . [could] impose that obligation.

Cal. Const. art. I § 7(a).

The McKinney court noted that although Proposition 1 is currently on appeal to
segregation plan undertaken by OUHSD and the Board was voluntary in nature, and the existing segregation was not caused by any intentional acts of the Board, Proposition 1 had no impact. Thus, Justice Mosk concluded that “Proposition 1 expressly refrained from interfering with the power of the school boards to voluntarily implement any desegregation measures they might choose.”

Justice Mosk then turned to the appellants' attacks on the procedure used by the advisory committee and the Board in determining whether any of the five OUHSD high schools were segregated. Although one of the five criteria utilized was the racial and ethnic composition of each school in comparison to the entire district, the Board did not calculate an exact mathematical percentage which would classify a school as being segregated. Relying on Crawford and the permissive language of the regulations, Justice Mosk argued that the ethnic and minority composition of a school was but one factor in the decision as to the presence of segregation. There are other factors which are just as important in the determination process. “[I]n determining whether a particular school is ‘segregated’ for constitutional purposes, we do not believe set racial or ethnic percentages can be established.” Thus, although the composition of the student body may be a primary factor, it should not be the sole factor in the determination.

Other factors in the desegregation determination process are the attitudes of the community, administration and staff as to whether a school is segregated. Since the OUHSD surveyed only the attitudes of those on the advisory committee, appellants attacked that survey as insufficient. The McKinney court suggested that although a wider statistical survey would have been

\[\text{the Supreme Court, the court's decision in McKinney would be based on the presumption that Proposition 1 is constitutional. } 31 \text{ Cal. 3d at 92 n.7, 642 P.2d at 466 n.7, 181 Cal. Rptr. at 555 n.7.}\]

16. 31 Cal. 3d at 93, 642 P.2d at 467, 181 Cal. Rptr. at 556 (emphasis added). Justice Mosk discussed the fact that Proposition 1 did not release school boards from the responsibility of carrying out California Constitutional Provisions which call for the remedy of segregation, no matter what the cause. Additionally, in case a school board does not carry out the mandate, California courts still have the authority to intervene so long as they use measures of desegregation other than pupil school assignment or pupil transportation, both of which are prohibited in Proposition 1. \textit{Id.} at 92-93, 642 P.2d at 467, 181 Cal. Rptr. at 556; see also Crawford v. Board of Educ., 113 Cal. App. 3d 633, 170 Cal. Rptr. 495 (1981).

17. 31 Cal. 3d at 95, 642 P.2d at 468, 181 Cal. Rptr. at 557.

18. \textit{Id.}


20. See supra notes 10 and 11 and accompanying text.
preferred, the survey of attitudes undertaken was sufficient under the regulations. The court relied on the fact that the advisory committee was well-represented by minorities, and that requiring a larger community survey could be financially crippling to many school districts. Therefore, the attacks of the appellants on the segregation determination process were without merit and the court upheld the finding that only two out of the five high schools were segregated and thus in need of desegregation.

The next contentions raised by the appellants concerned the lack of sufficient community involvement in the determination process and the lack of adequate notice given to interested parties as required under the regulations. After noting that the advisory committee received seven desegregation proposals, four from the OUHSD staff, and three from the appellants, Justice Mosk concluded that the advisory committee and the Board were "presented with a fair range of proposals supported by accurate, objectively developed data." This, held Mosk, is all that the regulations require.

In regard to the lack of adequate notice, appellants contended that procedural due process requires a right to notice by mail. However, the McKinney court pointed out that procedural due process rights do not arise in a quasi-legislative sphere. The only notice requirement, therefore, arises from the regulations.

21. 31 Cal. 3d at 96, 642 P.2d at 469, 181 Cal. Rptr. at 558.
22. CAL. ADMIN. CODE § 93.
23. 31 Cal. 3d at 96, 642 P.2d at 469, 181 Cal. Rptr. at 558. In this case the advisory committee had students, parents, faculty and staff membership. In addition, eleven of the twenty-two members were from minority groups. Id.
24. See supra note 12.
27. 31 Cal. 3d at 98, 642 P.2d at 470, 181 Cal. Rptr. at 559.
28. Id. The Supreme Court has "recognized [the] distinction in administrative law between proceedings for the purpose of promulgating policy-type rules or standards, on the one hand, and proceedings designed to adjudicate disputed facts in particular cases on the other." United States v. Florida East Coast Ry., 410 U.S. 224, 245 (1973).
29. CAL. ADMIN. CODE § 98(a) (West 1975) sets forth the following:
The pertinent language required notice in a general circulation newspaper as well as notification to parents "of all students enrolled in the district. . . ."\textsuperscript{30}

Justice Mosk concluded that publication of notice in two newspapers, and individual mailed notice to all parents of students currently in high school, constituted substantial compliance with the regulations.\textsuperscript{31} Although all children from kindergarten to junior high school will be affected by the plan for desegregation, notice requirements under the regulations were met when the Board sent notice only to those currently enrolled in the five high schools.\textsuperscript{32}

The McKinney court found that the notice which was sent adequately conformed with the regulations by \textit{generally} informing the community of the Board's decisions and the basis for those decisions.\textsuperscript{33} Justice Mosk ruled out a requirement under the regulations of a more detailed notice because it would not have "materially increased the quality or quantity of public input."\textsuperscript{34}

In conclusion, the McKinney court upheld the Board's desegregation plan based on the fact that the OUHSD and the Board has complied with all the CSBE regulations concerning adoption of a voluntary desegregation program.

IV. CRIMINAL LAW

A. \textit{The "continuous conduct exception" does not apply to bribery counts: People v. Diedrich}

I. INTRODUCTION

In \textit{People v. Diedrich},\textsuperscript{1} the California Supreme Court held that, in a bribery case,\textsuperscript{2} the refusal of a requested jury instruction re-
quiring unanimous agreement on a single, specific act of bribery

Diedrich. He was charged with two counts of bribery pursuant to CAL. PENAL CODE § 165 (West Supp. 1982) and one count of conspiracy to commit bribery under CAL. PENAL CODE § 182(1) (West Supp. 1982). A review of the complex factual situation is necessary for an understanding of the legal issues in the case. For the court's presentation of the facts, see 31 Cal. 3d 267-71, 643 P.2d at 972-74, 182 Cal. Rptr. at 355-57. The following scenario was alleged to have occurred:

Shortly after his election to the Orange County Board of Supervisors in November of 1972, Ralph Diedrich met with Richard Owen, president of the Grant Corporation. The Grant Corporation had founded the development company Anaheim Hill Inc. (AHI). AHI sought to develop a 4,200 acre parcel of land known as Anaheim Hills. However, approximately half of this parcel was subject to development restrictions based on the Williamson Act (CAL. GOVT CODE § 51200 et. seq. (West Supp. 1982)). Under the Act, restrictions were placed on the land for a minimum of 10 years, in exchange for substantial tax benefits. However, the restrictions were cancellable by the Orange County Board of Supervisors.

Because of the tremendously high interest payments AHI was making on the land (in excess of $7,000 a day), it sought an early cancellation of the restrictions. Meetings were arranged between Diedrich and Owen where the restrictions were discussed. Diedrich suggested to Owen that AHI purchase a certain parcel of land for an exceedingly high price, and also that Owen hire his personal attorney to handle the restrictions case before the Board; Diedrich also instructed his attorney to handle the case outside of his normal practice. The attorney's retainer fee of $50,000 was paid by AHI; two more checks totalling $24,480 were deposited in the attorney's name. For this sum, the attorney prepared two short documents for AHI: a 17 page background report and accompanying resolution for the Anaheim City Council, and a two page memo for the Orange County Planning Department.

At Diedrich's request, the attorney wrote a $10,000 check from the newly-opened account to a company in which Diedrich had wanted to invest (the money was subsequently returned) and also prepared a $30,000 check from this account to repay a loan owed by Diedrich. Additionally, a $25,000 check was made payable to a company wholly owned by Diedrich. Diedrich personally picked up both checks. While these financial transactions were being made, Owen cut off all contact with Diedrich and his attorney. He instructed his new lawyer to pick up the AHI file because "'[H]e didn't want anyone else to get hold of [it].' He testified that he was particularly concerned that the district attorney's office might see it." 31 Cal. 3d at 270, 643 P.2d at 973, 183 Cal. Rptr. at 356.

Ten months later, the Board of Supervisors agreed to remove Anaheim Hills from the Williamson Act restrictions. However, the resolution and agreement were not prepared by the county counsel, as was customary, but rather were prepared by Diedrich.

Approximately one month after this vote, Diedrich requested a $70,000 loan from Owen, who refused. Owen did, however, furnish an appraiser, file a title report and analyze Diedrich's equity in certain collateral to help him obtain the loan. Diedrich then obtained a bank loan of $80,000.

In addition to these alleged improprieties, several other allegations, not at issue here, were lodged against Diedrich. He was indicted on two counts of bribery under CAL. PENAL CODE § 165 (West Supp. 1982) (see infra note 9) and one count of conspiracy to commit bribery under CAL. PENAL CODE § 182(1) (West Supp. 1982). Diedrich was found guilty on all three counts.

3. The instruction requested by Diedrich read in part: "Before jurors may return a verdict of guilty, they not only must unanimously agree that the defendant asked for, received or agreed to receive a bribe, they must also unanimously agree
as the basis for conviction constituted prejudicial error. The court also held, however, that the defendant was properly convicted on the bribery counts charged, and that the charges were adequately supported by the evidence presented and were brought within the statute of limitations period. The court devoted extensive analysis to the sufficiency of the evidence, and the jury instructions issues. The conclusions reached by the court will be examined in this note.

II. SUFFICIENCY OF THE EVIDENCE

A. Count One

The defendant had contended that the evidence in Count One was insufficient to sustain his conviction. In rejecting this contention, the court first analyzed the elements of bribery that must be proved before a conviction can be legally sustained. These elements generally include: 1) that the person charged with bribery be a member of one of the bodies listed in Penal Code section 165, 2) that the person must ask for, receive, or agree to receive something of present or future value or advantage, and 3) that the request, receipt, or agreement must be upon an "understanding" that his opinion, judgment, or action upon any official matter on which he is required to act will be influenced.

Diedrich's defense to this three-pronged analysis was that no "understanding" existed.

In analyzing the evidence presented on Count One, the court discussed several events which could have formed the basis for
such an understanding. The first was the offer to sell a parcel of real estate to AHI at an inflated price in exchange for Diedrich's favorable vote on the restriction issue. Second was Diedrich's suggestion that his personal attorney be hired to represent AHI for the excessive figure of $100,000.

With respect to the first event, Diedrich contended that a jury could not have concluded beyond a reasonable doubt that the land sale offer was in exchange for his vote on the restriction question. The court responded simply that "[t]he record belie[d] the contention," and that, from the testimony heard at trial, a request for a bribe "was implicit in the offer of grossly overpriced land at the time AHI was seeking Diedrich's support. . . ."

The court then considered Diedrich's suggestion that his personal attorney be hired to handle the AHI case amounted to a bribe. The court conceded that no direct testimony suggested that the attorney was hired as a conduit for the bribe. The court nevertheless concluded that such testimony was not required in order to determine whether or not an "understanding" existed. Noting that the term "understanding" was a term of art in the law of bribery, the court distinguished its definition in this context from a definition that would be appropriate in the civil law of contracts. In conclusion, the court stated that the only evidence required was that which tended to show "the state of mind of the actual or potential bribe-receiver... a bilateral agreement is not necessary." Through this analysis the court determined that there was "ample testimony" by which the jury could have deter-

11. Id.
12. Id.
13. Id. The evidence presented at trial included testimony from the president of AHI concerning the land sale offer. Interestingly enough, the testimony from Robert Owen, who had been immunized from prosecution in exchange for his testimony, was offered by defense counsel as a prior inconsistent statement. "When questioned about the prior statement, Owen maintained that the connection between the purchase [of the land] and releasing [AHI from the restrictions] was, in fact, made explicit by the statement [by Diedrich] that the purchase would 'materially help' getting Anaheim Hills out of the restriction." Id. at 273, 643 P.2d at 980, 182 Cal. Rptr. at 358.
14. Id. at 272, 643 P.2d at 980, 182 Cal. Rptr. at 358.
15. Id.
16. Id. at 273-74, 643 P.2d at 976, 182 Cal. Rptr. at 359.
17. Id.
18. Id. at 274, 643 P.2d at 976, 182 Cal. Rptr. at 359 (quoting People v. Gliksman, 78 Cal. App. 3d 343, 350-51, 144 Cal. Rptr. 451, 460-61 (1978)).
mined that Diedrich subjectively understood that the money was accepted by his attorney in return for his favorable vote.19

B. Count Two

Diedrich also contended that the evidence presented on Count Two20 was insufficient since no specific action was pending before the Board on the date named in the charge. The court rejected this argument summarily, stating that "[t]he law does not require any specific action to be pending on the date the bribe is received."21

III. JURY INSTRUCTIONS

The court's analysis of the jury instructions issue also turned upon the evidence concerning the two separate section 165 violations.22 Diedrich had requested that the jury be required to unanimously agree upon at least one particular act of asking for, receiving, or agreeing to a bribe before a guilty verdict on the count could be returned.23 The prosecution had maintained that "bribery (asking, receiving or agreeing to receive) may logically take place over a period of time,"24 rather than at one fixed, precise moment.

This reasoning was rejected by the Diedrich court. The rejection reflected an adherence to decisional law supported by eighty years of precedent.25 While the court recognized the validity of

19. 31 Cal. 3d at 274, 643 P.2d at 977, 182 Cal. Rptr. at 360. Several important pieces of evidence supported this conclusion. First, it was Diedrich himself who set up the conduit transaction. He instructed his attorney to handle the case outside of his normal law practice. Also, the arrangement was deemed improper by the president of AHI, who refused to sign any more checks to the attorney after the first transaction was completed. Testimony was also given by the attorney to the effect that he felt that the arrangement was improper. Id. at 274-75, 643 P.2d at 976, 182 Cal. Rptr. at 359. See also supra note 2 for a full statement of the facts of the case.

20. Count Two alleged that the defendant received, offered to receive, and agreed to receive a bribe on Dec. 31, 1974. 31 Cal. 3d at 275, 643 P.2d at 977, 182 Cal. Rptr. at 360.

21. Id. at 276, 643 P.2d at 977, 182 Cal. Rptr. at 360.

22. For the text of the requested jury instructions, see supra note 3. See also infra note 23 and accompanying text.

23. 31 Cal. 3d at 280, 643 P.2d at 980, 182 Cal. Rptr. at 363.

24. Id.

25. In the 1901 case of People v. Castro, 133 Cal. 11, 65 P. 13 (1901), the court held that:

The state, at the commencement of the trial, should have been required to select the particular act upon which it relied to make good the allegation of the information. This was not done, and even conceding that the failure to make such election at that time did not constitute error. . . still, when the case went to the jury, the court. . . should have directed their minds to the particular act. . . which it was incumbent upon the state to establish.
the "continuous conduct exception" in certain limited circumstances, it did not believe that the exception was applicable in the present circumstances.

The error in refusing the proffered jury instructions was deemed to be prejudicial. The rationale for this conclusion rested with the fact that the nature of Diedrich's defenses differed with respect to the two separate violations of section 165 of the Penal Code.

As far as the [land] offer is concerned, it consisted of a simple denial. The [attorney] transactions were 'explained.' Having in mind that the proof of the [land] offer depended. . . on the testimony of a single immunized witness and that the proof of bribery via the [attorney] transaction was somewhat circumstantial, we feel bound to conclude that the error was prejudicial.

by the evidence, before a verdict of guilty could be returned against the defendant.

Id. at 13, 65 P. at 15. The obvious desire to adhere to this line of analysis is reflected by the Diedrich court's statement that "[t]he reasons for requiring jury unanimity on at least one particular crime shown by the evidence are too obvious to require another restatement." 31 Cal. 3d at 281, 643 P.2d at 980, 182 Cal. Rptr. at 363.

The court adroitly noted that the prosecution's theory on appeal differed significantly from the argument made to the jury at the closing of the trial. While the court realized that bribery "logically" could take place over a period of time, "this is not what the People argued to the jury." In closing, the Prosecutor had urged that when Diedrich commented on January 16, 1973 that "[b]uying the land overpriced will help you set the land out of the agricultural preserve'. . . . So at that point the crime is committed." Id. (emphasis in original).

26. Id. at 281, 643 P.2d at 980-81, 182 Cal. Rptr. at 363-64. The continuous conduct exception deals with a factual situation wherein "all the acts may be and justly should be treated as done in the commission of one and the same crime." People v. Simon, 21 Cal. App. 88, 91, 131 P. 102, 103 (1913). Simon was an abortion case which involved two separate operations for the purpose of procuring a miscarriage. The operations were performed over one month apart, yet the court convicted the defendant of only one crime, but based the conviction on the two acts.

Although Simon was held to be bad law (31 Cal. 3d at 282, 643 P.2d at 981, 182 Cal. Rptr. at 364), the Diedrich court attempted to justify the continuous conduct exception on other grounds. It failed to do so, noting that the prior exceptions involved acts so closely connected in time that they formed part of one transaction. See, e.g., People v. McIntyre, 115 Cal. App. 3d 899, 907-11, 176 Cal. Rptr. 3, 7-10 (1981) (two acts of oral copulation within "matters of minutes"); People v. Mota, 115 Cal. App. 3d 227, 231-34, 171 Cal. Rptr. 212, 214-16 (1981) (repeated acts of rape during one hour). Also, the court distinguished the nature of the crime of bribery from other crimes which inherently involve a continuous course of conduct. 31 Cal. 3d at 282, 643 P.2d at 981, 182 Cal. Rptr. at 364.

27. 31 Cal. 3d at 281, 643 P.2d at 981, 182 Cal. Rpr. at 363-64.

28. Id. at 282-83, 643 P.2d at 981, 182 Cal. Rptr. at 364.

29. Id. at 283, 643 P.2d at 981, 182 Cal. Rptr. at 364.
IV. IMPACT OF THE CASE

While concededly decided on narrow factual grounds, the Diedrich decision gives an in-depth discussion of the evidence needed to obtain a conviction for bribery brought under Penal Code section 165. It differentiated first the nature of a criminal bribery charge from its civil law counterparts, and also distinguished bribery from other crimes for purposes of disavowing the “continuous conduct exception.” It is believed that Diedrich will solidify the law of bribery with respect to these heretofore undecided areas.

The analysis presented by the court indicated a strong adherence to case precedent; the court was unwilling to break new ground in applying the continuous conduct exception to a bribery case.30

V. CRIMINAL PROCEDURE

A. The right to representation by retained counsel prevails over potential conflicts or ethical concerns: Maxwell v. Superior Court

In Maxwell v. Superior Court,¹ the California Supreme Court balanced the due process requirement that an individual charged with a serious crime be represented by competent and independent counsel against the defendant's right to counsel of his choice.

The defendant in Maxwell was an indigent charged with four counts of robbery and ten counts of murder. Because some of the murders involved special circumstances, it would be possible for the defendant to receive the death penalty.² The defendant retained attorneys who appeared to be experienced criminal defense lawyers. The contract, which is the crux of this case, provided that the defendant would assign to counsel, as their fee, “any and all right, title, and interest, of any kind, nature and description throughout the world in and to the story of [defend-

30. Of note in this respect is the court's special notice of the prosecutor's inconsistencies in establishing exactly when the bribery occurred. See supra note 23. One questions whether this inconsistency promoted the court's unwillingness to extend the exception, and if the court's analysis would have differed had the prosecution adhered to a unified theory of the case.


2. Id. at 610, 639 P.2d at 249, 180 Cal. Rptr. at 179. See CAL. PENAL CODE § 190.2 (West Supp. 1982) for a description of circumstances for which a conviction of first degree murder may result in the imposition of a death sentence.

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ant's] entire life..." including all entertainment and commercial exploitation rights. Under the contract, defendant's counsel was not obligated to undertake an appeal. The contract did disclose possible conflicts and prejudice which could occur between the parties.

The judge on his own motion inquired into the contract and personally questioned the defendant. The judge ruled that even though the defendant knowingly and willingly chose not to seek outside advice and was satisfied with his representation and the contract, the counsel must nevertheless be disqualified because of the inherent conflict created. Four days later, the judge recused the defendant's chosen counsel and appointed substitute counsel. The defendant sought mandate to overturn the rulings.

The court recognized the potential conflict which may exist in contracts such as the one between the defendant and his counsel. Such contract may tempt lawyers, consciously or unconsciously, to act adversely to the client's interests. It is foreseeable that the attorney may tilt the defense or sensationalize the trial for commercial reasons. Thus, it is possible that an attorney may be enhancing his own interest at the expense of his client's.

The court also pointed out that a judicial finding of potential conflict usually does not justify court-ordered removal. This is supported by the well-recognized principle that effective assist-

3. 30 Cal. 3d at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179. The contract further provided that the defendant was to receive 15 percent of the "net amount" realized by the exploitation of his life story. In addition, the contract stated that the defendant waived all defamation and invasion-of-privacy claims against counsel that may arise from the exploitation. Id. at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179.

4. The contract between defendant and counsel reflects that appellate representation and fees connected therewith are to be subjects of future negotiation. Id. at 610, 639 P.2d at 250, 180 Cal. Rptr. at 179.

5. The contract describes such conflicts as: (1) the creation of damaging publicity to enhance exploitation value; (2) the avoidance of mental defenses since they might suggest lack of capacity on the part of the defendant to enter into a contract; and (3) the desire to see the defendant convicted and sentenced to death for the sake of publicity. Id at 611, 639 P.2d at 250, 180 Cal. Rptr. at 179.

6. Id. at 612, 639 P.2d at 251, 180 Cal. Rptr. at 180.

7. Id. at 616, 639 P.2d at 253, 180 Cal. Rptr. at 182. See Wojtowicz v. United States, 550 F.2d 786 (2d Cir. 1977) where the court found counsel's representation was not constitutionally defective because his fees were to be paid from a fund created by the sale of movie rights to "Dog Day Afternoon." Id. at 793. See also Ray v. Rose, 535 F.2d 966, 975-76 (6th Cir. 1976) where it was held that a potential conflict of interest situation did not mean that the defendant was denied effective assistance of counsel.

8. 30 Cal. 3d at 614, 639 P.2d at 252, 180 Cal. Rptr. at 181.
ance is closely linked to representation by counsel of choice.\textsuperscript{9} It is only when a client is satisfied with a counsel that there exists mutual confidence and harmony which is necessary to an effective representation of the client's interest. It was the court's belief that judges "should make all reasonable efforts to ensure that a defendant financially able to retain an attorney of his own choosing can be represented by that attorney."\textsuperscript{10}

After considering both sides of the issue, the court concluded that the mere existence of a possible conflict does not warrant pretrial removal of competent counsel in a criminal case over defendant's informed objection.\textsuperscript{11} It was the court's belief that the defendant may insist on retaining his attorney for purposes of his criminal trial, if he knowingly and intelligently waives the right to declare a conflict.\textsuperscript{12}

In the Maxwel decision, the California Supreme Court has reinforced the notion that an individual should be free to choose who will represent him in a court of law. It is only when a potential conflict exists which would impair judicial integrity and diminish public respect for the administration of justice that a court should intervene and appoint counsel for a defendant.\textsuperscript{13}

B. A statute which imposes sentence enhancements for "personal" infliction of great bodily harm during the commission of a felony excludes co-felons:

\textbf{People v. Cole}

In \textit{People v. Cole},\textsuperscript{1} the California Supreme Court was confronted with a question relating to the construction and interpretation of certain provisions of California's recently enacted

\textsuperscript{9} Id. at 613, 639 P.2d at 251, 180 Cal. Rptr. at 180.
\textsuperscript{10} Id. at 613, 639 P.2d at 253, 180 Cal. Rptr. at 181, quoting People v. Crovedi, 65 Cal. 2d 199, 207, 217 P.2d 868, 874, 53 Cal. Rptr. 284, 290 (1966).
\textsuperscript{11} 30 Cal. 3d at 619, 639 P.2d at 255-56, 180 Cal. Rptr. at 185. However, the court noted: [w]e 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 ensure fairness and preserve the credibility of its judgments extends to recusal even when an informed defendant, for whatever reason, is cooperating in counsel's tactics.
\textsuperscript{12} Id. at 619 n.10, 639 P.2d at 256 n.10, 180 Cal. Rptr. at 185 n.10.
\textsuperscript{13} See the dissent by Justice Richardson. Justice Richardson was of the belief that the agreement drafted by the defendant's attorneys created, from its inception, conflicts of interest which would justify the trial court in recusing the attorneys and appointing new counsel. Id. at 626, 639 P.2d at 260, 180 Cal. Rptr. at 189.

\textsuperscript{1} 31 Cal. 3d 568, 645 P.2d 1182, 183 Cal. Rptr. 350 (1982).
Uniform Determinate Sentencing Act. California Penal Code section 12022.7 currently provides for an additional consecutive prison term enhancement of three years for individuals convicted of certain felonies who, in the course of commission of the crime, intentionally inflict great bodily injury upon another person. The specific question addressed in Cole was whether the sentence enhancement described in section 12022.7 will apply to individuals who aid and abet the infliction of great bodily harm during the commission of a felony but do not actually perform the injurious act. The decision of the court turned on an interpreta-

2. 1976 Cal. Stat. 5061. The act is a compilation of determinate sentencing laws which are located throughout the California Codes. The act replaced a system of indeterminate sentencing which had been passed in 1917. The new act became effective on July 1, 1977. See generally, Oppenheimer, Computing a Determinate Sentence . . . New Math Hits the Courts, 51 Cal. St. B.J. 604 (1976) [hereinafter cited as Oppenheimer].

3. CAL. PENAL CODE § 12022.7 (West Supp. 1982). The statute provides in pertinent part:

Any 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, in addition and consecutive to the punishment prescribed for the felony or attempted felony of which he has been convicted, be punished by an additional injury of three years, unless infliction of great bodily harm is an element of the offense of which he is convicted.


4. Note that the enhancement provided in the current version of Penal Code § 12022.7 is not applicable in cases such as murder or manslaughter where the great bodily harm is a necessary element of the crime. This is also the situation involving assault with a deadly weapon, see People v. Whitehouse, 112 Cal. App. 3d 479, 169 Cal. Rptr. 199 (1980); or rape, see People v. Hawk, 91 Cal. App. 3d 938, 134 Cal. Rptr. 773 (1979).

5. The specific intent necessary to apply this section has been utilized as a rationale supporting the imposition of enhancements upon convicted individuals who did not themselves actually commit great bodily harm during the commission of a felony. See, e.g., People v. Mills, 73 Cal. App. 3d 539, 140 Cal. Rptr. 803 (1977). See 31 Cal. 3d at 578-79, 645 P.2d at 1188, 183 Cal. Rptr. at 356.

6. "The injury must be inflicted on a person other than an accomplice of the defendant, which includes a bystander as well as the victim of the underlying offense." Oppenheimer, supra note 2 at 657.

7. "The issue in the present appeal is whether appellant, who blocked the victim's escape and directed the attack but did not physically strike the victim, may receive an enhanced sentence pursuant to [section 12022.7]." 31 Cal. 3d at 571, 645 P.2d at 1183, 183 Cal. Rptr. at 351. The victim was confronted by the appellant and an accomplice in his home at night. Several weapons in the room, known to the victim to be unloaded, were confiscated by the appellant and his accomplice. The two intruders, unaware of the harmlessness of the weapons, ordered the victim to move, but because he knew the weapons were unloaded he failed to move quickly enough to satisfy the appellant who then ordered the accomplice to
tion of the legislative intent of a 1977 amendment\(^8\) to section 12022.7.

Writing for a unanimous court, Justice Broussard concluded that the legislative intent of section 12022.7 was that the great bodily injury sentence enhancement described there could only be applied to individuals who had actually physically inflicted the proscribed harm during the commission of a felony.\(^9\) The contested position was the single word “personally” within the statute.\(^10\) The appellant contended that the inclusion by the legislature of the word “personally” in the 1977 amendment to section 12022.7,\(^11\) precluded the award of enhancement terms to persons who did not physically touch a person during the commission of a felony.\(^12\)

The court began its analysis by reviewing tenets applicable to judicial statutory construction.\(^13\) The court felt that the ques-

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8. Prior to the 1977 amendment to Penal Code § 12022.7 there was no language which required that to be the subject of enhancement under the section a convicted felon must have “personally” inflicted great bodily harm on someone other than an accomplice. See 1976 Cal. Stat. 5162-63, ch. 1139, § 306.

9. “In sum, we conclude that in enacting section 12022.7, the Legislature intended... to limit the category of persons subject to the enhancement to those who directly perform the act that causes the physical injury to the victim.” 31 Cal. 3d at 579, 645 P.2d at 1189, 183 Cal. Rptr. at 357.

10. See supra note 3. See also 31 Cal. 3d at 572, 645 P.2d at 1184, 183 Cal. Rptr. at 352.

11. See supra note 8.

12. This is a logically correct conclusion on grounds derived from other statutory language. The fact that the enhancement is limited to instances of “great bodily injury” would indicate that an individual who physically assaulted a person could escape the enhanced term if the injury was not “great.” See, e.g., People v. Jones, 119 Cal. App. 3d 749, 174 Cal. Rptr. 218 (1981). Normally, however, great bodily injury will be found in cases where the physical abuse results in a wound or major internal injury. See, e.g., People v. Lira, 119 Cal. App. 3d 837, 174 Cal. Rptr. 207 (1980) (head wound required stitches); People v. Johnson, 104 Cal. App. 3d 598, 184 Cal. Rptr. 69 (1980) (fractured jaw). See CAL. PENAL CODE § 12022.7 (West Supp. 1982). “As used in this section, great bodily injury means a significant or substantial physical injury.” 31 Cal. 3d at 572, 645 P.2d at 1184, 183 Cal. Rptr. at 352.

13. See Solberg v. Superior Court, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977). (“When statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.”) See also People v. Belleci, 24 Cal. 3d 879, 884, 598 P.2d 473, 477, 137 Cal. Rptr. 503, 508. (“We have declined to follow the plain meaning of a statute only when it would inevitably have frustrated the manifest purposes of the legislation as a whole or led to absurd results.”)
tioned language in section 12022.7 was clear on its face and there was no reason to provide an inconsistent interpretation. The rule in California is that a court must follow the express language of the statute unless to do so would either provide unreasonable results or would frustrate the obvious legislative intent of enactment. The word "personally," in the context of the supporting language of section 12022.7, has a very plain meaning when fused with the legislative intent of the statute to deter serious physical harm to felony victims. The court felt that to exercise the statute against those criminals who actually perform the physical act which inflicts great bodily harm would fulfill the legislative purpose. Justice Broussard also recognized the argument that a person who abets the perpetration of physical injury through acquiescence, encouragement, or as in the instant case, direction, is at least as morally responsible as the perpetrator. However, he concluded that to construe the statute favoring that argument would lead to difficult determinations of fact based on the proximity of the non-perpetrating felon to the infliction of the injury. Such an interpretation would patently frustrate the intent of the legislature to punish only the criminal who "personally" inflicts such harm.

In order to validate the tentative conclusion, the court proceeded to examine other analogous sections of the Penal Code which provide for sentence enhancement. In an attempt to de-

14. 31 Cal. 3d at 572, 645 P.2d at 1184, 183 Cal. Rptr. at 352. See supra note 13.
15. Id. at 572, 645 P.2d at 1185, 183 Cal. Rptr. at 352.
16. 31 Cal. 3d at 572-73, 645 P.2d at 1184, 183 Cal. Rptr. at 352. "A construction limiting [the] scope [of section 12022.7] to the person who himself inflicts the injury serves the purpose; each member of a criminal undertaking will know that, regardless of the urgings of his codefendants, if he actually inflicts the injury he alone will pay the increased penalty." Id. at 572-73, 645 P.2d at 1185, 183 Cal. Rptr. at 352. An unstated corollary to the preceding statement might be, however, that each member of a criminal undertaking will attempt to persuade all confederates to participate in any physical injury to avoid being the only one to pay the price.
17. 31 Cal. 3d at 573, 645 P.2d at 1185, 183 Cal. Rptr. at 353.
18. Id. at 573, 645 P.2d at 1185, 183 Cal. Rptr. at 353. "Such an expansion of the statutory language. . . would, however, inevitably pose difficult questions in future cases in which the charged accomplice is further removed from the act causing the injury." Id.
19. Id. at 573, 645 P.2d at 1185, 183 Cal. Rptr. at 353. "[T]he distinction between the person who actually inflicts the injury and the person who does not, is clearly consonant with the legislative purpose. . ." Id.
20. The court specifically discussed Penal Code section 12022, see infra notes 21-27 and accompanying text, and Penal Code section 12022.5, see infra note 23. In addition to these sections, the Penal Code provides sentence enhancements for
termine the limits of the class of persons to which the sentence enhancement provision of section 12022.7 applies, the court first examined two other sentence enhancement statutes, Penal Code sections 12022 and 12022.5. Section 12022[21] provides a one year penalty for all principals[22] involved in a felony where a firearm is used except for those felonies of which firearm use is an element of the crime. The same penalty is imposed on any person who "personally" uses a deadly weapon in the commission of a felony. Section 12022.5[23] applies a two year enhancement to individuals who personally use a firearm in the commission of a felony.

"Cases dealing...with the category of persons subject to the enhancement of section 12022 [have] limited its application to those who were themselves armed during the commission of a felony."[24] In addition, amendments to the section in 1977,[25] resulting partially because of court decisions espousing such an outcome,[26] expressly provided for the "personal" use requirement in section 12022(b).[27] Section 12022(a), created by the 1977 amendment, allows derivative liability for sentence enhancement by persons not

the use of firearms in commission of certain sex offenses, see Cal. Penal Code § 12022.3 (West Supp. 1982); for taking or destroying property in excess of $25,000.00 in the commission of a felony, see Cal. Penal Code § 12022.6 (West Supp. 1982); and inflicting great bodily harm during the commission of certain illegal acts, see Cal. Penal Code § 12022.8 (West Supp. 1982).


(a) Any person who is armed with 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 has been convicted, be punished by an additional term of one year, unless such arming is an element to the offense of which he was convicted. This additional term shall apply to any person who is a principal. . . whether or not such person is personally armed with a firearm.

(b) Any person who personally uses a deadly or dangerous weapon in the commission... of a felony shall, upon conviction... be punished by an additional term of one year[.].

Id. (emphasis added)


Any person who personally uses a firearm in the commission... of a felony shall, upon conviction... be punished by an additional term of... two years, unless use of a firearm is an element of the offense of which he was convicted.

Id. (emphasis added).
24. 31 Cal. 3d at 574, 645 P.2d at 1186, 183 Cal. Rptr. at 354. See People v. Hicks, 4 Cal. 3d 757, 763-66 n.4, 484 P.2d 65, 70 n.4, 94 Cal. Rptr. 393, 398 n.4 (1971); People v. Snyder, 276 Cal. App. 2d 520, 80 Cal. Rptr. 822 (1969).
27. See supra note 21.
"personally" perpetrators of the firearm "use."28 The legislature similarly amended section 12022.5 to include the term "personally" in 1977.29 Thus, there is clear legislative intent to distinguish enhancement in cases of "personal" acts or use of weapons for purposes of creating great bodily harm, from cases such as those prescribed in section 12022(a) which would allow derivative liability based on the performance of prohibited conduct by a person other than the charged defendant.30 In light of the amendment to section 12022 allowing derivative liability in non-"personal" cases, the legislature was obviously aware of the alternative types of enhancement, and in imposing the word "personally" into the language of section 12022.7, evidenced clear intent to limit liability in enhancement cases to only those defendants who, in fact, commit acts inflicting great bodily harm on persons during the commission of a felony.

The effect of the decision in People v. Cole is obvious. The opinion of the court is a mere restatement of language on the face of the statute which clearly defines those persons to whom the provisions of Penal Code section 12022.7 will apply. This holding runs counter to precedent31 which broadly construed the precursor of section 12022.7.32 However, this section was newly enactd to include the word "personally," thereby demonstrating a prohibition against broad construction of the new statute. The compatibility between the legislative intent and the patent semantical form of the statute will provide determinative authority in future cases which address the same question relative to Penal Code sections 12022(b) and 12022.5.

28. The previous statute had no provision regarding principals. See supra note 22. The statute as a whole was essentially the same as the current Penal Code § 12022(b). See 1976 Cal. Stat. 5161, § 304.
30. "[W]e can only conclude that in amending section 12022.7 in 1977 the Legislature intended to alter the law by requiring the defendant act "personally. . . ." 31 Cal. 3d at 579, 645 P.2d at 1189, 183 Cal. Rptr. at 357.
32. "Section 12022.7 was added to the Penal Code as part of the Uniform Determinate Sentencing Act of 1976, supplanting the specific great bodily injury provisions of section 213, 264, and 461 [of the Penal Code]." 31 Cal. 3d at 578, 645 P.2d at 1188, 183 Cal. Rptr. at 356. See Note, The Supreme Court of California 1977-78; People v. Caudillo, 67 CALIF. L. REV. 740 (1979).
C. The "Briggs Instruction" violates due process: People v. Haskett

In People v. Haskett, the defendant was charged with two counts of first degree murder, one count of second degree attempted murder, one count of rape and one count of robbery. The trial court convicted him on the murder and attempted murder counts and imposed the death penalty. The California Supreme Court reversed the sentence, declaring that the instructions given to the jury were improper. However, the court affirmed the convictions of attempted murder of Mr. Haskett's half-sister and first degree murder of her two sons. The court noted that there was substantial evidence of premeditation and deliberation on the part of the defendant to justify the guilty verdicts.

In reversing the sentence, the court held that two of the jury instructions relating to punishment were improper. The first erroneous instruction, known as the "Briggs Instruction," states that a governor may "commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole." Relying on People v. R-
The court determined that giving the Briggs Instruction violated the defendant's due process rights by inviting the jury to speculate regarding a discretionary function of the executive branch. In addition, the instruction tended to suggest to the jury that, by condemning the defendant to death, it might prevent the Governor from commuting a sentence. The court concluded that this instruction was prejudicial to the defendant.

Although the Attorney General argued that any prejudicial effect of the Briggs Instruction had been cured by the "Morse Instruction" dealing with the parole board's powers, the court disagreed. Instead, the court stated that there was nothing in the content of the Morse Instruction which would command the jury to disregard possible future intervention by the Governor in commuting sentences or otherwise reducing them. Indeed, the Morse Instruction itself was found to be inappropriate in Haskett because the sentencing alternatives left no discretion in the parole board. The court also found that giving the Morse Instruction probably confused the jury since it implied "that a sentence of life imprisonment without possibility of parole nevertheless leaves some discretion in the parole board to release the prisoner, even in the absence of commutation."

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commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

Id. at 861 n.9, 640 P.2d at 788 n.9, 180 Cal. Rptr. at 652 n.9.


7. The discretionary executive function of which the court speaks is the granting of a pardon, commutation or other reduction of sentence. See supra note 5.

8. 30 Cal. 3d at 861, 640 P.2d at 789, 180 Cal. Rptr. at 653. See People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), where the court stated that the Briggs Instruction focuses the jury's attention on the fact that the Governor may parole the defendant if the jury does not vote to execute him. Thus, a jury's decision may be based on their perception of the present or some future governor's philosophy or possible action when their deliberations should properly be focused on the defendant's crime, character and record. Id. at 591, 639 P.2d at 930, 180 Cal. Rptr. at 288.

9. 30 Cal. 3d at 863, 640 P.2d at 790, 180 Cal. Rptr. at 654.

10. The Morse Instruction given the jury dealt with the possible actions of the Adult Authority, an agency which determines if a prisoner should be paroled. Id. at 862 n.10, 640 P.2d at 789 n.10, 180 Cal. Rptr. at 653 n.10.

11. Id. at 862, 640 P.2d at 789, 180 Cal. Rptr. at 653.

12. Id. at 862, 640 P.2d at 789, 180 Cal. Rptr. at 653.

13. 30 Cal. 3d at 863, 640 P.2d at 790, 180 Cal. Rptr. at 654 (emphasis in original). This is confusing because the parole board can only parole a prisoner who is sentenced to life imprisonment as opposed to life imprisonment without the possibility of parole.
The court held that both instructions provided the jury with erroneous reasons to favor the death penalty, thus requiring a reversal of the death penalty determination.

D. A canine sniff search does not constitute a search under the California or United States Constitutions: People v. Mayberry

In People v. Mayberry, the California Supreme Court, in a five-to-one decision held that a sniff search made by a trained police dog at an airport does not constitute a “search” under either the California or United States constitutions. The court, however, also held that a trained police dog’s positive reaction to the contents of a suitcase does not constitute sufficient cause upon which to base a warrantless search.

The defendant’s appeal was premised on the contention that the investigating officer’s conduct was “unreasonable” under the constitution. While upholding the factual determination made

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1. 31 Cal. 3d 335, 644 P.2d 810, 182 Cal. Rptr. 617 (1982).
2. Id. at 335, 644 P.2d at 810, 182 Cal. Rptr. at 617. Justice Richardson wrote the opinion, in which Mosk, Newman, Kaus, and Broussard concurred. Chief Justice Bird wrote the dissenting opinion.
3. The search in question was conducted at the San Diego Airport on August 8, 1979, by two officers of the San Diego Police Department’s Narcotics Task Force (NTF). After having been granted full permission from the airport authority and each airline, the two officers, assisted by a fully trained police dog, conducted a check for narcotics in luggage on all incoming flights that had originated in Florida.
4. U.S. CONST. amend. IV.
7. 31 Cal. 3d at 342, 644 P.2d at 814, 182 Cal. Rptr. at 621. The court noted absent exigent circumstances or consent, an investigating officer must first obtain a search warrant upon a proper showing of probable cause. Id. at 342, 644 P.2d at 814, 182 Cal. Rptr. at 621.
8. Upon the discovery of narcotics following the sniff search made by the dog, the defendant Mayberry was charged with the transportation of marijuana (CAL. HEALTH & SAFETY CODE § 11360(a) (West Supp. 1982)) possession marijuana for sale, (CAL. HEALTH & SAFETY CODE § 11359 (West Supp. 1982)), and the possession
by the trial court, the members of the court exercised their independent judgment in reviewing the legal question of reasonableness of the officer's conduct.\(^9\)

In exploring this issue, the California Supreme Court first reviewed the several appellate cases which supported the defendant's contention that the officer's conduct was unreasonable.\(^{10}\) The court, however, dismissed each of these cases, stating the cases were "premised upon the proposition that similar canine olfactory investigation constituted a 'search' the propriety of which should be governed by Fourth Amendment principles."\(^{11}\) Rejecting the rationale presented by this long line of cases, the Cali-

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\(^9\) The findings of fact upheld by the supreme court included the following:
1. On the day in question, law enforcement officers and [the police dog] were allowed to be anywhere at the airport including the baggage handling area.
2. Both [the trained dog] and his handler, Officer Cooper, were fully trained in narcotics detection.
3. Based on information as to the flow of narcotics from Florida to San Diego, the agents had reason to believe narcotics could be found in the luggage of incoming passengers from planes originating in Florida.
4. Law Enforcement officers did not have specific information regarding the defendant.
5. The sniffing of the luggage...away from public view, was a minimal intrusion justified by the agents' reasonable efforts to protect the public from the flow of narcotics from Florida.
6. The use of [the dog] to alert the agents was reasonable.
7. Defendant voluntarily consented to a search of his suitcase after being contacted by law enforcement.
8. The motion to suppress should be denied.

\(^{10}\) See, e.g., People v. Denman, 112 Cal. App. 3d 1003, 1010, 169 Cal. Rptr. 742, 746 (1980) ("cause" to conduct canine search amply supported by record; fruits of olfactory search need not be suppressed simply because police officers are informants of record in case); People v. Nagdeman, 110 Cal. App. 3d 404, 412, 168 Cal. Rptr. 16, 21 (1980) (where officers have probable cause to arrest defendants, accelerated booking search allowed); People v. Lester, 101 Cal. App. 3d 613, 615, 161 Cal. Rptr. 703, 704 (1980) (upon probable cause, canine search permissible); People v. Evans, 65 Cal. App. 3d 924, 933, 134 Cal. Rptr. 436, 443 (1977) (absent sufficient facts upon which to justify detention, canine search violates fourth amendment rights); People v. Williams, 51 Cal. App. 3d 346, 350, 124 Cal. Rptr. 253, 255 (1975) (absent permission from airport authority and airlines, and absent probable cause, fruits of canine search may be suppressed); People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 368 (1973) (reliable informant's tip, corroborated by reaction of trained police dog, presents sufficient probable cause for search.)

\(^{11}\) 31 Cal. 3d at 340, 644 P.2d at 813, 182 Cal. Rptr. at 619.
California Supreme Court adopted the rationale set forth in *People v. Matthews*, wherein it was held that a canine’s “sniffing [of] the air surrounding an object is neither an intrusion nor a search.” The court then cited to nine different cases which were believed to support the *Matthew* decision, while dismissing one federal appellate case which had held to the contrary.

Combining the degree of intrusion present in a canine search with the corresponding privacy interests involved, the majority concluded that in no way could a canine search be analogized to the more indiscriminate intrusions presented by the use of

**12.** 112 Cal. App. 3d 11, 15-16, 169 Cal. Rptr. 263, 265-66. (1980). In *Matthews*, a Los Angeles police officer, accompanied by a trained police dog, routinely checked for narcotics at an automobile import terminal where foreign cars were held before they were delivered to their consignees. The dog registered a strong positive reaction to a certain Maserati. The officer radioed for an investigative team. Upon its arrival, the sniff search was run again. An agent then drilled 2 or 3 one-eighth inch holes into the frame on the underside of the car, producing a substance that appeared to be hashish. A positive field test was run, and the Maserati was siezed and taken to the customs station. Eight pounds of hashish were found.

The vehicle was then released to the defendant, who was placed under surveillance. When he arrived home, the defendant searched his car. At this point the defendant was placed under arrest.

The defendant appealed his conviction upon the basis of the search of the Maserati. The court held that it was a lawfully conducted border search. With respect to the canine search the court held: “[t]he use of narcotic trained detector dogs is not uncommon, and federal courts have analyzed such use in various cases. In all cases the courts have held that sniffing the air surrounding an object is neither an intrusion nor a search.” *Id.* at 19, 169 Cal. Rptr. at 268. Furthermore, the *Matthews* court noted that “[v]arious state authorities also approve the use of narcotic detector dogs; few cases discuss whether sniffing of the air around an object by detector dogs constitutes a search although some hold that it does and if not based upon reasonable suspicion constitute an exploratory search.” *Id.* at 20, 169 Cal. Rptr. at 268. As applied to the facts in *Matthews*, the court held that if the dog’s sniffing the open air in a place where the officers had a right to be constitutes a search it was certainly a non-intrusive one. *Id.* at 20-21, 169 Cal. Rptr. at 269.

**13.** 31 Cal. 3d at 340, 644 P.2d at 813, 182 Cal. Rptr. at 620. The *Mayberry* court, however, failed to note that *Matthews* was premised primarily upon the justification that a border search was involved; where “not even suspicion” was required to justify the dog’s actions. *People v. Matthews*, 112 Cal. App. 3d at 21, 169 Cal. Rptr. at 269.


**15.** United States v. Beale 674 F.2d 1327 (9th Cir. 1982). “No petition for certiorari has yet been filed in *Beale*, and, with due respect, we disagree with its conclusion. [Despite the contrary holding in *Beale*], one who secretes illegal narcotics in his suitcase has no protectable privacy interest in those narcotics. . . .” 31 Cal. 3d at 340-41, 644 P.2d at 813, 182 Cal. Rptr. at 620 (emphasis original). No petition for certiorari has been filed as of October 12, 1982.
telescopes, tape recorders and the like. Furthermore, the court held there was no protectable privacy interest in the airspace surrounding a passenger's luggage, which, the court noted, was the only area even minimally affected by the dog's activities. The majority stated that:

the escaping smell of contraband. . .may be likened to the emanation of a fluid leaking from a container. . .[we] conclude that any privacy right is lost when either escapes into the surrounding area. Given [the dog's] training, our conclusion is not altered by the fact that it is his nose and not his handler's which detected the odor.

The majority, however, was careful to make two cautionary points: first, the experience and training of the dog must be amply demonstrated before his reaction will be admitted into evidence; second, the reaction alone of the police dog does not provide sufficient probable cause to search the luggage without a warrant. In Mayberry, though, it was found that the defendant had given his consent to the search.

Chief Justice Rose Bird filed the lone dissent, strongly berating

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16. 31 Cal. 3d at 341, 644 P.2d at 813, 182 Cal. Rptr. at 620. "It is commonly accepted that a 'search' is a governmental intrusion upon, or invasion of, a citizen's personal security in an area in which he has a reasonable expectation of privacy." Id., 644 P.2d at 813, 182 Cal. Rptr. at 620 (citing Terry v. Ohio, 392 U.S. 1, 9, 16-19 & n.15 (1968)); People v. Hyde, 12 Cal. 3d 158, 164, 524 P.2d 830, 832, 115 Cal. Rptr. 358, 360 (1974); People v. Edwards, 71 Cal. 2d 1096, 1099, 458 P.2d 713, 80 Cal. Rptr. 633 (1969). The primary justification for the court's determination that the dog sniff is not a search was the lack of physical entry or invasion of physical person involved. "Additionally. . .police dogs are trained to 'alert' or react only to contraband, unlike mechanical investigatory aids or devices (magnetometers, telescope, recorders, etc.) which intrude in sweeping and indiscriminate fashion into one's private affairs and personal effects." 31 Cal. 3d at 341, 644 P.2d at 813, 182 Cal. Rptr. at 620.

17. 31 Cal. 3d at 341, 644 P.2d at 814, 182 Cal. Rptr. at 621. Reiterating the opinion set forth in United States v. Goldstein, 635 F.2d 356 (7th Cir. 1980), cert. denied, 452 U.S. 962 (1981), the majority held that "although an airline passenger may reasonably anticipate that the contents of his luggage will not be exposed in the absence of consent or a search warrant, 'the passenger's reasonable expectation of privacy does not extend to the airspace surrounding that luggage.'" 31 Cal. 3d at 341, 644 P.2d at 814, 182 Cal. Rptr. at 621 (quoting United States v. Goldstein, 635 F.2d 356, 361 (7th Cir. 1980).

18. 31 Cal. 3d at 342, 644 P.2d at 814, 182 Cal. Rptr. at 621.

19. Id. at 342, 644 P.2d at 814, 182 Cal. Rptr. at 621. For a discussion of the requisite training and experience see People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977) and People v. Furman, 30 Cal. App. 3d 454, 106 Cal. Rptr. 366 (1973). This was not at issue in Mayberry.

20. 31 Cal. 3d at 342, 644 P.2d at 814, 182 Cal. Rptr. at 621. The normally required circumstances of either exigent circumstances or consent must be present before a warrantless search will be deemed proper. Id. at 342, 644 P.2d at 814, 182 Cal. Rptr. at 621.

21. Id. at 343, 644 P.2d at 814, 182 Cal. Rptr. at 621.
the rationale and policy analysis of the majority. Chief Justice Bird’s sentiment is best expressed in the opening passage of the dissenting argument:

A rose by any other name would not make this a “plain smell” case. The odor which the dog perceived was not “detectable by the nose” of any police officer. In holding that no search occurs when the government uses specially trained animals to detect that which is undetectable to human senses, the majority casts its lot with a number of courts, most federal, whose decisions on this issue have been characterized as “short on reasoning” and “unsound.”

Chief Justice Bird stated the issue required a two-prong analysis. First, whether a fourth amendment “search” actually took place, and second, whether the conduct in question was reasonable.

In analyzing the first question, the Chief Justice stated that whether the official conduct constituted a search should be dependent on the interest to be protected. Here, the interest was the defendant's justifiable expectation of privacy he had in the contents of his luggage. According to Chief Justice Bird, the majority erred by focusing instead on the means of violating that protected interest. Chief Justice Bird believes that both federal and state seizure precedents “compel the conclusion that a search occurs when a specially trained detector dog is used by police to determine whether luggage contains contraband hidden within.”

Chief Justice Bird took particular issue with the majority’s analogy that the odor of the contraband, like fluid emanating from a leaky container, was knowingly exposed to the public. Chief Justice Bird stated that because the odor was undetectable by human senses, the defendant neither acted “knowingly” nor exposed the odor “to the public” by carrying the marijuana in a sealed suitcase.

22. Id. at 343, 644 P.2d at 815, 182 Cal. Rptr. at 622. (Bird, C.J., dissenting).
23. Id. at 343, 644 P.2d at 815, 182 Cal. Rptr. at 622 (citing 1 LA FAVE, SEARCH AND SEIZURE, p.283. (1978)).
24. Id. at 344, 644 P.2d at 815, 182 Cal. Rptr. at 622.
25. Id. at 347-48, 644 P.2d at 817, 182 Cal. Rptr. at 624.
26. Id. at 348, 644 P.2d at 818, 182 Cal. Rptr. at 625 (citing Katz v. United States, 389 U.S. 347 (1967)). In Katz the United States Supreme Court held that the fourth amendment protects all areas which a person seeks to preserve as private.
27. 31 Cal. 3d at 347-48, 644 P.2d at 817, 182 Cal. Rptr. at 624. Bird believed it “remarkable” that the majority did not mention the Katz decision in their analysis even once. 31 Cal. 3d at 350, 644 P.2d at 819, 182 Cal. Rptr. at 626.
28. 31 Cal. 3d at 348, 644 P.2d at 818, 182 Cal. Rptr. at 625. Chief Justice Bird reasoned that because the actions of the dog revealed the contraband located in the sealed luggage a search had occurred. Thus, there is a judicially protected privacy interest in luggage that has long been held by the federal and state courts. See, e.g., Arkansas v. Sanders, 442 U.S. 753 (1979); People v. Minjares, 24 Cal. 3d 410, 591 P.2d 514, 153 Cal. Rptr. 224, cert. denied, 444 U.S. 887 (1979).
29. 31 Cal. 3d at 349, 644 P.2d at 818, 182 Cal. Rptr. at 625.
30. Id. at 349, 644 P.2d at 818, 182 Cal. Rptr. at 625. “The scent detected by the dog...was undetectable to human beings...” Consequently, the luggage’s con-
Chief Justice Bird also noted that the majority's conclusion that there was no search was unsupported by precedent. In the cases cited by the majority, there was a "particularized cause" or "reasonable suspicion" to justify the police activity. Those cases specifically did not address the issue presented here of a dragnet operation directed at all passengers.

Turning to the question of whether the conduct of the police was reasonable, Chief Justice Bird balanced the traditional notions that compelled the conclusion that the activity was reasonable against the fact that this was a "general, exploratory, dragnet" search. The Chief Justice found that because general, exploratory and dragnet searches had never been upheld by a California court, the balance weighed in favor of the unreasonableness of the search. Chief Justice Bird also noted two other factors which led her to the conclusion that the search was unreasonable. First, any exception to the probable cause rule must be narrowly drawn and interpreted. Second, "purely statistical tents were not 'exposed to the public' unless we are to interpret 'the public' as meaning specially trained dogs." 

Id. at 349, 644 P.2d at 818, 182 Cal. Rptr. at 625. "Nor can it be said that the appellant 'knowingly' exposed the contraband to the public, since he, not being a specially trained dog himself, would not have known that any aroma was escaping from his luggage." Id. at 349, 644 P.2d at 818, 182 Cal. Rptr. at 625.

31. Id. at 345-46, 644 P.2d at 816-17, 182 Cal. Rptr. at 623.
32. Id. at 346, 644 P.2d at 816, 182 Cal. Rptr. at 623.
33. Id. at 346, 644 P.2d at 817, 182 Cal. Rptr. at 623.
34. Id. at 352, 644 P.2d at 820, 182 Cal. Rptr. at 627.
35. Id. at 352, 644 P.2d at 820, 182 Cal. Rptr. at 627. For example, the search was not conducted on the whim or discretion of an officer in the field, but was instead based upon police department policy. Also, the dog search was conducted of only domestic flights originating in Florida. Furthermore, statistics had shown that these flights had high levels of contraband aboard. Finally, Chief Justice Bird conceded that the searches revealed only contraband drugs, and not any other private effects of the individual.

36. Id. at 353, 644 P.2d at 820-21, 182 Cal. Rptr. at 627-28. In particular, Chief Justice Bird disagreed with the statistical computations relied upon by the majority. "[T]he search was premised primarily on a prediction based upon past experience that there was a three-quarters of 1 percent chance that someone's checked luggage would contain contraband." Id. at 353, 644 P.2d at 820-21, 182 Cal. Rptr. at 627-28 (footnote omitted) (emphasis original). In a footnote to this statement Chief Justice Bird asserted that "[t]his figure overstates the probability that appellant's luggage in particular would contain contraband. If it is...estimated that each...flight has...15 passengers with checked luggage the...statistics would suggest that the likelihood of contraband in appellant's luggage was one-twentieth of 1 percent." Id. at 353 n.12, 644 P.2d at 820-21 n.12, 182 Cal. Rptr. at 627-28 n.12. See infra note 35 and accompanying text.
37. Id. at 353, 644 P.2d at 821, 182 Cal. Rptr. at 628.
38. Id. at 353, 644 P.2d at 821, 182 Cal. Rptr. at 628. Chief Justice Bird empha...
probability, unconnected to a particularized suspicion in a specific case” should never by itself justify a search. 39

For these reasons, Chief Justice Bird concluded that, not only did the activity in question constitute a search, but that it was also unreasonable. The dissent is of little surprise in light of the broad holding made by the majority.

The impact of Mayberry will be to give narcotics officers the latitude to utilize sniff searches in areas where it is statistically demonstrated that there is significant traffic in illegal narcotics.

E. Identification testimony which rests on an independent and untainted source is admissible evidence: People v. Teresinski

In People v. Teresinski 1 the California Supreme Court narrowed the application of the exclusionary rule 2 where a victim's identification, the fruit of an illegal police detention, was supported by an independent, untainted source.

About two o'clock in the morning, Officer Rocha of the Dixon police saw an unfamiliar car with three occupants passing through the city's business district. The car was traveling at a lawful speed without any suspicious behavior on the part of the occupants. Nevertheless, Officer Rocha signaled the driver of the car to stop because he believed that there were juveniles in the car in violation of a local curfew ordinance. 3 As the car slowed to

sized that “if the level of suspicion required by Terry is reduced, there appears no discernable limitation from exclusion permitting the wholesale frisking of the general public whenever a serious threat of crime emerges.” 31 Cal. 3d at 353, 644 P.2d at 821, 182 Cal. Rptr. at 629 (quoting People v. Hyde, 12 Cal. 3d 158, 164, 524 P.2d 830, 833, 115 Cal. Rptr. 358, 361 (1974).

39. Id. at 354, 644 P.2d at 822, 182 Cal. Rptr. at 629. See supra notes 35-36.

1. 30 Cal. 3d 822, 640 P.2d 753, 180 Cal. Rptr. 617 (1982). The opinion was written by Justice Broussard with Chief Justice Bird and Justices Mosk, Newman, Kaus and Tobriner concurring. Justice Richardson wrote a separate concurring and dissenting opinion.

2. The exclusionary rule requires the exclusion from a criminal prosecution of evidence obtained in violation of the fourth amendment. The rule was established in Weeks v. United States, 232 U.S. 383 (1914), where the Court held that any evidence obtained by federal officers in violation of the fourth amendment would be barred from a federal prosecution. Id. at 398. In Mapp v. Ohio, 367 U.S. 643 (1961), the Court applied the federal rule to state prosecution by holding that “all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court.” Id. at 655.

3. The local curfew ordinance states:

It shall be unlawful for any person under the age of eighteen years to loiter, idle, wander, stroll, or play in or upon the public streets, highways, roads, alleys, parks, playgrounds, or other public grounds, public places and public buildings, places of amusement and eating places, vacant lots, or other unsupervised places, between the hours of 10:00 p.m. and 5:00 a.m. . . .
a stop, Officer Rocha noticed the defendant and a front seat passenger glanced back and reached down to the floorboard. Thus, Officer Rocha believed that the occupants might be hiding alcohol or reaching for a weapon. After examining the defendant's driver's license, Officer Rocha shined his light on the floorboard of the car where he observed a pool of liquid and a beer can. He then observed a gun holster and retrieved a loaded weapon from the floorboard. A subsequent search of the car produced incriminating evidence which tied defendant to the robbery of a nearby Seven-Eleven store. After the defendant and his two passengers were arrested on suspicion of robbery, the Seven-Eleven store clerk who witnessed the robbery identified photographs of the defendant and his passengers. At a subsequent preliminary hearing, the store clerk identified the defendant in person.

The defendant moved to suppress both the physical evidence seized and the identification testimony of the store clerk. The trial court granted the motion to suppress because Officer Rocha's detention of the defendants was illegal, even though it found that the store clerk was able to identify the defendants.

On remand, the California Attorney General contended that

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4. Since defendant's driver's license reflected that the defendant was an adult, no curfew violation had been committed. Id. at 828, 640 P.2d at 755, 180 Cal. Rptr. at 619.

5. Upon a further search of the car, Officer Rocha discovered several beer containers, a bag of marijuana, and a paper bag filled with bills and change. The money was found to be stolen from a Seven-Eleven store in a nearby community that had been robbed earlier that night. Id. at 828, 640 P.2d at 756, 180 Cal. Rptr. at 620.

6. Id. at 828, 640 P.2d at 756, 180 Cal. Rptr. at 620.

7. The defendant's motion to suppress was made pursuant to CAL. PENAL CODE § 1538.5 (West 1982), which states in pertinent part: "A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the grounds that the search or seizure without a warrant was unreasonable."

8. 30 Cal. 3d. at 828, 640 P.2d at 756, 180 Cal. Rptr. at 620.

9. Id. at 828, 640 P.2d at 756, 180 Cal. Rptr. at 620. In re Tony C., 21 Cal. 3d 888, 582 P.2d at 957, 148 Cal. Rptr. 366 (1978), states the standard for determining whether a detention of a suspect is valid:

[I]n order to justify an investigative stop or detention the circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity.

Id. at 933, 582 P.2d at 959, 148 Cal. Rptr. at 368 (emphasis added).

10. The California Supreme Court upheld the superior court's decision in People v. Teresinski, 26 Cal. 3d 457, 665 P.2d 874, 162 Cal. Rptr. 44 (1980).
the store clerk's identification of the defendant was admissible based on the United States Supreme Court decision in United States v. Crews. The California Supreme Court agreed, stating that there was "no basis" to distinguish Teresinski from Crews.

In analyzing the facts of the case, the court concluded that the store clerk's identification testimony rested upon an "independent and untainted source." Since the store clerk was able to identify the defendant based upon his memory, the fact that the store clerk learned of the defendant's name as a result of illegal police conduct was irrelevant. Thus, the store clerk's identification testimony of the defendant was admissible evidence.

By its decision in Teresinski, the California Supreme Court has aided the law enforcement effort because it permitted the introduction of evidence which was indirectly connected to illegal police conduct if such evidence rests upon a source which was independent and untainted from the illegal police conduct.

F. Double jeopardy: Stone v. Superior Court

Clifford Stone petitioned the California Supreme Court to prevent his retrial on a charge of murder after the first trial jury had, prior to the court's declaration of a mistrial, informally, but unanimously agreed and reported to the court that he was not guilty of...
the murder, but also had simultaneously acknowledged a deadlock on the lesser included offenses of voluntary and involuntary manslaughter. In *Stone v. Superior Court*, the supreme court, ruled that although retrial was proper as to the undecided lesser included offenses, a retrial of the defendant on the murder charge would subject him to double jeopardy in light of what effectively amounted to a partial verdict for acquittal on that specific offense. The court rejected the prosecution’s argument that the lack of either a formal verdict for acquittal on the charged greater offense, or a formal verdict of conviction on a lesser included offense impliedly acquitting the defendant on the greater offense, indicated an absence of a requisite definite and final expression of the intent of the jury. In the court’s view, the acceptance of such an argument could make the determination of a defendant’s guilt or innocence rest upon the procedural form of indictment. The prosecution could effectively determine its own ability to successively prosecute a defendant through discretionary exercises of either a statutorily conferred option of charging lesser included offenses as separate counts, or alternatively, charging only the greater principal offense and awaiting the jury verdict before determining the value of further prosecution. On a separate but re-


2. The different types of manslaughter are set forth at *Cal. Penal Code* § 192 (West 1970). In *Stone*, the defendant was not charged with vehicular manslaughter. See *id.* § 192(a), (b).

3. 31 Cal. 3d 503, 646 P.2d 809, 183 Cal. Rptr. 647 (1982).

4. In addition to Justice Mosk, the majority consisted of Chief Justice Bird, and Justices Newman and Broussard. Justices Richardson and Kaus each filed separate dissenting opinions.

5. *Id.* at 519, 646 P.2d at 820, 183 Cal. Rptr. at 658.

6. While the opinion does not expressly state that this was the assertion of the prosecution the decision implies that it was. See 31 Cal. 3d at 510-12, 646 P.2d at 814-15, 183 Cal. Rptr. at 652-53.

7. *Id.*

8. See *id.* at 517-18, 646 P.2d at 819, 183 Cal. Rptr. at 657.

9. See *id.* at 516-17, 646 P.2d at 818-19, 183 Cal. Rptr. at 656-57. See also *Cal. Penal Code* § 954 (West 1970). “An accusatory pleading may charge two or more different offenses . . . of the same class of crimes or offenses, under separate counts[. . . . . T]he court in which a case is triable . . . may in its own discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately[.]”

10. See *Cal. Penal Code* § 1159 (West 1970). “The jury . . . may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged[.]”

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lated issue, the court held, rejecting a rigid interpretation of apparently controlling statutory and case authority, that the defendant could be retried on lesser included offenses upon which the jury was deadlocked, although an acquittal of the greater offense had been received.11

The defendant was tried on the single charge of murder. At the completion of the evidence, the jury was instructed on first and second degree murder, and also on the offenses of voluntary and involuntary manslaughter.12 Following a deliberation of seven days, the jury submitted to an inquiry by the court. The voting posture of the jury members as to all possible verdict options, including justifiable homicide and acquittal was revealed.13 The foreman reported that although there was unanimity in opposing either first or second degree murder, or acquittal, the jury was deadlocked as to the possible verdicts of voluntary and involuntary manslaughter and justifiable homicide.14 Following this disclosure of the jury poll, and out of the jury's presence, the defendant put forth several alternative motions which had the ultimate objective of receiving a formal partial verdict of acquittal as to the offenses of first and second degree murder based upon the interim jury voting.15 The court denied the motions because of a lack of specific authority justifying the receipt of such partial

11. See 31 Cal. 3d at 520-22, 646 P.2d at 820-22, 183 Cal. Rptr. at 658-60. See also infra notes 57-62 and accompanying text.
12. 31 Cal. 3d at 507, 646 P.2d at 812, 183 Cal. Rptr. at 650. The trial judge is required to instruct the jury on lesser included offenses where evidence is speculative as to the principal offense. “When a prosecutor chooses to charge only the greater offense, the trial judge must instruct sua sponte on lesser included offenses when substantial evidence adduced at trial indicates that one or more of the elements necessary to sustain a conviction on the greater offense may be lacking.” Id. at 517, 646 P.2d at 819, 183 Cal. Rptr. at 657. See, e.g., People v. Flannel, 25 Cal. 3d 668, 684-85, 693 P.2d 1, 10, 160 Cal. Rptr. 84, 93 (1979); (It is “elementary that the court should instruct the jury upon every material question upon which there is any evidence deserving of any consideration whatsoever.”) (quoting People v. Carmen, 36 Cal. 2d 768, 773, 228 P.2d 281, 284 (1951)); People v. Sedeno, 10 Cal. 3d 703, 716-17, 514 P.2d 913, 921, 112 Cal. Rptr. 1, 9-10 (1974).
13. The jury poll was as follows:

<table>
<thead>
<tr>
<th>Verdict</th>
<th>Votes</th>
</tr>
</thead>
<tbody>
<tr>
<td>First degree murder</td>
<td>No votes</td>
</tr>
<tr>
<td>Second degree murder</td>
<td>No votes</td>
</tr>
<tr>
<td>Voluntary manslaughter</td>
<td>Four votes</td>
</tr>
<tr>
<td>Involuntary manslaughter</td>
<td>Two votes</td>
</tr>
<tr>
<td>Justifiable homicide</td>
<td>Six votes</td>
</tr>
<tr>
<td>Acquittal</td>
<td>No votes</td>
</tr>
</tbody>
</table>

31 Cal. 3d at 507, 646 P.2d at 812, 183 Cal. Rptr. at 650.
14. Id. The report was made by the foreman in open court and in the presence of the other members of the jury panel. Each member of the jury expressed the opinion that a hopeless impasse had been reached and that further deliberations would be futile. Id. at 507, 646 P.2d at 812, 183 Cal. Rptr. at 650. See infra note 51.
15. Id. at 508, 646 P.2d at 812-13, 183 Cal. Rptr. at 650-51.
verdicts\textsuperscript{16} where they are not requested,\textsuperscript{17} and merely based on the informal and tentative position of the jury.\textsuperscript{18} The trial court did, however, state on the record for the specific purpose of appeal\textsuperscript{19} that it was accepting the statement of the jury foreman disclosing the jury poll returns as a "clear expression that . . . there [was] not one juror of the twelve who believe[d] that the evidence [was] sufficient to support a finding of first degree murder beyond a reasonable doubt."\textsuperscript{20} Thereupon, the court ordered further deliberations which subsequently proved fruitless.\textsuperscript{21} Prior to a declaration of a mistrial and a dismissal of the jury, the foreman announced that a final poll had revealed a shift of votes as to the manslaughter and justifiable homicide verdicts, but there was still a unanimous opposition to conviction on either of the murder offenses or full acquittal.\textsuperscript{22} The defendant subsequently submitted a petition requesting relief by writ of prohibition on the ground of

\begin{itemize}
  \item 16. \textit{Id.}
  \item 17. \textit{See Cal. Penal Code} §§ 1150-1151 (West 1970). These statutes provide that except under circumstances where the jury is in doubt as to the legal effect of facts previously proved, they must return a general verdict of "not guilty" or "guilty" on the charges contained in the accusatory pleading.
  \item 18. \textit{But see Cal. Penal Code} § 1162 (West 1970). Section 1162 states:
    \begin{quote}
      If the jury persists in finding an informal verdict, from which, however, it can be clearly understood that their intention is to find in favor of the defendant upon the issue, it must be entered in the terms in which it is found, and the court must give account of acquittal. But no judgment of conviction can be given unless the jury expressly finds against the defendant upon the issue, or judgment is given against him on a special verdict.
    \end{quote}
  \item 19. 31 Cal. 3d at 508, 646 P.2d at 813, 183 Cal. Rptr. at 651. "I don't have any authority to take any of the action that you request other than to protect your record by what we have in. . . . I think your remedy, if there is one at all, lies with the California Supreme Court[.]" \textit{Id.}
  \item 20. \textit{Id.}
  \item 21. \textit{Id.} The jury deliberated for one and a half more days without reaching a consensus on any charge. \textit{Id.}
  \item 22. \textit{Id.} at 508, 646 P.2d at 813, 183 Cal. Rptr. at 651. The final jury poll was as follows:
    \begin{center}
      \begin{tabular}{ll}
        First degree murder & No votes \\
        Second degree murder & No votes \\
        Voluntary manslaughter & Three votes \\
        Involuntary manslaughter & Five votes \\
        Justifiable homicide & Four votes \\
        Acquittal & No votes
      \end{tabular}
    \end{center}
    \textit{See also supra} note 13. Examination discloses that votes were congregating in favor of involuntary manslaughter and were moving away from conviction of murder and excuse by justifiable homicide. Thus while the voting pattern would imply no guilt of murder, it would also indicate that a feeling existed in the deliberations that wrongful homicide of some degree had occurred. This fact is important to the analysis presented by the dissenting justices. \textit{See infra} notes 62-65 and accompanying text.
\end{itemize}
former jeopardy. The writ was answered by the decision in Stone v. Superior Court.

Multiple prosecutions based on a single offense are commonly referred to as "double jeopardy." The concept of successive prosecution is expressly prohibited by the fifth amendment to the United States Constitution. The principle was incorporated to the states in Benton v. Maryland in 1969. The constitutional guarantee against double jeopardy is founded on the rationale that the government should not be permitted to exercise its relatively limitless prosecutorial power and resources against a defendant after he has been acquitted once. To allow a "second chance" at conviction would place the defendant in a constant state of insecurity and "inhibit the ordering of his affairs." Additionally, allowing multiple prosecution of the same charge would enable the government to discover undisclosed testimony and defenses in a first trial, and if unsuccessful in prosecution there, utilize the knowledge gained to an advantage in a second trial. Thus, the primary purpose on the constitutional proscription against double jeopardy is to prevent unlimited exposure to trial

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23. The extraordinary writ of prohibition is clearly the proper form of relief to preclude retrial on the ground of double jeopardy. See 31 Cal. 3d at 509 n.1, 646 P.2d at 813 n.1, 183 Cal. Rptr. at 651 n.1.
24. U.S. CONST. Amend V. "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." California, as do all but five states, has included a double jeopardy clause in its state constitution. See CAL. CONST., Art. 1, § 15. See also Curry v. Superior Court, 2 Cal. 3d 707, 470 P.2d 345, 87 Cal. Rptr. 361 (1970).
26. See 31 Cal. 3d at 515, 646 P.2d at 817, 183 Cal. Rptr. at 655. The court articulated this rationale by citing United States v. Green, 355 U.S. 184 (1957). In Green the United States Supreme Court explained the balance to be used in weighing the rights of the state against those of a defendant with regard to multiple prosecution. The Court said:

The underlying idea . . . is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

Id. at 187-88.
27. In a normal situation of a retrial as the result of a "hung jury" the federal cases have held that a defendant is not subject to double jeopardy. See, e.g., United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824). See also J. Findlater, Retrial After a Hung Jury: the Double Jeopardy Problem, 129 U. Pa. L. Rev. 701 (1981) (hereinafter cited as Findlater).
28. See Findlater, supra note 27 at 713-14.
29. See Comment, Twice In Jeopardy, 75 YALE L.J. 262, 278 (1965). "Without a rule of finality no procession of juries could effectively acquit a defendant, but a single jury could convict. The prosecutor could keep trying until he found an accommodating panel." Findlater, supra note 27 at 714 n.51.
and conviction, not the prevention of double punishment.30

In California criminal proceedings, prosecutors are allowed by statute to charge a defendant with a greater offense and lesser included offenses as separate counts.31 Such a situation necessarily calls for the jury to render separate, albeit consistent, verdicts.32 Alternatively, the state can merely charge the defendant with only the greater offense whereupon lesser included offenses may arise from implied indictments.33 Where the principal offense is murder, lesser included offenses include voluntary and involuntary manslaughter.34 Under this circumstance the trial court is obligated to instruct the jury on lesser included offenses.35 Where this occurs, in rendering a single verdict of conviction on any separate offense the jury will, by necessary implication, render separate verdicts of acquittal as to the other related offenses. Where the jury becomes deadlocked and cannot give a verdict of conviction on any offense, but in its deliberations informally exhibits a determination that the defendant is not guilty of a particular offense upon which it has been instructed, the question becomes whether the prohibition against double jeopardy will bar a retrial on the offenses to which the jury has expressed favor of acquittal. Stated differently, the inquiry is whether a trial court is required by constitutional considerations to receive as a formal verdict, a partial verdict of acquittal based upon an intermediate jury poll.

30. See Price v. Georgia, 398 U.S. 323 (1970). “[T]he Double Jeopardy Clause . . . is written in terms of potential or risk of trial and conviction, not punishment.” Id. at 329 (emphasis added). C.f., Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy clause will operate to bar prosecution of an individual as an adult after the individual has appeared in Juvenile Court which found that he was in violation of a criminal statute but also unfit for treatment as a juvenile).


32. A person cannot be convicted of both the included and the greater offense because, in essence, only one offense is committed. See People v. Greer, 30 Cal. 2d 589, 600-01, 184 P.2d 512, 519 (1947).

33. See 31 Cal. 3d at 517, 646 P.2d at 818-19, 183 Cal. Rptr. at 656-57. “An indictment, by operation of law for murder, is also an indictment for manslaughter, and every less offense that may be included under the charge of murder, just as much as though it were charged in distinct and separate counts.” (emphasis deleted) (quoting People v. Gilmore, 4 Cal. 376, 380 (1854)).

34. Id.

35. Id. at 517, 646 P.2d at 819, 183 Cal. Rptr. at 657. See supra note 12.
although the same jury is unable to render a formal verdict as to any other charged offense. Such was the issue examined by the supreme court in Stone.\textsuperscript{36}

Justice Mosk began his analysis by noting two separate premises\textsuperscript{37} which would arguably compel acceptance of an informally expressed, yet clear, jury intent\textsuperscript{38} to acquit a defendant of a charged greater offense where deliberations as to lesser included offenses are at an impasse. First, the informal \textit{intent} of the jury will control with the force of a verdict\textsuperscript{39} when “unmistakeably expressed”\textsuperscript{40}; and second, an \textit{implied} verdict\textsuperscript{41} of acquittal of a greater offense will be received where the jury convicts on a lesser included offense.

While Stone was a case of first impression, prior California cases record the discussion of comparable issues. People v. Griffin\textsuperscript{42} involved a situation where a defendant charged with first degree murder was retried following a mistrial, wherein the jury had stated for the record that it had deadlocked standing ten for acquittal and two for conviction of second degree murder.\textsuperscript{43} The supreme court rejected a contention on appeal that because there had been no jury votes in favor of first degree murder, the jury had impliedly acquitted him of that charge.\textsuperscript{44} The basis of the court’s decision granting a retrial was that the jury had not \textit{unanimously} agreed to acquit for \textit{first} degree murder. The court felt that the two votes for second degree murder were not ultimate conclusions and may have merely been temporary compromises in deliberations foreshortened by the court’s declaration of a mistrial.\textsuperscript{45}

A factual setting very similar to that exhibited in Stone was found in the case of People v. Doolittle.\textsuperscript{46} There, the jury deliberated on a charged greater offense and uncharged but instructed lesser included offenses. The jury, although unanimous in their

\begin{footnotesize}
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\item \textsuperscript{36} 31 Cal. 3d at 507, 646 P.2d at 812-13, 183 Cal. Rptr. at 650-51.
\item \textsuperscript{37} Id. at 510-11, 646 P.2d at 814-15, 183 Cal. Rptr. at 652-53.
\item \textsuperscript{38} See CAL. PENAL CODE § 1162 (West 1970), supra note 17. Section 1162 does not discuss partial verdicts.
\item \textsuperscript{39} Id.; 31 Cal. 3d at 511, 646 P.2d at 814, 183 Cal. Rptr. at 652.
\item \textsuperscript{40} See People v. Bratis, 73 Cal. App. 3d 751, 763, 141 Cal. Rptr. 45, 52 (1977) (compilation of authorities holding that jury intent, if unmistakably expressed, will overcome the form of the verdict).
\item \textsuperscript{41} 31 Cal. 3d at 511, 646 P.2d at 814, 183 Cal. Rptr. at 652. “[C]ases hold that a verdict of guilty of a lesser included offense constitutes an implied acquittal of the greater offense of which the jury could have convicted the defendant.” See id. at 511 n.5, 646 P.2d at 815 n.5, 183 Cal. Rptr. at 653 n.5.
\item \textsuperscript{42} 66 Cal. 2d 459, 426 P.2d 507, 58 Cal. Rptr. 107 (1967).
\item \textsuperscript{43} Id. at 464, 426 P.2d at 509-10, 58 Cal. Rptr. at 109-10.
\item \textsuperscript{44} Id. at 464, 426 P.2d at 510, 58 Cal. Rptr. at 110.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} 23 Cal. App. 3d 14, 99 Cal. Rptr. 810 (1972).
\end{itemize}
\end{footnotesize}
refusal to vote for conviction of the greater offense, deadlocked on the lesser included offenses.47 A motion by the defendant to dismiss a subsequent retrial on the ground of double jeopardy was denied on the basis of the Griffin rule because nothing on the record of the first trial in Doolittle showed a clear final jury intent for acquittal.48 The Doolittle court said that "as in Griffin, the ballots taken and voted upon may well have been the result of temporary compromises in an effort to reach unanimity."49 Thus, the principle derived by the Stone court from their analysis was the requirement that to be binding, an informed partial verdict must be a "definite and final expression" of the jury intent as to acquittal on a greater charge50 and must be given prior to a declaration of mistrial which occurs as the result of a jury deadlock on lesser included offenses.51 There must be facts on the record showing a clear and uncontradicted intent of the jury to render a partial verdict of acquittal to be upheld in such circumstances.52 But, where such an implied verdict is rendered it will be upheld and the retrial of the offense acquitted therein would be barred on the basis of double jeopardy.53

The Stone court provided specific instructions for the application of such a rule. Describing two potential scenarios, Justice Mosk said that when a defendant is charged with only a single greater offense, but the jury has been instructed on lesser included offenses concomitantly rising from the greater charge, the judge can direct the jury to find specific verdicts for each individual offense.54 In that case, if the jury subsequently determines that the defendant is not guilty of the greater charge, at the same time declaring an inability to reach a consensus on any lesser in-

47. Id. at 17, 99 Cal. Rptr at 812-13.
48. Id. at 20-21, 99 Cal. Rptr. at 815.
49. Id. at 21, 99 Cal. Rptr. at 815.
50. 31 Cal. 3d at 514, 646 P.2d at 816, 183 Cal. Rptr. at 654.
51. Id. at 514, 646 P.2d at 816-17, 183 Cal. Rptr. at 654-55. In the instant case, the record shows that the jury had indicated in open court, through the representative presentation of the foreman, the vote summary and the inability to reach a consensus. This was done twice before the declaration of a mistrial. See supra notes 13 and 22.
52. Cf., People v. Griffin, 66 Cal. 2d 459, 464, 426 P.2d 507, 510, 58 Cal. Rptr 107, 110 (1967). ("We may not infer from the foreman's statement that the jury had unanimously agreed to acquit of first degree murder. There is no reliable basis in fact for such an implication, for the jurors had not completed their deliberations. . . .") (emphasis added).
53. 31 Cal. 3d at 519, 646 P.2d at 820, 183 Cal. Rptr. at 658.
54. Id. at 519, 646 P.2d at 820, 183 Cal. Rptr. at 658.
cluded charge, or full acquittal, the defendant will nevertheless stand acquitted of the greater offense and may not be retried upon it. In the alternative, the court may await the outcome of jury deliberations without directing the finding of specific verdicts. If a deadlock occurs, the court may then inquire as to whether any of the instructed offenses have been eliminated in the deliberations. If the court is satisfied that the jury has deadlocked on the lesser offenses but has currently reached a final decision of acquittal as to the principal offense, it is then required to accept the informal poll favoring acquittal as a binding verdict. Thereafter, the defendant is protected from further prosecution of the greater offense by constitutional proscriptions against double jeopardy.

Justice Mosk concluded the majority opinion by addressing the petitioner's contention that if a verdict of acquittal on a greater charge is formally received, statutory authority would dictate that he could not be retried on any lesser included offense upon which the jury deadlocked. The assertion was based upon language contained in Penal Code section 1023, which provides that an acquittal "is a bar to another prosecution for the offense charged... or for an offense necessarily included therein." Although an apparently express prohibition against successive prosecutions of lesser included offenses where an acquittal of a greater charged offense occurs, section 1023 was construed by the court as applying only to situations where the jury had expressed no opinion as to lesser included offenses while affirmatively acquitting the defendant on the greater offense. The court felt that the purpose behind section 1023 was the preclusion of situations where the prosecution attempts to convict the defendant by initially charging only the greater offense and then, if the defendant is acquitted, prosecuting him on further individual counts of lesser included offenses until a conviction can be obtained.
Thus, although section 1023 had been previously interpreted as favoring the bar of a retrial in circumstances similar to *Stone*, the court reinterpreted the statute as permitting such a retrial where a deadlocked jury has *expressed some sentiment* favoring conviction on a lesser included offense.

Justices Richardson and Kaus dissented in *Stone*. The primary thrust of their difference with the majority was a feeling that the vote shift of the jury between the first and second public jury poll indicated, as had been the case in *People v. Griffin*, that the reported unanimous vote for acquittal of both charges of murder was not a final and clear intent to acquit. Since the jury was deadlocked, and not in a consensus at the time of this dismissal, the dissenting Justices opined that the votes for acquittal could only be designated as a "temporary compromise," and thus, not a sound basis for formally recognizing acquittal on the murder counts which would bar further prosecution on the ground of double jeopardy.

The rule articulated in *Stone v. Superior Court*, that juries deadlocked on the question of guilt of lesser included offenses may still render partial verdicts of acquittal of the greater offense will seemingly have at least two significant effects. First, and most noticeable, the decision will most likely have the effect of relieving the California court system of the time consuming burden of rehearing evidence on certain criminal counts in retrials. The ruling will allow some retrial defendants to defend themselves

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63. *See supra* note 22.
64. *See supra* notes 42-45 and accompanying text.
65. 31 Cal. 3d at 524, 646 P.2d at 823, 183 Cal. Rptr. at 661.
66. Id. (Richardson, J., dissenting). *See supra* notes 13 and 22.
67. Id. at 524, 646 P.2d at 823, 183 Cal. Rptr. at 661. "The votes reported by the foreman merely demonstrated, at a particular time, the closest the jury could come to a unanimous verdict. . . . Most certainly, the reported votes did not show that the jurors had unanimously reached a verdict on the greater offenses[.]." *Id.* (emphasis in original) (Richardson, J., dissenting).
only as to those counts on which the initial jury could not reach consensus. Secondly, Stone will likely provide further assurances of judicial integrity by ensuring that a defendant is not convicted of a principal offense on a second prosecution when a prior jury had effectively acquitted the defendant of the same offense.

VI. DAMAGES

A. Retroactivity of punitive damages rule in drunk driving cases: Peterson v. Superior Court

In Peterson v. Superior Court, the California Supreme Court was presented with the question of whether the rule announced in Taylor v. Superior Court, regarding the recovery of punitive damages from an intoxicated driver who caused personal injury, should be applied retroactively to injuries which occurred before the Taylor rule was announced. The court concluded that making the Taylor rule retroactive would further the strong public policy of deterring persons from driving while intoxicated.

On April 24, 1979, an automobile accident occurred when the defendant was driving recklessly, at high speeds and under the influence of alcohol. The defendant lost control of the car causing personal injury to the plaintiff, Donald Peterson. The plaintiffs, Peterson and his wife, filed a complaint on April 11, 1980. The Peterson trial court denied the plaintiffs’ motion to amend their complaint so that it would conform to the Taylor rule. The trial

1. 31 Cal. 3d 147, 642 P.2d 1305, 181 Cal. Rptr. 784 (1982).
2. On August 21, 1979, the California Supreme Court, in Taylor v. Superior Court, 24 Cal. 3d 890, 598 P.2d 854, 157 Cal. Rptr. 693 (1979), held that the act of operating an automobile while intoxicated may constitute malice under then Civil Code § 3294. The Taylor court also held that because the intoxicated driver is the cause of many serious accidents, there should be a strong public policy of deterring people from driving while drinking. This policy justifies punitive damages against an intoxicated driver who has caused personal injuries. Id. at 900, 598 P.2d at 859, 157 Cal. Rptr. at 698.
3. 31 Cal. 3d at 147, 164, 642 P.2d at 1305, 1315, 181 Cal. Rptr. at 784, 794.
4. Id. at 163, 642 P.2d at 1313-14, 181 Cal. Rptr. at 792-93.
5. Plaintiff, Donald Peterson, sought damages for his personal injuries and his wife sought to recover “for the loss of services [of] husband and provider.” Id. at 150-51, 642 P.2d at 1306, 181 Cal. Rptr. at 785.
6. The Taylor decision was handed down on August 21, 1979. The plaintiffs’ attempt to amend their complaint was in order to comply with the newly amended Civil Code. When the complaint in Peterson was initially filed, Civil Code § 3294 had provided that “[i]n an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff may recover damages for the sake of example and by way of punishing the defendant.” CAL. CIV. CODE § 3294 (West 1970) (emphasis added). This section was amended effective January 1, 1981, to read: “In addition for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, the plaintiff may recover damages for the sake of example and by way of punishing the defendant. . . .” CAL. CIV. CODE
court based its denial upon the holding and rationale of Mau v. Superior Court, which denied retroactive application of the Taylor rule. The plaintiffs again moved to amend their complaint following the December 1980 decision announced in Busboom v. Superior Court, which applied the Taylor rule retroactively. The trial court again denied the motion.

In issuing its writ of mandate to permit the amended complaint, the California Supreme Court reiterated the general rule that "a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation." The supreme court rejected the defendant's contention that the factors considered in determining the retroactive application of criminal decisions announced by the United States Supreme Court in Stovall v. Denno should also guide the retroactivity analysis in the pres-

§ 3294(a) (West Supp. 1982). The legislature went on to define malice as: "means of conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others." CAL. CIV. CODE § 3294 (c) (West Supp. 1982).

7. 101 Cal. App. 3d 875, 161 Cal. Rptr. 895 (1981). In Mau, a negligence cause of action involving personal injuries was pending when the Taylor case was decided. The plaintiff had requested to amend her complaint in accordance with the new ruling. The request was granted. The appellate court issued a writ denying the amendment, stating that the rule allowing punitive damages was a form of punishment against the intoxicated driver which required fair warning. Id. at 881, 161 Cal. Rptr. at 898.

8. 113 Cal. App. 3d 550, 169 Cal. Rptr. 886 (1980). In Busboom, the plaintiff had originally alleged that the defendant was intoxicated and the action of driving his truck southbound in a northbound lane constituted a conscious disregard for the safety of others. As amended, the complaint additionally alleged that defendant "drove when intoxicated with knowledge of the probable dangerous consequences of his conduct, which he willfully and deliberately failed to avoid." Id. at 555, 169 Cal. Rptr. at 888. The amended complaint also alleged malice pursuant to the newly amended Civil Code. Id. See supra note 3. The Busboom court allowed the amended complaint to stand, concluding that the trend in the law allowing the recovery of punitive damages had evolved to such an extent that "[r]etrospective application in cases like these is not an enormous burden." 113 Cal. App. 3d at 554, 169 Cal. Rptr. at 883.

9. 31 Cal. 3d at 151, 642 P.2d at 1306, 181 Cal. Rptr. at 785. (footnote omitted). The court noted that the exceptions to the retroactivity rule did not include actions involving contracts and property rights. See County of Los Angeles v. Faus, 48 Cal. 2d 672, 680-81, 312 P.2d 680 (1957). The court then stressed that the case at hand concerned neither contract nor property, and fairness and public policy did not imply that the Taylor rule should not be retrospective. 31 Cal. 3d at 152, 642 P.2d at 1307, 181 Cal. Rptr. at 786.

10. 388 U.S. 293, 297 (1967). The United States Supreme Court held that the need for an attorney at a lineup was not retroactive. The court stated three criteria in determining whether a decision was retroactive: 1) the purpose of the decision; 2) the extent of reliance on the old standards; and 3) the effect on the administration of justice of a retroactive application of the decision.
ent case. The court noted, however, that the rules of retroactivity in civil cases were not inconsistent with those in criminal decisions, because decisions in the civil context also depend upon considerations of public policy and fairness. “Public policy considerations include the purpose to be served by the new rule, and the effect on the administration of justice of retroactive application. Considerations of fairness would measure the reliance on the old standards by the parties or other similarly affected. . . .”

Addressing the public policy consideration, the defendant first argued that the imposition of punitive damages could have no deterrent effect when the prohibited conduct had already occurred. The defendant further argued that fairness pointed to no imposition of punitive damages because there had been a significant degree of reliance on the pre-Taylor rule by both litigants and insurers. The court found both of these contentions unpersuasive. The public policy argument was rejected because the court believed that retroactive imposition of punitive damages did further the rule’s deterrent effect. In an extensive policy discussion, the court reasoned that the punitive damages rule should be broadly construed. Such a broad construction would not only deter other persons from driving while intoxicated, but would also deter offenders from repeating the same “antisocial conduct.”

In addition, the court believed that the publicity accompanying retroactive application of the Taylor rule would maximize the rule’s deterrent effect. Justice Broussard noted that if a rule of

11. The court cited numerous cases in support of this proposition: Safeway Stores, Inc. v. Nest-Kart, 21 Cal. 3d 322, 579 P.2d 441, 146 Cal. Rptr. 550 (1978) (discusses fairness and public policy in deciding whether to apply comparative indemnity retroactively); Isbell v. County of Sonoma, 21 Cal. 3d 61, 577 P.2d 188, 145 Cal. Rptr. 368, (1978) (fairness and public policy do not allow the retroactive application of a Civil Procedure rule); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 19 Cal. Rptr. 858 (1975) (apply limited retroactivity in a comparative negligence case because of the many cases pending litigation); Neel v. Magana, Olney, Cathcurt & Gelfand, 6 Cal. 3d 176, 491 P.2d 421, 98 Cal. Rptr. 837 (1971) (statute of limitations in attorney malpractice accrues when client discovers or should discover the wrong).

12. 31 Cal. 3d at 153, 642 P.2d at 1307, 181 Cal. Rptr. at 786-87. The foreseeability of the change in the law must be balanced as well in the analysis of these factors.

13. 31 Cal. 3d at 154, 642 P.2d at 1308, 181 Cal. Rptr. at 787.

14. Id.

15. Id. While the court acknowledged that there was extensive debate over whether punitive damages were an effective deterrent to drunk driving, the judicial assumption announced in Taylor was that punitives were an effective deterrent.

16. Id. at 156, 642 P.2d at 1309, 181 Cal. Rptr. at 788.

17. In a somewhat utopian analysis, Justice Broussard wrote:

Moreover, each defendant will serve as an example to others, so that they will be similarly deterred from driving while intoxicated. The sooner knowledge of the potential liability saturates the consciousness of the driv-
prospective application were followed, the deterrent effects of the Taylor rule would be delayed until at least 1985.18

The court also rejected the defendant's fairness argument stating that "it [could] not be said that the parties... have relied upon the old rule prohibiting punitive damages or that the change wrought by Taylor was unforeseen."19 Analyzing the contention that retrospective application punished insurance companies who had relied upon the pre-Taylor rule, the court stated that this "asserted reliance" was not a sound justification for requiring prospective application.20 In addition, the defendant contended that the imposition of punitive damages would negate an insurance company's obligation to cover an award of compensatory damages as well. The court, however, disagreed. "We do not consider conduct amounting to a conscious disregard of the safety of others sufficient to support punitive damages in the intoxicated driver context, to constitute a willful act so as to preclude any indemnification under [the] Insurance Code. . . ."21

The defendant also asserted that the principle underlying the ex post facto clauses of the United States22 and California23 Constitutions prohibited retroactive application of the punitive damages rule. The California Supreme Court stated flatly that the constitutional prohibition regarding ex post facto laws "extends
to criminal statutes and penalties, not to civil statutes."\(^{24}\)

The court noted the intended impact of *Peterson* by stating "[r]etroactivity will create a greater, more immediate deterrent impact on the consciousness of the driving public. . . ."\(^{25}\) Whether this will, in fact, deter individuals from driving while intoxicated remains to be seen.

VII. EMINENT DOMAIN

A. *Under revised California eminent domain statutes, intangible personal property rights may be condemned for the public purpose of promotion of recreation: City of Oakland v. Oakland Raiders, Ltd.*

In the recent past, the legal issues surrounding the subject of eminent domain have acquired a new significance.\(^1\) Due in great part to activism in the areas of environmental and real property interests, the constitutionally conferred right of the government to appropriate private property has become the subject of much controversy.\(^2\) The expanding awareness of the governmental utility of the eminent domain laws has led to innovative revisions of the California eminent domain statutes\(^3\) which include a less specified scope of property subject to appropriation than has heretofore existed.\(^4\)

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\(^{24}\) 31 Cal. 3d at 161, 642 P.2d at 1313, 181 Cal. Rptr. at 792 (citing Grimshaw v. Ford Motor Co., 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (upheld award of substantial punitive damages caused by an automotive design defect in the Ford Pinto)).

\(^{25}\) 31 Cal. 3d at 164, 642 P.2d at 1315, 181 Cal. Rptr. at 794.

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1. A seminal California decision regarding the question of the limit of the power of eminent domain is *Gilmer v. Lime Point (Tract of Land)*, 18 Cal. 229 (1861). The case and accompanying briefs of counsel provide an interesting view of the 19th century rationale for the utilization of the doctrine. *See infra* notes 25-46.


In *City of Oakland v. Oakland Raiders, Ltd.*, the California Supreme Court was required to address a unique interpretation of the limits of the power of eminent domain. The actual issue before the court was whether intangible personal property consisting of private ownership rights in multiple personal service contracts and other contractual matters, which in aggregate comprised the majority of assets of a membership franchise in the National Football League, could be appropriated for a legitimate public use. In an analysis primarily based on interpretation of the new eminent domain statutes, the supreme court held that intangible personal contract rights could be the valid object of the eminent domain power, and that the purpose of promoting recreation was an acceptable justification for appropriating such property for public use.

I. Facts

The Oakland Raiders is a limited partnership whose primary function is the formation and management of a professional football team. The partnership operates under a franchise conferred main. “Property” [under the new statute] includes real and personal property and any interest therein. *Id.* “Section 1235.170 is intended to provide the broadest possible definition of property. . . . Section 1235.170 eliminates the need for duplicative listings of property types and interests subject to condemnation. *Cf.*, e.g., former [Civil Procedure Code] Section 1240. . . .” *13 CAL. LAW REVISION COMMITTEE REPORTS, 1976-77,* comment § 1235.170.

5. 31 Cal. 3d 656, 646 P.2d 835, 183 Cal. Rptr. 673 (1982).
6. *See infra* notes 36-37 and accompanying text.
8. *See infra* notes 57-68 and accompanying text.
9. 31 Cal. 3d at 646, 646 P.2d at 840, 183 Cal. Rptr. at 678.
10. For eminent domain purposes, neither the federal nor the state Constitution distinguishes between property that is real or personal, tangible or intangible. . . . *We* conclude that our eminent domain law authorizes the taking of intangible property. To the extent that the trial court based its summary judgment on a contrary conclusion it erred.

*Id.*

10. *Id.* at 668, 646 P.2d at 843, 183 Cal. Rptr. at 681.
by the National Football League.\textsuperscript{11} To a large degree, the assets of the partnership consist of private ownership rights and personal service contracts between the Raiders and athletes for performance as professional football players.\textsuperscript{12}

The relationship between the Raiders and the City of Oakland commenced in 1962 when the Raiders initially established a professional football franchise in Oakland. In 1966, the Raiders entered into a licensing agreement with the Oakland-Alameda County Coliseum.\textsuperscript{13} The agreement designated an initial five-year period of use of the Coliseum by the Raiders and provided five separate three-year renewal options of the agreement.\textsuperscript{14} The relationship between the Coliseum and Raiders continued without substantial difficulty until 1980. That year, as the result of disagreements between the Raiders and the Coliseum,\textsuperscript{15} and because of additional developments relating to the geographical disposition of other National Football League franchises,\textsuperscript{16} the Raiders failed to renew its option on the Coliseum agreement and announced its intention to relocate the franchise in Los Angeles.\textsuperscript{17} The municipal government of the City of Oakland thereupon instituted an action in eminent domain, purportedly condemning the franchise as necessary for the public use of the city's inhabitants.\textsuperscript{18}

The Superior Court for Monterey County granted a motion by the Raiders for summary judgment on all issues, and the city appealed the judgment. On September 2, 1981, the Court of Appeals for the First District upheld the summary judgment.\textsuperscript{19} The court opined that the powers of eminent domain, as articulated by California statute,\textsuperscript{20} should not be broadened beyond traditional ap-

\textsuperscript{11} Id. at 659, 646 P.2d at 837, 183 Cal. Rptr. at 675. Allan Davis and Edward W. McGah are the Raiders' only general partners.
\textsuperscript{12} See supra note 7.
\textsuperscript{13} 31 Cal. 3d at 659, 646 P.2d at 837, 183 Cal. Rptr. at 675.
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} In 1980, the Los Angeles Rams franchise of the National Football League vacated the Los Angeles Coliseum in downtown Los Angeles and moved operations to Anaheim, California. It became common knowledge of the sports-interested public that the Oakland Raiders franchise desired to move into the vacated franchise area because of potentially advantageous business considerations.
\textsuperscript{17} 31 Cal. 3d at 659, 646 P.2d at 837, 183 Cal. Rptr. at 675.
\textsuperscript{18} Id. "When the Raiders announced its intention to move the football team to Los Angeles, the City [of Oakland] commenced this action in eminent domain to prevent the move." Id.
\textsuperscript{19} City of Oakland v. Oakland Raiders, Ltd., 123 Cal. App. 3d 422, 176 Cal. Rptr. 646.
lications of the power and that the taking of such intangible contractual property as a professional football franchise constituted an impermissible exercise of that power. The court of appeals found the grant of a summary judgment proper because it could find no statutory authority for the condemnation of such property.

Following the decision of the court of appeals, the city petitioned the California Supreme Court for a hearing on the matter. On November 19, 1981, a hearing was granted. On June 21, 1982, the supreme court issued a decision therein reversing the judgments of the courts below. The case was remanded to the trial court for rehearing not inconsistent with the opinion.

II. BACKGROUND

The power of eminent domain is an attribute recognized to be inherent in the sovereign. The purpose of the power is to ensure the expeditious acquisition of private property in situations

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Important as the power may be to the government, the inviolable sanctity, which all free constitutions attach to the property rights of the citizen, constrains the strict observance of the substantial provisions of law, which are prescribed as modes of the exercise of power, and to protect it from abuse. All statutory modes of divesting titles are strictly construed, and to be strictly followed.

123 Cal. App. at 426, 176 Cal. Rptr. at 647.

21. 123 Cal. App. at 425, 176 Cal. Rptr. at 647. "Statutes which confer the power of eminent domain provide for the taking of property without the owner's consent; therefore they should be strictly construed." Id. (citations omitted).

22. Id. at 430, 176 Cal. Rptr. at 650. "We conclude that the statute does not authorize condemnation of the diverse contract rights necessary to operation of the Raider's business enterprise." Id.

23. Id. at 425, 176 Cal. Rptr. at 646.

24. 31 Cal. 3d at 671, 646 P.2d at 845, 183 Cal. Rptr. at 683.

25. See Gilmer v. Lime Point (Tract of Land), 18 Cal. 229, 250-51 (1861). To each and every sovereignty belong certain rights which are deemed essential to its existence. These are called by the civilians jura majestatis, or rights of sovereignty. Among these is the jus eminens or the supreme power of the State over its members and whatever belongs to them. When applied to property alone, it is called the dominium eminens, or the right of eminent domain; that is the right of the sovereignty to use the property of its members for the public good or necessity. . . . This right is inherent in government, and is perhaps, inseparable from the idea of sovereignty.

where the public use of the property is deemed necessary. Accordingly, the power to condemn is limited, but is not conferred by constitutional provisions and statutory authority. Private citizens are protected from governmental abuse of the power of public appropriation by the “no-taking” provisions of the fifth amendment. This protection is actualized in the requirement that valid use of the eminent domain power exists only where the appropriation is justly compensated and made for a legitimate public use.

Traditionally, the eminent domain provisions of the California Constitution and statutes have been most frequently applied to interests in real property. In 1975, the California statutes regarding eminent domain were significantly revised. Under former law, the only property subject to appropriation was specifically enumerated. The revised statutes provide definitions of property subject to condemnation in purposefully broad terms which specifically include personal as well as real property.


The power of eminent domain is inherent in sovereignty and the constitutional provisions do not grant power but are limitations upon it [citations omitted]. While the power is inherent in sovereignty neither the state itself nor any of its agencies and subdivisions ‘may lawfully exercise such right in the absence of precedent legislative authority to do so.’ Id. at 425, 11 Cal. Rptr. at 192 (quoting People v. Superior Ct. (Los Angeles), 10 Cal. 2d 288, 295-96, 73 P.2d 1221, 1225 (1937)).
30. See CAL. CIV. PROC. CODE § 1240.010 (West 1982). “Where the Legislature provides by statute that a use, purpose, object, or function is one for which the power of eminent domain may be exercised, such action is deemed to be a declaration by the Legislature that such use, purpose, object, or function is a public use.” Id.
31. While the condemnation of real property has been the norm, the condemnation of intangible property rights is not without precedent. See 31 Cal. 3d at 662-63, 646 P.2d at 838, 183 Cal. Rptr. at 677.
32. See supra note 4.
33. Id. See also 31 Cal. 3d at 661, 646 P.2d at 838-39, 183 Cal. Rptr. at 676-77.
In the United States, the governmental condemnation of intangible property rights has occurred on limited occasions. The intangibles thus appropriated have generally taken the form of choses in action or contractual franchise rights conferred upon private parties by the government. The condemnation of a personal property right, consisting primarily of an aggregation of personal service contracts, has seemingly never been the subject of California court action. Under traditional concepts of the eminent domain power, the necessity of the government to acquire such rights in furtherance of a valid public use would appear speculative at best. Less drastic options would certainly be available. Under the revised California statutory authority, however, appropriation of such property can be merely a matter of harmonization of the proper statutes.

The public condemnation of private property under the eminent domain power is valid only when exercised adjunct to a “public use.” A valid public use is generally defined as a use which

35. This type of franchise is to be distinguished from the “franchise” at issue in the Oakland Raiders case. Generally, as the object of previous eminent domain proceedings, a franchise is “a special privilege conferred upon a corporation or individual by a government duly empowered to grant it.” Copt-Air, Inc. v. City of San Diego, 15 Cal. App. 3d 964, 987, 93 Cal. Rptr. 649, 651 (1971); see City of Oakland v. Hogan, 41 Cal. App. 2d 333, 346, 106 P.2d 987 (1940). A franchise as granted by a professional sports association is a privilege to field a team in a given geographic area under the auspices of the league that issues it. See Le Mat Corp. v. American Basketball Ass’n, 51 Cal. App. 3d 267, 276, 124 Cal. Rptr. 388, 394 (1975) (describing relationships between league and individual franchise). Few eminent domain cases involving California franchises are to be found. But, c.f. Citizen’s Util. Co. v. Superior Ct. (Santa Cruz), 59 Cal. 2d 805, 382 P.2d 356, 31 Cal. Rptr. 316 (1963) (eminent domain action maintained against utility co.); City of North Sacramento v. Citizens Util. Co., 192 Cal. App. 2d 482, 13 Cal. Rptr. 538 (1961) (condemnation of private utilities).
36. The necessity of condemning a professional sports franchise would certainly depend upon the evidentiary showing at trial of various facts and their relation to the statutory prerequisites of the purported public necessity justifying the taking. See supra note 26. Accordingly, the propriety of a summary judgment, see Cal. Civ. Proc. Code § 437(c) (West 1982), would be questionable under the circumstances existing in the Oakland Raiders case.
37. See City of Oakland v. Oakland Raiders, Ltd., 123 Cal. App. 3d 422, 427, 176 Cal. Rptr. 646, 648. “It is contended, however, that the present California Eminent Domain statute which was enacted ... to modernize, harmonize, and clarify the provisions of the former law, authorizes the taking attempted here.” Id. (footnote omitted).

The concept of the public welfare is broad and inclusive. The values it
concerns the entire community, or which promotes the general interest of a particular object of the government. It is a defense to a condemnation action if the appropriation questioned cannot be shown to be for a public use. The character of the use, and not the extent of the use, determines its validity. Various purposes have been established as valid public uses. Among others, these include condemnation for purposes of urban renewal, highway construction, water course construction, and public utility development. Additionally, use of the eminent domain power has been found valid in cases where real property has been appropriated for the establishment or expansion of parks or government reservations. Notably, all these uses are real property interests. It would appear that the public interest in recreation has never been utilized to condemn intangible personal property interests before Oakland Raiders.

III. THE COURT'S ANALYSIS

The majority opinion in Oakland Raiders presented a relatively simple and logical analysis that in reality did little more than har-
monize statutory authority contained in the revised eminent domain laws. The court implicitly recognized the position articulated by the court of appeals that the statutory limitations on the eminent domain power should guide the prospective expansion of the power. Unlike the appeals court, however, the supreme court correctly isolated and identified specific statutes which, when combined, form a persuasive basis for a judgment at variance with the two lower court decisions.

The supreme court concluded that the current eminent domain statutes provide for the legitimate government appropriation of intangible personal property rights. In particular, the court found that intangible property rights are, at minimum, inherently the object of public condemnation when tangible property rights are concurrently appropriated. The court also noted that the legislative intent accompanying the enactment of the revised eminent domain statutes provided that the definition of property statutorily subject to governmental appropriation is to be construed in the broadest manner possible. The analysis with regard to the propriety of governmental condemnation of intangible personal property was basic. Even so, the majority failed to address any implications arising from the fact that, in the cases cited by the court dealing with condemnation of intangible property rights, the object of the appropriation was generally a franchise agreement between the government and a private party, rather than a contractual right between two private parties. The existence of a direct government interest would seem to lend credibility to the necessity of condemnation for public appropriation, whereas the circumstance of a totally private agreement would seem to convey much less validity to an action for eminent domain.

47. See supra note 20 and accompanying text.
48. 31 Cal. 3d at 664, 646 P.2d at 840, 183 Cal. Rptr. at 678.
49. Id. “Indeed, the primary, if not sole, value of any tangible assets, real or personal, acquired in such a taking may well be that they serve the primary intangible right.” Id. (emphasis in original).
50. Id. at 661, 646 P.2d at 838-39, 183 Cal. Rptr. at 676-77.
51. See id. at 663-64, 646 P.2d at 840, 183 Cal. Rptr. at 678. See also supra note 35.
52. While the question of whether an appropriation is for a valid public use is justifiable, the question of whether a condemnation is necessary was, until the passage of the new eminent domain laws in 1976, a matter for the condemning authority to decide. “Former section 1241(2) of the Code of Civil Procedure had ‘the effect of placing the determination of the question of ‘necessity’ within the exclusive province of the condemning body, by expressly determining that the latter’s determination of ‘necessity’ shall be ‘conclusive evidence’ thereof.” Anaheim
In the final issue regarding the intangibility of the property appropriated, the court addressed a contention submitted by the Raiders that because statutory authority precludes the government from condemning and acquiring property "not within its territorial limits," the condemnation of intangible property, which is inherently transient in nature, is not permitted. The court declared that while factors such as the location of tangible assets which form the basis upon which the intangible interests are dependent could possibly determine the "territorial" location of the intangible assets, the question is ultimately one for the trier of fact. Thus the summary judgment granted by the trial court, at Union High School Dist. v. Viera, 241 Cal. App. 2d 167, 172, 51 Cal. Rptr. 94, 96 (1966). Under the old statutes, the court had exhibited an expressed avoidance of resolving questions involving "necessity." "[W]here the owner of the land sought to be condemned for an established public use is accorded his constitutional right to just compensation for the taking, the condemning body's 'motives or reasons for declaring that it is necessary to take the land are no concern of his.'" People ex rel. Dept. of Pub. Works v. Chevalier, 52 Cal. 2d 299, 307, 340 P.2d 598, 603 (1959) (quoting County of Los Angeles v. Rindge Co., 53 Cal. App. 166, 174, 200 P. 27, 31 (1921), aff'd. 262 U.S. 700 (1922)). See also McIntire, Necessity in Condemnation Cases — Who Speaks For The People?, 22 HAST. L.J. 561 (1971); King, Condemnation Quandary: Public Use and Necessity — The Impact of Decisions In Recent Years, 41 L.A. B. BULL. 405 (1966); Note, Judicial Review of the Necessity of Taking — People v. Chevalier (Cal. 1959), 48 CAL. L. REV. 164 (1960). Under the current statutes, the necessity provisions require more formal justification on the part of the condemning body. A condemnor is required to file a "resolution of necessity," see CAL. CIV. PROC. CODE § 1240.040 (West 1982), which must meet specific requirements. See CAL. CIV. PROC. CODE § 1245.230 (West 1982). Although the formalities of demonstrating necessity are more stringent under the new law (which could indicate a dissatisfaction with the former degree of conclusiveness imparted to a governmental proclamation of public necessity regarding the acquisition of certain property), the new eminent domain statutes provide for the conclusiveness of a resolution of necessity. See CAL. CIV. PROC. CODE § 1245.250 (West 1982). Formerly, this conclusiveness was shown by decisions of the courts, as shown above, or by former provisions of the Government Code. See former CAL. GOV'T. CODE § 15855, Law of April 13, 1953, ch. 180, § 1, 1953 Cal. Stat. 1110, repealed by Law of October 1, 1975, ch. 1239, § 13, 1975 Cal. Stat. 3150. Interestingly, former § 15855 made a resolution of necessity conclusive only as to real property or an interest therein. Id. 53. See CAL. CIV. PROC. CODE § 1240.050 (West 1982).

54. 31 Cal. 3d at 669-70, 646 P.2d at 844, 183 Cal. Rptr. at 682.

The final weapon in the Raider's legal arsenal is the contention that because a city is statutorily barred from condemning any property which is not 'within its territorial limits' (see [Civil Procedure Code] § 1240.050), City, [of Oakland] cannot acquire the partnership rights involved here which are not 'located' in Oakland.

Id.

55. See Estate of Waits, 23 Cal. 2d 676, 680, 146 P.2d 5,8 (1944). "An intangible, unlike real or tangible personal property, has no physical characteristics that would serve as a basis for assigning it to a particular locality. The location assigned to it depends on what action is to be taken with reference to it." Id. 56. Section 1240.050 of the Code of Civil Procedure provides that the exercise of the eminent domain power is properly used outside the territorial limits of a municipality if such power in that case is implied as incident to another conferred power. "Whether the action proposed by the city here is governed by section
least as to the questions relating to the intangible nature of the property in question, was improper.

A more difficult question before the court was whether the appropriation of a private professional football franchise could be accomplished pursuant to a valid public use. The court initiated its analysis by pointing out that the question of what is a "public use" rests upon a broad definitional basis. Indeed, the power of condemnation through eminent domain has been exercised in favor of a wide range of uses. Further, and more important to the case at hand, the court noted that the California Government Code authorizes the exercise of the eminent domain power for any use deemed necessary to fulfill its function. Thus, the question regarding public use hinges upon the range of valid governmental functions.

The *Oakland Raiders* court placed the acquisition of a professional sports franchise under the public purpose of promoting recreation for the benefit of the community. Noting several California decisions which dealt with the governmental appropriation of land interrelated with existing recreational enterprises, the court said that "activities which promote recreation of the public constitute a public purpose." Additionally, the court recognized the municipal ownership of sports complexes in San Francisco and Anaheim as indicating a public acceptance of the promotion

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57. See supra notes 38-46 and accompanying text.
58. 31 Cal. 3d at 665, 646 P.2d at 841, 183 Cal. Rptr. at 679.
59. See, e.g., supra notes 42-46 and accompanying text.
60. 31 Cal. 3d at 665, 646 P.2d at 841, 183 Cal. Rptr. at 679. See CAL. GOV'T CODE § 37350.5 (West Supp. 1982).
of recreation as a governmental interest. Viewing the authority of other jurisdictions, the court found further precedent for upholding the exercise of the power of eminent domain to acquire property for a public recreational use.

Although providing some arguable support for the proposition that recreation is a necessary public purpose, the court did not adequately address two key issues in the “public use” analysis. First, while the opinion recognized the patent distinction between the governmental acquisition and operation of real property interests which support a recreational activity and the acquisition of the personal property of the activity itself, the court boldly, and without articulated precedential support, simply declared that such a distinction was irrelevant to the existence of a valid public use. A second important issue was addressed only peripherally. The concurring opinion recognized the rule that although a public use may be established, the exercise of governmental powers of eminent domain in an arbitrary and capricious manner will invalidate the appropriateness of the condemnation action. The majority did not apply the rule to the facts of the case. Had the court applied the rule, it would have noted the apparent “selective prosecution” of the Raider’s franchise, on grounds never before asserted or determined, and arguably would have denied relief to the City of Oakland.

Viewing the broad spectrum of possibilities, it would appear a justifiable conclusion that the action of the city was arbitrary and capricious. The mere fact that the Raiders partnership was sin-

63. Id. at 666, 646 P.2d at 841-42, 183 Cal. Rptr. at 679-80.
65. 31 Cal. 3d at 667, 646 P.2d at 842, 183 Cal. Rptr. at 680. See, e.g., City of Anaheim v. Michael, 259 Cal. App. 2d 835, 839, 66 Cal. Rptr. 543, 546 (1968). “The trial court was fully justified in its conclusion [that the use of Anaheim Stadium by the City of Anaheim was a valid public use] inasmuch as statutory and judicial authority exist to the effect that the acquisition, construction, and operation of a stadium by a county or city represents a legitimate public purpose.” Id.
66. 31 Cal. 3d at 667, 646 P.2d at 842, 183 Cal. Rptr. at 680. “If acquiring, erecting, owning and/or operating a sports stadium is a permissible municipal function, we discern no valid legal reason why owning and operating a sports franchise which fields a team to play in the stadium is not equally permissible.” Id. There is a distinction, however, between governmental assumption of the ownership of a single non-mobile sports complex and the acquisition of one of many similar, geographically diverse, and transient sports franchise licenses.
67. Justice Bird concurred in the judgment, but disagreed with some of the majority’s findings. Id. at 671, 646 P.2d at 845, 183 Cal. Rptr. at 683.
68. Id. at 674, 646 P.2d at 846, 183 Cal. Rptr. at 684.
gled out of all the other sports concerns contiguous to the city indicates a certain amount of selective prosecution. Even if that discretion were allowed, it would have to be justified by a concrete test distinguishing the necessity of the public appropriation of a professional sports franchise from the necessity of the same action toward a recreationally oriented business. If such a justification could be found in the mobility and potential departure of the franchise, then questions relating to the "territorial" qualities of the concern bear closer scrutiny. Ultimately, the actions of the city under these circumstances constituted a discretionary exercise initiated only because of the intent of the Raiders to move their operations, and gives rise to a substantial argument asserting arbitrariness of action.

The final Raider contention was that governmental appropriation of the partnership with the obvious intent of an expeditious transfer to private parties would vitiate any validity of the alleged public use. As persuasive as this argument would seem, it was found to be overcome by the existence of express statutory provisions authorizing such a retransfer. On the basis of its findings, the majority directed the trial court to vacate the summary judgment in favor of eminent domain proceedings conducted in accordance with the opinion of the court.

A separate opinion was filed by Chief Justice Bird. Noting the potential abuse that such a broad interpretation of the eminent domain statutes would engender, and the lack of precedent relating to any similar factual circumstances, she urged restraint

69. Id. at 669, 646 P.2d at 843, 183 Cal. Rptr. at 681.

70. See CAL. CIV. PROC. CODE § 1240.120 (West 1982). "[A] person may acquire property [through eminent domain] with the intent to sell, lease, exchange or otherwise dispose of the property or an interest therein." Id.

71. 31 Cal. 3d at 671, 646 P.2d at 845, 183 Cal. Rptr. at 683. (Bird, C.J., concurring and dissenting).

72. Id. at 672, 646 P.2d at 845, 183 Cal. Rptr. at 683.

[If a rock concert impresario, after some years of producing concerts in a municipal stadium, decides to move his productions to another city, may the city condemn his business, including his contracts with the rock stars, in order to keep the concerts at the stadium? If a small business that rents a storefront on land originally taken by the city for a redevelopment project decides to move to another city in order to expand, may the city take the business and force it to stay at its original location? May a city condemn any business that decides to seek greener pastures elsewhere under the unlimited interpretation of eminent domain law that the majority appear to approve?]

Id.

73. Id. "It should be noted that research by both of the parties and by this
and caution in application of the majority's decision. However, while exhibiting much discomfort at the potential problems arising from such a decision, Chief Justice Bird reluctantly agreed with the interpretation of the majority.

IV. CONCLUSION

The effect of the court's decision in *City of Oakland v. Oakland Raiders, Ltd.* was primarily declaratory. The ultimate effect that it will have on the parties involved will await the outcome of the remanded litigation. The future effect of the decision on other parties will be determined by the magnitude of the impetus which the holding may provide to governmental bodies regarding the condemnation of intangible personal properties, or properties for the purpose of promoting "recreation."

Governmental officials would be wise to exercise careful attention to avoid scenarios of capricious and ill-advised condemnation of unnecessary ongoing business concerns as envisioned by the Chief Justice Bird. Of greatest potential impact, however, is the possibility that the recognition of problems implicitly arising from the implementation of the decision will cause the California legislature to more clearly define the types and uses of property which validate the exercise of the eminent domain power. Unless such legislative action occurs, the potential for virtually unlimited government appropriation of private property would seem possible under the currently effective eminent domain statutes of California.

VIII. INSURANCE LAW

A. Names and claim records of non-party insurance claimants are discoverable in claims of unfair insurance settlement practices: Colonial Life and Accident Insurance Co. v. Superior Court

In recent years, the claims settlement practices of insurance companies have been the subject of much controversy in California.¹ Insurance companies are often accused of delaying or liti-

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gating settlement of claims simply as a means of increasing their revenues through the extended investment use of funds which represent the unpaid claims.\(^2\) The California courts have limited the attractiveness of extended insurance claims settlements proceedings by imposing a duty of good faith and fair dealing upon the insurance carrier.\(^3\) Unfair claims settlement practices have also been the subject of prohibitive legislation which has led to their statutory disfavorment.\(^4\) In Colonial Life & Accident Insurance Co. v. Superior Court,\(^5\) the California Supreme Court placed a further, albeit indirect, restriction upon the ability of insurance


2. The argument normally submitted by the plaintiff in this regard is that the insurance companies delay payment of the insurance proceeds until they are absolutely required to pay the claims of the insured. This delay is beneficial to the insurance company because it allows the investment of the unpaid claim proceeds and the collection of interest generated by that investment for a longer period of time than would otherwise be possible. For example, assume that a claim proceed payment is delayed through litigation for the full five-year limit allowed under California law (see CAL. CIV. PROC. CODE § 583(b) (West 1982)) or otherwise for a like period of time, and further assume that the market rate of interest paid to the insurance company is 14 percent, a representative interest amount. In applying those figures to a standard compound interest calculation, it can be seen that after payment of the original claim amount at the end of five years, the insurance company realizes a profit of 92.5% of that value through the investment of the unpaid claim proceeds.


4. See, e.g., CAL. INS. CODE § 780.03 (West Supp. 1982). See also infra note 11 and accompanying text. Cf., CAL. CIV. CODE § 3291 (1982). This section, to become effective as CAL. CIV. CODE § 3291 on January 1, 1983, relates to the payment of prejudgment interest on personal injury claims. Briefly, the statute will require the defendant in a personal injury claim to pay prejudgment interest from the date of a settlement offer if a final judgment is rendered in an amount greater than the amount of defendant's pretrial settlement offer. This is designed to encourage settlement prior to trial, thus benefitting the plaintiff and foreclosing delay in payment of insurance claims.

5. 31 Cal. 3d 785, 647 P.2d 86, 183 Cal. Rptr. 810 (1982). The opinion was written by Justice Kaus, expressing the unanimous view of the court.
companies to exercise less than good faith in settling valid claims of insureds.

The specific issue addressed by the court in Colonial Life concerned pretrial discovery. The precise question was whether, under the California Insurance Code6 and rules of discovery,7 the names, addresses and claims records of non-party claimants who had previously engaged in claims settlements with a particular agent of Colonial were relevant and thus discoverable in an action for damages rising upon allegations of unfair claims settlement activities8 by the same agent.9 The resolution of the question hinged on a determination of the relevancy of the requested information10 as it related to specific statutory language11 delineating the requirements necessary for the establishment of liability for the tort of unfair claims settlement practices.

The case arose subsequent to the filing of a complaint by an insured claimant alleging that defendant Colonial Life had engaged, through the actions of one of its agents, in bad faith settlement practices.12 Several months after the complaint was filed, the plaintiff served defendant Colonial Life with discovery pleadings requesting the disclosure of information relating to the identity

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6. CAL. INS. CODE § 790.03 (West Supp. 1982) prohibits unfair competition and unfair settlement of claims. See id., § 790.03(h).
8. The allegations in this case arose as the result of the action of defendant's agent. Following an injury to the insured which ultimately resulted in the amputation of the injured's leg, the agent represented to the insured that the injury was not covered under the policy in question. He then offered to settle the claim for $1,500 of the policy limit of $10,000 if the insured would drop the claim. The insured refused the offer and subsequently died without receiving any policy benefits. The underlying action to the appeal before the court was brought by the administratrix of the insured's estate. 31 Cal. 3d at 788, 647 P.2d at 87-88, 183 Cal. Rptr. at 811-12.
9. For the insurance company to be held liable, the insurance agent must have the authority to bind the company. See, e.g., Hale v. Farmers Ins. Exch., 42 Cal. App. 3d 681, 117 Cal. Rptr. 146 (1974). This question of agency generally arises in cases of independent insurance agents who may be acting in the capacity of either an agent or a broker. See Cline v. Atwood, 241 Cal. App. 2d 108, 50 Cal. Rptr. 233 (1966) (agent acting as broker for 30 agencies).
10. 31 Cal. 3d at 790-91, 647 P.2d at 89, 183 Cal. Rptr. at 813. See CAL. CIV. PROC. CODE § 2031(a) (West Supp. 1982). “Any party may serve on any other party a request (1) to identify such [things] . . . which are relevant to the subject matter of the action, or are reasonably calculated to discover admissible evidence.” Id. The production of materials is required to the extent that good cause is shown. See CAL. CIV. PROC. CODE § 2036(a) (West Supp. 1982). See generally, Comment, Good Cause Requirement of California Discovery Procedure, 20 STAN. L. REV. 594 (1968).
11. With regard to what constitutes unfair claims settlement practices, CAL. INS. CODE § 790.03 provides in pertinent part: “Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices.” (emphasis added).
12. See supra note 8.
and claims of other insureds who had previously negotiated those claims with the same agent who was the subject of the action filed by the plaintiff. Over the objection of the defendant, the trial court granted a motion to compel the requested disclosure. As a result of this decision granting plaintiff's discovery motion, the court thereafter issued two orders restricting the plaintiff with regard to the use of the disclosed information in client solicitation. The first order approved the language and content of a letter from plaintiff to prior non-party claimants who had dealt with the agent who was the object of the action. The order also limited plaintiffs to contacting only those non-party claimants who responded to the letter. The trial court subsequently issued a second order which prevented plaintiff's counsel from disclosing the identities and claims information discovered, and also prohibited the use of that information for any purpose other than trial preparation. The defendant insurance company filed motions in opposition to the orders seeking to bar discovery of all the information on the grounds that it was irrelevant to the issue of unfair settlement practices as a matter of law, and thus was not discoverable. Following the trial court's denial of the motions, defendant peti-

13. 31 Cal. 3d at 788-89, 647 P.2d at 88, 183 Cal. Rptr. at 812.
14. Id. at 788-89 nn. 3, 4, 647 P.2d at 88 nn. 3, 4, 183 Cal. Rptr. at nn. 3, 4. The defendant did not object on either the ground of attorney-client privilege (see CAL. EVID. CODE § 952 (West Supp. 1982)) or on the ground that the discovery ordered was embarrassing or oppressive (see CAL. CIV. PROC. CODE § 2019(b)(1) (West Supp. 1982)).
15. 31 Cal. 3d at 789, 647 P.2d at 88, 183 Cal. Rptr. at 812.
16. Id.
17. Id. See also id. at 793-95, 647 P.2d at 91-92, 183 Cal. Rptr. at 815-16. The court set forth a discussion of whether such an order would be restrictive enough upon the potential solicitation of claims against the insurance company by the attorneys receiving the discovery information. Regarding the limitations relating to client solicitation delineated in the Code of Professional Responsibility, see generally MODEL CODE OF PROFESSIONAL RESPONSIBILITY 2-201(B).
18. Colonial [was] apparently concerned about two related but distinct problems: (1) that plaintiff's attorney will improperly solicit clients from those who contact him pursuant to the letter approved by the trial court; and (2) that even if plaintiff's lawyer does not solicit clients, he may 'stir up' litigation by suggesting to other claimants that they have legitimate claims.
19. Id. at 790-91, 647 P.2d at 89, 183 Cal. Rptr. at 813. The defense argument was based on a passage taken out of context from Royal Globe Ins. Co. v. Superior Court, 23 Cal. 3d 880, 592 P.2d 392, 153 Cal. Rptr. 842 (1979), which essentially stated that if a litigant alleging unfair claims settlement practices could show intent on the part of the insurer, then evidence of "general business practices" was irrelevant. See supra note 11.
tioned the supreme court for a writ of mandate. In its opinion, the court analyzed the question of the propriety of the discovery by examining relevant statutory provisions. Because discovery in California is limited by the Code of Civil Procedure to those documents “which are relevant to the subject matter of the action or... reasonably calculated to lead to admissible evidence,” the court upheld the decision of the trial court allowing discovery by establishing the relevancy of the claims information requested to the specific terms articulated in section 790.03 of the Insurance Code, which establishes liability for unfair claims settlement practices. Section 790.03 states that an insurer is liable for unfair claims settlement practices if the plaintiff can show that certain bad faith conduct of the company or its agents is either knowingly performed or is occurring with such regularity as to indicate that the disputed conduct is a “general business practice.” Thus, the court found that discovery which has as its object the disclosure of information which would indicate the frequency of alleged unfair settlement practices is patently relevant to the required statutory elements and is thus discoverable under California discovery requirements.

In further support of their finding that the identities and claims records of specifically defined prior non-party claimants were relevant and concomitantly discoverable, the court noted that information of that nature was highly relevant to the issue of liability for punitive damages. California decisions hold that punitive damages may be proven by either direct or indirect evidence of intentional oppression or fraud. Correspondingly, the court stated that circumstantial evidence establishing a marginal course of conduct by an insurer in claims settlement activities, although indirect evidence of fraudulent or generally oppressive conduct, was discoverable as leading to admissible evidence on the question of punitive damages.

The holding in Colonial Life is a definite deterrent to less than “good faith” conduct by insurers in claims settlements.

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21. See supra note 11.
22. Id. See also 31 Cal. 3d at 790, 647 P.2d at 89, 183 Cal. Rptr. at 813.
23. 31 Cal. 3d at 790-91, 647 P.2d at 89, 183 Cal. Rptr. at 813.
26. 31 Cal. 3d at 792, 647 P.2d at 90, 183 Cal. Rptr. at 814.
heretofore an insurer might have consistently utilized a practice of settling claims which was on the margin of good faith and never be held liable for any individual claim of unfair settlement practice because of the plaintiff's lack of ability to show an improper "general business practice," the decision in Colonial Life will allow the plaintiff to show liability of the insurer under section 790.03 by the cumulation of evidence of consistent marginal claims settlement practices obtained through discovery. While seemingly related more to the issue of pre-trial discovery, the ultimate effect of the Colonial Life decision will be a further deterrent against bad faith claims settlement practices of California insurance companies.

B. A stepson is not part of a "family" for the purpose of excluding family members from insurance coverage: Reserve Insurance v. Pisciotta

In Reserve Insurance Co. v. Pisciotta, the California Supreme Court addressed the question of whether a family member exclusion in an insurance policy applied to an insured's stepson. The court held that it did not.

Reserve Insurance issued a liability policy to Pisciotta whereby Reserve agreed to pay all damages which Pisciotta became legally obligated to pay because of bodily injury or property damage arising out of Pisciotta's operation of his speedboat. The policy stated that it did not apply to bodily injury sustained by the insured or a member of his family.  

Tyler Campbell, a stepson of Pisciotta, was a passenger in a speedboat driven by Pisciotta, and was seriously injured when two boats collided. Reserve Insurance filed a declaratory judg-
ment action seeking a ruling that the family member exclusion in the policy issued to Pisciotta applied to Pisciotta's stepson, Tyler. The Pisciotta court noted that there were no California cases directly on point. But it did state that two cases in other jurisdictions have held that the family member exclusion does apply to stepchildren.

The court stated that in order for the exclusion to apply to Tyler, the language of the exclusion must have been sufficiently clear to inform a reasonable insured in Pisciotta's position that the exclusion would apply to his stepson. The court held that from the language of the exclusion, a reasonable insured could have believed that the term "family" did not encompass stepchildren.

In arriving at its decision, the court stated the well known rules of interpretation that: (1) "[w]ords used in an insurance policy are to be interpreted according to the plain meaning which a layman would ordinarily attach to them," (2) "any ambiguity or uncertainty in an insurance policy is to be resolved against the insurer. . .", (3) "exclusionary clauses are interpreted narrowly against the insurer," and (4) "the burden rests upon the insurer to phrase exceptions and exclusions in clear and unmistakeable language."

5. 30 Cal. 3d at 810, 640 P.2d at 769, 180 Cal. Rptr. at 632.
6. Id. at 809, 640 P.2d at 768, 180 Cal. Rptr. at 632. In Zipperer v. State Farm Mutual Automobile Ins. Co., 254 F.2d 853, 855 (5th Cir. 1958), the court held that the insured's stepson was not covered by the insurance policy. In Zipperer, the stepson was under twenty one years of age and resided with his mother and stepfather. Leroux v. Edmundson, 276 Minn. 120, 148 N.W.2d 812 (1967) held step-children to be members of "family" and thus excluded by the coverage of the insurance policy. However, the court emphasized the meaning of "family" and based its holding on the relationship between the parent and stepchildren. In contrast to the principal case, the children in Leroux were supported emotionally and financially by both their father and stepfather. Id. at 122-23, 148 N.W.2d at 813-14.
7. 30 Cal. 3d at 810, 640 P.2d at 769, 180 Cal. Rptr. at 633.
8. Id. at 811, 640 P.2d at 770, 180 Cal. Rptr. at 634. The court's conclusion was buttressed by the fact that Reserve used the word "household" in a conjunctive sense with "family." The court stated that this implied that the terms were not intended to be synonymous. Id.; see infra note 12.
9. Id. at 807, 640 P.2d at 767, 180 Cal. Rptr. at 631. CAL CIV. CODE § 1638 (West 1973) states that "[t]he language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."
10. 30 Cal. 3d at 807, 640 P.2d at 768, 180 Cal. Rptr. at 632 (quoting Harris v. Glen Falls Ins. Co., 6 Cal. 3d 699, 701, 493 P.2d 861, 862, 100 Cal. Rptr. 133, 134 (1972)).
12. 30 Cal. 3d at 808, 640 P.2d at 768, 180 Cal. Rptr. at 632. The court noted that Reserve could have easily clarified the scope of its exclusion by defining the word "family," and indicated that a clause excluding coverage to persons "related by blood, marriage or adoption" would be acceptable. Id. at 810 n.2, 640 P.2d at 769.
As the court points out, the Pisciotta decision establishes a "clear cut rule." It simply determines that a stepchild is not covered by a family member exclusion in an insurance policy. This does away with ad hoc determinations of whether a stepchild has sufficiently close ties with his stepparent to be considered a member of his family.

IX. JUVENILE LAW

A. Only lesser included offenses or amendments specifically agreed to may be used to sustain juvenile wardship petitions: In re Robert G.

In the case of In re Robert G., the California Supreme Court was called upon to decide whether a wardship petition under California Welfare and Institutions Code section 602 could be sustained if a minor has committed an offense other than one specifically pled or necessarily included as a lesser offense therein, absent the consent of the minor to such a substituted charge. The court, in a unanimous opinion by Justice Richardson, held that such an amended wardship petition may not be sustained. Due process principles dictate that amendments to the wardship petition only encompass substitutions of necessarily included lesser offenses, or those substitutions specifically consented to by the minor.

The In re Robert G. petitions recited the following facts: that


13. 30 Cal. 3d at 811, 640 P.2d at 770, 180 Cal. Rptr. at 634. By adopting this rule, the court states that the reasonable expectation of the insured will not be defeated. Id. at 811, 640 P.2d at 770, 180 Cal. Rptr. at 634.

However, the dissent questioned whether the insured had any reasonable expectation of coverage:

[while the majority insists that "Courts will not adopt a strained or absurd interpretation" to create an "ambiguity". . ., the consequences of its analysis are unusual. If the following persons, all living together in Pisciotta's "household," were injured in the same boat accident, the majority would interpret his Reserve insurance coverage to exclude his wife, his son and an adopted son, but not to exclude his stepson. This seems to me to be a "strained" interpretation, and an artificial and unnatural result. It surely is not consistent with the reasonable coverage expectations of the insured or his family.

Id. at 818-19, 640 P.2d at 775, 180 Cal. Rptr. at 639 (Richardson, J., dissenting in part).

"[o]n... May 13, 1980, within the County of Los Angeles, said minor [Robert G.] did willfully and unlawfully commit an assault upon [a victim] with a deadly weapon, to wit, a rock, and by means of force likely to produce great bodily injury, thereby violating § 245(a)3 [of the Penal Code]. . . ."4 Pursuant to Welfare and Institutions Code § 675 et seq.,5 an adjudication hearing was held after the filing of the petition. The minor rested his case without presenting evidence as to the assault charge.6 The prosecution requested the petition be sustained upon the grounds that the commission of another offense, battery, had been established by the evidence presented.7 While readily conceding that the charge of battery was not an offense necessarily included in the assault charge, the prosecution nevertheless argued that the commission of a battery had been established factually at the hearing, and therefore, no prejudice would ensue to the minor if the petition were amended to specifically charge the commission of a battery. The court agreed with the prosecution, and the petition was so amended.8

On appeal, the minor contended that the amendment of the petition violated his procedural due process rights, as he was given no notice that the wardship petition would be sustained solely on a battery charge. Citing the recent decision of People v. Lohbauer,9 the minor argued that absent consent to a substituted charge, he could not be made a ward of the court pursuant to a petition which did not originally and specifically include the charge ultimately pursued.10 This was the contention upheld by

3. CAL. PENAL CODE § 245(a) (West Supp. 1982) provides in pertinent part: "Every person who commits an assault upon the person of another with a deadly weapon or instrument or by any means of force likely to produce great bodily injury is punishable by imprisonment . . . or by fine . . . or by both. . . ."

4. 31 Cal. 3d at 439, 644 P.2d at 838, 182 Cal. Rptr. at 645. Robert G. was 14 years old. The writ concerned a rock-throwing incident at Burbank Junior High School. One rock hit the building itself, while another struck the school custodian. Originally, the minor moved for acquittal on the grounds that the one-inch rocks he threw could not be classified as deadly weapons under CAL. PENAL CODE § 245(a) (West Supp. 1982). The court agreed that the classification was improper, but denied the acquittal on other grounds. 31 Cal. 3d at 439, 644 P.2d at 838, 182 Cal. Rptr. at 645.

5. CAL. WELF. & INST. CODE § 675 (West 1982) (provides for a special hearing for wards of the state).

6. 31 Cal. 3d at 439-40, 644 P.2d at 838, 182 Cal. Rptr. at 645.

7. Id. at 440, 644 P.2d at 838, 182 Cal. Rptr. at 645.

8. Id.


10. 31 Cal. 3d at 440, 644 P.2d at 838, 182 Cal. Rptr. at 645. In Lohbauer the court held that when a defendant pleads not guilty to a certain charge, the court then lacks jurisdiction to convict on another offense not also charged or necessarily included in a lesser offense. 29 Cal. 3d at 368, 627 P.2d at 184, 173 Cal. Rptr. at
the California Supreme Court. Since the court deemed meritless the prosecution's argument that the commission of a battery had been factually established at the adjudication hearing, the complete failure to allege any element of a battery charge proved fatal to the prosecution's position.11

The prosecution attempted to distinguish the present case from the Lohbauer rule on the basis that the defendant was a minor, and therefore the court could follow more liberal rules of pleading than are required in other criminal cases. The primary authority for this contention was grounded in Welfare and Institutions Code section 678,12 which provides that the more liberal rules of pleadings in the Civil Procedure Code be applied to juvenile court proceedings. The prosecution argued that such liberal rules permitted the amendment of wardship petitions to conform to the evidence presented at the adjudication hearing, so long as the minor was not prejudiced in the preparation of his defense.

454. In so holding, the court relied extensively on People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970), which set forth the due process considerations involved in such an issue. It is required by the constitution that an accused be advised of all charges pending against him, so that he may prepare an adequate defense. The goal of this requirement is to eliminate unfair surprise and its resulting prejudice to the defendant at trial. Id. at 612, 477 P.2d at 419, 91 Cal. Rptr. at 395.

It is apparently conceded that appellant was not accused of battery in the language of the wardship petition here. The requisite physical contact to the person is nowhere alleged therein. It is also well established that the offense of battery is not necessarily included within the charge of assault with a deadly weapon. Such an assault may . . . be committed without "any willful and unlawful use of force or violence upon the person of another" (Pen. Code, § 242) and thus without a battery.


11. Lesser included offenses are necessarily included in this definition. As previously noted, however, simple battery is not an offense included in the charge of assault with a deadly weapon. The Lohbauer court noted that the traditional test for determining lesser included offenses is "simply that where an offense cannot be committed without necessarily committing another offense, the latter is a necessarily included offense." 29 Cal. 3d at 369, 627 P.2d at 185, 173 Cal. Rptr. at 455 (citations omitted).

12. CAL. WELF. & INS. CODE § 678 (West 1972). Particular reference is made to CAL. CIV. PROC. CODE §§ 469-70 (West 1982) which provides in pertinent part:

§ 469: No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action in defense upon the merits.

§ 470: Where the variance is not material, as provided in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment, without costs.

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The California Supreme Court refused to accept this reasoning. Not only was the Lohbauer case found to be "strikingly similar,"13 but the due process concerns of the minor, as applied with particular emphasis to juvenile court proceedings, were stressed as well. Relying on the Supreme Court decision of In re Gault,14 the court emphasized that due process concerns are "no less relevant to juvenile court proceedings. '[D]ue process requires that a minor, like an adult, have adequate notice of the charge so that he may intelligently prepare his defense.' "15

The court noted the case of In re Arthur N.,16 wherein juvenile procedural due process rights were set forth and clarified. "[I]n Arthur N., the rules permitting liberal amendment in civil matters to cure immaterial variances were reconciled with the requirements of due process of law in juvenile proceedings."17 For example, procedural due process rights of juveniles are not impaired if an amendment to state a lesser included offense is sustained when evidence is presented that is sufficient to support this charge. Thus, by implication, procedural due process rights of juveniles would be impaired if the amendment stated any charge other than a necessarily included lesser offense (or one specifically consented to by the minor).18 The Robert G. court labeled

13. 31 Cal. 3d at 442, 644 P.2d at 839, 182 Cal. Rptr. at 646.
15. 31 Cal. 3d at 442, 644 P.2d at 840, 182 Cal. Rptr. at 647, citing 387 U.S. at 33. In re Gault set forth the specific procedural details to be observed as well. Gault requires that an accused minor be notified in writing of the specific charges to be heard at the adjudication hearing. Also, such notice must be given at the earliest possible time so that the juvenile may have time to prepare an adequate defense. 387 U.S. at 33.
16. 16 Cal. 3d 226, 545 P.2d 1345, 127 Cal. Rptr. 641 (1976). The central issue dealt with the sufficiency of evidence supporting a robbery charge and the standard of proof to be applied in such cases. Arthur N. is distinguishable because the minor in that case had previously been named a ward of the court; thus, the preliminary issues before the court were different from the outset of the case. 16 Cal. 3d at 232-33, 545 P.2d at 1349-50, 127 Cal. Rptr. at 645-46.
17. 31 Cal. 3d at 443, 644 P.2d at 840, 182 Cal. Rptr. at 647.
18. Id. Two cases cited by the prosecution were either distinguished or disapproved by the Robert G. court. In In re Beverly H., 103 Cal. App. 3d 1, 182 Cal. Rptr. 788 (1980) (assault with a deadly weapon charge amended to state battery) and In re Joe R., 12 Cal. App. 3d 80, 90 Cal. Rptr. 530 (1970) (battery amended to interfering with an officer in discharge of his duties), the evidence presented at the adjudication hearing detailed the commission of an uncharted, uninculded offense. The amendments in both cases to the lesser offenses were sustained with the court emphasizing that in neither case did the juvenile choose to object to the lesser charge. (Interestingly enough, the Robert G. court initially characterized the Beverly H. and Joe R. cases as ones where the minors could not demonstrate that they had been prejudiced by the amendment. This characterization is questionable in light of the court's later emphasis upon the minors' choice not to object.) The court in Robert G. characterized the failure to object to the substituted charge as a consent to that charge. "While such failure to object may not invariably bar a minor from raising the due process [challenges], it may well be that the
the limitations on liberal amendment rules a "reasonable accommodation" upon the mandate of a juvenile's due process rights.19

In further support of their position, the California Supreme Court cited several California Appellate decisions which had adopted similar reasoning.20 The policy supporting the overall rationale was summarized as follows: "[w]hile reasonable differences in criminal and juvenile procedures may be constitutionally permissible within other contexts, we are not persuaded that due process of law is as malleable as the People here contend."21

The court's decision solidifies the trend in both federal and California Appellate case law to give broad support to due process principles in juvenile proceedings. The Robert G. decision presents an example of the court's methodology of fashioning policy-oriented relief to a narrow question of juvenile procedure. The primary impact of the case will be felt by state prosecutors, who now must carefully and specifically plead each separate offense demonstrated by the facts in a particular case.

X. LABOR RELATIONS

A. Absent a formal administrative ruling, a judicial grant of injunctive relief does not violate public policy favoring nonjudicial interference: ALRB v. California Coastal Farms, Inc.

One of the fundamental policies underlying the enactment of the California Agricultural Labor Relations Act1 (ALRA) is to provide for continued peace in the expansive and often volatile2 produce fields of California.3 In relation to this policy, the Califor-

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1. CAL. LAB. CODE §§ 1140-66.3 (West Supp. 1982).
3. The legislature noted the congenital unrest present in the agriculture labor
nia courts have struggled with the issue of granting striking union
members access to non-striking workers on the land of the em-
ployer. In *Agricultural Labor Relations Board v. California
Coastal Farms, Inc.*, the California Supreme Court directly ad-
dressed that issue. The arguments in the case were couched in
terms of a conflict between the scope of judicial discretion in
granting striking union members temporary injunctive access to
non-striking workers at their place of employment, and the need
to determine labor practices in a definitive rule-making manner.

The court was confronted with a claim for injunctive relief filed
by the Agricultural Labor Relations Board (ALRB) which alleged
that the defendant was engaging in unfair labor practices by re-
stricting access of his fields as to striking union members. The
court held that the discretionary lower court ruling which granted
the striking workers temporary access to the employers' property
was proper and within the jurisdiction provided in the language of
California Labor Code section 1160.4. This holding refuted the
setting in enacting the ALRA. "This enactment is intended to bring certainty and
a sense of fair play to a presently unstable and potentially volatile condition in

4. In addition, a corollary issue implied, but not squarely addressed is the
right of the employer, as a private property owner, to bar access to individuals on
a personally discretionary basis. The central question rising from that issue is the
scope of the incidents of ownership of private property. For cases involving the
question of discrimination in private sales, rather than access, see 5 R. POWELL
and P. ROHAN, *POWELL ON REAL PROPERTY §§ 752-53* (rev. ed. 1981); see also Reit-
man v. Mulkey, 387 U.S. 369 (1967). (California referendum prohibiting state legis-
lature and local governments from enacting legislation curtailing housing
discrimination was violative of equal protection.)

5. 31 Cal. 3d 469, 645 P.2d 739, 183 Cal. Rptr. 231 (1982).

6. The court makes no effort to cite authority in support of the position that
there is a right of access to striking employees upon the land of an employer being
struck. See *Agricultural Labor Relations Board v. Superior Court*, 16 Cal. 3d 392,
546 P.2d 887, 128 Cal. Rptr. at 239-40 (Richardson, J., dissenting).

7. [F]arm labor peace is best achieved through establishment of *rules of
law* which provide certainty and fairness in an otherwise 'unstable and
potentially volatile' industry. Is this certainty, fairness, and stability bet-
ter achieved by case-by-case, piecemeal adjudication or by the enforce-
ment of administrative rules negotiated after full, industry-wide hearings?
31 Cal. 3d at 394, 645 P.2d at 747-49, 183 Cal. Rptr. at 239-40 (Richardson, J.,
dissenting).

8. The claim was based on alleged threats made by the defendant in re-
response to acts perpetrated by striking workers. *Id.* at 472-73, 645 P.2d at 740, 183
Cal. Rptr. at 232.

9. See 31 Cal. 3d at 474 n.1, 645 P.2d at 740-41 n.1, 183 Cal. Rptr. at 232-33 n.1.

10. *Id.* at 483, 645 P.2d at 747, 183 Cal. Rptr at 239. *CAL. LAB. CODE § 1160.4*
(West Supp. 1982) provides in pertinent part:

The board shall have power, upon issuance of a complaint as provided in
Section 1160.2 charging that any person has engaged. . .in an unfair labor
practice, to petition the superior court. . .for appropriate temporary relief
or restraining order. . .[T]he court shall have jurisdiction to grant to
the board such temporary relief or restraining order as the court deems
just and proper.
defendant's position that the granting of such an order, in the absence of an express rule promulgated by the ALRB, was an abuse of judicial discretion and not in furtherance of the policy of stabilizing agricultural labor relations that are normally achieved through the requirement of formalized rules and the avoidance of ad hoc judicial decision. The court stated that defendant's argument reflected "a misconception of the role of the ALRB in [such] proceedings. Under Labor Code section 1160.4, the court is not bound by the recommendation of the ALRB, but rather, retains discretion to issue any order that is 'just and proper' under the circumstances." The court stated that both the property rights of the employer and the associational rights of the non-striking workers were protected by the narrow restrictions included in the lower court order. The court ultimately held that the interests of the strikers in informing the public of strike issues and the interests of the ALRB policy were best served by allowing some access to non-striking workers in the defendant's fields.

A single dissenting Justice noted the apparent practical inconsistency in allowing access to non-striking workers in relation to the policy of promotion of peace in the fields. Additionally, the dissent pointed to the possible infringement upon the property rights of the owner if a full ALRB hearing was not provided prior to granting access to non-striking workers.

Id.

11. See supra note 3. See also CAL. LAB. CODE § 1140.2 (West Supp. 1982). See Bruce Church, Inc., 7 A.L.R.B. No. 20 (1981). “The ALRB was created so that non-violent forms of dispute resolution would replace violent confrontation on California farms.” Id. at 3.


13. 31 Cal. 3d at 479, 645 P.2d at 744, 183 Cal. Rptr. at 235.

14. Id. at 482-83, 645 P.2d at 746-47, 183 Cal. Rptr. at 238-39. The court order included provisions that violence would terminate the order, specifically precluded damage to crops and machinery, and simultaneously limited the number of striking workers granted access at any given time.

15. Id.

16. “In light of the history of violence which has been experienced during similar confrontation when there are no guidelines, the encouragement of such access during a strike impresses me as most unwise.” Id. at 484, 645 P.2d at 747, 183 Cal. Rptr. at 239 (Richardson, J., dissenting).

17. See supra note 14.

18. “[T]he ad hoc disposition or impairment of rights of this magnitude and nature does not further the express purposes of the [ALRA]. The ad hoc approach to such an issue may did lead to confrontation, to disruption of the labor peace. Thus, one of the prime objectives of the [ALRB] is thwarted by an invasion of a property right without the opportunity of

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Labor peace can best be served by the adoption of detailed rules and regulations rather than case by case confrontation. . . . Granting direct access to the grower's property at best is a risk-taking business. During an active strike, when feelings and mutual distrust are high, the danger of violent confrontation is greatly enhanced.19

The result of the decision in ALRB v. Coastal will possibly be more encompassing than the court desired. While the decision was apparently intended to expeditiously solve a specific grievance in a single case, in reality, it exists as precedent for a case-by-case strike access determination, and will undoubtedly lead to an increase of litigation in this area. This illustrates the potential impropriety of ad hoc judicial decisions which sidestep the rule-making process of agencies specifically designed to predetermine particular disputes and relieve the burden of unnecessary litigation.

XI. LANDLORD AND TENANT

A. Procedural Due Process prohibits the eviction of unnotified persons who occupy premises which are the subject of an unlawful detainer judgment: Arrieta v. Mahon

The stringent effect of the summary nature of unlawful detainer actions1 was mitigated by the California Supreme Court in Arrieta

hearing and care and preciseness in adjudication of the various factors which are necessary to authorize a limited entry." 31 Cal. 3d at 485, 645 P.2d at 748, 183 Cal. Rptr. at 240. (quoting San Diego Nursery Co. v. Agricultural Labor Relations Board, 100 Cal. App. 3d 128, 142, 160 Cal. Rptr. 822, 830-31 (1979)).

1. See CAL. CIV. PROC. CODE §§ 1159-1179 (West 1982). The unlawful detainer statute is designed to provide immediate repossession of the premises by a title holder following the execution of a judgment; see generally Comment, California's Writ of Immediate Possession: Landlords and the Courts v. The Indigent Tenant, 10 SANTA CLARA LAWYER 152 (1969); Comment, Unlawful Detainer: Synopsis of California Law and Constitutional Considerations 44 S. CAL. L REV. 768 (1971).

The immediacy of the nature of unlawful detainer actions are evidenced by the view taken by the California Judicial Council. Unlawful detainer actions are exempt from otherwise mandatory judicial arbitration in most jurisdictions within the state on the implied basis that time considerations relating to the fee holders right of possession outweigh the "efficiency of litigation" rationale supporting mandatory arbitration. See Cal. R. Ct. 1600, 1600.5. The summary nature of the proceedings themselves have, however, been somewhat vitiated in recent years. See e.g., Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1975) (establishing affirmative defense of breach of warranty of habitability); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970) (establishing affirmative defense of retaliatory eviction); see also, Comment, The Great Green Hope: Implied Warranty of Habitability in Practice, 28 STAN. L. REV. 729 (1976); Note, Green v. Superior Court: A New Remedy for the California Tenant, 5 GOLDEN GATE L. REV. 145 (1975); Comment, California's Common Law Defense Against Landlord Retaliatory Conduct: Common Law Defenses, 22 U.C.L.A.
The question addressed by the court was whether an administrative policy of a County Marshall's Office which required the eviction of all occupants of a premises upon the execution of a writ of restitution includes occupants who were not named as parties and who had no knowledge of the unlawful detainer proceedings.

The plaintiff was a female who had been living in a Los Angeles County apartment under an unspecified term month to month tenancy. Also residing in the apartment were her sister, children and an unrelated male. The apartment had been procurred and originally leased in the name of the male; however, subsequent to the first month, the rental payments were made by the plaintiff. The male vacated the premises in November, 1978, approximately 18 months following the original occupation of the premises. In March, 1979, the landlord filed an unlawful detainer action naming only the former male occupant as the sole defendant. After the default judgment, the Los Angeles County Marshall's Office served notice upon the premises for all occupants to vacate within five days under penalty of forcible eviction. The plaintiff had no knowledge of the unlawful detainer proceedings until this time.

The policy of the County Marshall in effect at the time required eviction of any occupant of premises subject to execution of writs...
for unlawful detainer. The plaintiff immediately filed motions to quash the execution of the writ on the ground of lack of notice. After these motions were denied, the plaintiff filed an action for declaratory and injunctive relief against the landlord and the County on the grounds of denial of due process and illegal search and seizure. The plaintiff also brought a taxpayer's suit to enjoin the Marshall from expending public funds to carry out the policy of evicting all occupants. Because the landlord instructed the Marshall to not evict the plaintiff, the case proceeded as a taxpayer's action.

The Arrieta court held that non-named occupants of premises who receive no notice of unlawful detainer actions against the premises and whose possessory claim pre dates the filing of such actions may not be evicted under a writ originating from the actions. The eviction of such a party who is unnamed and who has no notice violates the constitutional right of procedural due process because the occupant, unaware that his possession is imperiled, is denied the right to raise a defense at the hearing.

The court concluded that the proffered rationale supporting the County policy in question, an administrative interpretation of past court rulings allowing eviction of unnamed non-parties and family members, was faulty. The opinion noted that the original

11. See supra note 3.
12. 31 Cal. 3d at 385, 644 P.2d at 1251, 182 Cal. Rptr. at 772.
13. Id., 644 P.2d at 1251, 182 Cal. Rptr. at 772. The trial court addressed the question of fourth amendment violations, however, the supreme court bypassed such a discussion in its decision to uphold the declaratory finding of the lower court barring the eviction of parties unnamed in a suit for unlawful detainer, who had a possessory claim predating the commencement of such an action. The supreme court apparently felt that the analysis was more appropriately couched in terms of procedural due process. See infra note 17 and accompanying text.
15. 31 Cal. 3d at 385, 644 P.2d at 1251, 182 Cal. Rptr. at 772.
16. 31 Cal. 3d at 389, 644 P.2d at 1253-54, 182 Cal. Rptr. at 774-75.
18. The situations in which an occupant could be evicted from property without notice under the administrative policy in issue are boundless. These include the potential eviction of virtually any occupant taking property subsequent to the party executing the lease under attack. See 31 Cal. 3d at 385 n.4, 644 P.2d at 1251, 182 Cal. Rptr. at 772.
rule relied upon in the establishment of the Marshall’s policy of eviction of non-named parties to unlawful detainer actions,\(^{20}\) dealt only with the “entry of nonparties after judgment,”\(^{21}\) and not with non-parties whose claim of possession ante-dated the filing of the unlawful detainer action.\(^{22}\) Also, the court noted that the former rule, allowing the eviction of the wife and family members of a named defendant to an unlawful detainer action\(^ {23}\) on the policy basis of the subservient nature of any possessory claim of a wife, was no longer viable.\(^ {24}\) Thus, the court initially found that the policy of the County Marshall requiring total eviction in unlawful detainer actions was void as a matter of law.

In an equally significant portion of the opinion, the court held that while a non-named occupant who is evicted under unlawful detainer proceedings may have available certain alternative non-statutory remedies to retain or regain possession of the premises,\(^ {25}\) such remedies are not an acceptable substitute for notice of the pre-eviction hearing.\(^ {26}\) Additionally, the court contextually distinguished section 1164 of the Code of Civil Procedure which purportedly provided express authority for the County Marshall’s policy.\(^ {27}\) It found that the particular statute, part of which ap-


\(^{21}\) 31 Cal. 3d at 388, 644 P.2d at 1252-53, 182 Cal. Rptr. at 773-74 (emphasis in original).

\(^{22}\) Id. at 388, 644 P.2d at 1252-53, 182 Cal. Rptr. at 774.

\(^{23}\) See Saunders v. Webber, 39 Cal. 287, 290 (1870).


\(^{25}\) California courts have recognized the propriety of a motion to recall writs of execution against unnamed occupants of premises subjected to unlawful detainer actions. 31 Cal. 3d at 390, 644 P.2d at 1254, 182 Cal. Rptr. at 775. See Evans v. Superior Court, 20 Cal. 2d 186, 124 P.2d 840 (1942); Jones v. World Life Research Institute, 60 Cal. App. 3d 856, 131 Cal. Rptr. 674 (1976).

\(^{26}\) Because of the mere five-day time period between the posting of vacation notice and eviction, Cal. Civ. Proc. Code § 1174(d), and the lack of knowledge as to the existence of such remedies by the practicing bar, the court found this remedy “too speculative” to be considered as a substitute for pre-hearing notice. 31 Cal. 3d at 391 & n.9, 644 P.2d at 1255 & n.9, 182 Cal. Rptr. at 776 & n.9.

\(^{27}\) See Cal. Civ. Proc. Code § 1164 (West 1982). The statute provides in pertinent part: “No person other than the tenant of the premises, and subtenant if there be one, in the actual occupation of the premises when the complaint is filed, need be made parties [to the action].” (emphasis added). However, the unlawful detainer statute defines a tenant as “any person who hires real property.” Cal. Civ. Proc. Code § 1161(5) (West 1982).
peared to indicate that only the actual tenant was required to be made a party in unlawful detainer actions, was actually designed to provide for streamlining unlawful detainer proceedings by negating the normally mandatory joinder of all indispensable parties. The court held, however, that the statute did not attempt to legitimize the ex parte determination of the possessor rights of such indispensable parties not joined.

The Arrieta decision serves to require landlords to provide notice of the action to all occupants of a premises prior to evicting such occupants pursuant to unlawful detainer proceedings. A corollary effect would seem to simply require greater cognizance by the landlord as to the current status of his or her property, thus possibly promoting better premises upkeep, improved landlord-tenant relations, and less litigation involving possession of leaseholds.

XII. Property

A. The public trust doctrine applies to tidelands in the state in which the federal government has never possessed fee title: City of Los Angeles v. Venice Peninsula Properties

I. INTRODUCTION

In City of Los Angeles v. Venice Peninsula Properties, the California Supreme Court was presented with the question of whether the public trust doctrine applies to tidelands in which

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28. See supra note 27.
29. 31 Cal. 3d at 391-92, 644 P.2d at 1255, 182 Cal. Rptr. at 776.
   Read out of the context of the remainder of the sentence, the words—'[n]o person other than the tenant... and subtenant... need be made parties defendant'—lend credence to the argument that an unlawful detainer judgment against one tenant would bind others. However, the remainder of the sentence clearly establishes that the section is only intended as a rule of nonjoinder to permit unlawful detainer actions to go forward in the absence of individuals who, but for the rule, might be considered indispensable parties.”
Id. at 391-92, 644 P.2d at 1255, 182 Cal. Rptr. at 776.
30. Id. at 392, 644 P.2d at 1255, 182 Cal. Rptr. at 776. (“[s]ection 1164 does not suggest, nor should it be read to suggest, that the rights of those who are not joined may be determined in their absence.”)

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2. Under the public trust doctrine, the state holds a trust interest on behalf of the public in California tidelands. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 606 P.2d 382, 162 Cal. Rptr. 327 (1980). Also, there is a public trust held in lands between the high and low mark in navigable, non-tidal lakes and rivers. State of Cal. v. Superior Court (Lyon), 29 Cal. 3d. 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981); State of Cal. v. Superior Court (Fogerty), 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981). In Lyon, the court discussed the importance of the public trust doctrine to the people of California, noting that:
neither the state nor federal government ever possessed fee title.\textsuperscript{3}

Ballona Lagoon, the property in question in this case, is located near the community of Marina Del Rey, a suburb of Los Angeles.\textsuperscript{4} The Lagoon is subject to the tidal flows of the Pacific Ocean. At its northern end, the Lagoon is connected to the popular Venice Canals; and is the sole source of water for the canals.

The controversy in the present case arose when the City of Los Angeles, desiring to improve certain tracts adjacent to the tidelands,\textsuperscript{5} filed an action for declaratory relief and to quiet title in the Lagoon against the owners of specific tracts of land abutting the Lagoon.\textsuperscript{6} The complaint alleged that, pursuant to the public trust doctrine, the citizens of California owned an easement in the Lagoon for commerce, navigation, and fishing. In addition, the complaint alleged that, under this doctrine, the public had an easement for the passage of fresh water to the Venice Canals, and that the land had been dedicated by its legal owners for the public use.\textsuperscript{7}

No less than 4,000 miles of shoreline along 34 navigable lakes and 31 navigable rivers in the state are involved. . . . Lands of the type involved in this proceeding constitute a resource which is fast disappearing in California; they are of great importance for the ecology, and for the recreational needs of the state.

29 Cal. 3d at 216, 625 P.2d at 242, 172 Cal. Rptr. at 700.
3. 31 Cal. 3d at 291, 644 P.2d at 794, 182 Cal. Rptr. at 601.
4. Id. In 1905, the shore around Ballona Lagoon was divided into several tracts, some of which were then dredged, filled, and improved. However, the two tracts in question, C and R, remained unimproved. This action arose when the City of Los Angeles, desiring to improve the Lagoon area, filed an action for declaratory relief and to quiet title against the titleholders of the adjacent tracts, so that the desired improvements could be made without interference by the Venice landowners.

5. Id. at 292, 644 P.2d at 794, 182 Cal. Rptr. at 601. Specifically, the city wished to dredge the Lagoon, build concrete sea walls, and make other improvements, without having to exercise the eminent domain powers, and therefore be forced to compensate the defendants.

6. Id. Shoreline Investment Corp. and Venice Peninsula Properties were the two remaining named defendants. The court noted that other defendants, originally named, sold their interests to the present corporate owners. In addition, the court acknowledged that Southern California Gas Company, holder of an easement for a gas pipeline which traverses the Lagoon, would have to be compensated if the desired improvements were to interfere with the operation of the pipeline, pursuant to CAL. PUB. RES. CODE § 6312 (West 1977). 31 Cal. 3d at 292 n.1, 644 P.2d at 794 n.1, 182 Cal. Rptr. at 601 n.1.

7. 31 Cal. 3d at 292, 644 P.2d at 794, 182 Cal. Rptr. at 601. The State of California was joined as a defendant in the action, pursuant to CAL. PUB. RES. CODE § 6308 (West 1977) which states in pertinent part:

Whenever an action or proceeding is commenced by or against a county, city, or other political subdivision or agency of the State involving the title
At trial, it was held that the public trust doctrine operated to protect the rights claimed in the plaintiff's complaint. It therefore logically followed that the city of Los Angeles had the right to make the desired improvements without exercising its power of eminent domain. Additionally, the trial court determined that the legal title holders of the tidelands had dedicated the property to public use as "public streets or waterways."\(^8\)

II. THE CALIFORNIA SUPREME COURT DECISION

The issue before the California Supreme Court was the defendant's claim that the public trust domain doctrine did not apply to their property, as the property had never been held in fee by either the federal or state government.\(^9\) A lengthy historical analysis was necessary in the adjudication of this claim.

A. Historical Analysis

Under the Act of 1851, all land in California, including tidelands, which had belonged to Mexico and was not patented to private parties, became the property of the United States. The federal government held the interest in tidelands in trust for the future state, and when California was admitted to the Union, it succeeded to the rights of the United States as an incident of sovereignty.\(^10\)

In the present case, with respect to the specific tracts in controversy, a patent had been issued by the United States government. Due to incomplete record, however, the parties disputed the final determination of the 1865 patent proceeding.\(^11\) For purposes of

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8. 31 Cal. 3d at 293, 644 P.2d at 795, 182 Cal. Rptr. at 602. The court indicated that the granting of the public trust rights from the state to the City of Venice in 1917, and subsequently from Venice to the City of Los Angeles in 1943 (pursuant to statute) had no significant bearing on the issue before the court. "Whether that interest is held by the city, or by the state . . . has no significant effect on the public's rights in the property if such rights exist." Id. at 293 n.3, 644 P.2d at 795 n.3, 182 Cal. Rptr. at 602 n.3.

9. Id. at 293, 644 P.2d at 795, 182 Cal. Rptr. at 602.

10. Id. at 296, 644 P.2d at 797, 182 Cal. Rptr. at 604 (emphasis added) (citations omitted). The patent issued pursuant to the grant in this case, however, was inherently ambiguous. For further explanation, see infra note 11 and accompanying text.

11. In 1839, the Constitutional Governor of the territory of California granted to Augustin and Ignacio Machado and Tomas and Filipe Talamantes the property known as Rancho Ballona. This property included the tracts C and R in the Silver Strand subdivision under question in the present case. At approximately the same time that the property was conveyed, the Mexican American War was ended, and the Treaty of Guadalupe Hildalgo was signed. Pursuant to this treaty, the territory of California was ceded to the United States. It was specified in the treaty that the rights of Mexican citizens were to be "inviolably respected." 31 Cal.
analysis, however, the court deemed that the patent dispute should be decided in the defendants' favor.12

Proceeding to the central issue, the court was forced to “decide, first, whether the title which defendants' predecessors received from Mexico was subject to the rights of the public in the tide-

3d at 294, 644 P.2d at 795, 182 Cal. Rptr. at 602; see Treaty of Guadalupe Hidalgo, Feb. 2, 1848, United States-Mexico, art. VIII, Mason's Constitution of California 1455, 1458-59 (1946).

Twelve years later, the United States government passed the Act of 1851, entitled "[a]n Act to ascertain and settle the private Land Claims in the State of California." 31 Cal. 3d at 294, 644 P.2d at 795, 182 Cal. Rptr. at 602. One year later, the Machados and Talamantes petitioned the Board of Land Commissioners under the Act for a decree affirming their rights in Rancho Ballona. The title was confirmed, and in the decree the boundaries to the property were described in exactly the same manner as had been done in the cession grant from Mexico.

However, a survey was required before the federal government would issue a patent on the property. For reasons left unexplained by the record, the required survey was not conducted until 1858. What is even more perplexing is that the survey was not reviewed by the Land Commissioner until 1869.

The survey itself demonstrated that a large body of water, known as the “inner bay” (i.e. Ballona Lagoon) extended from the southwest corner of the property parallel to the Pacific Ocean, in a northwesterly direction. The survey also described the boundaries of the Rancho Ballona property. When the survey was finally reviewed by the Land Commissioner in 1869, objections were filed by the adjacent property owners, disputing the validity of the northern boundary of Rancho Ballona. The title was confirmed, and in the decree the boundaries to the property were described in exactly the same manner as had been done in the cession grant from Mexico.

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An appeal to the Commissioner's determination was taken to the Secretary of the Interior, who, in affirming the decision, referred only to the northern boundary dispute, and not to the tideland's character of the “inner bay.” Because of this, the plaintiffs in the present action contended that the intermediate decision labeling the land as dry pasturage is not binding as it was addressed on appeal, and further, that the character of the “inner bay” was irrelevant to the northern boundary issue on appeal. In opposition, the defendants countered that the area described as the inner bay would be specifically excluded from the patent had it consisted of tidelands under the tidelands trust doctrine, and therefore, its characterization as dry pasturage was conclusively determined by the Secretary of the Interior. Id. at 294-95, 644 P.2d at 795-96, 182 Cal. Rptr. at 602-03.

12. 31 Cal. 3d at 295, 644 P.2d at 796, 182 Cal. Rptr. at 603. “[W]e assume, without deciding, that defendants prevail on these matters and that [the Commissioner's] determination that the ‘inner bay' was not an arm of the sea was a final decision on that question and a necessary predicate to the issuance of the patent.” Id. The court did, however, note an “obvious ambiguity” in the survey by the simple label of “bay” affixed to the area in question. Noting that, by definition, a bay is an inlet of the sea, the court deemed that this ambiguity allowed the trial court to hear evidence on the question and to make a present factual determination of the character of the property. The trial court “found as a fact that for more than 900 years the lagoon has been an arm of the sea, subject to the tides.” Id. at 295-96, 644 P.2d at 796-97, 182 Cal. Rptr. at 603.
lands encompassed in the grant, and second, if so, whether the United States acquired these rights upon annexation of California.”

The first determination was provided by an analysis of Mexican law in effect at the time of the cession of California pursuant to the treaty of Guadalupe-Hidalgo. “The law of Mexico at the time of cession declared that the public had a right to use the tidelands; this right was similar to the common law public trust.”

Thus, the court was able to determine that the title received by the defendants’ predecessors-in-interest was subject to a public trust in the tidelands included in the Mexican land grant.

The court next addressed the question of whether the United States government acquired that interest when the State of California was annexed. Despite a dearth of authority, the court was able to reason that the public interest in the tidelands could be analogized to a property interest; therefore, this “property” passed to the federal government by virtue of the cession. The court was aided in this interpretation by the strong public policy against the destruction of a public use in tidelands.

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13. Id. at 297, 644 P.2d at 797, 182 Cal. Rptr. at 604. In support of their position, the defendants argued that since the tidelands trust is an incident of title and the federal government never acquired title from the tidelands granted by Mexico to private citizens, and merely only confirmed grants through the patent process, it was a legally compelled conclusion that California could not be the successor to an interest, upon its entry into the union, of a right never possessed by the federal government. Id. at 296, 644 P.2d at 797, 182 Cal. Rptr. at 604.

The plaintiffs countered that, while conceding that the defendants’ predecessors in interest acquired legal title to the property by virtue of the Mexican conveyance, the federal government nevertheless acquired an equitable trust interest in the Lagoon tidelands on behalf of the general public pursuant to the tidelands trust doctrine. Therefore, the plaintiffs contended, this trust interest passed to the state when it acquired sovereignty in 1850. Id. at 296-97, 644 P.2d at 797, 182 Cal. Rptr. at 604.

14. Id. at 297, 644 P.2d at 797, 182 Cal. Rptr. at 604. In a footnote, the court noted that Mexican law specifically prohibited the alienation of tidelands property, and that “the concept of retention by the public of rights in land conveyed by the government to private parties was not alien to the law of Mexico. . . .” Id. at 297 n.9, 644 P.2d at 797 n.9, 182 Cal. Rptr. at 604 n.9.

15. Id. at 297, 644 P.2d at 797-98, 182 Cal. Rptr. at 604-05.

16. Id. at 297, 644 P.2d at 798, 182 Cal. Rptr. at 605.

17. Id. at 297-98, 644 P.2d at 798, 182 Cal. Rptr. at 605.

18. Id. at 298, 644 P.2d at 798, 182 Cal. Rptr. at 605. The one case on point addressed the issue of the transfer of mineral rights at the time of cession. In Moore v. Smaw, 17 Cal. 199 (1861), it was determined that rights to gold and silver mines “constituted . . . the property of the Mexican nation, and by cession passed, with all other property of Mexico within the limits of California, to the United States.” Id. at 217.

19. 31 Cal. 3d at 298, 644 P.2d at 798, 182 Cal. Rptr. at 605. Pursuant to the 70 year-old policy, first announced in People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913), the court stated that, in view of the public’s long standing interest in tidelands, any rule purporting to convey an interest in tidelands should be con-
In so holding, the court dismissed the defendants’ contention that the tidelands trust is inevitably an incident of fee title that is held by the government. Disapproving dicta in previous cases, the court stated that title in the government is not a prerequisite to the existence of the trust.

B. The Patent Process

Upon concluding that the federal government succeeded to the public trust interest when California joined the Union, there remained a final issue to be resolved by the court; namely, whether the rights in the public trust were relinquished as a result of the patent issued on the Ballona Lagoon property. Fundamentally, the question was whether or not the tidelands trust determination was even at issue in the 1873 patent proceedings.

A review of United States Supreme Court opinions addressing the question led the court to conclude that the issuance of a "patent from the federal government was a 'confirmation in a strict sense' of the interest received from Mexico," and was not in the nature of a quitclaim deed executed by the federal government. If reasonably possible, to avoid destruction of the public use. Id. at 596-97, 138 P. at 87-88.

20. The court noted three cases which contained the misleading dicta. 31 Cal. 3d at 298-99 nn.10-11, 644 P.2d at 798 nn.10-11, 182 Cal. Rptr. at 605 nn.10-11. In People v. California Fish Co., 166 Cal. 576, 584, 138 P. 79, 85 (1913), it was stated that tidelands "belong to a state in its sovereign character. . . ." In Illinois Central Railroad v. Illinois, 146 U.S. 387, 452 (1892) (relied on heavily in the Lyons and Fogerty cases; see supra note 2), the Supreme Court stated the interest in tidelands "is a title held in trust for the people of the State. . . ." Specifically disapproved by the court was the language in San Diego Archeological Soc'y, Inc. v. Compadres, 81 Cal. App. 3d 923, 927, 146 Cal. Rptr. 786, 788 (1978) ("However, the public trust doctrine applies only to limited types of real property to which the state holds or held title. . . .")

21. 31 Cal. 3d at 298-99, 644 P.2d at 798, 182 Cal. Rptr. at 605.

22. Id. at 299, 644 P.2d at 798, 182 Cal. Rptr. at 605. In addition to the patent dispute discussed supra note 11, the defendants had contended that, relative to the particular patent in question, the failure of the federal government to reserve the trust rights when issuing a patent to the Ballona Lagoon tidelands meant that those rights passed to the private landowner. The plaintiffs had argued that the public trust rights had not been addressed at the patent proceedings because they simply were not at issue.

government.25

In this analysis, the court distinguished the 1861 case of *Moore v. Smaw*,26 which had held that under the Act of 1857, the states acquired ownership of minerals in land which had been conveyed by Mexico to private parties.27 The distinction was based on the rationale that the tidelands trust rights are inherent in the sovereign, whereas mineral rights are more appropriately characterized as rights held in a proprietary capacity.28 Although the defendants had argued that case precedent had established that a federal patent was a conclusive determination of title to all subsequent claimants (either private parties or the government),29 the court was able to distinguish these cases as well.30

25. In *Boquillas*, 213 U.S. 339, the Supreme Court settled the issue of riparian rights arising out of the Sonora grant from the government of Mexico. At issue was the impact of a federally issued patent upon the territory in question. Justice Holmes delivered the opinion of the court, stating that “while it is true that in *Beard v. Federal*, . . . Mr. Justice Field calls such a patent a quit-claim, we think it rather should be described as a confirmation in a strict sense.” *Id.* at 344. Justice Holmes noted that when the United States issues a patent based on an earlier grant from a foreign government, the patent does not purport to enlarge or diminish the grant, but merely confirms the existing state of title. *Id.* at 344.

26. 17 Cal. 199 (1861).

27. The court in *Moore* concluded that mineral rights not expressly reserved in a federally issued patent passed to the legal titleholders, reasoning that, as California did not receive the mineral rights as an incident of sovereignty, the federal government held those rights in the same category as would a private landowner. Therefore, since the patent failed to expressly reserve those rights in the government, they passed to the grantee. 31 Cal. 3d at 300, 644 P.2d at 799, 182 Cal. Rptr. at 606. See also 17 Cal. at 216-219, 225-26.

28. 31 Cal. 3d at 300, 644 P.2d at 799, 182 Cal. Rptr. at 606. As the court stated: Thus, although *Moore* held that the federal patent enlarged the property rights of Mexican grantees, the reason for its conclusion was that mineral rights are not an incident of sovereignty and, therefore, a patent by the United States which failed to reserve that right conveyed fee title to the grantee. The clear implication of this holding is that if sovereign rights to property had been involved the court’s conclusion would have been otherwise. Tidelands are not held by the government in a proprietary capacity, they are held in trust for the benefit of the public. . . . *Id.* at 300, 644 P.2d at 799, 182 Cal. Rptr at 606.

29. The defendant relied on three cases in particular: United States v. Coronado Beach Co., 255 U.S. 472, 487-88 (1921) (“[T]he title of the State was subject to prior Mexican grants . . . [when] the patent[s] went in favor of the grantee it is too late to argue that they are not conclusive against the United States.”); *Knight v. U.S. Land Assn.*, 142 U.S. 161, 184 (1891) (“[T]he patent of the government is evidence of the title. . . . and is conclusive. . . . as against all parties. . . .”); and *San Francisco v. LeRoy*, 138 U.S. 656, 670-71 (1891) (“[T]he tidelands trust doctrine cannot apply to such lands as had been previously granted to other parties by the former government. . . .”).

30. 31 Cal. 3d at 302, 644 P.2d at 800, 182 Cal. Rptr. at 607. The court based its distinction on the issue of collateral attack; the cases the defendants had relied upon turned on the propriety of collateral attack on the titles or boundaries contained within the federal patent in each particular situation. However, in the instant case, the plaintiffs conceded that the defendants possessed legal title. The plaintiffs merely asserted the existence of a sovereign trust right, independent of the question of who had actual title. As noted in Justice Richardson’s dissent,
One case specifically addressed by the court was *United States v. Title Insurance Co.*,\(^3\) which considered the issue of which property rights, in addition to title, were addressed in a patent proceeding. The Court held that a tribe of Indians who had occupancy rights in certain lands under Mexican law lost them to private patentees when those rights were not asserted in the patent proceeding.\(^3\) This case was dismissed by the *Venice Peninsula Properties* court, which did not find it to be "convincing authority."\(^3\)

C. Conclusion

The court concluded its decision with an interesting policy argument, first noting that much of the land along the Pacific Coast from San Diego to Sonoma County is situated in former Mexican land grants. The court used this fact as a basis for analyzing the impact of any conclusion other than what the majority had decided. In Justice Mosk's words:

> If these areas of tidelands are free of the public interest, there is no right in the federal government, the state, or its successors, to improve or to use them for trust purposes without pursuing condemnation proceedings.

The result would be a California Mason-Dixon coastline dramatically divided between the north, in which the public trust doctrine is respected, and the south, where it is unrecognized. A dual system of rights would be created.\(^3\)

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\(^3\) California Supreme Court Survey

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this reasoning, and the conclusion it compels, is made without citation to authority. For a further discussion, and excerpts from Richardson's scathing dissent see infra note 43 and accompanying text.


32. *Id.* In noting that the Indians had waived a rather substantial property interest by not asserting it at the patent proceedings, the court stated that if the "Indians had any claims founded in the action of the Mexican government they abandoned them by not presenting them to the commission for consideration. . . ." *Id.* at 484.

33. 31 Cal. 3d at 302, 644 P.2d at 800-01, 182 Cal. Rptr. at 607-08. Distinguishing the right of occupancy asserted by the Indians in the *Title Ins. Co.* case from the public rights asserted in the present case, the court stated:

> We do not find this case to be convincing authority. The right to occupy land is a normal incident of title, and we have no quarrel with the proposition that private persons who failed to assert their right to occupancy in the patent proceedings may not thereafter claim that right. But the right to exclude the public from tidelands is not a normal incident of title. To the contrary, as we have seen, conveyance of such lands by the government does not ordinarily free them from the burden of the public trust even though no reservation is made in the deed for the preservation of the people's interest.

*Id.* at 302, 644 P.2d at 800-01, 182 Cal. Rptr. at 607-08.

34. *Id.* at 303, 644 P.2d at 801, 182 Cal. Rptr. at 608.
Thus, the court concluded that the public trust doctrine applies to tidelands which were never owned in fee by either the federal or state government.

III. THE DISSenting OpINIONS

Both Justices Richardson\textsuperscript{35} and Kaus\textsuperscript{36} filed dissenting opinions in the \textit{Venice Peninsula Properties} case. Justice Richardson felt that the majority erred in two important respects. First, he took issue with the majority’s “cavalier”\textsuperscript{37} disavowal of the one-hundred-year-old patent decision.\textsuperscript{38} The Justice also took issue with the majority’s failure to recognize that federal law controlled the analysis of the case.\textsuperscript{39}

Perhaps the thrust of Richardson’s belief is best expressed by the following passage, taken from his dissenting opinion:

> It is obvious that much more is involved in this litigation than the title to two lots. By imposing a public trust easement upon properties which are neither tidal, navigable, nor formerly under public dominion, the majority has removed all heretofore recognized reasonable limitations on the scope of the public trust doctrine. What is left? While the majority refrains from defining the extent of the easement beyond the land under the water of the lagoon, the implications of its decision equally threaten large areas held in private ownership elsewhere in the coastal areas of this state. The private title to such property, and the right to use it, suddenly are clouded

\textsuperscript{35} Id. at 303, 644 P.2d at 801, 182 Cal. Rptr. at 608 (Richardson, J., dissenting).

\textsuperscript{36} Id. at 315, 644 P.2d at 809, 182 Cal. Rptr. at 616 (Kaus, J., dissenting).

\textsuperscript{37} Id. at 304, 644 P.2d at 801, 182 Cal. Rptr. at 608-09 (Richardson, J., dissenting).

\textsuperscript{38} Id. Justice Richardson strongly denounced as unwarranted the majority’s determination of this issue:

> Along the way the majority cavalierly overturns a century-old judicial determination that the premises in question did not consist of tidal navigable waters. Disregarding the earlier federal court finding of fact the majority now, more than 100 years later, substitutes its own retroactive “finding” that the subject property was, indeed, then covered by tidal navigable waters. Resting upon its self-created factual premise, the majority attempts to justify both its disavowal of the federal patent of 1873... and its use of the public trust doctrine, which heretofore has applied only to navigable waters previously owned by public entities. These conclusions, like their common premise, are flawed.

\textsuperscript{39} 31 Cal. 3d at 308, 644 P.2d at 804, 182 Cal. Rptr. at 611. Richardson discussed the patent-issuance process with special reference to the Rancho Ballona property, and concluded that title to the property had been privately owned in 1839. Upon the issuance of the patent in 1873, the “title has been free and clear of any right, title or interest of the State of California or any of its political subdivisions from that day to this.” Id. at 306, 644 P.2d at 803, 182 Cal. Rptr. at 610.
by the creation of a state-administered easement even though the state heretofore has neither owned such property nor asserted any interest in it.40

Carefully drawing a distinction between public and private ownership, Richardson noted that "the rationale of the public trust doctrine is that public lands conveyed into private ownership remain subject to public use for certain limited purposes unless the intention to extinguish that right is clearly expressed in the grant."41 It was "obvious"42 to Justice Richardson that the tidelands trust doctrine should not be applied to lands that had never been publicly owned.

Justice Richardson attacked even more vehemently the majority's "failure to acknowledge the binding effect of the federal patent issued to the predecessors in title of the present owners,"43 noting that the essential purpose of the patent proceedings was to settle permanently all claims to the property.44 Departing from the analysis employed by the majority, Richardson noted that, because federal patents are issued by the governments pursuant to Congressional legislation, the issues regarding the Ballona patent were only appropriately analyzed by federal, and not state, law.45

Specifically at issue in this regard was the trial court's finding of fact that the Ballona Lagoon did consist of tidelands in 1851, in direct opposition to the determination made in the patent proceeding.46 Additionally, Richardson carefully noted that, while the majority placed great emphasis on the point that at cession the Mexican title was subject to the reservation of an interest by the Mexican government, the Mexican government had, in fact, never reserved such an interest. "The point is that there is no evidence whatever that [the Mexican government] did limit or condition its grant."47

Richardson also dismantled the majority's reliance on Moore v. Smaw. Moore, as interpreted by the majority, stood for the proposition that public trust rights were reserved by the Mexican gov-

40. Id. at 307, 644 P.2d at 803, 182 Cal. Rptr. at 610.
41. Id. at 307, 644 P.2d at 804, 182 Cal. Rptr. at 611 (emphasis in original).
42. Id. at 307, 644 P.2d at 804, 182 Cal. Rptr. at 611.
43. Id. at 308, 644 P.2d at 804, 182 Cal. Rptr. at 611.
44. Id.
45. Id. at 308-09, 644 P.2d at 804-05, 182 Cal. Rptr. at 611-12.
46. "The federal judgment which found that the lagoon was nontidal cannot be ignored, now, 100 years later, by a state court determination that it was then 'tidal.'" Id. at 309, 644 P.2d at 805, 182 Cal. Rptr. at 612.
47. Id.
ernment at the time of cession, and that this reservation of interest passed first to the United States, and then as a sovereign right to the State of California. However, the Justice deftly noted that Moore could not be properly analogized to the issues present in Venice Peninsula Properties, because, in Moore, "we stressed that at the time of the Mexican grant to the private Moore grantees 'it was the established doctrine of the Mexican law that all mines . . . were the property of the nation. No interest in the minerals passed . . . without express words designating them.'"\(^{48}\) However, "no similar doctrine traditionally established that such land grants were subject to a reservation of any 'public trust rights.'"\(^{49}\)

Richardson concluded his dissent by stating that procedures should be established so that eminent domain powers could be properly invoked, "to condemn the property in question, rather than upset long established principle, in order to obtain the property 'on the cheap'. . . .[I]f the state and city now seek use of [this] property, they should pay first."\(^{50}\)

Justice Kaus, writing a separate dissent, agreed with Richardson's conclusion that the decision was one properly to be made according to federal law.\(^{51}\) In light of this, Kaus examined the pertinent federal decisions, pointing out that each of them drew a "clear distinction between tidelands that passed to the state as sovereign, and tidelands — like those involved in the present case — that had been ceded by Mexico to private parties. . . ."\(^{52}\)

Kaus concluded by stating that, while the "public trust" analysis of the majority in this case was incorrect, the state nevertheless does retain substantial power to regulate the use of tidelands, under the aegis of environmental, navigational and commercial

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\(^{48}\) Id. at 310, 644 P.2d at 805-06, 182 Cal. Rptr. at 612-13 (quoting Moore v. Smaw, 17 Cal. 199, 212-13 (1861).

\(^{49}\) Id. at 310, 644 P.2d at 806, 182 Cal. Rptr. at 613. In a particularly artful passage that reveals the extent of Richardson's dismay with the analytical capabilities of the majority, Justice Richardson notes:

In the absence of some legal authority or a factual determination of such reservation by Mexico, Moore provides absolutely no support for the majority's inventive concept that public trust rights were somehow silently "reserved" by Mexico when it conveyed the premises into private ownership in 1839; were then quietly passed to the United States upon cession; thereafter, without either notice or acknowledgement were handed to California upon its admission to the Union; survived the subsequent issuance of a patent by the United States; lay dormant for over 100 years, and then, warmed by 143 summers, like a juridical century plant sprang suddenly into life and full bloom in 1982.

Id. at 310-11, 644 P.2d at 806, 182 Cal. Rptr. at 613.

\(^{50}\) Id. at 315, 644 P.2d at 809, 182 Cal. Rptr. at 616.

\(^{51}\) Id. at 315, 644 P.2d at 809, 182 Cal. Rptr. at 616 (Kaus, J., dissenting).

\(^{52}\) Id. at 317, 644 P.2d at 809, 182 Cal. Rptr. at 616.
regulatory powers. Because of this expansive legislative power, Kaus felt that "the majority’s concern over the problems emanating from a ‘Mason-Dixon’ coastline was probably overstated."

III. CONCLUSION

The impact of the decision is potentially far reaching. The decision does mandate that the public trust right is now superior to the rights of titleholders in tidelands originally received by private grant. While the majority asserts a policy-oriented approach that appears to balance the rights involved in favor of the public, little mention is made of the hardship now imposed upon private titleholders whose property rights will inevitably be affected by the decision.

The precise impact, of course, will be realized only as the state seeks to assert public trust rights on a case-by-case basis. However, the rationale offered by the majority is broad, and it is fair to state that in any given case the state is blessed with the support of the supreme court.

Rather than criticize the decision on public policy grounds, Richardson’s strongly worded dissent instead effectively dismantles the legal underpinnings of the majority's conclusion. Comparing the different analyses of the federal case law offered first by the majority and then by Richardson, one wonders if the words of Justice Richardson should not be read aloud to the other justices:

I confess to a growing unease about what I view as an accelerating erosion of private property rights of California citizens. We need look no further than the first section of the very first article of the state constitution to learn that the sovereign people of California have proclaimed: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety, happiness, and privacy." (Italics added.) From this solemn pronouncement of the people... I conclude that preserving the sanctity of a citizen’s private property is a singular responsibility of government and its courts. When, therefore, that government seeks to trench on such constitutionally protected and “inalienable rights” of its own people, its conduct must be closely scrutinized and its reach carefully measured by the rule of law.

53. Id. at 317, 644 P.2d at 810, 182 Cal. Rptr. at 617.
54. Id.
55. Id. at 315, 644 P.2d at 809, 182 Cal. Rptr. at 616.
XIII. REAL ESTATE

A. The Wellenkamp decision applies to non-institutional lenders and commercial property: Dawn Investment Co., Inc v. Superior Court of Los Angeles County

In *Dawn Investment Co., Inc. v. Superior Court*, the Supreme Court of California was required to answer the question of whether their holding in *Wellenkamp v. Bank of America* applied to non-institutional lenders and to commercial property. In *Wellenkamp*, the court held that the enforcement of a due-on-sale clause in a deed of trust or promissory note constituted an unreasonable restraint on the alienation of property unless it was necessary to protect against the impairment of security or risk of default. In *Dawn Investment*, the court concluded that the *Wellenkamp* rule applies to noninstitutional lenders and to commercial property.

In March 1977, petitioners sold an apartment house to the Becks. The Becks gave petitioners a note for $34,000 secured by a second deed of trust on the property as part of the purchase price of the apartment. The promissory note and the deed of trust contained a due-on-sale clause. In March, 1980, the Becks conveyed the apartment to a third party. The Becks took back an all-inclusive deed of trust to secure an indebtedness of $455,000. Upon learning of the conveyance, petitioners refused to accept installment payments on the 1977 note made by the Becks. The petitioners gave notice that they elected to accelerate payment under the terms of the note and the deed of trust. After the issuance of

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2. 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).
3. There are two types of due-on clauses. There is a due-on-sale clause and the due-on-encumbrance clause. These clauses provide for acceleration of the maturity of the loan upon the sale, alienation or further encumbering of the real property security. The lender usually has the option to enforce the clause.
4. Id. at 953, 582 P.2d at 976-77, 148 Cal. Rptr. at 385-86.
5. 30 Cal. 3d at 697, 639 P.2d at 974, 180 Cal. Rptr. at 332.
6. Petitioner Dawn Investment Co., Inc. is a corporation which is wholly owned by Don and Maria Robinson, husband and wife. The corporation's holdings consist of real property and four notes secured by real property. Id. at 697 n.1, 639 P.2d at 974 n.1, 180 Cal. Rptr. at 332 n.1.
7. Id. at 697, 639 P.2d at 975, 180 Cal. Rptr. at 332.
8. Id. at 679, 639 P.2d at 975, 180 Cal. Rptr. at 333.
a notice of default and election to sell, the Superior Court granted a preliminary injunction enjoining sale upon the payment of installments. Petitioners sought to have the injunction vacated.9

California Civil Code section 711 is the basic statute which deals with restraints on alienation.10 The case of *Coast Bank v. Minderhout*11 presented the court with an opportunity to consider, in light of Civil Code section 711, the effect of an agreement which purported to prohibit the transfer of property. The bank made several loans to the Enrights, and the Enrights gave the bank a promissory note for the full amount of the debt and agreed that they would not encumber or transfer, without the bank's consent, certain real property owned by them until the debt was completely paid.12 The court emphasized that there are several interests which justify a reasonable restraint on alienation.13 It then held that the bank could validly provide for an acceleration of the debt due if the Enrights encumbered or transferred the property.14

In *La Sala v. American Savings & Loan Association*,15 borrowers brought a class action against the saving and loan association to have the association's form of trust deed, which permits acceleration of the debt if the borrower executes a junior encumbrance on secured property, declared invalid.16 The court held that a due-on-encumbrance clause is enforceable where the borrower's conduct, subsequent to receiving a loan, endangers the lender's security.17 But when enforcement of the clause is not necessary

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9. *Id.* at 679, 639 P.2d at 975, 180 Cal. Rptr. at 333.
10. Cal. Civ. Code § 711 (West 1982) provides that: "Conditions restraining alienation, when repugnant to the interest created, are void."
12. *Id.* at 313, 392 P.2d at 266, 38 Cal. Rptr. at 506. The agreement was in a separate instrument.
13. *Id.* at 316, 392 P.2d at 268, 38 Cal. Rptr. at 508. The court noted the following as reasonable restraints on alienation: spendthrift trusts, a lease which is terminable upon alienation, a life estate which is terminable upon alienation, a restriction on the transfer of shares of stock and an executory land contract.
14. *Id.* at 317, 392 P.2d at 268, 38 Cal. Rptr. at 508.
15. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).
16. A clause in the deed states:

    Should trustor sell, convey, transfer, dispose of or further encumber said property, or any part thereof, or any interest therein, or agree to do so without the written consent of Beneficiary being first obtained, then Beneficiary shall have the right, at its option, to declare all sums secured hereby forthwith due and payable.

*Id.* at 869, 489 P.2d at 1115, 97 Cal. Rptr. at 851.
17. *Id.* at 881, 489 P.2d at 1124, 97 Cal. Rptr. at 860.
to protect the lender's security, the lender's use of the clause to obtain collateral benefits is an unreasonable restraint on alienation.¹⁸

In Tucker v. Lassen Savings and Loan Association,¹⁹ the plaintiffs purchased an improved parcel of land. The plaintiffs financed part of the purchase price with a loan from the defendant, giving a promissory note secured by a deed of trust on the property. Both the note and the deed contained "due-on" clauses.²⁰ The plaintiffs subsequently entered into an installment land contract²¹ for the sale of the property. Upon learning of the installment land contract, the defendants sought to enforce the "due-on" provision by demanding that the plaintiffs pay the unpaid principal of the loan. The plaintiffs claimed that the exercise of the "due-on" clause was an unreasonable restraint on the alienation of the property.

The court held that a "due-on" clause can be validly enforced only when it is necessary to protect a legitimate interest of the lender.²² Since the defendants in Tucker made no showing of how the installment land contract entered into by the plaintiffs would infringe upon their legitimate interests, the purported enforcement of the clause was an unreasonable restraint on the alienation of the property.²³ The court's most definitive response to the "due-on" clause question came in Wellenkamp v. Bank of America.²⁴ In Wellenkamp, the defendant bank sought to enforce a "due-on" clause when the property securing its note was sold.²⁵

In analyzing the case, the court stated that the lender's interest

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¹⁸. Id. at 882, 489 P.2d at 1125, 97 Cal. Rptr. at 861.
²⁰. The clause in the promissory note provided in pertinent part that if plaintiffs should:

[S]ell, convey or alienate the property... or any part thereof, or any interest therein, or shall be divested of title, or any interest therein in any manner or way, whether voluntary or involuntary, the holder hereof may, at its option, declare any portion or the entire amount of principal and interest to be immediately due and payable.

Id. at 632, 526 P.2d at 1170, 116 Cal. Rptr. at 634.
²¹. An installment land contract is one where a seller of property retains title to the property while the purchaser makes installment payments. When the purchaser completes all of the installment payments, the seller conveys title of the property to the purchaser. This arrangement is also known as a "contract for a deed."

²². Id. at 639, 526 P.2d at 1175, 116 Cal. Rptr. at 639. The court stated that the lender's legitimate interests included preserving the security from waste or depreciation and guarding against having to resort to the security upon default. Id. at 639, 526 P.2d at 1175, 116 Cal. Rptr. at 639.
²³. Id. at 640, 526 P.2d at 1176, 116 Cal. Rptr. at 640.
²⁴. 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).
²⁵. In July 1973, the Mans purchased a parcel of real property which they financed with a loan from defendant bank in the amount of $19,100 at eight percent

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in maintaining its loan portfolio at current interest rates did not justify the exercise of a "due-on" clause.\textsuperscript{26} Furthermore, when balancing the quantum of restraint imposed by the clause against the necessity for the clause, the court concluded that the mere fact of sale is not sufficient to warrant enforcement of the clause.\textsuperscript{27} Therefore, the holding emerged that a "due-on" clause contained in a promissory note or deed of trust cannot be enforced upon a sale of the property unless it is necessary to protect against the impairment of the lender's security or the risk of default.\textsuperscript{28} The court expressly limited its holding to institutional lenders and did not express an opinion with regard to private lenders.\textsuperscript{29}

Based on its decision in \textit{Wellenkamp}, the court in \textit{Dawn Investment} concluded that there was no basis to treat private lenders differently from institutional lenders when determining the restraint on alienation resulting from the enforcement of a due-on-sale clause.\textsuperscript{30} The court stated that lack of credit information was not reason enough to treat private lenders differently than institutional lenders.\textsuperscript{31} The fact that private financing may be short-term, and private lenders may not be able to spread the risk of loss over numerous loans, was also held insufficient to justify the disparate treatment of institutional and private lenders.\textsuperscript{32}

The court went on to point out that the opinion in \textit{Wellenkamp} did not indicate whether the property involved was residential or investment.\textsuperscript{33} The court also noted that California Civil Code interest per annum. The deed of trust contained a due-on clause. \textit{Id.} at 946, 582 P.2d at 972, 148 Cal. Rptr. at 381.

In July 1975, the Mans sold the property to Wellenkamp. Wellenkamp assumed the bank's loan. The bank offered to waive its right to accelerate if Wellenkamp would assume the loan at nine percent instead of the original eight percent. \textit{Id.} at 946, 582 P.2d at 972, 148 Cal. Rptr. at 381.

\textsuperscript{26} \textit{Id.} at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385. They stated that the exercise of a "due-on" clause to protect against fluctuations in the money market would not further the main purpose of the clause which is to protect against impairment to the lender's security which may result from transfer of title. \textit{Id.} at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385.

\textsuperscript{27} \textit{Id.} at 952, 582 P.2d at 976, 148 Cal. Rptr. at 385.

\textsuperscript{28} \textit{Id.} at 953, 582 P.2d at 976-77, 148 Cal. Rptr. at 385-86.

\textsuperscript{29} \textit{Id.} at 952 n.9, 582 P.2d at 976 n.9, 148 Cal. Rptr. at 385 n.9.

\textsuperscript{30} 30 Cal. 3d at 702, 639 P.2d at 978, 180 Cal. Rptr. at 335.

\textsuperscript{31} \textit{Id.} at 700, 639 P.2d at 977, 180 Cal. Rptr. at 334-35. The court pointed out that many private lenders deal through brokers and thus would have credit information to the same extent as institutional investors. There was also no showing by petitioners that the cost of acquiring credit information was unreasonable.

\textsuperscript{32} \textit{Id.} at 701, 639 P.2d at 977, 180 Cal. Rptr. at 335.

\textsuperscript{33} \textit{Id.} at 702, 639 P.2d at 978, 180 Cal. Rptr. at 335-36.
section 711 does not make an exemption for investment pro-

perty. Because economic conditions may have a similar impact

upon residential and investment property, the court concluded

that the Wellekamp rule also applies to investment property.

In Dawn Investment, the California Supreme Court extended

the Wellekamp ruling by holding that a “due-on” clause may be

an unreasonable restraint on the alienation of both residential

and commercial property. This decision will benefit purchasers of

property during periods of decreased availability of capital and

high interest rates. The benefit is that the purchaser may be able
to assume an existing loan at less than current interest rates. In
addition, the court’s ruling will depress an already ailing savings
and loan industry. This result stems from savings and loan as-

sociations being saddled with long-term loans at relatively low in-

terest rates, and not being able to call those loans due on the

subsequent sale or encumbrance of the property which secures

their repayment.

XIV. TAX

A. Exemption from Proposition 13 tax limitations for

obligations imposed by the Public Employees

Retirement System: Carman v. Alvord

In Carman v. Alvord, the California Supreme Court deter-

mined that the one percent limitation on ad valorem taxes im-

posed by the 1978 enactment of Proposition 13 does not apply to
city taxes imposed to meet previously established obligations of a
city to the statewide Public Employees Retirement System
(PERS). In so deciding, the court analyzed several specific terms
found in Proposition 13, and concluded that they should be
broadly construed.

The case arose when Richard Carman, a landowner in the city
of San Gabriel, brought a class action suit on behalf of all city tax-

payers. The suit charged that a specific tax imposed by the city

2. Cal. Const. art. XIII A. Section 1(b) of article thirteen A provides that “the

[one percent] limitation . . . shall not apply to ad valorem taxes or special assess-
ments to pay the interest or redemption charges on any indebtedness approved
by the voters prior to the time this section becomes effective.” CAL. CONST. art. XIII
A, § 1(b).
and first levied in 1948,3 was unconstitutional in light of the passage of Proposition 13. After disposing of some preliminary procedural contentions,4 Justice Newman, writing the court's unanimous opinion, proceeded to analyze two specific provisions of Proposition 13 in determination of the propriety of the San Gabriel tax.

The debate hinged on whether the 1978-79 levy of the PERS taxes was a “prior indebtedness approved by the voters”5 within the contemplation of the framers of Proposition 13. Petitioner Carman set forth a two part argument explaining why the PERS obligation was not a prior indebtedness, even though the voters’ approval of the obligation occurred in 1948. Contending that section (b) of Proposition 136 only applies to “traditional, fixed, long-term debt for borrowed funds,”7 the petitioner noted that each year the tax that arises is “annually executory,”8 and therefore, the long term indebtedness contemplated in the enactment of Proposition 13 never arose. In addition, Carman urged that under

3. In 1948, San Gabriel adopted a ballot measure which authorized the assessment and collection of a special tax for purposes of meeting the obligations imposed by the statewide Public Employees Retirement System (PERS). Taxes have been collected annually pursuant to this provision ever since 1948. 31 Cal. 3d at 322, 644 P.2d at 194, 182 Cal. Rptr. at 508. In 1978, the city determined the PERS tax that it was obligated to pay equaled $450,619, and in 1978-79, a special tax of 48 cents per $100 assessed valuation was thereby imposed upon landowners under the city's jurisdiction, to help defray the city's PERS obligation. Id.

4. The procedural context of the case is somewhat complex. The trial court originally sustained the city's demurrer to Carman's class action complaint. Carman appealed the trial court ruling and during the interim period filed several amended complaints regarding the constitutionality of the tax. The city's demurrer to these subsequent complaints was also sustained. However, Carman's appeal on the first class action complaint was successful. Based on this success, Carman urged that this appellate ruling become the law of the case on the appeal of the second demurrer. The response brief filed by the City expressly raised the Proposition 13 issue, conceding to Petitioner Carman that class-action relief was proper. The City instead argued that, despite the propriety of class relief, (the issue appealed by Carman) the disputed tax was nevertheless valid under Proposition 13. 31 Cal. 3d at 324, 644 P.2d at 195, 182 Cal. Rptr. at 509. The California Supreme Court, in disposing of the issue, noted that, despite the earlier dismissal, the city's general demurrer placed at issue “the legal merits of the action on the assumed facts.” Id. Additionally, the court noted that “[a]ll parties and numerous amici urge that we resolve the Proposition 13 issue. We conclude that the merits of the case are properly before us.” Id.


6. Id.

7. 31 Cal. 3d at 325, 644 P.2d at 195, 182 Cal. Rptr. at 510.

8. Id.
no circumstance could an annual contribution, assessed *after* Proposition 13 became effective, meet the requirement of *prior* voter approval.9

The court rejected Carman's contentions, choosing to concentrate on the pre-existing nature of the long-standing duty of an employer to pay pensions promised to and earned by public employees, rather than upon the characterization of the taxes as "annually executory."10 The taxes imposed by the PERS are but one method of meeting the pension obligations to public employees; the court emphasized that upon passing the PERS ballot measure in 1948, the voters of San Gabriel "[n]ecessarily . . . approved *all indebtedness to employees, current and future*, that would be incurred."11

Specifically holding that the type of indebtedness found in the PERS system falls outside of the Proposition 13 taxing limitations, the court stated that the word "indebtedness" itself has no fixed or rigid meaning, "but rather must be construed in every case in accord with its context."12 Cautioning that this holding would be confined to the parameters of the present case, Newman stressed in a footnote that the court:

[w]as not concerned with open-ended voter approval, given before Proposition 13, to incur any government expense deemed desirable from year to year and to tax accordingly. Pursuant to statutory authority the San Gabriel voters authorized a levy for a narrowly defined purpose that necessarily would give rise to payment obligations in the future.13

Additionally, the petitioner had argued that the subdivision 1(b) exemption from Proposition 13 tax cutting measures applied only to interest or redemption charges on any prior indebtedness approved by the voters (typically those charges incurred by long-term bonded or secured debt).14 Rejecting the petitioner's claim, Justice Newman focused on language which could have been

9. Id. (emphasis added).
10. Id. In this analysis, Newman cited to several cases for the general rule that, upon entering public service, an employee gains a "vested contractual right to earn a pension on terms substantially equivalent to those then offered by the employer." Id. See, e.g., Olson v. Cory, 27 Cal. 3d 532, 636 P.2d 532, 178 Cal. Rptr. 568 (1980); Kern v. City of Long Beach, 29 Cal. 2d 848, 179 P.2d 799 (1947). In a footnote to this argument Newman stated that "[p]ensions are a government obligation of great importance. They help induce faithful public service and provide agreed subsistence to retired public servants who have fulfilled their employment contracts." 31 Cal. 3d at 325 n.4, 644 P.2d at 196 n.4, 182 Cal. Rptr. at 510 n.4 (citing Bellus v. City of Eureka, 69 Cal. 2d 336, 444 P.2d 711, 723, 71 Cal. Rptr. 135, 141 (1968)).
11. 31 Cal. 3d at 326, 644 P.2d at 195, 182 Cal. Rptr. at 510 (emphasis added).
13. 31 Cal. 3d at 326 n.6, 644 P.2d at 196 n.6, 182 Cal. Rptr. at 510 n.6.
14. Id. at 327, 644 P.2d at 197, 182 Cal. Rptr. at 511. For the full text of the subdivision 1(b) exemption, see supra note 2.
placed in subdivision 1(b), rather than on the precise wording of the provision itself. "Plaintiff suggests that the phrase 'interest and redemption charges' shows an intent to limit the indebtedness protected by subdivision (b) to bonded or secured debt. Article XIII A does not, though, use these well-known limitations on the term 'indebtedness.' . . . Rather, it speaks of 'any indebtedness approved by the voters.' "\(^{15}\)

Underscoring the policy behind Proposition 13, Justice Newman further stressed that the exemptions found in subdivision 1(b) imply "a concern that irrevocable, long term obligations, solemnly approved by local electorates and entered on faith in taxing powers then available, not be frustrated by a revolutionary tax limitation imposed from outside the community."\(^{16}\) Furthermore, case precedent from the Court of Appeal had rejected the contention that subdivision 1(b) was applicable only to the traditional bonded debt.\(^{17}\)

The Petitioner argued that the interpretation of the meaning of Proposition 13 should be governed by reference to the ballot and voting material presented to the public at the time Proposition 13 was being debted. These materials described the exemption provision as applying only to bonded debt.\(^{18}\) The court concluded flatly that "[e]lection materials may be helpful but are not conclusive in determining the probable meaning of initiative language."\(^{19}\)

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15. *Id.* at 327, 644 P.2d at 197, 182 Cal. Rptr. at 511 (emphasis added). As an example of a statutory provision which is precisely limited by its terms, Justice Newman referred to Cal. Gov't Code § 45605 (West 1982), which defined the debt for public improvements specifically as "bonded indebtedness."

16. 31 Cal. 3d at 327-28, 644 P.2d at 197, 182 Cal. Rptr. at 511. In several passages Justice Newman reemphasized the liberal construction that should be accorded to the exemption provision of Proposition 13: "[R]edemption, like indebtedness, is not fixed or inflexible. . . . It has been defined broadly as 'the payment of principal and unpaid interest on bonded or other debt obligations.' " *Id.* at 327, 644 P.2d at 197, 182 Cal. Rptr. at 511 (quoting Blacks Law Dictionary, 5th ed. 1979 1149) (emphasis in original); "Courts construe constitutional phrases liberally and practically. . . ." *Id.* at 327, 644 P.2d at 197, 182 Cal. Rptr. at 511; "We should not assume that the phrase 'interest and redemption charges' is a hypertechnical, arbitrary category. . . ." *Id.* at 328, 644 P.2d at 197, 182 Cal. Rptr. at 511.

17. Two cases, Kern County Water Agency v. Board of Supervisors, 96 Cal. App. 3d 874, 158 Cal. Rptr. 430 (1979) and County of Shasta v. County of Trinity, 106 Cal. App. 3d 30, 185 Cal. Rptr. 18 (1980) both concluded that subdivision (b) extends to any indebtedness approved by the voters.

18. 31 Cal. 3d at 330, 644 P.2d at 198, 182 Cal. Rptr. at 511.

19. *Id.* See Amador Valley Joint Union High School Dist. v. State Bd. of
The final analysis offered by the court stemmed from an interpretation of the California State legislature’s reaction to the impact of Proposition 13 upon the PERS. “In 1978, soon after passage of Proposition 13, the Legislature enacted Revenue and Taxation Code section 2237, designed to clarify assessment and allocation of taxes under the new constitutional limitation.” \(^20\) Then, in 1979, the legislature adopted Revenue and Taxation Code section 2237.1, which specifically addressed the pension problem. “That statute [Revenue Code section 2237] declared that the term ‘indebtedness’ . . . included ‘city charter provisions which were approved by the voters prior to July 1, 1978, which require a city to levy additional property taxes to pay obligations under the retirement system for city employees,’ up to the level of benefits approved by the voters before that date.” \(^21\) Section 2237.1 was not recodified, however, in 1980. Additionally, the legislature had explicitly stated that section 2237.1 was only intended to extend emergency relief, and was not designed to interpret the question of “whether retirement obligations are, or are not, intended to be considered ‘voter approved indebtedness’ within the meaning of the Article XIII A of the California Constitution.” \(^22\) Nevertheless, the Carman court seized upon the enactment of the temporary section 2237.1 as an indication of the legislature’s interpretation of the exemption provision,\(^23\) and stressed that much deference should be given to such legislative interpretation.\(^24\) “The Legislature is presumed to adopt constitutional laws. Its commendably prompt decision to clarify pension rights, even as a transitional

Equalization, 22 Cal. 3d 209, 593 P.2d 1281, 149 Cal. Rptr. 239 (1978). The court noted that Howard Jarvis, the drafter of Proposition 13, had sent a letter to the court urging that the exemptions of subdivision (b) be narrowly construed to exclude pensions. “To the extent this was an after-the-fact declaration of intent by a drafter of Proposition 13, it may deserve some consideration . . . but by no means does it govern our determination how [sic] the voters understood the ambiguous provisions.” 31 Cal. 3d at 331 n.10, 644 P.2d at 199 n.10, 182 Cal. Rptr. at 513 n.10 (citation omitted).

20. Id. at 331, 644 P.2d at 199, 182 Cal. Rptr. at 513. In the words of the court: Section 2237 provided for a single ad valorem tax of 1 percent or less, levied by each county and distributed among all local agencies. No other local agency was to levy a property tax, except for certain purposes including “annual payments for the interest and principal on general obligation bonds or other indebtedness approved by the voters prior to July 1, 1978. . . .”

Id.

21. Id.

22. Id. at 331-32, 644 P.2d at 200, 182 Cal. Rptr. at 514 (quoting Stats. 1979, ch. 949, § 6 p. 3245). The legislature noted that § 2237.1 was enacted in response to the recognition that cities all over the state were prevented from carrying out their normal duties and functions while the meaning of Proposition 13 remained unclear. Id.

23. Id. at 332, 644 P.2d at 200, 182 Cal. Rptr. at 514.

24. 31 Cal. 3d at 331, 644 P.2d at 191, 182 Cal. Rptr. at 513.
measure, suggests its view that the voters did not intend to disrupt those important, voter approved obligations."

In conclusion, the court hastily noted that their ruling "suggests no elusive deviation" from the stern tax cutting measure that is Proposition 13. Rather, they stressed that the exemption of prior-approved pension obligation could continue to be funded by property taxes that were also exempt from the one-percent limitation, and that no other government obligations were included in this exemption.

Thus, the immediate impact of the Carman decision is limited to ad valorem taxes imposed by charter cities who adopted the PERS obligations prior to the enactment of Proposition 13. However, it is important to note that a broad construction of the exemption provision was stressed several times and each justice joined in Justice Newman's opinion. It may be suggested that this court has realized the tremendous impact that Proposition 13 has had upon the daily procedures and obligations of most publicly supported entities, and is now prepared to soften that impact through judicial interpretation.

B. A special tax imposed by the Los Angeles County Transportation Commission was validly adopted by a majority vote: Los Angeles County Transportation Commission v. Richmond

The Los Angeles County Transportation Commission (LACTC) was created by the legislature in 1976. The Commission was responsible for expanding the public transportation system in Southern California. In order to finance the system, LACTC adopted section 130350 of the Public Utilities Code, authorizing

25. Id. at 332, 644 P.2d at 200, 182 Cal. Rptr. at 514 (emphasis added) (citations omitted). It is ironic to note that when interpreting the meaning of subdivision (b), Justice Newman saw fit to emphasize terms that were not present in the wording of the provision, and in analyzing the legislature's interpretation of the same problem, saw fit to emphasize stop-gap legislation that the legislature chose not to reenact.
26. Id. at 334, 644 P.2d at 201, 182 Cal. Rptr. at 514.
27. Id.
28. See supra note 16.

1. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982).
2. CAL. PUB. UTIL. CODE § 130350 (West Supp. 1982). This section provides: A retail transaction and use tax ordinance applicable in the incorporated and unincorporated territory of the County of Los Angeles may be
the imposition of a retail and use tax in the County of Los Angeles. Of particular significance is the fact that adoption of this special tax requires approval only by a simple majority of voters. Following the passage of Proposition 13 by state voters, and pursuant to the requirements set forth in the Public Utilities Code, the LACTC enacted a retail transaction and use tax. The measure was approved by fifty-four percent of the voters.

In Los Angeles County Transportation Commission v. Richmond, the primary issue to be determined was whether the LACTC could impose such a sales tax without violating section 4, article XIII A of the California Constitution, which requires that special taxes be approved by a two-thirds vote. Section 4, article XIII A provides:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

The supreme court issued a peremptory writ of mandate, holding that the LACTC was not a “special district” within the meaning of the term as it was used in section 4, and that the sales tax at issue could be validly adopted by a majority vote.

adopted by the Los Angeles County Transportation Commission in accordance with part 1.6 (commencing with section 7251) of Division 2 of the Revenue and Taxation Code, provided that a majority of the electors voting on the measure vote to authorize its enactment at a special election called for that purpose by the commission.

Id.

3. Id.


5. 31 Cal. 3d at 200, 643 P.2d at 942, 182 Cal. Rptr. at 325.

6. Id. at 197, 643 P.2d at 941, 182 Cal. Rptr. at 324, (1982). The majority opinion was written by Justice Mosk with Chief Justice Bird and Justice Broussard concurring. A separate concurring opinion was written by Justice Kaus. Justice Richardson wrote a lengthy dissenting opinion. The pertinent facts of the case are as follows: The LACTC imposed a special tax in Los Angeles County which was approved by a majority of the voters. LACTC’s executive director, George Richmond, refused to implement the tax measure, claiming that it was in violation of the two-thirds vote requirement prescribed in § 4, art. XIII A of the California Constitution. LACTC filed a petition for a writ of mandate to compel Richmond to implement the tax. The supreme court issued an alternative writ of mandate and invoked original jurisdiction to hear the matter. Id. at 199-200, 643 P.2d at 942, 182 Cal. Rptr. at 325.

7. Id. at 199, 643 P.2d at 941, 182 Cal. Rptr. at 324.


9. 31 Cal. 3d at 208, 643 P.2d at 947, 182 Cal. Rptr. at 330.
The court, in its analysis, was particularly concerned with the interpretation to be given the term "special district" within the meaning of section 4, article XIII A. If the LACTC was found not to be a "special district" within the meaning of section 4, then the requirement of two-thirds voter approval was not applicable. However, if the court determined that the LACTC was encompassed by the term, the sales tax imposed would be in violation of the constitutional requirement prescribed in section 4. It concluded that the appropriate interpretation to be given the term "special district" was that the term referred only to those districts having the power to levy taxes on real property. The opinion stated that because "LACTC was not authorized to levy a property tax," it was precluded from classification as a "special district."

In arriving at this conclusion, the court relied on the 1978 case of Amador Valley Joint Union High School District v. State Board of Equalization. In Amador, the constitutional validity of article XIII A was challenged. The court recognized that the language in article XIII A was "imprecise and ambiguous," but upheld the constitutionality of the two-thirds vote requirement.

10. Id. at 207, 643 P.2d at 947, 182 Cal. Rptr. at 330. The court noted that the term "special district" has generally been given a broad definition. However, varying statutory interpretations have resulted in qualification of the term. See CAL. GOV'T CODE § 16271(d) (West 1980), which excludes from its definition of "special district" any agency not authorized to levy a property tax. But see CAL. GOV'T CODE § 50077(c) (West 1982). This section defines the term "district" broadly as including "an agency of the state, formed pursuant to general law or special act, for the local performance of governmental or proprietary functions with limited boundaries."

11. Id. at 205-06, 643 P.2d at 945-46, 182 Cal. Rptr. at 328-29. In reaching this conclusion the court reasoned that the specific language of § 4 prohibits cities, counties or special districts from levying real property taxes. This prohibition implies that "special districts" have the power to levy such taxes. LACTC, as was indicated in the opinion, has no authority to levy real property taxes and is therefore not encompassed by the term "special district." Justice Richardson, in his dissent, suggested that the majority's conclusion is not within the language of § 4. Id. at 212, 643 P.2d at 950, 182 Cal. Rptr. at 333.

12. Id. at 202, 643 P.2d at 944, 182 Cal. Rptr. at 327.

13. 22 Cal. 3d 208, 583 P.2d 1281, 149 Cal. Rptr. 239 (1978). The court relied on Amador throughout the opinion. In that case the constitutionality of article XIII A was at issue. Speaking generally, the court stated that "[t]he requirement of section 4 that any 'special taxes' must be approved by a two-thirds vote of the 'qualified electors' restricts but does not abolish the power of local governments in the raising of revenues." Id. at 226, 583 P.2d at 1287, 149 Cal. Rptr. at 245.

14. Id. at 218, 583 P.2d at 1283, 149 Cal. Rptr. at 241.

15. Id. at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 257.
The ambiguity of the language, particularly in section 4, was also acknowledged by this court in the case at bar. Relying on the standard for interpretation set forth in *Amador*, the court stated that any ambiguities should be resolved in favor of permitting voters to exact special taxes by majority vote. Support for this interpretation was based upon: 1) the particular language of Section 4; 2) material provided in the voter's pamphlet regarding Proposition 13; and 3) the interpretation of the term “special district” by the legislature.

In a strong dissenting opinion, Justice Richardson argued that the majority's strict construction of the language in section 4 was dubious at best. Richardson contended that the traditional rule of constitutional interpretation as expressed in *Mills v. County of Trinity*, would give “full effect to the framer's objective.” He proposed that the objective of section 4 is to provide relief from real property taxes; to allow local government agencies to impose new taxes without a two-thirds approval would clearly be contrary to this objective.

16. 31 Cal. 3d at 201, 643 P.2d at 943, 182 Cal. Rptr. at 326. The ambiguity in § 4 is reflected in the terms “special taxes” and “special districts.” The court determined that for the purpose of this case, the analysis should be limited to interpretation of the words “special district.” The rationale for this decision was that if LACTC is not a “special district,” then the two-thirds requirement is inapplicable to any tax within the meaning of that section. *Id.* at 201-02, 643 P.2d at 943, 182 Cal. Rptr. at 326.

17. *Id.* at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328. In *Amador*, the two-thirds requirement was referred to as the “extraordinary majority” requirement. The court held that such a requirement was constitutional and did not violate the Equal Protection Clause of the United States Constitution. 22 Cal. 3d at 237, 583 P.2d at 1294-95, 149 Cal. Rptr. 252-53. See Gordon v. Lance, 403 U.S. 1 (1971) (upholding a 60% vote requirement, primarily because no particular minority was singled out for special treatment by application of the voting requirement); but see Westbrook v. Mihaley, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970) (holding that the result of the two-thirds requirement was to give one group of voters an advantage over another group of comparable size). Although the Westbrook decision was overturned by *Gordon*, the majority considered its analysis of the effects of the two-thirds vote relevant to the case at bar. 31 Cal. 3d at 203, 643 P.2d at 944, 182 Cal. Rptr. at 327.

18. 31 Cal. 3d at 205, 643 P.2d at 945, 182 Cal. Rptr. at 328. The particular language of § 4 implies that “special districts” are only those that can impose real property taxes. *See supra* note 12.

19. 31 Cal. 3d at 205, 643 P.2d at 945-46, 182 Cal. Rptr. at 328-29. The information contained in the voter's pamphlet on Proposition 13 suggests that “special districts” are those entities authorized to levy a tax on real property.

20. *Id.* at 206-07, 643 P.2d at 946, 182 Cal. Rptr. at 329. The court noted it could derive “no plain guidance” from post-Proposition 13 legislation. *See supra* note 10.

21. 31 Cal. 3d at 212, 643 P.2d at 950, 182 Cal. Rptr. at 333.

22. 108 Cal. App. 3d 656, 166 Cal. Rptr. 674 (1980). Justice Richardson cites the Mills case in support of the contention that constitutional provisions should be liberally interpreted.

23. *Id.* at 660, 166 Cal. Rptr. at 676.

24. 31 Cal. 3d at 214, 643 P.2d at 951, 182 Cal. Rptr. at 334.
As a result of the supreme court's decision in *Los Angeles County Transportation Commission v. Richmond*, local governmental entities, not encompassed by the restrictions of section 4, are permitted to impose special taxes for the purpose of supporting local services and programs of particular significance to local populations, by a majority vote. The court's ruling allows local agencies greater flexibility and a more efficient means of obtaining local objectives.

XV. TORTS

A. In civil cases involving questions of comparative negligence, jurors may participate in separate special verdicts where they initially vote against the existence of liability and subsequently in favor of apportionment of liability: *Juarez v. Superior Court*

In the case of *Juarez v. Superior Court*¹ the California Supreme Court was faced with the issue of consistency of jury voting in comparative negligence cases² where multiple special verdicts are required. The precise question before the court involved the validity of a special verdict of comparative apportionment of damages³ where a juror who had initially voted against the existence of liability had subsequently cast a deciding vote in the poll for the special verdict relating to apportionment.⁴ In effect, the court

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1. 31 Cal. 3d 759, 647 P.2d 128, 183 Cal. Rptr. 852 (1982).
3. A special verdict is distinguished from a general verdict in that while a general verdict is a finding by the jury in terms of all the issues, the special verdict is basically a response to a specific question of fact. Special verdicts have become commonplace since the establishment of the doctrine of comparative liability.
   With the advent of the apportionment rule among tort-feasors, closely followed by the adoption of a rule of comparative negligence to replace the traditional rule of contributory negligence, the need to have the jury reveal its specific findings of percentages of fault in personal injury and wrongful death cases has given rise to the increased use of the special verdict. BLACK'S LAW DICTIONARY 1399 (rev. 5th ed. 1979).
4. A jury poll indicated that several jurors who had voted in favor of liability did not vote in favor of the final apportionment verdict that was rendered. Con-
was asked to rule on the question of whether a juror is bound to adopt consistent positions when voting on interrelated special verdicts.\(^5\)

The case was one of first impression. Following a brief analysis of existing California\(^6\) and foreign precedent,\(^7\) a majority of the court\(^8\) concluded that after having viewed all the evidence, a juror could logically refuse to accept the existence of liability and still validly participate in the apportionment of that liability.\(^9\) This position was based on the belief of the court that it would be improper to assume that a juror could not put prejudice aside and could not impartially perform his sworn duty based on the evidence presented.\(^10\)

The analysis of the majority focused on two lower California court decisions. The two decisions were the only comparative negligence cases addressing the question of juror consistency as to special verdicts.\(^11\) The court found that the decision in \textit{Borns v. Butts},\(^12\) which had overturned a trial court decision allowing inconsistent juror voting, was effectively invalid because the rationale advanced in support of the court's reversal was founded upon pre-comparative authority.\(^13\) The court ultimately utilized the second California decision, \textit{United Farm Workers of America v. Superior Court},\(^14\) as the foundation of its own conclusion. The \textit{Juarez} court agreed with the \textit{United Farm Workers} court that "af-

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5. The trial court below granted a mistrial on the basis of the fact that the same nine jurors had not agreed on both the existence of liability and the apportionment of damages. This was the basis of the appeal by the plaintiff below. \textit{Id.} at 763-64, 647 P.2d at 130, 183 Cal. Rptr. at 854. Additionally, the defendant below, real party in interest on appeal, unsuccessfully argued to the supreme court that the plaintiff appellant had waived any error in the trial court's grant of a mistrial by failing to request entry of the special verdicts within 10 days of the mistrial ruling and also that mandate was an inappropriate remedy. \textit{Id.} at 764, 647 P.2d at 131, 183 Cal. Rptr. at 855.

6. See \textit{infra} notes 11-14 and accompanying text.


9. 31 Cal. 3d at 768, 647 P.2d at 133, 183 Cal. Rptr. at 857.

10. \textit{Id.}

11. The court noted that the majority of the relevant authority was based on cases decided before the adoption of comparative negligence. \textit{Id.} at 766, 647 P.2d at 132, 183 Cal. Rptr. at 856. See \textit{Li v. Yellow Cab Co.} 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).


13. 31 Cal. 3d at 766-67, 647 P.2d at 132, 183 Cal. Rptr. at 856. See \textit{supra} note 11.

ter nine identical jurors agree that a party is negligent and that his negligence has proximately caused the injuries complained of, subsequent special verdicts allocating fault to that party are valid if supported by the votes of any nine jurors."15 One policy behind the supreme court decision was declared to be the enhancement of judicial efficiency.16 Additionally, it was the feeling of the Juarez majority that to foreclose any juror from participating in the deliberation of any special verdict would be the denial of the right to trial by jury on all issues.17

The dissenting opinion in Juarez vigorously attacked the majority on the ground that it is irrational to allow a juror to vote on the special verdict of liability apportionment after he or she has previously indicted a belief that no liability exists.18 Further, if the members of the jury majority who have found liability are unable to muster the required number of votes as to the apportionment verdict from within themselves, then the entire verdict must fall.19

In an appealing opinion, the dissent points to the potential conflict in allowing jurors who are unpersuaded by the evidence to find liability, to thereafter vote on the issue of apportionment based on the same evidence.20 The dissent distinguishes the majority interpretation of United Farm Workers concluding that the rule articulated therein cannot rationally function in cases such as comparative negligence where the special verdicts are necessarily interrelated.21 Indeed, one can only speculate how it is that the majority requires juror consistency on special verdicts of lia-

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15. 31 Cal. 3d at 767, 647 P.2d at 132-133, 183 Cal. Rptr. at 857 (emphasis original).
16. Id. at 767-68, 647 P.2d at 132-33, 183 Cal. Rptr. at 857. (quoting United Farm Workers of America v. Superior Court, 111 Cal. App. 3d 1009, 1021, 169 Cal. Rptr. 94, 101 (1980)). "[W]e agree with the United Farm Workers court that a contrary rule would result in 'time consuming writs, mistrials, frustrating delays and confusion for the trial judge and jury — all adding to the burden of the California civil trial process.'" Id.
17. 31 Cal. 3d at 768, 647 P.2d at 133, 183 Cal. Rptr. at 857.
18. Id. at 770-71, 647 P.2d at 135, 183 Cal. Rptr. at 859 (Richardson, J., dissenting).
19. Id. at 769, 647 P.2d at 858, 183 Cal. Rptr. at 134. "In my view, the well established rule which requires consistency in the votes of jurors to support a general verdict is equally applicable where the ultimate verdict rests upon specific questions denominated as 'special verdicts.'" Id.
20. Id.
21. Id. at 771, 647 P.2d at 134, 183 Cal. Rptr. at 858.
bility and proximate cause, yet disavows such a necessity when the special verdict goes to the ultimately crucial determination of the precise amount of that liability.

B. Narrow application of the Fireman's Rule to allow a fireman to collect damages for harm negligently caused by the property owner: Lipson v. Superior Court

Fireman John Berger responded to a boilover call at an Orange County chemical plant. When he arrived on the scene he was told by the plant owners that the resulting fire did not involve toxic chemicals at the plant. In reality, however, it did, and Berger's exposure to the blaze caused him serious injury. In the case of Lipson v. Superior Court, Berger's suit to collect damages for his injuries was determined by California Supreme Court.

Berger brought two issues before the court. First, whether the common law fireman's rule precluded a fireman's recovering damages from a party whose negligent or intentional misrepresentation of the nature of the emergency proximately caused injury to the fireman, and second, whether the fireman's rule barred a fireman's strict liability claim for damages for injuries proximately caused by the defendant's maintenance of an ultra hazardous activity upon the instant property. Each issue called for a re-evaluation of the exact role of the fireman's rule in California.

In resolving the first issue, Chief Justice Bird reviewed the rule's history and evolution in California. From the initial statement of the rule in Giorgi v. Pacific Gas & Electric Co., up to the California Supreme Court's acceptance of the rule in Walters v. Sloan, Justice Bird traced the changes in the rule. In concluding

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1. Lipson v. Superior Court, 31 Cal. 3d 362, 365, 644 P.2d 822, 825, 182 Cal. Rptr. 629, 632 (1982). The facts show that Berger, in reliance on the chemical plant's owners' representation that the fire did not involve toxic materials, did not take the precautions commensurate with a toxic substance fire.

2. 31 Cal. 3d at 362, 644 P.2d at 822, 182 Cal. Rptr. at 629. The majority opinion was written by Bird, C.J., with Newman, Kaus and Broussard, J.J., concurring. Mosk, J., concurred in part and dissented in part with Richardson, and Reynoso, J.J., concurring.

3. The trial court denied the defendant owners' summary judgment and they sought a writ of mandate to the California Supreme Court. Id. at 366, 644 P.2d at 826, 182 Cal. Rptr. at 633.


5. 266 Cal. App. 2d 355, 72 Cal. Rptr. 119 (1968). The court of appeals initially stated: "a paid fireman has no cause of action against one whose passive negligence causes the fire in which he was injured." Id. at 360, 72 Cal. Rptr. at 124.

6. 20 Cal. 3d 199, 571 P.2d 609, 142 Cal. Rptr. 152 (1977). The Walters court stated that "negligence in causing a fire furnishes no basis for liability to a professional fireman injured fighting the fire." Id. at 202, 571 P.2d at 612, 142 Cal. Rptr. at 294.
that the rule was narrow in scope and limited in its application, Chief Justice Bird stated that it was “unmistakably clear that in California, the fireman’s rule has never been construed as shielding a defendant from liability for acts of misconduct which are independent from those which necessitated the summoning of the firemen.” Rather, the fireman’s rule only precludes recovery for an injury which is caused by the actions that led to the summoning of the firemen in the first place. While the court noted that the overall philosophy behind the rule was indeed “assumption of the risk,” Chief Justice Bird pointed out that the narrow scope of the fireman’s rule precluded its application where a fireman encounters the negligent or intentional misrepresentation of a property owner. A fireman does undoubtedly assume the risk of combating a fire but not “the risk that the owner...of a burning building will deceive [him] as to the nature or existence of a hazard on the premises...” As a result, Berger was permitted to recover for the injuries he sustained in performing his duty as a fireman. The injury he sustained (exposure to toxic chemicals) resulted from a misrepresentation by the owner (denial of toxic chemical involvement) communicated after Berger was originally summoned to the hazard (the boilover).

In addressing the second issue raised by Berger, whether a fireman could recover damages for injury sustained in fighting a fire

156. Yet, the Walters court added that any willful misconduct other than that which caused the fireman to be summoned might create liability to the fireman for any injury arising therefrom. Id. 7. 31 Cal. 3d at 369, 644 P.2d at 829, 182 Cal. Rptr. at 636. 8. Id. Cases dealing with policemen also rely on the application of the fireman’s rule. See Malo v. Willis, 126 Cal. App. 3d 543, 178 Cal. Rptr. 774 (1981) (officer allowed to collect damages when the car he pulled over accidently crashed into him). 9. 20 Cal. 2d at 204, 571 P.2d at 614, 142 Cal. Rptr. at 158. This principle states that “one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby.” Id. 10. 31 Cal. 3d at 371, 644 P.2d at 831, 182 Cal. Rptr. at 638. The conclusion that a fireman be allowed to recover for any injury caused by the negligent or intentional misrepresentation of the nature of the hazard he is summoned to fight, is also in keeping with the policy in California that all persons owe a duty of care to avoid injury to others. Id. at 372, 644 P.2d at 832, 182 Cal. Rptr. at 639. This policy has been codified in CAL. CIV. CODE § 1714 (West 1975), and affirmed in case law. See Sprecher v. Adamson Companies, 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981); Rowland v. Christain, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). For a general discussion of Sprecher and the duty of care see, California Supreme Court Survey A Review of Decisions: July 1981 - December 1981, 9 PEPPERDINE L. REV. 1055 (1982).
based on strict liability of the defendant for maintenance of an ultra hazardous activity,¹¹ the Lipson court relied on its previous analysis of the first issue in the case. "In considering the [second issue herein presented], this court returns to the distinction drawn [earlier] between tortious conduct which necessitates the summoning of the fireman and tortious conduct which is unrelated to the original reason for the fireman's presence."¹² In order for a fireman to collect damages simply because the defendant maintained an ultra hazardous activity on his property, the court held that the fireman must first be summoned by an independent cause, and the presence of the ultrahazardous activity must then act to cause injury independent of this initial cause for summons.¹³ In Lipson, however, because the court was unable to determine whether the chemicals were the initial cause of the fire,¹⁴ the opinion was substantially limited in this regard. Nonetheless, the Lipson court was able to reaffirm the presence of the fireman's rule in California, and once again define it as being limited in scope and application.

C. A child may recover special damages but not general damages in a claim for wrongful life: Turpin v. Sortini

I. INTRODUCTION

In Turpin v. Sortini,¹ the California Supreme Court granted a hearing to resolve a conflict between two California appellate decisions rendered in Curlender v. Bio-Science Laboratories² and Turpin v. Sortini.³ The issue before the court was whether a child born with a hereditary defect could pursue a wrongful life claim "against a medical care provider who — before the child's

¹¹. See supra note 4 and accompanying text. Ultra hazardous activity is defined as that which "(a) necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage." Restatement, Tort § 520.
¹². 31 Cal. 3d at 376, 644 P.2d at 836, 182 Cal. Rptr. at 634.
¹³. Id.
¹⁴. Id. at 378, 644 P.2d at 838, 182 Cal. Rptr. at 636. If the chemicals had not been a cause of the fire, and therefore an action subsequent and independent from the reason the fireman was initially summoned, then they would be considered an ultrahazardous activity. The defendants would then be liable to the fireman because the maintainance of the ultrahazardous chemicals was the subsequent and proximate cause of the fireman's injuries after he had been summoned to the property. Id.
conception — negligently failed to advise the child's parents of the possibility of the hereditary condition, depriving them of the opportunity to choose not to conceive the child."4

Although the suit originally involved four causes of action,5 the only claim before the California Supreme Court was that brought on behalf of the Turpins' second daughter, Joy. The suit sought general damages for her deprivation "of the fundamental right of a child to be born as a whole, functional human being, without total deafness,"6 and special damages for the "extraordinary expenses for specialized teaching, training and hearing equipment" which Joy would require throughout her life.7

The court began its substantive analysis by noting that the "wrongful birth" cause of action has been addressed favorably in both sister jurisdictions8 and legal commentaries9 in recent years,

4. 31 Cal. 3d at 223, 643 P.2d at 955, 182 Cal. Rptr. at 338. The court noted the following facts in their preliminary analysis:

On September 24, 1976, James and Donna Turpin, acting pursuant to their pediatrician's advice, took their then-only child Hope to the Fresno Community Hospital for hearing tests. Adam Sortini, a hearing specialist, performed the requested tests and concluded that Hope's hearing was normal. In actuality, however, Hope was completely deaf as the result of a detectable hereditary hearing ailment.

The Turpins did not learn of their daughter's true condition until 13 months later, when other specialists properly diagnosed her condition and concluded that there was a "reasonable degree of medical probability" that the defect would be inherited by any of the Turpins' children. However, prior to the Turpin's awareness of Hope's condition, they had conceived a second child, who was born in August of 1977. The girl, Joy, suffered from the same hereditary hearing defect and was totally deaf.

Mr. and Mrs. Turpin brought suit on four causes of action against Sortini, the hospital, and the hearing center where Hope had been diagnosed.

5. 31 Cal. 3d at 224, 643 P.2d at 956, 182 Cal. Rptr. at 339. The plaintiffs first sought damages for the harm that Hope, the first daughter, had suffered as a result of the negligent misdiagnosis. The third and fourth claims, respectively, were brought by Mr. and Mrs. Turpin. These claims sought special damages for the support and medical care which Joy would require until she reached majority, and also sought general damages for emotional distress "attendant to the raising and caring for a totally deaf child." Id.

6. Id.

7. Id.


9. See, e.g., Capron, Tort Liability in Genetic Counseling, 79 COLUM. L. REV. 618 (1979); Note, Father and Mother Know Best: Defining the Liability of Physi-
while wrongful life claims brought on behalf of children have been almost universally rejected.10

II. CALIFORNIA COURT OF APPEAL OPINIONS

Noting that the wrongful life issue was one of first impression in the California Supreme Court,11 the majority examined three California appellate decisions which have addressed somewhat similar claims.12 The most important of the three decisions is Curlender v. Bio-Science Laboratories,13 which was a suit brought on behalf of a child born with Tay-Sachs disease. The suit claimed that blood tests, which the parents had specifically requested for determining the probability that any child they conceived would be so afflicted, were negligently administered and analyzed by the laboratory which had performed them. The Curlender court found, in opposition to the previous court of appeal precedent, that such a child can suffer a legally cognizable injury when he is born with severe hereditary defects. The philosophy of the Curlender court is best expressed in the following passage:


10. See, e.g., Berman, 80 N.J. 421, 404 A.2d 8; Becker, 46 N.Y.2d 401, 413 N.Y.S.2d 895, 368 N.E.2d 807; Speck, 439 A.2d 110; Dumer, 69 Wis. 2d 766, 233 N.W.2d 372; Elliot v. Brown, 361 So. 2d 546 (1978). The court interpreted this difference to the judiciary’s willingness to permit parents to recover for medical costs and other costs which would not have been incurred “but for” the defendant’s negligence. At the same time, courts are understandably reluctant to allow recovery for a child’s complaint that, “but for” the defendant’s negligence, that child would not have been born. The dual rationale for this reluctance is that the child has suffered no legally cognizable injury, and that “appropriate” damages are impossible to ascertain. 31 Cal. 3d at 225-26, 643 P.2d at 956, 182 Cal. Rptr. at 340.

11. Id. at 226, 643 P.2d at 957, 182 Cal. Rptr. at 340.

12. Id. The first two cases had little or no impact on the Turpin analysis. Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967), a “wrongful birth” case, upheld the parents’ right to bring an action against a doctor who had negligently attempted to sterilize the plaintiff’s wife; the sterilization operation failed to prevent the conception and birth of the couple’s healthy child. The case was decided on general negligence principles. Stills v. Gratton, 55 Cal. App. 3d 698, 127 Cal. Rptr. 652 (1976), followed the analysis in the Custodio ruling and permitted recovery by a mother for the birth of her illegitimate yet healthy child as the result of a negligently performed therapeutic abortion. Again, liability and damages were determined according to general tort principles. The Stills court did not permit recovery by the illegitimate son, noting that he “was and is a healthy, happy youngster who is a joy to his mother” (55 Cal. App. 3d at 705, 127 Cal. Rptr. at 656) and that he was only minimally affected by the fact of his illegitimacy. The court noted that the “issue involved is more theological or philosophical than legal.” Id. at 705, 127 Cal. Rptr. at 656.

The reality of the "wrongful-life" concept is that such a plaintiff both exists and suffers, due to the negligence of others. It is neither necessary nor just to retreat into meditation on the mysteries of life. We need not be concerned with the fact that had defendants not been negligent, the plaintiff might not have come into existence at all. The certainty of genetic impairment is no longer a mystery. In addition, a reverent appreciation of life compels recognition that plaintiff, however impaired she may be, has come into existence as a living person with certain rights.14

Regarding the question of damages, the Curlender court held that a child may "recover damages for the pain and suffering to be endured during the limited life span available to such a child and any special pecuniary loss resulting from the impaired condition."15

III. ANALYSIS OF THE CASE

In order to simplify the analytical challenge presented to it, the majority stated that "it may be helpful to recognize that although the cause of action at issue has attracted a special name — 'wrongful life' — plaintiff's basic contention is that her action is simply one form of the familiar medical or professional malpractice action."16 Analyzing the issue within a negligence frame-

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14. Id. at 829, 165 Cal. Rptr. at 488.
15. Id. at 831, 165 Cal. Rptr. at 489. The opinion also stated that, to the extent that the parents did not recover the costs of the child's care, the child himself should be permitted to recover for them. Id. The court then addressed an additional issue which is related to the after-effect of the Curlender decision. In 1981, the California legislature enacted § 43.6 of the Civil Code, which provides that:
(a) No cause of action arises against a parent of a child based upon the claim that the child should not have been conceived or, if conceived, should not have been allowed to have been born alive.
(b) The failure or refusal of a parent to prevent the live birth of his or her child shall not be a defense in any action against a third party, nor shall the failure or refusal be considered in awarding damages in any such action.
(c) As used in this section "conceived" means the fertilization of a human ovum by a human sperm.

CAL. CIV. CODE § 43.6 (West 1982). The Turpin majority concluded that § 43.6 had "no significant effect" on the issue in the case. The court further held that § 43.6 did not create a cause of action for wrongful life, but rather that the purpose of the new legislation "was simply to eliminate any liability or other similar economic pressure which might induce potential parents to abort or decline to conceive a potentially defective child." 31 Cal. 3d at 229, 643 P.2d at 959, 182 Cal. Rptr. at 342.
16. 31 Cal. 3d at 229, 643 P.2d at 959, 182 Cal. Rptr. at 342. This analogy to general tort law was similar to the reasoning used in Custodio and Stills. (For a further discussion of these two cases, see supra note 12.) It should be noted that the court set forth the general elements of a professional malpractice action. These elements have been previously determined in Budd v. Nixen, 6 Cal. 3d 195, 491 P.2d 433, 98 Cal. Rptr. 949 (1971). The court quoted extensively from the Budd elements, which set forth the prima facie case.
work,\textsuperscript{17} the court determined that the foreseeability element of the prima facie case was fulfilled because "it was reasonably foreseeable that Hope's parents and their potential offspring would be directly affected by defendants' negligent failure to discover that Hope suffered from an hereditary ailment. . . ."\textsuperscript{18} With the question of foreseeability answered, the court turned to the more fundamental questions of whether or not Joy suffered a "legally cognizable injury" and whether or not "rationally ascertainable damages" could be computed.\textsuperscript{19}

Concerning the issue of whether a "legally cognizable injury was suffered," the court recognized that the problem was not that the negligence and injury occurred before birth,\textsuperscript{20} but rather that the injury as claimed could not be classified as "pre-natal,"\textsuperscript{21} as the plaintiff was claiming that, had the defendants not been negligent, she "would not have been born at all."\textsuperscript{22} Noting that a remedy for injury in tort is compensatory in nature,\textsuperscript{23} the court concluded that "it appears inconsistent with basic tort principles to view the injury for which defendants are legally responsible solely by reference to plaintiff's present condition without taking

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\item 17. The elements of a cause of action in tort for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's negligence.
\item 18. 31 Cal. 3d at 229, 643 P.2d at 960, 192 Cal. Rptr. at 343.
\item 19. Id. In an effort to simplify their analysis, the court treated these two issues separately. "Although the issues of 'legally cognizable injury' and 'damages' arc intimately related and in some sense inseparable, past cases have generally treated the two as distinct matters and, for purposes of analysis, it seems useful to follow that approach." Id.
\item 20. "Although at one time the common law denied recovery for injuries inflicted before birth, California — in tune with other American jurisdictions — has long abandoned that arbitrary limitation." Id. In addition, CAL. CIV. CODE § 29 (West 1982) provides, in pertinent part: "a child conceived, but not yet born, is to be deemed an existing person so far as may be necessary for its interests in the event of its subsequent birth."
\item 21. 31 Cal. 3d at 231, 643 P.2d at 961, 182 Cal. Rptr. at 344.
\item 22. Id.
\item 23. Id. at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344.
\end{itemize}
into consideration the fact that if defendants had not been negligent she would not have been born at all."\(^{24}\)

Adopting a method of analysis used in sister jurisdictions which had addressed similar questions, the court phrased the essence of plaintiff's complaint for general damages as a comparison between being born with a hereditary ailment versus not being born at all.\(^{25}\) Some jurisdictions have concluded that, as a matter of public policy, a claim for damages in this context should be denied. The *Turpin* court stated that "considerations of public policy dictate a conclusion that life — even with the most severe of impairments — is, *as a matter of law*, always preferable to nonlife."\(^{26}\)

The California Supreme Court, however, was uneasy about adopting such a far-ranging conclusion, for several reasons. First, the court noted that "it is hard to see how an award of damages to a severely handicapped or suffering child would 'disavow' the value of life or in any way suggest that the child is not entitled to the full measure of [his] legal rights. . . ."\(^{27}\) Also, the court labeled as "inaccurate" the conclusion that California's public policy established — *as a matter of law* — that life is always preferable to non-life, citing as support California Health and Safety Code section 7186.\(^{28}\) In part, this section provides that adults have the right to control their medical destiny and, if confronted with the prospect of being sustained only on life support machines, have the right to withhold such procedures.\(^{29}\) "This statute recognizes that — at least in some situations — public policy supports the right of each individual to make *his* or *her own determination* as to the relative value of life and death."\(^{30}\)

\(^{24}\) *Id.* See also Capron, "Tort Liability in Genetic Counseling," 79 COLUM. L. REV. 619, 654-57 (1979); Comment, "Wrongful Life": The Right Not to be Born, 54 TUL. L. REV. 480, 494-97 (1980).

\(^{25}\) *Id.* at 232, 643 P.2d at 961, 182 Cal. Rptr. at 344.

\(^{26}\) *Id.* (emphasis added). The rationale of these decisions is that an award for damages for being born would "disavow" the sanctity and value of a less-than-perfect human life." *Id.* See, e.g., Berman v. Allan, 80 N.J. 421, 404 A.2d 8 (1979); Phillips v. United States, 508 F.Supp. 537 (D.S.C.) (1980).

\(^{27}\) 31 Cal. 3d at 233, 643 P.2d at 961-62, 182 Cal. Rptr. at 344-45.

\(^{28}\) CAL. HEALTH & SAFETY CODE § 7186 (West Supp. 1982).

\(^{29}\) *Id.*

\(^{30}\) 31 Cal. 3d at 233, 643 P.2d at 962, 182 Cal. Rptr. at 345 (emphasis added). Important, of course, is the court's contrast between determinations based on public policy that may be held to be a matter of law, and those determinations which, while they may present questions of public policy, remain a question of individual choice. The court did recognize, however, that in the wrongful life context, an un-
Summarizing the analysis of the issue of whether a legally cognizable injury had occurred, the court denied Joy Turpin's claim for general damages, stating: "[R]ecovery should be denied because . . . it is simply impossible to determine in any rational or reasoned fashion whether the plaintiff has in fact suffered an injury in being born impaired rather than not being born." However, the court left open the question with respect to illnesses more serious and debilitating than deafness.

In addition to the question of a legally cognizable injury, the Turpin court analyzed the issue of the assessability of general damages, "even if it were possible to overcome the first hurdle [recognition of a legally cognizable injury], it would be impossible to assess general damages in any fair, nonspeculative manner." Although the plaintiff had argued that damages should not be denied merely because they are difficult to compute, the court responded that a wrongful life damage question was not at all analogous to one presented in a normal personal injury or wrongful death action. The court also believed that an award of dam-

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31. Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 345. The court implied that more serious cases would receive a different treatment, and that a legally cognizable injury would be awarded:

Considering the short life span of many of these children and their frequently very limited ability to perceive or enjoy the benefits of life, we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all.

Id. at 234, 643 P.2d at 963, 182 Cal. Rptr. at 346. To emphasize this point, the court took particular notice of the debilitating illness in the Curlender case. In that case, Shauna Curlender was afflicted with Tay-Sachs disease and suffered from "mental retardation, . . . convulsions, sluggishness . . . loss of motor reactions, inability to sit up or hold her head up . . . muscle atrophy, blindness . . . and gross physical deformity." Id. at 234 n.10, 643 P.2d at 963 n.10, 182 Cal. Rptr. at 346 n.10. It appears that, while denying the "injury" element in Joy Turpin's claim, Shauna Curlender's illness was that type envisioned by the court as presenting a "wrongful life" claim. However, petition for hearing was denied by the California Supreme Court in September of 1980.

32. Id. at 234, 643 P.2d at 963, 182 Cal. Rptr. at 346.
33. Id. at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347.
34. Id. at 235, 643 P.2d at 963, 182 Cal. Rptr. at 346. Worthy of note in this regard is the opinion of Justice Weintraub of the New Jersey Supreme Court, who stated his view in Gleitman v. Cosgreve, 49 N.J. 22, 63, 227 A.2d 689, 711 (1967):

Ultimately, the infant's complaint is that he would be better off not to have been born. Man, who knows nothing of death or nothingness, cannot possibly know whether that is so.

. . .

We must remember that the choice is not between being born with health or being born without it. . . . Rather the choice is between a worldly existence and none at all. . . . To recognize a right not to be born is to enter an area in which no one can find his way.

35. 31 Cal. 3d at 233, 643 P.2d at 963, 182 Cal. Rptr. at 346.
36. This is because the threshold question of determining a legally cognizable injury is so difficult to answer. Id. For example, in a normal negligence action, the
ages would be hopelessly speculative, as the jury would have no “frame of reference in their own general experience to appreciate what the plaintiff has lost. . . .” 37

As support for their conclusion that general damages may not be recovered in a wrongful life action, the court cited two recent appellate decisions38 which refused to recognize a new cause of action for the loss of affection and security of the parent-child relationship. In these cases, the plaintiffs' causes of action were denied because money damages would not provide meaningful compensation for the loss, and because damages for these sorts of losses were very difficult to measure.39 “A monetary award of general damages — as opposed to the claim for medical expenses . . . cannot in any meaningful sense compensate the plaintiff for the loss of opportunity not to be born, and the assessment of damages is, of course, much more problematical here. . . .”40

Thus, Joy Turpin's claim for general damages was denied on two grounds. First, the court could not decide that in this particular set of circumstances the plaintiff had stated a legally cognizable injury. Second, the court felt that an award of general damages would be too speculative and in any event would not meaningfully compensate the plaintiff. This did not, however, de-

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jury is presented with a "once-healthy plaintiff" who was harmed by the defendant's negligence. This the jury can compare with the now damaged one. Id. at 236, 643 P.2d at 963-64, 182 Cal. Rptr. at 346-47. In a wrongful life case, the value of non-life is inestimable.

37. Id. at 236, 643 P.2d at 964, 182 Cal. Rptr. at 347. Additional support for rejecting a claim for general damages was grounded in the "benefit" doctrine of tort law. Specifically, § 920 of the Restatement (Second) of Torts provides that when the defendant's tortious conduct has harmed the plaintiff, yet in addition confers a "special benefit" on the plaintiff that otherwise would not have occurred, the value of the benefit conferred becomes an element in the damage award. In the wrongful life case, however, the benefit conferred becomes an element in the damage award. In the wrongful life case, however, the benefit conferred is life itself. As the court stated:

With respect to general damages, the harmed interest is the child's general physical, emotional and psychological well-being, and in considering the benefit to this interest which defendant's negligence has conferred, it must be recognized that as an incident of defendant's negligence the plaintiff has in fact obtained a physical existence with the capacity both to receive and give love and pleasure as well as to experience pain and suffering. Because of the incalculable nature of both elements of this harm-benefit equation, we believe that a reasoned, non-arbitrary award of general damage [sic] is simply not obtainable.

31 Cal. 3d at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347.


39. 31 Cal. 3d at 237, 643 P.2d at 964, 182 Cal. Rptr. at 347.

40. Id.
ter the court from making an award of special damages.41 “Although we have determined that the trial court properly rejected plaintiff’s claim for general damages, . . . her claim for . . . ‘extraordinary expenses’. . . because of her deafness stands on a different footing.”42 This “different footing” arose because the claim for special damages was both certain and readily measurable.43 Among the recoverable expenses in Joy Turpin’s case were those for specialized teaching, training, and hearing equipment that she will incur during her lifetime.44 An additional rationale offered by the court in support of the award of medical expenses was the recognition that such damages are regularly awarded in “wrongful birth” cases.45 The court stated: “it would be illogical and anomalous to permit only parents, and not the child, to recover for the cost of the child’s own medical care.”46

IV. CONCLUSION

Upon the foregoing analysis, the California Supreme Court remanded the Turpin case to the trial court for a decision in accordance with the principles announced in the opinion. The dissent, authored by Justice Mosk and concurred in by Chief Justice Bird, criticized the majority for rendering an “internally inconsistent”47 opinion. Mosk believed that Curlender, which allowed a cause of action for wrongful life, was controlling authority, and felt that the majority “abandoned” the Curlender doctrine in the Turpin decision.48 His dissent, however, seems to ignore an important part of the majority opinion in which the Turpin court applied the Curlender factual situation to a wrongful life framework. In short, the majority opinion presented a discourse on the law of cognizable injury and hinted that, given a more extreme factual situation, the court would be willing to permit a wrongful life claim. How-

41. Id. at 239, 643 P.2d at 965-66, 182 Cal. Rptr. at 346. The internal inconsistency of an order denying that an injury had occurred and refusing an award of general damages, while making an award of special damages, was pointed out by Justice Mosk in his dissent. Id. at 240, 643 P.2d at 966, 182 Cal. Rptr. at 349 (Mosk, J., dissenting).
42. Id. at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348 (footnote omitted).
43. Id. at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.
44. Id. at 237, 643 P.2d at 965, 182 Cal. Rptr. at 348.
45. As defined by the court, a “wrongful birth” case refers to an action brought by the parents in the same circumstances as in the present case. Id. at 225 n.4, 643 P.2d at 957 n.4, 182 Cal. Rptr. at 329 n.4.
46. Id. at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.
47. See supra note 41.
48. Justice Mosk cites extensively from the Curlender decision, giving little, if any, independent analysis of the facts in the Turpin case. Apparently Mosk did not perceive the willingness of the majority to allow a wrongful life claim in a more extreme factual situation. See supra notes 16-46 and accompanying text for the analysis of the majority decision.
ever, since the plaintiff could not demonstrate a legally cognizable injury, and since general damages would be highly speculative and would not be adequately compensatory, the court denied the request for general damages. A claim for special damages was upheld, since they were held to be specifically related to readily measurable medical expenses.

The precise impact of the Turpin ruling remains to be seen. The court was sufficiently ambiguous so as to create an impression that a wrongful life claim might be upheld in the future, depending upon the severity of the injury suffered. The court did offer some guidelines in that they cited Curlender as an example of what would constitute a severe, debilitating injury.49

It appears that a general damage issue will be less favored than the legal injury issue in future cases. This is demonstrated by the thoroughness of the court's analysis of the philosophical and practical barriers to the determination of such damages posed by these issues. Special damages, however, will continue to be permitted where they are related to the medical costs incurred in caring for the child's ailment. As the court stated, it is consistent with "basic liability principles . . . to hold defendants liable for the cost of such care, whether the expense is to be borne by the parents or by the child."50

XVI. WILLS

A. A liberalized approach to accepting a writing as a holographic will: Estate of Black

In Estate of Black,1 the California Supreme Court was called upon to decide whether a purported holographic will met the requirements of California Probate Code section 53.2 The court

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49. 31 Cal. 3d at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348. See id. at 234 n.10, 643 P.2d at 963 n.10, 182 Cal. Rptr. at 340 n.10.
50. Id. at 238, 643 P.2d at 965, 182 Cal. Rptr. at 348.
1. 30 Cal. 3d 880, 641 P.2d 754, 181 Cal. Rptr. 222 (1982). The majority opinion was written by Justice Richardson with Chief Justice Bird and Justices Broussard and Tobriner concurring. Justice Mosk wrote a dissenting opinion with Justices Newman and Kaus concurring.
2. CAL. PROB. CODE § 53 (West 1956). It provides:
A holographic will is one that is entirely written, dated and signed by the hand of the testator himself. It is subject to no other form, and need not be witnessed. No address, date or other matter written, printed or stamped upon the document, which is not incorporated in the provisions
held that even though the will incorporated printed language on a stationer's form, it was nevertheless valid as a holographic will.³

Frances Black, testatrix, used three copies of a stationer's form in drafting her will. She inserted, in her own handwriting, her signature and place of domicile in the exordium clause located at the top of each page and used preprinted blank spaces to denote the name and gender of her executor. She also inserted, using the appropriate black spaces provided, the date of the instrument and the city and state where the will was being executed. She then proceeded to ignore or cross out all other printed language in the forms using the balance of the space in the form to detail, in her own handwriting, the disposition of her estate.⁴ When later presented for probate, the holograph was denied since it incorporated parts of the preprinted portions of the stationer's form.⁵

In analyzing Estate of Black, the court relied heavily on its earlier decision in Estate of Baker.⁶ In Baker, the decedent wrote an instrument he intended to operate as a holographic will on the printed letterhead of a hotel. In so doing, he drew lines through the name of the hotel and other printed material, but did not cross out the words "Modesto, California" which appeared at the top of the page.

In deciding whether the document met the requirements of California Probate Code section 537⁷ the Baker court stated that "[t]he policy of the law is toward 'a construction favoring validity, in determining whether a will has been executed in conformity with statutory requirements.'"⁸ In consequence, the court ruled that printed material on the paper does not defeat an otherwise valid holographic will if the testator does not intend to incorporate the printed material into the will.⁹ The Baker court then concluded that the printed words "Modesto, California" were not relevant to the substance of the will nor essential to its validity as a will and, most importantly, that the testator did not intend to incorporate the printed words into the will. Therefore, these two

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³ 30 Cal. 3d at 882, 641 P.2d at 755, 181 Cal. Rptr. at 223.
⁴ As part of her testamentary disposition the testatrix made specific devises and legacies to individuals and a charitable institution. The testatrix also made a bequest of her residuary estate. Id. at 883, 641 P.2d at 755, 181 Cal. Rptr. at 223.
⁵ See supra note 2.
⁷ See supra note 2.
⁸ 59 Cal. 2d at 683, 381 P.2d at 914, 31 Cal. Rptr at 34, (citing Estate of Janes, 18 Cal. 2d 512, 116 P.2d 438 (1941)).
⁹ Id. at 683, 381 P.2d at 915, 31 Cal. Rptr. at 35. See also Estate of Bower, 11 Cal. 2d 180, 187, 78 P.2d 1012, 1016 (1938).
printed words would not defeat the writing as a valid holographic will.10

In applying this precedent to Black, the court began by stating that the printed preamble on Frances Black's will was not necessary to identify the writing as a will nor herself as its maker. The testatrix had accomplished this via express wording in the handwritten portion of the document. The court further pointed out that the testatrix's use of the "testimonial" clause at the end of the will was equally unnecessary since she had already dated the document in her own handwriting on the first page. The court also stated that designating the location of where a will was executed is not necessary to its validity,11 emphasizing that California Probate Code section 53 only requires a holographic will be "written, dated and signed" by the testator.12 Because the will in Black was handwritten by the testatrix and was likewise signed13 and dated, the court felt that it met the requirements of section 53.

After reconfirming the Baker holding that in order to determine whether printed material has been incorporated into a holographic will the focus must be on whether the testator intended to include it in the will,14 the court noted its satisfaction as to the testatrix's contrary intent. The court felt her only error was that she used a small superfluous portion of the language of a preprinted form, an amount insufficient to establish the non-holographic intent necessary to invalidate her efforts.

It was the court's belief that this decision in no way affected the "sanctity" of California Probate Code section 53.15 However, by its decision in Black, the court did adopt a "surplusage" test in determining the validity of a holographic will. This can be seen

10. 59 Cal. 2d at 863-84, 381 P.2d at 915, 31 Cal. Rptr. at 35.
11. Id. at 885, 641 P.2d at 737, 181 Cal. Rptr. at 225.
12. 30 Cal. 3d at 886, 641 P.2d at 758, 181 Cal. Rptr. at 226.
13. The testatrix wrote her name on each page of the will. This was satisfactory, as a signature does not have to be located at the end of a holographic will. Id. at 886, 641 P.2d at 758, 181 Cal. Rptr. at 226. See Estate of Black, 39 Cal. 2d 570, 248 P.2d 21 (1952); Estate of Kinney, 16 Cal. 2d 50, 104 P.2d 782 (1940).
15. 30 Cal. 3d at 888, 641 P.2d at 758, 181 Cal. Rptr. at 226. Though the court felt that section 53 of the Probate Code was not affected, the State Legislature apparently thought otherwise. This is reflected in the repeal of Section 53 which was in question in this case. The newly-enacted Section 53 of the California Probate Code reads as follows:
by the court's decision to validate a holographic will if the instru-
ment contains printed material which is neither material to the
substance of the will nor essential to its validity as a testamentary
disposition. The printed material can be seen as mere "sur-
plusage," thus, not affecting the will as a testamentary
document.16

XVII. WORKERS' COMPENSATION

A. Definition of partial dependency when computing
depth benefits: Atlantic Richfield Co. v. Workers'
Compensation Appeals Board

Two issues were before the California Supreme Court in Atlantic
Richfield Company v. Workers' Compensation Appeals Board.1
The primary issue resolved by the court concerned the correct
method for computing death benefits due to the working spouse
of an employee killed in an industrially related accident.2 In ad-
dition, the court was called upon to determine whether the De-
partment of Industrial Relations should receive the difference
between the amount actually awarded to a partially dependent
spouse and the statutory maximum award of $50,000 when such a
differential occurs.

After her husband's death in 1978, Carman Arvizu filed a claim

(a) A will which does not comply with Seciton 50 is valid as a ho-
lographic will, whether or not witnessed, if the signature and the material
provisions are in the handwriting of the testator.

(b) If a holographic will does not contain a statement as to the date of
its execution and:

(1) If such failure results in doubt as to whether its provisions or the
inconsistent provisions of another will are controlling, the holographic will
is invalid to the extent of such inconsistency unless the time of its execu-
tion is established to be after the date of execution of the other will;

(2) If it is established that the testator lacked testamentary capacity at
any time during which the will might have been executed, the will is inva-
lid unless it is established that it was executed at a time when the testator
had testamentary capacity.

1982 Cal. Legis. Serv. 907-08 (West).

16. Justice Mosk, in his dissent, states that he does not believe that the sur-
plusage test should be adopted. It is his belief that the court should follow the
statute and case law which would deny probate to a purported holographic will
unless it was completely in the handwriting of the testator. Id. at 908, 641 P.2d at
775, 181 Cal. Rptr. at 243.


2. The decedent, Gilbert Arvizu, was employed with ARCO as a truck driver,
earning approximately $16,800 a year. He was killed in a trucking accident on May
309, 174 Cal. Rptr. 569, 570-71 (1981). The wife of the decedent, Carmen Arvizu, had
been employed at a Thrifty Drug store for 19 years, earning approximately $9,940 a
year. Id. at 311 n.2, 174 Cal. Rptr. at 571 n.2.

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for death benefits pursuant to Labor Code section 4701. At the hearing, the compensation judge determined that Carman Arvizu was a partial dependent within the statutory definition enunciated in Labor Code section 4706.5 and awarded her death benefits totalling $33,600. Mrs. Arvizu filed a petition for reconsideration, contending that she was not a partial dependent merely because she earned a separate income. She argued that she should have been classified as totally dependent upon her husband's income in order to maintain the standard of living to which she had become accustomed.


4. Only persons who can qualify as dependents within the meaning of the workers' compensation laws can be eligible for death benefits. "Depending" means simply reliance on another person for support. Partial dependents are those who, at the time of the employee's injury, have means of support other than the deceased's contributions. In all cases the extent of their dependency is a question of fact. Hanna, CALIFORNIA LAW OF EMPLOYEE INJURIES AND WORKMEN'S COMPENSATION § 15.02[1] (citing CAL. LAB. CODE § 3502) [hereinafter cited as HANNA]. See also Mendoza v. Workers' Comp. App. Bd., 41 Cal. Comp. Cases 71, 73-74 (1976). "The Code provides that no person is a dependent of any deceased employee unless he or she in good faith, is a member of the family or household of the employee, or unless the person bears to the employee the relation of husband or wife..." O'BRIEN, CALIFORNIA EMPLOYER - EMPLOYEE BENEFITS HANDBOOK, 101, (1981).

The formula for computing the award of benefits under this section is found at CAL. LAB. CODE § 4702(d) (West Supp. 1982) which states in pertinent part: "In the case of no total dependents and one or more partial dependents, [the death benefit award will equal] four times the amount annually devoted to support of the partial dependents, but not more than fifty thousand dollars ($50,000) in total." Thus, the judge took Gilbert Arvizu's annual salary, ($16,800) and found that, because the deceased and his wife lived together with no other dependents, it could be assumed that one-half of his income was used to support Mrs. Arvizu. Pursuant to CAL. LAB. CODE §4702(d), $8,400 was multiplied by four to reach the award figure of $33,600. Interestingly, the Arvizu's had a 20 year-old child at home at the time of Gilbert's death. Because the child never filed for benefits or attempted to establish the fact of his dependency on the decedent, the compensation judge properly found that Carmen was the sole surviving dependent of her husband. 120 Cal. App. 3d at 311 n.4, 174 Cal. Rptr. at 571 n.4. See also HANNA, supra, at §15.02[7] (a).

5. 31 Cal. 3d at 719, 644 P.2d at 1258, 182 Cal. Rptr. at 779. Mrs. Arvizu noted that at the time of her husband's death, the couple was in debt far beyond that customary for the usual marital purchases of a home and a car. Indeed, when the petition for reconsideration was heard on a writ of review, Judge Zenovich of the court of appeals argued emphatically that the economic hardships suffered by the couple could have supported a different result entirely. "The facts developed before the workers' compensation judge are susceptible of a finding that Carman was a total dependent, thereby entitling her to the full $50,000 award." 120 Cal. App. 3d at 312 n.8, 174 Cal. Rptr. at 572 n.8.

The existing circumstances can just as reasonably be construed as demonstrative of total dependency. Carmen's decision to work may have been an attempt to help keep the wolf from the door and to erect a barrier...
Reconsideration was granted and the Appeals Board, sitting en banc, determined that Mrs. Arvizu was entitled to the maximum award of $50,000. In so holding, the Board heavily relied upon Oropeza v. Newman Seed Company, which held that the proper method for computing death benefits when both spouses were employed is to treat the entire earnings of the deceased spouse as the measure of actual support for the surviving spouse. Upon writ of review, the court of appeals overturned the Board's holding and the supreme court affirmed.

Dealing at length with the issue of partial dependency, the California Supreme Court first noted the fundamental rule for determining compensation awards announced in Arp v. Workers' Compensation Appeals Board. There, the court held that the conclusive presumption of total dependency in favor of widows, found at Labor Code section 3501, denied widowers their rights of equal protection of the law. In addition (pending any action against the onslaught of rampant inflation. As is true of most couples in these times of skyrocketing costs, Carmen and her husband were practically treading water to merely maintain the same level of living. They had to run to stand still and avoid falling below their accustomed standard of living. In our opinion, the workers' compensation judge and the Board would do well to prudently and realistically consider that the present economic situation has transformed many working spouses (who would appear at first blush to be partially dependent only) into total dependents from a practical standpoint.

Id. at 1152. In the Oropeza case, the widow earned $2,694.24 in the year prior to her husband's death. Had this forced the conclusion that she was but a partial dependent for the purpose of computing benefits, she would have received $28,500 less than if she had not worked at all. "Absence specific directions from the Legislature, [we] will not presume that the Legislature intended the harsh results which would flow from... the logical extremes urged by the petitioner." Id. at 1152. In 1979, the legislature responded to the Arp ruling, amending CAL. LAB. CODE § 3501 so as to remove the presumption of total dependency for unemployed spouses. Section 3502 was returned to read, in pertinent part, that "questions of entire or partial dependency
taken by the state legislature in this area), the Arp court held that, pursuant to Labor Code section 3502, all applicants for death benefits must factually establish the extent of their dependence upon the deceased wage earner. Dependents would then be compensated in accordance with the extent of the dependency actually proven.12 Using the Arp decision as a foundation, the supreme court proceeded to analyze the various proposed alternatives for computing death benefit awards.13

The first alternative had been presented by the Atlantic Richfield Company (ARCO) to the Appeals Board. ARCO urged that a simple percentage formula should be adopted. This computation would tally the total community earnings accumulated by both spouses, and would compare that total amount with the earnings actually accumulated by the decedent. This percentage could then be applied to the statutory maximum of $50,000 provided in Labor Code section 4702(d). Using this alternative, Carmen Arvizu would have been entitled to $31,500.14

The court correctly noted, however, that the computation offered by ARCO completely overlooked the statutory mandate presented in section 4702(d). This statute requires that benefits for partial dependents must be determined by ascertaining the extent of their dependency shall be determined in accordance with the facts as they exist at the time of the injury of the employee." CAL. LAB. CODE §3502 (West 1971).

It had long been the rule in California that partial dependents must provide proof of their dependency. Section 3502 itself dates back to 1937; even earlier, the Workmen's Compensation Act provided that the question of partial dependency would be determined in accordance with the facts as they exist at the time of the employee's injury. Workmens' Compensation Act, § 14(6), 1917 Cal. Stat. 915. Therefore, in cases of partial dependency, it is incumbent upon the claimant to prove the dollar value of the decedent's contribution, for the claimant's benefit will be computed at four times the annual support received at the date of injury. 1 Herlick, CALIFORNIA WORKERS' COMPENSATION LAW HANDBOOK § 9.10, p. 38 (2d ed. 1978).

12. 31 Cal. 3d at 719, 644 P.2d at 1259, 182 Cal. Rptr. at 780.
13. The computation is as follows:
   
   Gilbert's earnings + Carmen's Earnings = total earnings
   
   $16,800 + $9,840 = $26,640
   
   16,800 + 26,640 = 63.06 (percentage amount of
decedent's contribution to support)

   63% of the $50,000.00 maximum award equals $31,500.00.

14. 31 Cal.3d at 720, 644 P.2d at 1259, 182 Cal. Rptr. at 780. In the court's words, this was "an arbitrary percentage method unrelated to the actual sums used for support." Id.
amount annually devoted to the support of the partial dependent and multiplying that figure by four.\textsuperscript{15}

A second computation method offered by ARCO\textsuperscript{16} was initially adopted by the compensation judge. "Under this formula, where the parties live together without other dependents, one-half of the earnings of the deceased spouse is considered the amount contributed to the support of the survivor."\textsuperscript{17} Thus, one-half of Gilbert Arvizu's earnings ($8,400) was multiplied by four, producing an award of $33,600.

Both Carman Arvizu and the California Supreme Court took issue with this computation. An arbitrary determination that precisely one-half of the decedent's income was used for the support of the surviving spouse ignored several rules of employee benefit law and community property law. Fundamentally, such a determination ignores the amount actually contributed to the surviving spouse's support, and also ignores the standard of living enjoyed by the surviving spouse.\textsuperscript{18}

After the compensation judge made this award, Mrs. Arvizu filed a petition for reconsideration. The Appeals Board rescinded the award based on this computation,\textsuperscript{19} and instead deemed that

\begin{quote}
15. In calculating the partial dependency award, the judge first rejected Mrs. Arvizu's contention that she was entitled to the maximum benefit provided by law in order to maintain the standard of living to which she was accustomed, and in order to prevent discrimination against a working spouse. 120 Cal. App. 3d at 311, 174 Cal. Rptr. at 571.

16. 31 Cal. 3d at 720-21, 644 P.2d at 1259, 182 Cal. Rptr. at 780. The compensation judge noted that "[t]he better rule to follow is to find the amount the deceased contributed to the applicant's needs and award accordingly. As deceased and applicant lived together with no other dependents, it can be assumed that one-half (\(\frac{1}{2}\)) of his income was used to support applicant." 120 Cal. App. 3d at 311-12, 174 Cal. Rptr. at 571.

17. 31 Cal. 3d at 720-21, 644 P.2d at 1259, 182 Cal. Rptr. at 780. With regard to community property law, the Civil Code provides that each spouse owes the other the mutual duty of support (CAL. CIV. CODE § 5100 (West 1970), and that there is vested in both spouses the equal power of management and control of the community property. CAL. CIV. CODE §§5125 (personal property) and § 5127 (real property) (West Supp. 1982).

In addition, there is no showing required under the workers' compensation laws that the spouse could not have lived without the decedent's contributions. Warren Hanna notes in his treatise on California employee benefit law that in a partial dependency situation, it is sufficient that the decedent's "contributions were looked to in the maintenance of the dependent's accustomed mode of living and that after the employee's death the dependent could no longer maintain the same living standard." HANNA, CALIFORNIA LAW OF EMPLOYEE'S INJURIES AND WORKMEN'S COMPENSATION, § 15.02[3][c] (citations omitted).

18. 31 Cal. 3d at 722, 644 P.2d at 1259-60, 160 Cal. Rptr. at 781.

19. In so holding, the Board relied on Oropeza v. Newman Seed Co., 45 Cal. Comp Cases 1148 (1980). The Appeals Board in Oropeza noted correctly that, following the Arp decision, the California Supreme Court gave no guidance as to how to determine the partial dependency benefit for the surviving, working spouse. Id. at 1149. In analyzing this undecided area of law, the Appeals Board

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the total actual earnings of the decedent was the correct basis by which to determine the final award. Accordingly, the Appeals Board awarded her the $50,000 maximum award provided for by state law.

On writ of review to the court of appeals, Judge Zenovich noted that the Board's approach:

constitutes a windfall to a surviving spouse who works herself (like respondent here). In addition, it fails to recognize that a decedent may have used a portion of his earnings to cover personal expenses (e.g. entertainment costs, payment of personal debts, alimony, etc.). Thus, we conclude the rationale of Arp demands that the applicant—whether widow or widower—prove the amount of [actual] dependency under section 4702.2

This reasoning was adopted in full by the California Supreme Court. In addition, the court enunciated several standards by which the amount of actual dependency is to be determined.

First, the court cautioned that the issue of dependency was to be analyzed as of the date of the employee's injury, and not as of the date of his death. As to the determination of allowances for actual support, the court concluded that the computation should include "those fixed expenses which are an integral and reasonable part of the standard of living enjoyed by the community."

The court further ruled that the costs incurred for the purchase and maintenance of the community residence and transportation expenses incurred for the community benefit should be "readily" recognized as "actual support" for the survivor. However, those

21. Id. at 312, 174 Cal. Rptr. at 573.
22. Id.
23. "[W]e conclude that the approach which is the most consistent with our Arp analysis and the liberal construction of the payment of benefits mandated by the Legislature (§3202) is one which considers the actual amount which the deceased spouse devoted to the community and the surviving spouse." 31 Cal. 3d at 722, 644 P.2d at 1260, 182 Cal. Rptr. at 282.
24. Id.
25. Id. "Expenses related to the standard of living of the community are relevant. Expenses which are personal to the decedent are not." Id. at 723, 644 P.2d at 1260, 182 Cal. Rptr. at 782.
26. Id. at 722, 644 P.2d at 1260, 182 Cal. Rptr. at 781. It is interesting to note that
arguably personal expenses, such as food, clothing, or other incidental expenses incurred for the decedent's own personal use should not be considered in the determination of actual support.27 Recognizing that the guidelines set forth were quite general in nature, the court suggested that it was more appropriately the duty of the legislature to adjust the worker's compensation death benefit laws, as the legislature could consider in detail the "variants in cost and expense incurred by the spouses and the community. . . ."28

The remaining issue before the court was whether any differential existing between the amount awarded to the dependent spouse and the statutory maximum of $50,000 should be relinquished to the Department of Industrial Relations.29 In analyzing this issue, the court considered Labor Code section 4706.5(a)30 and the 1979 case of Department of Industrial Relations v. Workers' Compensation Appeals Board (Tessler).31

Noting that this was an issue that "heretofore had not been

this entire analysis was undertaken by the court to eliminate the uncertainty and unfairness resulting from the compensation judge’s decision which deemed that one-half of Gilbert Arvizu’s salary was equal to the support of his spouse. The irony was revealed when the court concluded its analysis by stating: "We fully recognize that arguably inconsistent results may accrue depending on the fortuitous employment status of the surviving spouse." Id. For a further discussion of this result, see infra note 47 and accompanying text.

27. Id.
28. Id. at 722, 644 P.2d at 1260, 182 Cal. Rptr. at 782.
29. This issue arose as a result of the joinder by the Appeals Board of the State of California, Department of Industrial Relations, as a party to the action. The joinder was done in the event that the "total earnings" decision of the Appeals Board was overturned on appeal. 120 Cal. App. 3d at 316, 174 Cal. Rptr. at 574.
30. CAL. LAB. CODE § 4706.5(a) (West Supp. 1982) provides that:
Whenever any fatal injury is suffered by an employee under such circumstances as to entitle the employee to compensation benefits, but for his or her death, and such employee does not leave surviving any person to a dependency death benefit, the employer shall pay a sum to the Department of Industrial Relations equal to the total dependency death benefit that would be payable to a surviving spouse with no dependent minor children.
Id. (emphasis added).

This section of the Labor Code was enacted after the passage of a ballot proposition which amended article 20, § 21 of the California Constitution to read:
The Legislature shall have the power to provide for the payment of an award to the state in the case of death arising out of and in the course of the employment of an employee without dependents, and such awards may be used for the payment of extra compensation for subsequent injuries beyond the liability of a single employer for awards to his employees.
CAL. CONST. art. XIV, § 4 (emphasis added).
31. 94 Cal. App. 3d 72, 156 Cal. Rptr. 183 (1979). Tessler held that a woman cohabiting with a worker who died as a result of an industrially related injury was not entitled to the full workers’ compensation death benefit award (then equaling a statutory maximum of $40,000), as the woman had knowingly and voluntarily entered into a compromise and release of her disputed benefit claim for the sum of $10,000. The Tessler court held that the Department of Industrial Relations was
squarely considered" by the California Supreme Court. Justice Richardson, writing for the court, gave an extensive analysis of the legislative and judicial history of Labor Code section 4706.5. In brief, the issue centered upon the constitutionality of imposing a legal liability upon an employer to pay a death benefit award to a state fund, while at the same time being legally responsible for compensating the dependents of an employee killed in an industrially related accident. The pre-1952 law in this area is best explained by the California Supreme Court's decision in Commercial Casualty Insurance Co. v. Industrial Accident Commission, wherein the court stated that:

"[T]he intent of the framers [of the California Constitutional provision authorizing the Workmen's Compensation Amendment] thereof is clear and unambiguous, and that they intended by this amendment, . . . to limit the power of the legislature in enacting a Workmen's Compensation Act to provide for the compensation by the employers of their own employees, and that any legislation which exceeds these limits is beyond the power of the Legislature, and, therefore, void."

This blanket prohibition on legislative power was amended in 1952 by the decision in Subsequent Injuries Fund of the State of California v. Industrial Accident Commission. In this case, the court announced that Labor Code sections 4750 to 4755, which au-

entitled to any "undisbursed balance" after partial payment had been made to this partial dependent. See also infra note 42.

32. 31 Cal. 3d at 724, 644 P.2d at 1261, 182 Cal. Rptr. at 782.

33. In so doing, Justice Richardson noted that the unopposed ballot argument favoring the amendment stated that "[A] yes vote for Proposition 13 would allow the Legislature to enact laws which would require that such benefits be paid to a state fund when no legal heirs can be found." 31 Cal. 3d at 724, 644 P.2d at 1261, 182 Cal. Rptr. at 783.

34. The seminal case invalidating the propriety of such a fund was Yosemite Lumber Co. v. Industrial Accident Comm'n, 187 Cal. 774, 204 P. 226 (1922). At issue was the constitutionality of the requirement that an employer pay specified funds to the state treasury when a deceased employee left no "dependents" as characterized under the then Workmen's Compensation Act. The Yosemite court held that the power conferred by the Workmen's Compensation Act was restricted to the creation of tribunals to settle disputes between employers and their employees; therefore, it was beyond the scope of the enabling clause of the Act to validate the creation of state funds into which award differentials would be paid.

This does not authorize the creation of a liability on the part of any person to compensate the workmen of other persons. [It] necessarily confines the persons to be compensated to workmen who are in the employ of the person who is made liable. . . . [it] thus excludes any idea of liability in such a case to provide for the welfare of workmen in general. . . .

Id. at 780, 204 P. at 232.

35. 211 Cal. 210, 295 P. 11 (1930).

36. Id. at 216, 295 P. at 14.

37. 39 Cal. 2d 83, 244 P.2d 889 (1952).
authorized injury awards from a state fund supported by the entire taxing public (and not just employers of the injured employees) were not constitutionally impaired.38

Concluding his historical analysis, Justice Richardson noted that the issue at hand, concerning payment into a state fund used to support compensation of injured employees not connected in any way to the employer making such payment, presented none of the constitutional questions raised in earlier cases. Rather, the only question presented was one of statutory interpretation.39

To properly apply Labor Code section 4706.5 to this issue, Richardson deemed that, absent incongruent or unintended results that would frustrate the purpose of the law, the plain meaning of the statute should be ascertained and followed.40 Section 4706.5, by its very terms, contemplates payment to the Department of Industrial Relations only when decedents leave no dependents, and not when decedents leave behind partial dependents. "Since the deceased left a widow, albeit only a partial dependent, the statute does not apply."41 Furthermore, Richardson noted correctly that section 4706.5 is silent with respect to the payment of any "differential" or "balance" to the Department of Industrial Relations.42

In so holding, the court disapproved the Tessler case, insofar as it

38. The statutes in question authorized a "subsequent injuries fund" to supplement benefits to workers who suffered permanent disabilities resulting from industrially related accidents. The fund was supported by monies in the state treasury that were not otherwise earmarked for use. The Subsequent Fund case held that Yosemite and Commercial Casualty Insurance were distinguishable, and thus not controlling, as the fund in question imposed a liability upon the entire public, rather than the single employer. Id. at 88, 244 P.2d at 891-92.

39. "We need not, however, consider the further question of whether section 4706.5 exceeded constitutional limits because the statute by its own terms does not specifically contemplate the situation where, as here, only a partial death benefit is paid." 31 Cal. 3d at 726, 644 P.2d at 1262, 182 Cal. Rptr. at 784.

40. Id.
41. Id.
42. [T]o apply the statute would require the employer to pay the partial dependent a partial dependency award and, in addition, to pay the DIR the maximum death benefit. This, in our view, would be manifestly unfair to employers, inconsistent with the statute, and assuredly would discourage dependency claims.

Id. at 727, 644 P.2d at 1263, 182 Cal. Rptr. at 784. Richardson discussed another reason why such payments are not statutorily mandated. Presently, under § 4706.5(g), an employer is required to make a "reasonable search" for dependents before making payments to the DIR. CAL. LAB. CODE § 4706.5 (West Supp. 1982). ("When, after a reasonable search, the employer concludes that the deceased employee left no one surviving who is entitled to a dependency death benefit... [the employer may make the payments to the DIR].") If the employer were required to pay the statutory maximum regardless of whether partial dependents actually existed, the employer would lose incentive to make the "reasonable search" contemplated by subdivision (g). Moreover, such an interpretation would foster an adversarial relationship between the DIR and partial dependents rather than create the supportive relationship contemplated by the statute. Id.
was inconsistent with this analysis.\textsuperscript{43}

The final decision made by the court concerned the retroactive application of its holding.\textsuperscript{44} To avoid the possible unfairness and confusion that would result from an application to cases finally adjudicated that had relied on the \textit{Tessler} and \textit{Oropeza} decisions, the court deemed that such final adjudications should remain undisturbed. Therefore, the decision was made applicable to cases \textit{still} pending before the Appeals Board where the compensation due to the partial dependent has not yet been computed, and also to those cases pending on petition for reconsideration or writ of review to the appellate courts.\textsuperscript{45} This case was then remanded to the Appeals Board for a determination consistent with the California Supreme Court opinion.\textsuperscript{46} Chief Justice Bird wrote a separate opinion, concurring in part and dissenting in part, which

\begin{itemize}
\item \textsuperscript{43} Arguably, \textit{Tessler} remains fully consistent with the conclusion reached by the \textit{ARCO} court, as \textit{Tessler} involved the unique situation involving a compromise and release of a claim. \textit{See supra} note 32. Nevertheless, the \textit{Tessler} court did “dis-cern a patent legislative purpose” that when a worker dies and compensation under the statute becomes due, the employer will be obligated, at the very least, for the amount of the death benefit equal to that due to a surviving spouse with no dependent children, and that when such benefits are not paid to defendants, they are due to the state.

\item \textsuperscript{44} “[O]ur opinion here could create a landslide of reopenings of previously adjudicated cases.” 31 Cal. 3d at 728, 644 P.2d at 1263, 182 Cal. Rptr. at 785. This is so because \textit{CAL. LAB. CODE} §§ 5803-04 provides that the Appeals Board has continuing jurisdiction to reopen a case for “good cause” upon a petition filed within five years of the date of the injury. “Good cause” has been held to include subsequent judicial interpretations of prior administrative decisions. \textit{Messina v. Workers' Comp. App. Bd.}, 105 Cal. App. 964, 971, 164 Cal. Rptr. 762, 766,(1980); \textit{Knowles v. Workmen's Comp. App. Bd.}, 10 Cal. App. 3d 1027, 1030, 89 Cal. Rptr. 356, 359 (1970).

\item \textsuperscript{45} 31 Cal. 3d at 728, 644 P.2d at 1263, 182 Cal. Rptr. at 785, citing \textit{Messina}, 105 Cal. App. 3d at 972, 164 Cal. Rptr. at 766-67.

\item \textsuperscript{46} Justice Newman concurred in the result reached by the majority but took issue with Justice Richardson's analysis of the legislature's constitutional power to go beyond the precise terms of the enabling provision of the Workers' Compensation Laws. Newman referred to his dissent in \textit{Hustedt v. Workers' Comp. App. Bd.}, 30 Cal 3d 329, 349-52, 636 P.2d 1139, 1151, 178 Cal. Rptr. 801, 813 (1981) In \textit{Hustedt}, it was held that the California Legislature, under the separation of powers doctrine, was forbidden to exercise disciplinary power under \textit{CAL. LAB. CODE} § 4907 with respect to attorneys. The majority noted that in all other areas except for that of attorney discipline, the California Constitution vests the legislature with unlimited plenary power to create and enforce a complete system of Workers' Compensation Laws. Newman, dissenting from this holding, quoted extensively from the court of appeals decision: “Any doubt as to the Legislature's authority to act in a given area must be resolved in favor of the legislative action and the enactment must not be construed to embrace matters not covered by the language of such enactment.” 30 Cal. 3d 329, 350-51, 636 P.2d at 1152, 178 Cal. Rptr. at 814 (Newman, J., dissenting). For a further discussion of the \textit{Hustedt} case, see \textit{California Supreme Court Survey: A Review of Decisions}, 9 \textit{PEPPERDINE L. REV.}, 947 (1982).
\end{itemize}
emphasized that the majority position was concerned with the calculation of benefits due to a partial dependent.\textsuperscript{47}

The impact of \textit{ARCO} is readily ascertainable, for the court has now set a standard by which the calculation of death benefits awarded to working dependents are to be computed. The standard is very general, and as Chief Justice Bird notes, confusion will probably reign in the lower courts until more particular guidelines are set forth, either by judicial opinion or legislative action.

\textbf{XVIII. ZONING}

\textbf{A.} "\textit{Health facilities}" which offer psychiatric treatment may be located in any zone where "hospitals" or "nursing homes" are permitted: City of Torrance v. Transitional Living Centers for Los Angeles, Inc.

In \textit{City of Torrance v. Transitional Living Centers of Los Angeles,}\textsuperscript{1} the California Supreme Court was called upon to resolve a conflict between a municipal zoning ordinance and section 5120 of the Welfare and Institutions Code. The court decided that section 5120 preempted the municipal zoning ordinance.\textsuperscript{2}

Transitional Living Centers is a nonprofit corporation which sought to maintain a facility for mental patients in an area classified as an R-2 zone.\textsuperscript{3} Transitional Living Centers sought and received from the California Department of Social Services a permit

\textsuperscript{47} Chief Justice Bird's dissent was based on a three pronged analysis. First, Bird felt that the case by case approach adopted by the majority only seemed to frustrate the Appeals Board's more general (and thus more easily administered) rule that the total earnings of the deceased spouse be used as the measure of the surviving spouse's dependency. "I see no reason why we should deviate from that rule in this case. The Board [in \textit{Oropeza}, 45 Cal Comp. Cases 1148 (1980)] adopted a reasonable interpretation of the statute, and I would adopt its formulation." \textit{Id.} at 729, 644 P.2d at 1264, 182 Cal. Rptr. at 785, (Bird, C.J., dissenting).

Second, Bird noted that the rule adopted by the majority would result in the "anomalous" situation of a totally dependent spouse receiving the statutory maximum, while a spouse earning only a small salary would be required to prove the amount of support her husband's salary had provided. \textit{Id.} at 730, 644 P.2d. at 1264, 182 Cal. Rptr. at 785.

Finally, Chief Justice Bird noted again that the case-by-case method not only upset the general policy of according due deference to an administrative agency ruling, but also would increase the Board's workload tremendously, resulting in "harsh and unfair" judgments for those slighted by the pressure of the Board's calendar. \textit{Id.} at 730, 644 P.2d at 1264-65, 182 Cal. Rptr. at 786.

\textsuperscript{1} 30 Cal. 3d 516, 638 P.2d 1304, 179 Cal. Rptr. 907 (1982). Justice Richardson wrote the opinion for a unanimous court.

\textsuperscript{2} \textit{Id.} at 524, 638 P.2d at 1308, 179 Cal. Rptr. at 911.

\textsuperscript{3} The owners of the property where Transitional Living Centers wanted to establish its facility were granted a conditional use permit which allowed the own-
to operate the facility in an area zoned as R-2. Soon thereafter, the City of Torrance sought injunctive and declaratory relief claiming that Transistional Living Centers had violated the city's zoning laws.

In analyzing the issues before it, the court considered section 5120 of the Welfare and Institutions code. The court found that section 5120 establishes a strong statewide policy of treating mental patients locally instead of regionally. The court also noted that section 5120 prohibits discrimination by local government and authorizes local psychiatric care and treatment facilities in areas where hospitals and nursing homes are permitted.

The court then looked at the relevant Torrance Municipal Code section to determine where it might conflict with section 5120 of the Welfare and Institutions Code. The Torrance zoning ordinance provides that "[r]est homes, convalescent homes, guest homes and homes for the aged . . ." are conditionally permitted, but it excludes "mental hospitals" and similar facilities. The

ers to operate a board and care home for the elderly. This conditional use permit was granted in December 1971. Id. at 518, 638 P.2d at 1305, 179 Cal. Rptr. at 908.

4. Id. at 519, 638 P.2d at 1305-06, 179 Cal. Rptr. at 909. The permit allowed Transistional Living Centers to serve 15 mentally disordered adults.

5. The city claimed that Transitional's proposed use was not authorized by local or state law or by the conditional use permit issued to the owners of the property. The city further alleged that the planned use of the property would constitute a public nuisance. Id. at 519, 638 P.2d at 1306, 179 Cal. Rptr. at 909.

6. CAL. WELF. & INST. CODE § 5120 (West Supp. 1982) provides:
It is the policy of this state . . . that care and treatment of mental patients be provided in the local community. In order to achieve uniform statewide implementation of the policies of this act, it is necessary to establish the statewide policy that, notwithstanding any other provision of law, no city or county shall discriminate in the enactment, enforcement, or administration of any zoning laws, ordinances, or rules and regulations between the use of property for the treatment of general hospital or nursing home patients . . . and the use of property for the psychiatric care and treatment of patients, both inpatient and outpatient. . . .

Health facilities for inpatient and outpatient psychiatric care and treatment shall be permitted in any area zoned for hospitals or nursing homes, or in which hospitals and nursing homes are permitted by conditional use permit.

I d.

7. 30 Cal. 3d at 519-20, 638 P.2d at 909-10, 179 Cal. Rptr. at 1306-07.

8. Id. at 520, 638 P.2d at 1306, 179 Cal. Rptr. at 909.

9. The relevant local zoning ordinance is Torrance Municipal Code § 95.3.9.

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10. Uses permitted only in zones other than R-2 are hospitals, sanitariums, mental hospitals, institutions for the treatment of alcoholics, mental hygiene homes, nursing homes, specialized home for geriatrics and convalescent hospitals.
court noted that such an ordinance creates the potential for abuse and discrimination in zoning.\textsuperscript{11}

The court focused on the last sentence of section 5120 of the Welfare and Institutions code. It provides that "[h]ealth facilities" are permitted in an area zoned for nursing homes. After looking at the legislative history, the court concluded that the legislature contemplated a broad definition of "health facilities" and that the Transitional Living Center was a health facility within the meaning of section 5120.\textsuperscript{12}

Based on the court's conclusion, it follows that the facility may be located where nursing homes are permitted.\textsuperscript{13} The City of Torrance permits "convalescent homes" in an R-2 zone. The court found that the Torrance Municipal Code contained overlapping definitions of "convalescent homes" and "nursing homes."\textsuperscript{14} It concluded that convalescent homes are equivalent to "nursing homes" under the city's code; therefore, section 5120 of the Welfare and Institutions Code preempts the City of Torrance's regulation of mental facilities serving more than six persons in R-2 zones.\textsuperscript{15}

The court's holding in \textit{Transitional Living Centers} supports the State's strong policy of favoring local treatment for mental patients. It also puts communities on notice that local zoning ordinances which seek to keep mental rehabilitation centers out of residential zones may be preempted by section 5120 of the Welfare and Institutions Code.

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\textsuperscript{11} It would be possible for a city to grant a conditional use permit to a hospital so that the hospital could operate in an area not zoned for hospitals. It could deny such a permit to a mental health facility. Cal. 30 3d at 520-21, 638 P.2d at 1306-07, 179 Cal. Rptr. at 909-10; see also Comment, \textit{Review of Selected 1972 California Legislation}, 4 PAC. L.J. 211, 595-96 (1973).

\textsuperscript{12} 30 Cal. 3d at 522-24, 638 P.2d at 1307-08, 179 Cal. Rptr. at 910-11.

\textsuperscript{13} The express language of section 5120 of the Welfare and Institutions Code so provides.

\textsuperscript{14} 30 Cal. 3d at 525, 638 P.2d at 1309, 179 Cal. Rptr. at 912.

\textsuperscript{15} Under this interpretation, the Torrance ordinance, in effect, does not allow health facilities where nursing homes are located. This is in conflict with section 5120 of the Welfare and Institutions Code and thus preempted by it.