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The California Supreme Court Survey: A Review of Decisions: March - May 1981

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The California Supreme Court Survey
A Review of Decisions: March 1981 - May 1981

In a continuing effort to provide the legal community with an analytical examination of recent California Supreme Court cases, the Pepperdine Law Review *surveys the following decisions as indicative of current court activity. The following is designated to briefly expose the practitioner to recent decisions which are anticipated to significantly impact California law.*

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I. Constitutional Law

A. Criminal Due Process

1. *The Right to Effective Counsel:* People v. Barboza

Conflicts of interest arise in a number of situations when counsel undertakes to represent multiple defendants. The California Supreme Court in People v. Barboza examines a situation wherein a contract between the county and the public defender's office resulted in a disincentive for counsel to search out possible conflicts. The court concludes that these contracts in themselves present inherent and irreconcilable conflicts of interest.

I. Introduction

In the situation where counsel undertakes the representation of multiple defendants, various circumstances often promote the existence of irreconcilable conflicts of interest. One such set of circumstances is found in the California Supreme Court case of *People v. Barboza*.[1]

The conflict of interest in *Barboza* involved the legal affect of a contract between the County of Madera and the Madera County Public Defender's office. The agreement, in relevant part, provided for the payment of $104,000 per year by the County to the Public Defender's office. From this amount, $15,000 was to be deducted and deposited in a reserve account for the purpose of retaining alternative defense counsel in the event the Public Defender was disqualified due to a conflict of interest. At the end of each fiscal year, the residue balance of the reserve account, if any, was to be paid to the Public Defender; conversely, the Defender was liable for any deficit in the account.[2] The natural consequence of this provision was that fewer outside attorneys employed by the County, more money that became available to the Public Defender.

The case arose out of the arrests and convictions of two brothers on charges of assault with a deadly weapon or force likely to

1. 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981). The majority opinion was written by Justice Richardson with Justices Tobriner, Mosk, Newman, Grodin, and Reynoso concurring. Justices Grodin and Reynoso were assigned by the Chairperson of the Judicial Council. Chief Justice Bird wrote the concurring opinion.

2. *Id.* at 378, 627 P.2d at 189, 173 Cal. Rptr. at 459. The balance of the compensation to the Public Defender was paid in monthly installments of $7416.66.

produce great bodily injury.[3] Both brothers were jointly represented by an attorney provided by the Public Defender of Madera County.[4] The defendants appealed their convictions, asserting the deprivation of effective counsel as their primary contention,[5] with the thrust of their argument centering upon the financial disincentive for the Public Defender to investigate and curtail any conflicts of interest. This disincentive, it was argued, was the direct consequence of the agreement between the County and the Public Defender's office.[6]

II. The Supreme Court's Analysis

In finding an irreconcilable conflict of interest and requiring a retrial with separate counsel for the defendants, the California Supreme Court first recognized the fundamental premise that joint representation of multiple defendants by either appointed or retained counsel is not impermissible.[7] In such situations, the court explained that the ethical obligations imposed upon counsel and the informed choice of defendants themselves as to whether to accept joint representation have generally assured conflict—free representation.[8] It was held, however, that in cases such as *Barboza* where contractual arrangements act as a disincentive to defense counsel to declare a conflict of interest, such ethical con-

3. Conflicting evidence at trial related to a physical attack on the victim outside a Madera bar. 29 Cal. 3d at 378, 627 P.2d at 189, 173 Cal. Rptr. at 459.

4. Although the record did not reflect the formal appointment of counsel, defendants were jointly represented by an attorney from the Madera Public Defender's office. The defendants were thereupon arraigned and plead not guilty to the charge. 29 Cal. 3d at 377-378, 627 P.2d at 189, 173 Cal. Rptr. at 459.

5. U.S. Const. amend. VI states that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the assistance of Counsel for his defense." Cal. Const. art 1, § 13 states that "In criminal prosecutions, in any court whatever, the party accused shall have the right to . . . appear and defend in person and with counsel."

6. The essence of this assertion is that due to the loss of revenue that will be realized by the public defender, he will not be as zealous in the search for possible conflicts as would be the case without this economic disincentive. Therefore, due to the conflict of interest, the defendants were deprived of effective assistance of counsel. 29 Cal. 3d at 378, 627 P.2d at 189, 173 Cal. Rptr. at 459.

7. 29 Cal. 3d at 378, 627 P.2d at 189, 173 Cal. Rptr. at 459. Cuyler v. Sullivan, 446 U.S. 335, 348 (1980) (the sixth amendment is not violated unless multiple representation gives rise to a conflict of interest); People v. Cook, 13 Cal. 3d 663, 671, 532 P.2d 148, 153, 119 Cal. Rptr. 500, 505 (1975), *cert. denied*, 423 U.S. 870 (1975) (if counsel is privately retained, the court does not assume the burden of assuring that effective counsel is assured.

8. 29 Cal. 3d at 378, 627 P.2d at 189, 173 Cal. Rptr. at 459.

siderations cannot properly be relied upon to insure proper client representation.[9] The typical conflict situation involving joint representation was also distinguished from the instant case by the fact that here, unlike the former setting, the initial conflict is created at the moment of counsel's appointment. The opposing interests of adequate legal representation versus the protection of one's own financial resources immediately confronts the public defender.[10] It was noted further that in the case of appointed counsel to an indigent defendant, there may exist a general ignorance on the part of the client regarding possible financial self—interests of the attorney. This, coupled with the indigent defendant's financial inability to seek separate representation, distinguishes this situation from that in which multiple defendants jointly retain single counsel.[11]

Although the court refrained from any suggestion that the Public Defender in *Barboza* knowingly concealed the possibility of conflicts arising from joint representation of the defendants, it did stress the overriding interest in preventing counsel from being placed in a situation where conflicting concerns could affect representation of clients. The requirement that "the public have absolute confidence in the integrity and impartiality of our system of criminal justice" was also noted as a compelling force influencing the court's decision.[12] Applying these principles to the facts of the present case, the court opined that the competing interests presented by the appointment of counsel to the defendants in question resulted in not only "an appearance of impropriety" but the creation of "a real and insoluble tension . . . between [the defendants' rights and] the defender's conflicting interests.[13]

The court also found significant the case of *Marshall v. Jerrico,*

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9. 29 Cal. 3d at 379, 627 P.2d at 189, 173 Cal. Rptr. at 459. Pursuant to the contract, the fewer outside attorneys that were engaged, the more money was available for the operation of the Public Defender's office. The direct consequence of this arrangement was a financial disincentive for the Public Defender to either investigate or declare the existence of actual or potential conflict of interest requiring the employment of other counsel.

10. 29 Cal. 3d at 379, 627 P.2d at 189, 173 Cal. Rptr. at 459. *See also* Jague, *Multiple Representation and Conflicts of Interest in Criminal Cases*, 67 GEO. L.J. 1075, 1077-78 (1979), which states that a "conflict could surface at any stage of the proceedings--plea bargaining, investigation and preparation of a defense, the decision whether to have the defendants testify, the final argument, or allocation at sentencing."

11. 29 Cal. 3d at 379, 627 P.2d at 189-190, 173 Cal. Rptr. at 459-460.

12. 29 Cal. 3d at 379-80, 627 P.2d at 190, 173 Cal. Rptr. at 469; People v. Rhodes, 12 Cal. 3d 180, 186-187, 524 P.2d 363, 367-368, 115 Cal. Rptr. 235, 239-240 (1974) (held that a city attorney who had prosecutorial responsibilities and yet was representing an indigent criminal defendant had the appearance of impropriety).

13. 29 Cal. 3d at 381, 627 P.2d at 191, 173 Cal. Rptr. at 461.

Inc.[14] which held that violation determinations and assessment of fines by an assistant regional administrator of the Department of Labor were not improper despite the fact that such penalties were paid to the Employment Standards Administration within the same department. The *Barboza* court distinguished *Marshall* on the ground that no government official actually profited from the assessed fines in that case,[15] whereas here the Public Defender's income and office budget were directly affected by his determination of whether an actual conflict of interest situation existed.[16] As a consequence of the obvious affect upon lawyer-client relationships resulting from the agreement involved, the court concluded that "as a 'judicially declared rule of criminal procedure,' . . . contracts of the type herein presented contain inherent and irreconcilable conflicts of interest."[17]

III. CONCLUSION

It appears that the main impact of *People v. Barboza* on the legal community is simply its illustrative value insofar as providing yet another setting in which conflicts of interest resulting from joint representation of multiple defendants may arise. It suggests a legal guide to the drafting of employment contracts in the realm of the public defender's office to the effect that such contracts may not now create situations in which the private interests of the appointed attorneys will be affected by their decisions with respect to client representation.

B. CRIMINAL PROCEDURE

1. *A Clarification Regarding the Test for Lesser Included Offenses:* **People v. Lohbauer**

Two tests have traditionally been used to determine whether the crime convicted of is a lesser included offense within the crime charged. A third test was being developed in the appellate courts allowing defendants to be convicted of an offense other than the one charged unless they were misled to their prejudice and prevented from preparing an effective defense. The California Supreme Court in People v. Lohbauer rejected this third test,

14. 446 U.S. 238 (1980).
15. 29 Cal. 3d at 380, 627 P.2d at 190, 173 Cal. Rptr. at 460. The court said "[i]t is plain that no official's salary is affected by the levels of the penalties." *Id.*
16. See note 9 *supra*.
17. 29 Cal. 3d at 381, 627 P.2d at 191, 173 Cal. Rptr. at 461.

holding that its adoption would violate the well settled statutory interpretation of "necessarily included."

I. INTRODUCTION

In *People v. Lohbauer*,[1] the California Supreme Court rejected an additional test for lesser included offenses[2] that had developed in the appellate courts.[3] The appellate courts had been using this additional test in determining whether the offense for which a defendant is convicted could be considered a lesser included offense within the crime charged. This new test allowed the appellate courts to uphold the convicted offense unless the defendant was misled to his prejudice and prevented from preparing an effective defense. The test had developed as a result of the appellate court's interpretation of language in the California Supreme Court decision of *People v. Collins*.[4]

II. FACTS

In *Lohbauer*, the defendant was charged by information with burglary.[5] The complainant testified that on the night in question she awakened to see the defendant standing in the hallway outside her bedroom. When she asked him what he wanted, the defendant walked out of the house. The defendant testified that he was intoxicated and mistakenly believed he was in the home of a woman friend who had invited him to stop by. He alleged that upon seeing the complainant, he realized his mistake and left.

A requisite element of the charge of burglary is entering with

1. 29 Cal. 3d 364, 627 P.2d 183, 173 Cal. Rptr. 453 (1981). The majority opinion was written by Justice Richardson with Justices Tobriner, Mosk, Newman, Rattigan and Reynoso concurring. A separate concurring opinion was written by Chief Justice Bird. Justices Rattigan and Reynoso were assigned by the Chairperson of the Judicial Council.

2. Statutory authority for lesser included offenses is found in the California Penal Code, which authorizes a trier of fact to "find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged, or of an attempt to commit the offense." CAL. PENAL CODE § 1159 (West 1970).

3. Most of the cases arose from the Court of Appeal, Second District, Divisions 1 and 2.

4. 54 Cal. 2d 57, 351 P.2d 326, 4 Cal. Rptr. 158 (1960) (Defendants convicted of statutory rape as a lesser included offense of rape by force or violence). *See* text following note 10 *infra*.

5. CAL. PENAL CODE § 459 (West Supp. 1981). The pertinent text reads: "Every person who enters any house, room, apartment, . . . with intent to commit grand or petty larceny or any felony is guilty of burglary. As used in this * * * *chapter*, 'inhabited' means currently being used for dwelling purposes, whether occupied or not." *Id.*

intent to commit larceny or any felony.[6] In a non-jury trial, the court found reasonable doubt as to whether the defendant harbored the requisite intent upon entering the complainant's residence. The court, therefore, found the defendant not guilty. However, the court did find the defendant guilty of the misdemeanor offense of entering a noncommercial dwelling without the consent of the owner.[7] The trial court believed this charge to be a lesser and necessarily included offense within the crime of burglary.

The supreme court examined the established principles with respect to the test for lesser included offenses. The court confronted the People's argument that a new test had been developed in which variances between the offenses charged and a lesser offense of which the defendant is convicted would be immaterial, unless the defendant was misled to his prejudice and prevented from preparing an effective defense. The supreme court disapproved of those cases adopting this construction of its decision in *Collins*. The court held fast to the established due process principles that one must have notice and opportunity to prepare and present a defense so as not to be surprised by evidence offered at trial.

III. HISTORICAL ANALYSIS

The fundamental principles underlying lesser included offenses are found in the fourteenth amendment[8] and in the California Constitution's requirements of procedural due process.[9] Due process would require that the accused be advised of the charges against him in order to avoid unfair surprise, allowing him to prepare and present a defense to all possible offenses.[10] Under the

6. *Id.*

7. CAL. PENAL CODE § 602.5 (West 1970). The text reads as follows:

> Every person other than a public officer or employee acting within the course and scope of his employment in performance of a duty imposed by law, who enters or remains in any noncommercial dwelling house, apartment, or other such place without consent of the owner, his agent, or the person in lawful possession thereof, is guilty of a misdemeanor.

Id.

8. The U.S. CONST. amend XIV § 1 provides: "[n]or shall any state deprive any person of life, liberty or property, without due process of law."

9. The relevant provision of the California Constitution reads: "nor be deprived of life, liberty, or property without due process of law." CAL. CONST. art. 1, § 13.

10. "Due process of law requires that an accused be advised of the charges

theory of lesser included offenses, a defendant can be convicted of a crime not charged; therefore, any test must include a determination of whether the requisite notice has been met.

There are two well established tests used to determine lesser included offenses. First, where an offense cannot be committed without committing another offense, the latter is a lesser included offense.[11] The second test is whether the offense has been specifically charged in the information. This is the "accusatory pleading" test and is satisfied "if the facts alleged in the charging papers sufficiently notified defendant of any potential lesser included offenses. . . ."[12] The problem the court faced in *Lohbauer* was whether it should adopt a third test being used by the appellate courts.

The third test has its origin in the supreme court case of *People v. Collins*.[13] That case involved three defendants accused of rape by force or violence.[14] In a non-jury trial, the defendants were found guilty of rape by intercourse with a female under the age of

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against him in order that he may have a reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." People v. West, 3 Cal. 3d 595, 612, 477 P.2d 409, 419, 91 Cal. Rptr. 385, 395 (1970). *West* involved a defendant who was charged with possession of marijuana. After his motion to suppress was denied, the defendant pleaded nolo contendere to the lesser offense of opening or maintaining a place to sell, give away or use a narcotic (CAL. HEALTH & SAFETY CODE § 11557) (repealed 1972). One of the issues was whether the trial court properly exercised its jurisdiction in accepting the plea to a lesser offense when the lesser offense was not an included offense. The court held that since the defendant requested or acquiesced in the conviction of the lesser offense, he could not legitimately claim lack of notice. The court, therefore, had jurisdiction to convict him of that offense.

11. People v. Cole, 94 Cal. App. 3d 854, 861, 155 Cal. Rptr. 892, 895 (1979) (Defendant convicted of assault with a deadly weapon as a lesser included offense within the charged assault with intent to commit murder). *See* text accompanying notes 18-20 *infra*.

12. People v. Muis, 102 Cal. App. 3d 206, 209, 163 Cal. Rptr. 791, 793 (1980) (Defendant convicted of unauthorized entry as a lesser included offense within the charge of burglary). *See* text accompanying notes 24-27 *infra*.

13. *See* note 4 *supra*.

14. CAL. PENAL CODE § 261 (repealed 1970) read:

> Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years; 2. Where she is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent; 3. Where she resists, but her resistance is overcome by force or violence; 4 Where she is prevented from resisting by threats of great and immediate bodily harm, accompanied by apparent power of execution, or by an intoxicating narcotic, or anaesthetic substance, administered by or with the privity of the accused; 5. Where she is at the time unconscious of the nature of the act, and this is known to the accused; 6. Where she submits under the belief that the person committing the act is her husband, and this belief is induced by an artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

Section 261 now reads:

eighteen.[15] On appeal, the defendants contended that they could not be convicted of statutory rape when the information had only charged them with forcible rape. The court held that "[t]he decisive question . . . is whether the variance was of such a substantial character as to have misled defendants in preparing their defense."[16] The court believed that the defendants were not prejudiced and, under the circumstances of the case, the variance was immaterial.[17]

In *People v. Cole*,[18] the appellate court construed and expanded *Collins* in formulating a third test for lesser included offenses. The defendant in *Cole* was charged with assault with intent to commit murder.[19] A jury found the defendant guilty of assault with a deadly weapon,[20] as a lesser included offense within the

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> Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances:
> 1. Where a person is incapable, through lunacy or other unsoundness of mind, whether temporary or permanent, of giving legal consent.
> 2. Where . . . it is accomplished against a person's will by means of force or fear of immediate and unlawful bodily injury on the person or another.
> 3. Where a person is prevented from resisting by . . . any intoxicating, narcotic or anaesthetic substance, administered by or with the privity of the accused.
> 4. Where a person is at the time unconscious of the nature of the act, and this is known to the accused.
> 5. Where a person submits under the belief that the person committing the act is the victim's spouse, and this belief is induced by any artifice, pretense, or concealment practiced by the accused, with intent to induce such belief.

CAL. PENAL CODE § 261 (West Supp. 1981).

15. Subdivision (1)(d) of Section 261 has been repealed. *See* note 14 *supra*. A separate statute, Section 261.5 was enacted in 1970 prohibiting sexual intercourse with a female under 18 years of age. The text reads as follows: "Unlawful sexual intercourse is an act of sexual intercourse accomplished with a female not the wife of the perpetrator, where the female is under the age of 18 years." CAL. PENAL CODE § 261.5 (West Supp. 1981).

16. 54 Cal. 2d at 60, 351 P.2d at 328, 4 Cal. Rptr. at 160.

17. *Id.* The court cited the following factors in support of its determination that defendants were not prejudiced: it was proved at the preliminary hearing that the prosecuting witness was fifteen years of age; an attorney for one of the defendants expressed the view that the evidence tended to show statutory rape only, defendants did not claim that if rape in violation of section 261 had been expressly alleged that he would or could have disputed the age of the prosecuting witness; and defendants were not in danger of double jeopardy.

18. *See* note 11 *supra*.

19. CAL. PENAL CODE § 217 (West 1870) (repealed 1890).

20. CAL. PENAL CODE § 245(a) (West 1970). The text reads as follows:

> (a) 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 in the state

charge of assault with intent to commit murder.

The *Cole* court first ruled out the two established tests for lesser included offenses. With respect to the first test, the court concluded that assault with intent to commit murder did not encompass all the elements of assault with a deadly weapon. With respect to the second test, because the district attorney failed to allege that the defendant employed a deadly weapon, the accusatory pleading requirements were not satisfied. The court then applied the language in *Collins* to reach its conclusion that the convicted offense was a lesser included offense.

Between the *Collins* decision and the *Cole* decision, a number of appellate courts had limited the *Collins* rationale to situations involving different subdivisions of the same penal statute.[21] The *Cole* court was of the opinion that these cases "Ignor[ed] the underlying reasoning of the *Collins* case and exalt[ed] form over substance."[22] "The crux of the *Collins* decision is that a variance between the offense charged and a lesser offense of which a defendant is ultimately convicted will be deemed material only if the defendant was misled to his prejudice and prevented from preparing an effective defense."[23] Since the evidence at the preliminary hearing left no doubt that the assault involved use of a deadly weapon, and the only question involved was the identity of the perpetrator, the court held that the defendant's opportunity to prepare and defend was in no way impaired by omitting the charge from the information. Following the rationale of *Collins*, the appellate court upheld the conviction.

People v. Muis[24] followed *Cole* in applying this third test. The defendant in *Muis* was convicted of unauthorized entry, but the

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> prison for two, three or four years, or in a county jail not exceeding one year, or by fine not exceeding five thousand dollars ($5,000), or by both such fine and imprisonment. When a person is convicted of a violation of this section, in a case involving use of a deadly weapon or instrument, and such weapon or instrument is owned by such person, the court may, in its discretion, order that the weapon or instrument be deemed a nuisance and shall be confiscated and destroyed in the manner provided by Section 12028.

Id.

21. *See* People v. Tatem, 62 Cal. App. 3d 655, 133 Cal. Rptr. 265 (1976) (theft held not to be necessarily included within charge of burglary because burglary can be committed without the commission of a theft); People v. Escarega, 43 Cal. App. 3d 391, 117 Cal. Rptr. 595 (1974) (exhibiting a deadly weapon as proscribed under the California Penal Code §417, held not to be necessarily included offense within charge of assault with a deadly weapon because an assault with a deadly weapon can be committed without drawing or exhibiting the deadly weapon in a rude, angry or threatening manner as required under Section 417); People v. Leech, 232 Cal. App. 2d 397, 42 Cal. Rptr. 745 (1965) (same as *Escarega*).

22. 94 Cal. App. 3d at 863, 155 Cal. Rptr. at 897.

23. *Id.*

24. *See* note 12 *supra*.

information charged him with burglary.[25] The court explictly recognized that a third test had evolved from *Collins*, stating that the decisive question was "whether the variance was of such a substantial character as to have misled defendants in preparing their defense."[26] In applying this third test, the court held that the conviction for unauthorized entry was proper, because the defendant's opportunity to prepare and defend against the charge was not impaired by the fact the offense was not charged in the information, adding that this omission did not result in a miscarriage of justice.[27]

Two additional decisions evidence that this third test was developing strength in the appellate courts. *In re Beverly H.*[28] involved a minor charged with assault with a deadly weapon.[29] The female minor used a knife during a fight with another girl, inflicting cuts to her opponent's body. The minor was convicted of battery as a lesser included offense. The appellate court applied its interpretation of *Collins* to uphold the conviction.[30] *In re Walter S.*[31] in-

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25. *See* note 5 *supra*.

26. 102 Cal. App. 3d at 211, 163 Cal. Rptr. at 793.

27. *Id.* at 213, 163 Cal. Rptr. at 795. In People v. Wetmore, 22 Cal. 3d 318, 583 P.2d 1308, 149 Cal. Rptr. 265 (1978),

> the court stated that "Defense counsel suggested at oral argument that defendant probably could have been convicted of the lesser offense of unauthorized entry (Pen. Code § 602.5). Although unauthorized entry is not a necessarily included offense within the crime of burglary, '[i]n determining whether one crime is a lesser included offense of another, courts ordinarily look to the specific of the accusatory pleading rather than to the statutory definition of the greater crime.'

[Citation]. Arguably the information filed. . .adequately charged the lesser offense of unauthorized entry." *Id.* at 327 n.8, 583 P.2d at 1314 n.8, 149 Cal. Rptr. at 271 n.8. People v. Holderman, 64 Cal. App. 3d 375, 134 Cal. Rptr. 223 (1976) (trial court was not in error for failing to instruct an alleged lesser included offense of unlawful entry where, defendant entered no evidence existed to establish defendant entered without consent).

These cases at least suggest that an unauthorized entry can be a lesser included offense within the charge of burglary, and the fact the defendant conceded that sufficient facts existed to find an authorized entry, it would appear that the defendant in *Muis* had sufficient notice of a potential conviction for unauthorized entry.

28. 103 Cal. App. 3d 1, 162 Cal. Rptr. 768 (1980).

29. CAL. PENAL CODE § 245(a) (West Supp. 1981).

30.
> [T]here can be no doubt on the record before us that the minor's counsel was aware of the facts upon which the alleged assault with a deadly weapon and by force likely to produce great bodily injury was based well before the adjudication hearing, and that the minor's opportunity to prepare and defend against a battery charge was in no manner impaired by the failure to allege the same in the petition.

103 Cal. App. 3d at 6, 162 Cal. Rptr. at 771.

31. 105 Cal. App. 3d 475, 164 Cal. Rptr. 442 (1980).

volved a 16 year old charged with vehicle theft.[32] Upon the defendant's submission to the crime of joyriding[33] as a lesser included offense, the trial judge sustained a petition declaring the minor a ward of the court. On appeal, the defendant contended that joyriding is not a lesser included offense within the crime of vehicle theft. The court, without ruling out the two established tests for lesser included offenses, based its decision on the additional test of *Collins*, finding that joyriding and vehicle theft "spring from the same basic legislative policy" and that the "variance had no effect whatsoever insofar as a defense posture was concerned."[34]

IV. THE COURT'S ANALYSIS

In *Lohbauer*, the Supreme Court of California clarified the *Collins* holding and disapproved of those appellate cases taking an alternative construction.[35] The court stated that

> "[t]he rationale of *Collins* was that one charged with forcible rape could be convicted of 'statutory rape' under the same statute, provided he had adequate notice and a reasonable opportunity to prepare his defense. . . . Collins had neither redefined a 'necessarily included'

offense within the meaning of Section 1159, nor departed from the

32. CAL. VEH. CODE § 10851 (West Supp. 1981). The text reads as follows:

> Any person who drives or takes a vehicle not his own, without the consent of the owner thereof, and with intent either permanently or temporarily to deprive the owner thereof of his title to or possession of the vehicle, whether with or without intent to steal the same, or any person who is a party or accessory to or an accomplice in the driving or unauthorized taking or stealing is guilty of a public offense, and upon conviction thereof shall be punished by imprisonment in the state prison . . . , or in the county jail for not more than one year or by a fine of not more than five thousand dollars ($5,000) or both such fine and imprisonment. The consent of the owner of a vehicle to its taking or driving shall not in any case be presumed or implied because of such owner's consent on a previous occasion to the taking or driving of the vehicle by the same or a different person.

Id.

33. CAL. PENAL CODE § 499(b) (West 1970). The text reads as follows:

> Any person who shall, without the permission of the owner thereof take any automobile, bicycle, motorcycle, or other vehicle or motorboat or vessel, for the purpose of temporarily using or operating the same, shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall be punished by a fine not exceeding two hundred dollars ($200), or by imprisonment not exceeding three months, or by both such fine and imprisonment.

Id.

34. 105 Cal. App. 3d at 481, 164 Cal. Rptr. at 445. The court also noted that the defense counsel's desire to submit to having the judge consider joyriding a lesser included offense attests to the nonsubstantial nature of the variance.

35. "*Collins* is not authority for any expanded definition of 'necessarily included' offenses. To the extent that *Walter S.*, *Beverly H.*, *Muis*, and *Cole* . . . adopt such a construction, they are disapproved." 29 Cal. 3d at 372, 627 P.2d at 187, 173 Cal. Rptr. at 457.

rule of that statute; it had held only that rape was one crime within that meaning."[36]

The supreme court held that the adoption of this third test would violate well settled interpretations of statutory language. The court based this conclusion on its prior decisions which have uniformly interpreted the language "necessarily included" of the Penal Code[37] as being restricted to the traditional tests.[38] The court found no satisfactory argument for modification of the traditional tests.[39]

The court noted that even if the new test was compatible with Section 1159, serious due process problems would arise. In essence, the problem would be one of trying to determine when the test had been met. The language "misled to his prejudice" and "prevented from preparing an effective defense" would be difficult to ascertain.[40] The present case posed such a problem for the court. The People argued that the defendant could not have been misled because the evidence at the preliminary hearing established the specific conduct upon which the accusation was based. The court, however, believed that when an essential element of

36. *Id.* at 372, 627 P.2d at 186, 173 Cal. Rptr. at 456. This is the point Chief Justice Bird addresses in her concurring opinion. She would override *Collins* because "[u]nder that decision, a person charged with begging (Pen. Code § 647, subd. (b), could be convicted of prostitution (Pen. Code § 647, subd. (b)), on the theory that the various subdivisions of Penal Code section 647 do not state different offenses, but merely define the different circumstances in which one may commit the misdemeanor of disorderly conduct." 29 Cal. 3d at 373-74, 627 P.2d at 187-88, 173 Cal. Rptr. at 457-58.

37. CAL PENAL CODE § 1159 (West 1970).

38. *Id.* at 370, 627 P.2d at 185, 173 Cal. Rptr. at 455. The court is referring to People v. Pendleton, 25 Cal. 3d 371, 599 P.2d 649, 158 Cal. Rptr. 343 (1979) and People v. Greer, 30 Cal. 2d 589, 184 P.2d 512 (1947). In *Pendleton*, the trial court refused to instruct the jury on unauthorized entry as a lesser included offense within the crime of burglary. The supreme court upheld on the basis that an entry need not be a trespass to support the charge of burglary, therefore, it is not necessarily included. In *Greer*, the defendant was convicted of both statutory rape and lewd and lascivious conduct. The court held that both crimes can be charged, but since lewd and lascivious conduct is necessarily included within the crime of statutory conduct, there can only be one conviction.

39. It appears from the decision that the People's argument was that the court should adopt a third test, not modify the traditional tests. Once the court rejected this third test, the question then became whether the traditional tests should be modified. Perhaps if a persuasive argument for modification had been made, the court might have responded with reasoning why the traditional tests should not be modified. However, it would appear that if a persuasive argument for modification were made, and such modification would continue to insure the defendants due process rights, the court would consider it.

40. 29 Cal. 3d at 370, 627 P.2d at 185, 173 Cal. Rptr. at 455.

the crime charged is intent, notice of conduct is not sufficient to give the defendant notice of the crimes which may be proved against him.[41] The court also noted that the trial court concluded that the defendant was not put on notice, but "is at least guilty of trespass" and "ought to" be convicted of that offense.[42] The court concluded that even if the new test were adopted, the record did not indicate that the test had been satisfied.[43]

V. CONCLUSION

The *Lohbauer* decision eliminates ambiguities that may have existed with respect to the test for lesser included offenses. The major impact of *Lohbauer* will be to prevent the appellate courts from sustaining a conviction for a lesser offense, not necessarily included within the charged offense, when the traditional tests have not been satisfied. The *Lohbauer* decision is correct since the appellate court's third test did not effectively insure a defendant's due process rights. No longer will the prosecution be able to look to the appellate courts to correct insufficient accusatory pleadings. A heightened burden will again be placed on the prosecution to insure that a defendant has notice of any lesser offenses for which he may be convicted.

II. PROFESSIONAL RESPONSIBILITY

A. ATTORNEY DISCIPLINE

1. *Mitigation of Disbarment Recommendations:* **In re Petty**

In re Petty[1] addressed the issue arising in the situation where the State Bar Court recommends that an attorney be disbarred for conviction of a crime involving moral turpitude,[2] whether

41. "[W]here the actor's state of mind is an essential element of an offense, as where it is charged that the entry is 'with the intent to commit theft,' notice of 'conduct' alone cannot be said fairly to forewarn a defendant of the specific crimes which may be proven against him." *Id.* at 370, 627 P.2d at 185-86, 173 Cal. Rptr. at 455-56.

42. *Id.* at 371, 627 P.2d at 186, 173 Cal. Rptr. at 456.

43. All of this leads us to a conclusion that even under the test proposed by the People, we could not fairly conclude from the record before us that defendant was not 'misled to his prejudice and thereby prevented from preparing an effective defense.' The difficulties readily apparent in attempting such a factual inquiry in the course of appellate review do not commend for adoption the proposed new definition.

Id.

1. 29 Cal. 3d 356, 627 P.2d 191, 173 Cal. Rptr. 461 (1981).

2. "Criminal acts involving intentional dishonesty for the purpose of personal gain are acts involving moral turpitude." In re Hallinan, 48 Cal. 2d 52, 54, 307 P.2d 1, 2 (1957).

youth, inexperience, and restitution may mitigate the attorney's actions constituting a basis for the supreme court to reject the recommendation as being excessive?

Petitioner Petty was convicted on eight counts of grand theft[3] and four counts of forgery.[4] Petitioner McCray, Petty's partner,[5] was convicted on two counts of grand theft and one count of forgery.[6] The State Bar Court consolidated the two actions into one hearing. Their recommendation was that both petitioners be disbarred. The review department affirmed the recommendation.[7]

When such actions are presented before the court for its determination of proper discipline, great weight is given to the recommendation of the hearing panel.[8] The court, however, is not bound by the recommendation.[9] Petitioner has the burden of showing that the recommendation was erroneous.[10]

In the proper circumstances, financial and personal problems as well as alcoholism and rehabilitation are properly considered as mitigating circumstances in determining the appropriate discipline.[11] Also, an attorney's prior disciplinary record may be taken

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3. CAL. PENAL CODE § 487 (West 1970).

4. CAL. PENAL CODE § 470 (West 1970). An additional forty counts were dismissed.

5. The parties established a law partnership in January, 1972.

6. *See* notes 3 and 4 *supra*. An additional forty-two counts were dismissed.

7. Petty requested the review and the department made independent findings of fact as to Petty; as to McCray the hearing panel's findings were adopted.

8. *See* Olguin v. State Bar of Calif., 28 Cal. 3d 195, 616 P.2d 858, 167 Cal. Rptr. 876 (1980); Di Sabatino v. State Bar of Calif., 27 Cal. 3d 159, 606 P.2d 765, 162 Cal. Rptr. 458 (1980); Lewis v. State Bar, 9 Cal. 3d 704, 511 P.2d 1173, 108 Cal. Rptr. 821 (1973).

9. *See* Olguin v. State Bar of Calif., 28 Cal. 3d 195, 616 P.2d 858, 167 Cal. Rptr. 876 (1980); Di Sabatino v. State Bar of Calif., 27 Cal. 3d 159, 606 P.2d 765, 162 Cal. Rptr. 458 (1980); *see also* Finch v. State Bar of Calif., 28 Cal. 3d 659, 621 P.2d 253, 170 Cal. Rptr. 629 (1981) (court indicates a more severe penalty may be imposed).

10. Kitsis v. State Bar, 23 Cal. 3d 857, 592 P.2d 323, 153 Cal. Rptr. 836 (1979); Hawkins v. State Bar, 23 Cal. 3d 622, 591 P.2d 524, 153 Cal. Rptr. 234 (1979); In re Abbott, 19 Cal. 3d 249, 561 P.2d 285, 137 Cal. Rptr. 195 (1977).

11. Motives, previous record, character and reputation, youth and inexperience, client's character and other circumstances have been properly considered. *See* 7 CAL. JUR. 3d, Attorneys at Law § 150 (1973).

Whether the court will consider something as a mitigating factor depends upon the circumstances of that particular case. The court may be sympathetic to one's problems but decline to use it as a mitigating factor because their "primary concern must be the fulfillment of proper professional standards, whatever the unfortunate cause" may be. In re Abbott, 19 Cal. 3d at 254, 561 P.2d at 288, 137 Cal. Rptr. at 198, *citing from* In re Duggan, 17 Cal. 3d 416, 423, 551 P.2d 1922, 130 Cal. Rptr. 715, 718 (1976), and Grove v. State Bar of Calif., 66 Cal. 2d 680, 427 P.2d 164, 58 Cal. Rptr. 564 (1967).

into account.[12] The court, in the instant case, rejected this factor due to the brief period of practice prior to the attorneys' misconduct. Disbarment is not reserved for attorneys possessing prior misconduct records.[13] Discipline must be based on a "balanced consideration of all relevant factors," which include any mitigating circumstances.[14] "Our guiding principal is that the purpose of a disciplinary proceeding is not punitive but to inquire into the fitness of the attorney to continue in that capacity for the protection of the public, the court, and the legal profession."[15]

The court declared that youth and inexperience are not mitigating factors where criminal conduct is interwoven with the practice of law.[16] Restitution does not establish the "requisite rehabilitation"[17] sufficient to excuse the petitioners' conduct and, therefore, allow the supreme court to reject the recommendation of the State Bar Court.

B. Attorney-Client Relationship

1. *Limitations Upon the California Attorney General:* **People v. Brown**

Without reaching the merits in the case of *People v. Brown*,[1] the California Supreme Court issued an order enjoining the Califor-

12. McMorris v. State Bar of Calif., 29 Cal. 3d 96, 623 P.2d 781, 171 Cal. Rptr. 829 (1981); Samuelsen v. State Bar of Calif., 23 Cal. 3d 558, 591 P.2d 15, 152 Cal. Rptr. 918 (1979); Jackson v. State Bar of Calif., 23 Cal. 3d 509, 591 P.2d 47, 153 Cal. Rptr. 24 (1979).

13. In re Weber, 16 Cal. 3d 578, 546 P.2d 1378, 128 Cal. Rptr. 434 (1976).

14. Doyle v. State Bar of Calif., 15 Cal. 3d 973, 979, 544 P.2d 937, 939, 126 Cal. Rptr. 801, 803 (1976).

15. *Id.* at 978, 544 P.2d at 939, 126 Cal. Rptr. at 803, *citing from* Bradpiece v. State Bar of Calif., 10 Cal. 3d 742, 748, 518 P.2d 337, 341, 111 Cal. Rptr. 905, 909 (1974). *See also* Demian v. State Bar, 3 Cal. 3d 381, 386, 475 P.2d 652, 654, 90 Cal. Rptr. 420, 422 (1970), and Clancy v. State Bar, 71 Cal. 2d 140, 151, 454 P.2d 329, 336, 77 Cal. Rptr. 657, 664 (1969). *See also* Jackson v. State Bar of Calif., 23 Cal. 3d 509, 591 P.2d 47, 153 Cal. Rptr. 24 (1978).

16. The nature of petitioners' actions were not such that most young and inexperienced lawyers would take such action. 29 Cal. 3d at 361, 627 P.2d at 194, 173 Cal. Rptr. at 464 (1981).

17. *Id.* at 362, 627 P.2d at 194, 173 Cal. Rptr. at 464. The court indicates that rehabilitation is more effectively considered during a reinstatement proceeding.

1. 29 Cal. 3d 150, 624 P.2d 1206, 172 Cal. Rptr. 478 (1981). The Pacific Legal Foundation and the Public Employees Service Association filed an original petition for a writ of mandate to compel the Governor, the State Controller, the Public Employment Relations Board, and the State Personnel Board to perform their constitutional and statutory duties without regard to the provisions of the State Employer-Employee Relations Act. This Act, set forth at CAL. GOV'T. CODE § 3512 (West 1980), basically lists procedure for the formation of state employees' organizations, meetings and rules criteria, and mediation guidelines in the event of a dispute between the Governor and recognized employee organizations.

nia State Attorney General from proceeding with a petition for a writ of mandate against the California Governor and other state entities and officials.

Prior to filing the petition for the writ of mandate, the Attorney General had acted as counsel for the State in the same lawsuit.[2] After reviewing the provisions of the State Employer-Employee Relations Act of 1978 (SEERA),[3] he determined the provisions were unconstitutional and thus filed suit against the Governor and the State, thereby attempting to compel them to perform their duties without regard to SEERA.

Without reviewing the constitutionality of SEERA, the California Supreme Court found that the Attorney General had breached the confidentiality of his attorney-client relationship with the State and surmised that it could "find no constitutional, statutory, or ethical authority for such conduct by the Attorney General."[4] While the court acknowledged the Attorney General to be both a representative of a state agency and the guardian of the public interest, it felt that any personal conflict should be resolved by withdrawal of the Attorney General as state counsel.[5]

Furthermore, the court found that in a situation such as this, where there is a conflict between the Governor and the Attorney General over the determination of the public interest, the Governor retains the "supreme executive power."[6] The court believed that the Attorney General, as the chief law officer of the State, was subject to the power and duties of the Governor.[7]

Although the court noted that many states permit their attorneys general to sue state officers or agencies,[8] it felt that these

2. Acting through two deputies, the Attorney General met with members of the State Personnel Board, who had already been served with process in the suit, and, as their counsel, outlined the legal possibilities and described their options. 29 Cal. 3d at 154, 624 P.2d at 1207, 172 Cal. Rptr. at 479.

3. CAL. GOV'T. CODE § 3512 (West 1980). While the Governor had this bill under consideration, the Attorney General urged him to sign what he described as "a standard, well-accepted method of resolving labor/management disputes . . . a good step forward." 29 Cal. 3d at 155, 624 P.2d at 1207, 172 Cal. Rptr. at 479.

4. 29 Cal. 3d at 155, 624 P.2d at 1207, 172 Cal. Rptr. at 479.

5. *Id.* at 157, 624 P.2d at 1209, 172 Cal. Rptr. at 481. *See* CAL. GOV'T. CODE § 11040 (West 1980); D'Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 112 Cal. Rptr. 520, 786 P.2d 10 (1974).

6. 29 Cal. 3d at 157-58, 624 P.2d at 1209, 172 Cal. Rptr. at 481 (quoting CAL. CONST. art. 4, § 1).

7. CAL. CONST., art. 5, § 13.

8. Connecticut Comm'n v. Connecticut Freedom of Information Comm'n, 174 Conn. 308, 387 A.2d 533 (1978); Feeney v. Commonwealth, 373 Mass. 359, 366 N.E.2d

precedents were not persuasive in California. The court found the Constitution of Arizona and case law interpreting it more in line with those of California and chose to follow the ruling of the Arizona Supreme Court in *Arizona State Land Dept. v. McFate*,[9] which held that the governor alone, and not the attorney general, is responsible for the supervision of the state executive department.[10]

III. ADMINISTRATIVE LAW

A. WELFARE LAW

1. *Allowable Expenses Under the Social Security Act:* **Green v. Obledo**

The California Supreme Court decision in *Green v. Obledo*[1] concerned a California state welfare regulation, EAS 44-113.241(d),[2] which established a per-mile standard allowance for expenses of driving a private motor vehicle to and from work and on the job, and set forth a maximum limit on the recognition of those expenses. The *Green* court held that this statute failed to provide for individualized consideration of expenses in excess of the standard amount and thus was invalid due to its violation of the Social Security Act.[3]

1262 (1977), EPA v. Pollution Control Bd., 69 Ill. 2d 399, 372 N.E.2d 50 (1977); Commonwealth v. Paxton, 516 S.W.2d 865 (Ky. App. 1974).

9. 87 Ariz. 139, 348 P.2d 912 (1960).

10. The Arizona Supreme Court held:

> Significantly, these powers are not vested in the Attorney General. Thus, the Governor alone, and not the Attorney General, is responsible for the supervision of the executive department and is obligated and empowered to protect the interests of the people and the State by taking care that the laws are faithfully executed.

Id. at 148, 348 P.2d at 918.

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1. 29 Cal. 3d 126, 624 P.2d 256, 172 Cal. Rptr. 206 (1981). Plaintiffs, Aid to Families with Dependent Children recipients, alleged in a class action suit that their employment required use of automobiles for transportation to and from work. Such use resulted in costs which greatly exceeded mileage-based deductions when determining need for assistance, and thus served to reduce monthly grants. The action attacked the compliance of a state welfare regulation with the language set forth under the Social Security Act, 42 U.S.C. § 602(a)(7) (1976).

2. This statute enumerates certain work related expenses allowable as deductions from earned income used to determine eligibility for and amount of AFDC assistance. Regulation subdivision (d) states:

> recipient's necessary costs of transportation to and from work shall be allowed; but in the case of a recipient who is compelled to use his or her own automobile for that purpose because public transportation is either unavailable or inappropriate, the regulation limits those costs to a flat rate of 15 cents per mile.

EAS 44-113.241(d).

3. 42 U.S.C. § 602(a)(7) (1976). The Act provides that in determining need, a state agency shall take into consideration any expenses reasonably attributable to the earning of other income.

Consistent with prior law,[4] the supreme court reiterated that when determining eligibility for an amount of so-called Aid to Families with Dependent Children (AFDC)[5] assistance, it was the intent of Congress to permit the exclusion of all work related expenses, without regard to the amount expended, provided that such expenses were reasonably related to employment.[6] In addition, Health, Education, and Welfare regulations consider only actual available net income in their determinations of aid; thus, such work related expenses serve to reduce current support needs and therefore must be adjudged.[7] The court also reasoned that average per-mile allowances would not be practical in light of the fact that most automobiles used by families in need of aid are in below average condition, and that many expenses are often not related to mileage.[8]

The *Green* court continued to follow precedent in its conclusion that procedural class action issues, including composition of the class, must ordinarily be resolved prior to a decision on the merits.[9] This prevents one-way intervention on the part of potential class members and also may alleviate a binding adjudication against that class.[10] Furthermore, this rule protects plaintiffs

4. *See* Shea v. Vialpando, 416 U.S. 251 (1974). *See also* County of Alameda v. Carleson, 5 Cal. 3d 730, 488 P.2d 953, 97 Cal. Rptr. 385 (1971), in which the court emphasized "if these work expenses are not considered in determining need, they have the effect of providing a disincentive to working since that portion of family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter."

5. The AFDC program was established by the federal Social Security Act, 42 U.S.C. § 601 et seq. (1976) with the goal of providing financial assistance to needy dependent children and the parents or other relatives with whom they reside. This program is controlled by federal financial assistance and state administrative efforts. California participates in this program under the provision of the Burton-Miller Act, CAL. WELF. AND INST. CODE, § 11200 (West 1980). 29 Cal. 3d at 131, 624 P.2d at 528, 172 Cal. Rptr. at 208 (1981).

6. County of Alameda v. Carleson, 5 Cal. 3d 730, 488 P.2d 953, 97 Cal. Rptr. 385 (1971); [1962] U.S. Code Cong. & Ad. News, 1959-60.

7. *Id.*

8. 29 Cal. 3d at 139, 624 P.2d at 263, 172 Cal. Rptr. at 213. Major costs include monthly payments on car loans, insurance premiums, depreciation, and licensing and registration fees. In addition, second-hand cars often consume more oil and require additional mechanical maintenance.

9. Home Sav. & Loan Assn. v. Superior Court, 54 Cal. App. 3d 208, 211-14, 126 Cal. Rptr. 511, 512-14 (1976); Hypolite v. Carleson, 52 Cal. App. 3d 566, 125 Cal. Rptr. 221 (1975). CAL. CIV. PROC. CODE § 338(1) (West 1954) states that a liability created by statute, was subject to the three year limitations period. However, the trial court has discretion to fix a more realistic date for payment of retroactive benefits to class member to avoid excessiveness.

10. 29 Cal. 3d at 146, 624 P.2d at 268, 172 Cal. Rptr. at 218 (1981).

from possible abuse by a defendant of a delayed motion to decertify the class.[11] Although, as a general rule, the issuance of a writ of mandate is restricted to persons "beneficially interested," the *Green* court sustained prior law which allowed an exception to instances dealing with a public right and a public duty.[12]

The supreme court held that the appellant's retroactive relief should be restricted to the period preceding the filing of the complaint.[13]

IV. LABOR LAW

A. LIABILITY FOR UNFAIR LABOR PRACTICES

1. *A Growers Liability For the Unfair Labor Practices of a Labor Contractor Under the California Agricultural Labor Relations Act:* **Vista Verde Farms v. Agricultural Labor Relations Board**

The central question in *Vista Verde Farms v. Agricultural Labor Relations Board*[1] was whether a grower who obtains workers through a farm labor contractor[2] may be held responsible under the California Agricultural Labor Relations Act (ALRA) for actions of that labor contractor which constitute unfair labor practice.[3]

In this case, the actions of the labor contractor were held to constitute unfair labor practice.[4] The actions consisted of pushing, shoving, and threatening to fight with union organizers who had gone to the contractor's camp to speak with the farm workers about an upcoming union certification election.[5] When an argu-

11. *Id.* at 147, 624 P.2d at 268, 172 Cal. Rptr. at 218.

12. Hollman v. Warren, 32 Cal. 2d 351, 196 P.2d 562 (1948); American Friends Serv. Comm. v. Procunier, 33 Cal. App. 3d 252, 109 Cal. Rptr. 22 (1973). Fuller v. San Bernardino Valley Mun. Wat. Dist., 242 Cal. App. 2d 52, 51 Cal. Rptr. 120 (1969).

13. 29 Cal. 3d at 141, 624 P.2d at 265, 172 Cal. Rptr. at 215.

1. 29 Cal. 3d 307, 625 P.2d 263, 172 Cal. Rptr. 720 (1981).

2. The appellant, Vista Verde Farms, had only ten or twelve permanent employees who worked the full period that the farm was open. However, during peak season, up to 600 employees were needed for farm worker crews. During this time, Vista Verde hired labor contractors who, in turn, supplied Vista Verde with farm worker crews.

3. What is contemplated is an imputation of liability from an independent contractor to the employer, via reference to the broad purposes underlying the statutory scheme, as opposed to general agency or respondent superior principles.

4. 29 Cal. 3d at 316, 625 P.2d at 267, 172 Cal. Rptr. at 724.

5. The union organizers went to the labor contractor's camp to speak with the workers since many of the workers employed by Vista Verde were living at the camp and none of the workers would be able to return to Vista Verde before the union certification election. 29 Cal. 3d at 313-14, 625 P.2d at 266, 172 Cal. Rptr. at 723.

ment ensued as to the union organizers' right to speak with the farm workers in their own homes, the labor contractor departed and returned later with several deputy sheriffs. The union organizers were cited for trespass and told to leave the premises immediately. The court found that these actions of the labor contractor constituted unfair labor practice in that they were an improper interference with, coercion, and restraint of workers in the exercise of their statutorily protected rights under Labor Code section 1153.[6] The significance of the case lies in its resolution of the issue as to whether, and under what theory, liability for an unfair labor practice can be imputed from the labor contractor to the grower under California law.

The court embarked upon an extensive analysis of both federal and state law,[7] which concluded, generally, that under the ALRA an employer may be held responsible for any improper and coercive actions which his employees may reasonably believe were either engaged in on the employer's behalf or reflect the employer's policy.[8] The court further concluded that, under the ALRA, these general principles of employer responsibility apply equally to the coercive actions of a farm labor contractor hired by a grower as they do to similar conduct engaged in by a regular employee of such a grower.[9]

Although this conclusion does not contemplate imposition of a strict form of liability upon a grower for the wrongful actions of his labor contractor,[10] it is important, nonetheless, because it sig-

6. Labor Code § 1153 provides in pertinent part that "[i]t shall be an unfair labor practice for an agricultural employer to [inter alia] . . . interfere with, restrain, or coerce agricultural employees in the exercise of the rights guaranteed in Section 1152." CAL. LAB. CODE § 1153 (West 1980).

Labor Code § 1152 provides in pertinent part:

> Employees shall have the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

Id. § 1152.

7. The court noted that the drafters of the ALRA drew heavily upon the provisions of its federal counterpart, the National Labor Relations Act (NLRA), and thereafter proceeded to analyze portions of it and some of the applicable federal precedents which followed its passage, most notably I.A. of M. v. Labor Bd., 311 U.S. 72 (1940), and H.J. Heinz Co. v. Labor Bd., 311 U.S. 514 (1941).

8. 29 Cal. 3d at 312, 625 P.2d at 265, 172 Cal. Rptr. at 722.

9. *Id.*

10. In fact, the court expressly rejected such a contention:

> Inasmuch as the employer is not 'strictly' or 'absolutely' liable even for

nals a new approach by California courts in dealing with unfair labor practices on the part of labor contractors.[11] The court believed that this new approach would better protect the worker's rights and deter similar coercive conduct in the future.[12]

V. CONTRACT LAW

A. CONSIDERATION

1. *Mutuality of Obligation and the Sufficiency of Consideration:* **Bleecher v. Conte**

In *Bleecher v. Conte*,[1] the California Supreme Court was presented with the contractual issues of mutuality of obligation and the availability of specific performance as a remedy where the other party has waived that right in a liquidated damages clause.[2] Agreeing with the trial court, the court found that the buyers' promise to "do everything in their power to expedite the recordation of the final map"[3] and to "proceed with due diligence" was a sufficient obligation to supply adequate consideration.[4]

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the actions of its own supervisors or foremen *under all circumstances*, we believe that if the Legislature had intended to enact such a strict liability standard with respect to labor contractor misconduct it would have done so in clearer, more explicit terms.

29 Cal. 3d at 326, 625 P.2d at 273, 172 Cal. Rptr. at 731 (emphasis in original).

The court went on to give examples of types of misconduct on the part of the labor contractor for which the grower would not be responsible.

11. People v. Medrano, 78 Cal. App. 3d 198, 144 Cal. Rptr. 217 (1978) took the position that any actions taken by labor contractors were not subject to review under the ALRA; this position was expressly disapproved in *Vista Verde Farms*, 29 Cal. 3d at 325, 625 P.2d at 273, 172 Cal. Rptr. at 730.

12. 29 Cal. 3d at 312, 625 P.2d at 265, 172 Cal. Rptr. at 722.

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1. 29 Cal. 3d 345, 626 P.2d 1051, 173 Cal. Rptr. 278 (1981). The unanimous decision was authored by Chief Justice Bird.

2. The contract at issue centered around the sale of forty acres of land in Palm Desert, California. The contracting parties were experienced business persons dealing in real estate transactions. The original contract offer tendered by the buyers provided for a $1000 deposit to open escrow, twenty-nine percent to be paid at the close of escrow and the balance to be paid within five years. The closing of escrow was conditioned upon the buyers' approval and recordation of the final tract map. The seller rejected the offer, but made a signed counteroffer. The terms of the original offer remained the same, but a provision was added stipulating that the entire purchase price, $575,000, should be paid in cash. The buyers accepted the counteroffer and deposited $1000 in escrow. The controversy arose when the seller refused to proceed with the arrangement unless the buyers paid the entire purchase price in the current year rather than over the five year period. This conditioned refusal was a material alteration in the terms of the contract.

3. The buyers' obligation to pay was contingent upon their approval of the title report, plat map, and soil, zoning, and engineering reports. This approval could not be unreasonably withheld.

4. The agreement was a bilateral contract in which each party is both a promisor and a promisee. The mutuality of obligation supplies the requisite consideration to make the contract binding. *See* RESTATEMENT OF CONTRACTS § 12 (1932).

The court held that for a contract to bind either party, there must be mutuality of obligation.[5] It further noted that "in every contract there is an implied covenant of good faith and fair dealing"[6] and also that if a contract is capable of two constructions, the court must choose the interpretation which makes the contract legally binding, if it can be so construed without violating the intentions of the parties.[7] The court rejected the seller's argument for voiding the contract on the basis that the buyers had not assumed any real obligation.[8] Both the express and implied covenants to proceed with due diligence made the contract binding.

Additionally, the court found that even though a liquidated damages clause existed in the contract that limited the seller's remedy to possession of all completed maps and records in the event of default by the buyers, the clause in no way precluded the buyers' from asserting their contractual remedy of specific performance. The court held that the "rigid and outdated requirement of mutuality of remedy" was discarded by the California Legislature.[9] The authors of the Restatement of Contracts likewise profess that "the fact that the remedy of specific enforcement is not available to one party is not sufficient for refusing it to the other party."[10] Thus, the seller's waiver of her right to specific performance in the liquidated damages clause did not prevent the buyers from availing themselves of that remedy.

5. *See* Mattei v. Hopper, 51 Cal. 2d 119, 122, 330 P.2d 625, 626 (1958). *See also* CAL. CIV. CODE § 3391 (West 1978).

6. Brown v. Superior Court, 34 Cal. 2d 559, 564, 212 P.2d 878, 881 (1949); Redke v. Silvertrust, 6 Cal. 3d 94, 100, 490 P.2d 805, 808, 98 Cal. Rptr. 293, 296, *cert. denied*, 405 U.S. 1041 (1971).

7. Rodriguez v. Barrett, 52 Cal. 2d 154, 160, 338 P.2d 907 (1959); CAL. CIV. CODE §§ 1643, 3541 (West 1970).

8. The seller contended that the buyers' promise was illusory because the buyers could decline to have a tract map prepared or obtain city approval for development, renege on the agreement, and still get their $1000 escrow deposit back.

9. CAL. CIV. CODE § 3386 (West 1970).

> Notwithstanding that the agreed counterperformance is not or would not have been specifically enforceable, specific performance may be compelled if:
>
> (a) Specific performance would otherwise be an appropriate remedy; and,
>
> (b) The agreed counterperformance has been substantially performed or its concurrent or future performance is assured, or, if the court deems necessary, can be secured to the satisfaction of the court.

10. RESTATEMENT OF CONTRACTS § 372 (1932).

VI. INSURANCE LAW

A. Automobile Liability Insurance

1. *California Insurance Code Section 11580.1:* **Farmers Insurance Exchange v. Cocking**

In *Farmers Insurance Exchange v. Cocking*,[1] the California Supreme Court resolved a constitutional challenge to section 11580.1, subdivision (c)(5) of the California Insurance Code,[2] which authorizes automobile liability insurers to exclude from coverage an insured's bodily injury liability to any other person insured under the policy.

The defendants attacked the Code section on two grounds. First, it was contended that the exclusion provision violated public policy and a general policy favoring adequate recovery for persons injured in automobile accidents. The court noted that such arguments have been repeatedly rejected by the courts[3] and that such exclusion provisions have enjoyed judicial sanction since 1966.[4] The court further noted that, in light of this authority, the legislature in 1970 amended section 11580.1 to expressly permit

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1. 29 Cal. 3d 383, 628 P.2d 1, 173 Cal. Rptr. 846 (1981). The defendant, Ceclia Glorious, wife of defendant Paul Cocking, was injured while a passenger in a car driven by her husband. She sued her husband for damages, alleging that her injuries were caused by his negligence. The plaintiff, Farmers Insurance, in seeking to avoid indemnifying Cocking under the automobile liability policy it had issued to him, brought a declaratory relief action to determine their liability under the insurance policy. The plaintiff, Farmers, relied upon an exclusion in its policy with Cocking which read: "[T]his policy does not apply under Part I (liability insurance) . . . to the liability of any insured for bodily injury to (a) the named insured or (b) a relative of the named insured who is a resident of the same household." Another relevant portion of the policy provided that "[i]f the insured named in Item 1 of the declarations is an individual, the term 'named insured' includes his spouse if a resident of the same household." It is undisputed that at the time of the accident, the defendant, Glorious, was defendant Cocking's wife living with him in the same household. All parties agreed that the exclusion, if valid, would bar recovery for bodily injury sustained by the defendant Glorious. *Id.* at 386.

2. CAL. INS. CODE § 11580.1 (c)(West 1972) provides in relevant part: "In addition to any exclusion as provided in paragraph (3) of subdivision (b), the insurance afforded by any such policy of automobile liability insurance to which subdivision (a) applies may, by appropriate policy provision, be made inapplicable to . . . [¶] (5) Liability for bodily injury to an insured."

3. Cooper v. Bray, 21 Cal. 3d 841, 582 P.2d 604 148 Cal. Rptr. 148 (1978); Schwalbe v. Jones, 16 Cal. 3d 514, 546 P.2d 1033, 128 Cal. Rptr. 321 (1976) (*overruled on other grounds*); California Cas. Indem. Exch. v. Hoskin, 82 Cal. App. 789, 147 Cal. Rptr. 348 (1978); State Farm Mut. Auto. Ins. Co. v. Hartle, 59 Cal. App. 3d 852, 131 Cal. Rptr. 141 (1976); Civil Serv. Employees Ins. Co. v. Klapper, 59 Cal. App. 3d 918, 130 Cal. Rptr. 921 (1976); Meritplan Ins. Co. v. Woolum, 52 Cal. App. 3d 167, 123 Cal. Rptr. 613 (1975).

4. Travelers Indem. Co. v. Colonial Ins. Co., 242 Cal. App. 2d 227, 51 Cal. Rptr. 724 (1966) was the first reported California case to uphold the provision in question, clearly implying that such provisions were available and in use in California long before the date of that case. *Id.* at 234-35 n.7. It is likely that the 1961 legisla-

such exclusions.[5] Earlier in *Schwalbe v. Jones*,[6] the court took judicial notice of the fact that most automobile liability insurance policies contain such exclusion provisions and that "[a]ny suggestion . . . that this practice would contravene some vaguely conceived public policy . . . must surely founder upon the explicit language used by the Legislature to authorize such exclusions."[7]

The defendants further maintained that section 11580.1 contravenes a basic public policy expressed in California Civil Code section 1714, subdivsion (a),[8] making every person responsible for his own negligent acts. The court responded that section 11580.1 is not contrary to the policy expressed in the Civil Code since an injured party, such as the defendant, still retains the full unrestricted right to sue the negligent insured. The exclusion, the court continued, affects only the right to reach insurance proceeds for the satisfaction of any judgment obtained. As to the defendants' reliance on general principles favoring recovery for injuries, the court held that "the public policy of this state is contained not in broadly expressed generalized abstractions but in the applicable statutory provisions themselves . . ."[9] which expressly allow such exclusionary provisions in automobile liability insurance policies.[10] The court found that the Legislature's decision to au-

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ture, in passing the pre-1973 version of § 17158, did so in full awareness of the prevalence of such provisions.

5. 16 Cal. 3d at 521, 546 P.2d at 1038, 128 Cal. Rptr. at 326.

6. *Id.*

7. *Id.* Although the precise holding in *Schwalbe* was overruled by the court in Cooper v. Bray, 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978), nothing the court said in *Cooper* casts any doubt upon the validity of the exclusion authorized by § 11580.1. "*Cooper's* holding was directed solely to the propriety of the substantive immunity granted to negligent drivers vis-a-vis owner-passengers under Vehicle Code section 17158." Farmers Ins. Exch. v. Cocking, 29 Cal. 3d at 388, 628 P.2d at 3, 173 Cal. Rptr. at 848. No similar grant of immunity from suit was involved in *Farmers*.

8. CAL. CIV. CODE § 1714(a) (West Supp. 1981) reads in relevant part: "Every one is responsible, not only for the result of his willful acts, but also for an injury occassioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself."

9. 29 Cal. 3d at 388, 628 P.2d at 3, 173 Cal. Rptr. at 848.

10. CAL. INS. CODE § 11580.5 (West Supp. 1981) expressly recites that:

> The Legislature declares that the public policy of this state in regard to provisions authorized or required to be included in policies affording automobile liability insurance or motor vehicle liability insurance issued or delivered in this state shall be as stated in this article, [and] that this article expresses the total public policy of this state respecting the contents of such policies . . . .

Id.

thorize automobile insurers to exclude bodily injury liability to an insured is supported by a variety of rational, legitimate reasons.[11]

The second major attack by the defendants on section 11580.1 was that it violated the equal protection provisions of the state and federal constitutions. The defendants maintained that the exclusion provision was irrational and arbitrary.[12] The court, however, held that the provision rationally relates to a legitimate state purpose.[13] Citing a recent Indiana case,[14] the court pointed out such reasons as prevention of suspect interfamily legal actions, which may not be truly adversary and over which the insurer has little or no control, collusive assertions of liability, and the freedom of parties to exclude risks from an insurance contract.[15] The court also observed[16] that the legislature may have concluded that the benefits to the public from automatically including "family member" coverage in all automobile liability policies were outweighed by the probable adverse consequences of such a rule, including substantial increases in premiums. Such a substantial increase could also result in more uninsured motorists. Further, family members are frequently protected by medical provisions of the insured's policy, or by other medical or casualty insurance.

For the above reasons, and in avoidance of unprecedented judicial interference into private contractual and economic arrangements between contracting parties,[17] the court reversed the judgment of the trial court and directed it to enter judgment for the plaintiffs.

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11. 29 Cal. 3d at 388, 628 P.2d at 3, 173 Cal. Rptr. at 848.

12. The plaintiff "Farmers answered the equal protection challenge by contending, alternatively, that (1) there is no state action upon which to invoke equal protection principles, and (2) in any event, section 11580.1 is supported by sufficient rational bases." 29 Cal. 3d at 389, 628 P.2d at 4, 173 Cal. Rptr. at 849. As the second contention was clearly meritorious, the court did not see a need to reach the state action issue.

13. As noted by the court, the applicable review standard for testing the constitutionality of § 11580.1, subdivision (c)(5) is the so-called "traditional" or "restrained" standard which requires courts to uphold the validity of a legislative classification if it rationally relates to a legitimate state purpose. Under this standard, the judiciary affords challenged legislation a presumption of constitutionality. Cooper v. Bray, 21 Cal. 3d at 847, 582 P.2d at 607, 148 Cal. Rptr. at 151; Newland v. Board of Governors, 19 Cal. 3d 705, 566 P.2d 254, 139 Cal. Rptr. 620 (1977).

14. United Farm Bur. Mut. Ins. Co. v. Hanley, 172 Ind. App. 321, 360 N.E.2d 247 (1977).

15. *Id.*

16. 29 Cal. 3d at 390, 628 P.2d at 4, 173 Cal. Rptr at 849.

17. *Id.* at 390-91, 628 P.2d at 5, 173 Cal. Rptr. at 850.

VII. CALIFORNIA CONSTITUTION

A. RIGHT TO PRIVACY

1. *Medi-Cal Funding of Abortions—The Right of Procreative Choice is Guaranteed:* **Committee to Defend Reproductive Rights v. Myers**

The 1978-80 California Budget Acts restricted funding for abortions under the California Medi-Cal Program. The California Supreme Court held that the right to procreative choice is a fundamental right under the California Constitution and can only be restricted pursuant to a compelling state interest. The court applied the three-part test established in Bagley v. Washington Township Hospital District and found that no compelling state interest existed.

I. INTRODUCTION

The California Supreme Court, in *Committee to Defend Reproductive Rights v. Myers*[1], continued its firmly established trend of guaranteeing greater rights and protection under the California Constitution than those granted by the United States Constitution. The *Myers* decision clearly reinforced this trend. Just nine months earlier, in *Harris v. McRae*[2], the United States Supreme Court upheld provisions similar to those struck down as unconstitutional in *Myers*.[3]

1. 9 Cal. 3d 252, 625 P.2d 779, 172 Cal. Rptr. 866 (1981). The majority opinion was written by Justice Tobriner, with Justices Mosk and Newman concurring. Chief Justice Bird wrote a separate concurring opinion. Justice Richardson, with Justice Clark concurring, authored the dissent.

2. 448 U.S. 297 (1980). *McRae* upheld certain restrictions on federal funding of abortions. For an indepth analysis of the United States Supreme Court's application of the federal constitution to the Hyde Amendment, *see Harris v. McRae: Whatever Happened to the Roe v. Wade Abortion Right*? 8 PEPPERDINE L. REV. 861 (1981).

3. The *Meyers* decision clearly holds that the rights of the fetus are subordinate to the woman's right of procreative choice prior to the third trimester. The rationale of Roe v. Wade, 410 U.S. 113 (1973), was adopted to protect the rights of the fetus during the third trimester. *See* notes 63 & 64 *infra*. The effect of *McRae*, in contrast, was to subordinate the woman's right of procreative choice to the rights of the fetus. These results do not appear to be distinguishable on divergent policies favoring the rights of the mother vis-a-vis the child or vice-versa. Rather, any distinctions should be primarily based on the level of scrutiny employed. The United States Supreme Court used a minimum scrutiny test by merely looking to see whether any new obstacles to abortion were imposed. The California Supreme Court, however, used a strict scrutiny test similar to equal protection analysis. *See* notes 25 & 28 *infra* and accompanying text.

II. Facts

The *Myers* action was brought by an organization representing indigent women throughout California. The dispute centered around funding for abortions under the California Medi-Cal Program.[4] Prior to 1978, the Medi-Cal program paid for legal abortions obtained by Medi-Cal recipients.[5] The 1978-80 Budget Acts,[6] however, limited such funding. In summary, these restrictions essentially provide funding for abortions only: "when pregnancy would endanger the mother's life; when pregnancy would cause severe and long lasting physical health damage to the mother; when pregnancy is the result of illegal intercourse. . . ; or when abortion is necessary to prevent the birth of severely defective infants."[7] The plaintiffs contended that these Budget Acts violated

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4. "The California Medi-Cal program funds 'physician, hospital or clinic outpatient, [and] surgical center' services, as well as 'inpatient hospital services,' for 'recipients of public assistance [and] medically indigent' aged and other persons.'" 29 Cal. 3d at 258, 625 P.2d at 782, 172 Cal. Rptr. at 869, *citing*, CAL. WELF. & INST. CODE §§ 14000 (West 1980) 14132(a)(b) (West Supp. 1981).

5. 29 Cal. 3d at 258, 625 P.2d at 782, 172 Cal. Rptr. at 869.

6. Stats. 1978 ch. 359, § 2, item 298, pp. 823-825; Stats. 1979 ch. 259, § 2, item 261.5 pp. ——; Stats. 1980, ch. 510, § 2, item 287.5, pp. ——. There were separate challenges to each Budget Act of 1978 through 1980. The three were consolidated upon appeal because each Act essentially provided for funding under the same conditions, *see* note 4 *supra*.

7. 29 Cal. 3d at 259, 625 P.2d at 782, 869 Cal. Rptr. at 869.

> The 1979 and 1980 Budget Acts restrict Medi-Cal abortion funding by specifying that none of the funds appropriated for Medi-Cal shall be used to pay for abortions, except under any of the following circumstances:
>
> '(a) Where the life of the mother would be endangered if the fetus were carried to full term.
>
> '(b) Where the pregnancy is ectopic.
>
> '(c) Where the pregnancy results from an act punishable under Section 261 of the Penal Code, and such act has been reported, within 60 days, to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency, and the abortion occurs during the first trimester.
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> '(d) Where the pregnancy results from an act punishable under Section 261.5 of the Penal Code, and the female is under 18 years of age, and the abortion is performed no later than the first trimester, provided the female's parent or guardian or, if none, an adult of the female's choice is notified at least five days prior to the abortion by the physician who performs the abortion. Regulations governing the notice requirement shall be promulgated by the State Director of Health Services.
>
> '(e) Where the pregnancy results from an act punishable under Section 285 of the Penal Code, and such act has been reported to a law enforcement agency or a public health agency which has immediately reported it to a law enforcement agency and the abortion occurs no later than during the second trimester.
>
> '(f) Where it is determined by prenatal studies limited to amniocentesis, fetal blood sampling, fetal antiography, ultrasound, X-ray, or maternal blood examination that the mother is likely to give birth to a child with a major or severe genetic or congenital abnormality due to the presence of chromosomal abnormalities, neural tube defects, biochemical diseases, hemoglobinopathies, sex-linked diseases, and infectious processes.

their constitutional guarantees of right to privacy, due process, and equal protection.

The *Myers* court was quick to point out that the question before them did not turn on the morality or immorality of abortions, nor did it concern whether or not the state must subsidize poor people enabling them to exercise their constitutional rights. Rather, the court stated that the issue was whether a state that has enacted a program to provide medical services to the poor, can discriminate by withholding benefits from otherwise qualified individuals, because they exercise their constitutional right of procreative choice in a manner not favored by the state.[8]

Distinguishing *McRae*, the court decided that the issue before it turned on whether the controversial restrictions are compatible with the California Constitution. *McRae* had already determined that such restrictions are compatible with the federal Constitution; but the *McRae* Court does not address or resolve the issue of whether such restrictions are compatible with the California Constitution.[9]

In determining the constitutionality of the restrictions in controversy, the court noted that, through a series of cases spanning three decades,[10] it had developed a three-part test to evaluate "funding schemes" that condition the receipt of benefits upon the recipient's waiver of a constitutional right or upon the exercise of such a right in a manner the government approves. This test requires the state to demonstrate that: the conditions imposed relate to the purpose of the legislation; the utility of the conditions manifestly outweigh any impairment of constitutional rights; and

'(g) Where severe and long-lasting physical health damage to the mother would result if the pregnancy were carried to term, when so certified under penalty of perjury by two physicians, one of whom, where practicable, is a specialist in the affected medical discipline, and documentation thereof is provided with the claim for payment'.

The primary difference between the 1978 Act and the later acts is that the 1978 Act provided funding for abortions to avoid severe and long-lasting physical health damage only when that damage arose from 10 enumerated medical conditions. Since the Legislature deleted that language in the 1979 and 1980 enactments, the question of the validity of the 1978 language is moot.

29 Cal. 3d at 259 n.1, 625 P.2d at 782 n.1, 172 Cal. Rptr. at 869 n.1, citing, Stats. 1979 ch. 259, § 2, item 261.5 pp. ——; Stats. 1980, ch. 510, § 2, item 287.5 pp. ——.

8. 29 Cal. 3d at 256-57, 625 P.2d at 780-81, 172 Cal. Rptr. at 867-68.

9. 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.

10. 29 Cal. 3d at 264, 625 P.2d at 785-86, 172 Cal. Rptr. at 873-74. *See* note 25 *infra*.

there are no less offensive alternatives available for achieving the state's objective.[11]

II. HISTORICAL ANALYSIS

The *Myers* decision is based on the two important premises[12] that California constitutional law is controlling and the restrictions in controversy must satisfy the three-part test established in *Bagley v. Washington Township Hospital District*.[13]

A. Federal Law Distinguished

Under the basic principles of federalism, the California Constitution is considered a document of independent force having independent responsibility for safeguarding the rights of California citizens.[14] The California Supreme Court has on numerous occasions found that the California Constitution provides greater protection than similar provisions in the United States Constitution.[15] It is on this basis that the court distinguished *Har-*

11. Bagley v. Washington Township Hospital District, 65 Cal. 2d 499, 505-07, 421 P.2d 409, 414-15, 55 Cal. Rptr. 401, 406-07 (1966) (governmental agency's imposition of restraints on the political activities of a public employee). *See* 29 Cal. 3d at 258, 625 P.2d at 781, 172 Cal. Rptr. at 868. *See also* note 23 *supra*.

12. Chief Justice Bird's concurring opinion disagreed with the second premise. She argues that when any governmental action burdens the exercise of a fundamental right, the state must show a compelling state interest to justify its actions. She believed the *Bagley* test to be an early attempt to formulate a standard for close scrutiny when indirect burdens are placed on fundamental rights. Since the Chief Justice believed that no distinction exists between direct and indirect burden scrutiny, she applied the traditional strict standard of compelling state interest. 29 Cal. 3d at 289-90 n.2, 625 P.2d at 801-02 n.2, 172 Cal. Rptr. at 888-89 n.2.

The dissent disagrees with both premises. Justice Richardson, with Justice Clark concurring, argues that the essential question is whether women have a right to abort *free of charge and at taxpayer expense*. 29 Cal. 3d at 298, 625 P.2d at 807, 172 Cal. Rptr. at 894 (emphasis in original). He concludes that federal law is controlling and thus *Harris v. McRae* should be followed.

13. 65 Cal. 2d at 505-07, 421 P.2d at 414-15, 55 Cal. Rptr. at 406-07. *See* note 11 *supra* and accompanying text.

14. People v. Brisendine, 13 Cal. 3d 528, 549-51, 531 P.2d 1099, 1112-14, 119 Cal. Rptr. 315, 328-30 (1975). The California Supreme Court, in interpreting the state constitution, imposed higher standards upon law enforcement officers regarding searches and seizures than the standards required by the United States Constitution as interpreted by the United States Supreme Court.

15. As the *Myers* court noted, "we have on numerous occasions construed the California Constitution as providing greater protection than that afforded by parallel provisions of the United States Constitution." 29 Cal. 3d at 261 n.4, 625 P.2d at 783-84 n.4, 172 Cal. Rptr. at 870-71 n.4. *See, e.g.*, People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978) (protection against self-incrimination); People v. Hannon, 19 Cal. 3d 588, 564 P.2d 1203, 138 Cal. Rptr. 884 (1977) (right to speedy trial); Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) (equal protection); People v. Disbrow, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) (protection against self-incrimination); People v. Longwill, 14 Cal. 3d 943, 538 P.2d 75, 123 Cal. Rptr. 297 (1975) (search of arrestees); Curry v. Superior Court, 2 Cal. 3d 707, 470 P.2d 345, 87 Cal. Rptr. 361 (1970) (double jeopardy); Cardenas v.

ris v. McRae.[16]

The Attorney General had argued that *McRae*, and hence, federal law is controlling. However, as the majority pointed out, *McRae* dealt only with the provisions of the federal Constitution; it did not address the issue of whether such a funding scheme would be valid under the California Constitution.[17]

In support of its conclusion that California law is controlling, the court compared recent California and United States Supreme Court decisions, which demonstrate the divergence between state and federal law. For example, in *Parrish v. Civil Service Commission*,[18] the California Supreme Court applied the *Bagley* test to the State's practice of conditioning receipt of welfare benefits upon the recipient's waiver of his constitutional right of privacy. The *Parrish* court struck down the practice as unconstitutional.[19] However, in *Wyman v. James*,[20] the United States Supreme Court upheld similar practices under a lesser degree of scrutiny. In *Wirta v. Alameda-Contra Costa Transit District*,[21] the California Supreme Court held invalid a public advertising policy allowing commercial expression but disallowing non-commercial, political expression, since such action could not survive scrutiny under the

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Superior Court, 56 Cal. 2d 273, 363 P.2d 889, 14 Cal. Rptr. 657 (1961) (same); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955) (vicarious exclusionary rule).

16. 448 U.S. 297 (1980). *See* note 2 *supra*.

17. 29 Cal. 3d at 260, 625 P.2d at 783, 172 Cal. Rptr. at 870.

18. 66 Cal. 2d 260, 425 P.2d 223, 57 Cal. Rptr. 623 (1967). The *Parrish* case involved a social worker discharged for insubordination because she declined to participate in a mass morning raid upon the homes of welfare recipients. The court held that the county's failure to secure legally effective consent to search rendered the raids unconstitutional. Further, even if consent had been obtained, the county could not condition receipt of benefits upon the giving of such consent. Because of the unconstitutionality of the raids, the social worker possessed adequate grounds for declining to participate.

19. 29 Cal. 3d at 266, 625 P.2d at 787, 172 Cal. Rptr. at 874.

20. 400 U.S. 309 (1971). In *Wyman*, a recipient of public assistance refused to permit a caseworker to visit her home. Pursuant to her refusal, benefits were terminated. The United States Supreme Court held that such visits were not unreasonable since they served a valid administrative purpose and no right guaranteed under the fourth amendment was violated. 29 Cal. 3d at 266, 625 P.2d at 787, 172 Cal. Rptr. at 874.

21. 68 Cal. 2d 51, 434 P.2d 982, 64 Cal. Rptr. 430 (1967). *Wirta* involved an organization called Women for Peace who attempted to place an advertisement on district operated buses requesting individuals to write to the president asking him to end the Vietnam War. The district refused, contending such advertisement conflicted with their policy of accepting commercial advertisement for the sale of goods only. The court found this to be protected speech and any discrimination violated the first amendment. *See* 29 Cal. 3d at 266, 625 P.2d at 787, 172 Cal. Rptr. at 874.

Bagley test. In contrast, the United States Supreme Court in *Lehman v. City of Shaker Heights*,[22] upheld similar advertising policies. In *Bagley*[23] the California Supreme Court found limitations on the political activities of public employees to be unconstitutional; whereas in *United States Civil Service Comm'n v. National Association of Letter Carriers*[24] the United States Supreme Court upheld similar restrictions on the activities of federal employees.

In addition to distinguishing the applicability of federal law, the court distinguished between the factors used to scrutinize the discriminating schemes under federal and California law. For example, in *McRae*, the federal approach to the constitutionality of funding restrictions focuses on whether additional obstacles are placed in "the path of a woman's exercise of her freedom of choice."[25] The *Myers* court, however, noted that such an approach does not correspond to the California standard; and therefore has no bearing on applying California law.[26] Specifically, California law pursuant to the *Bagley* decision[27] requires that "whenever the state conditions the receipt of a benefit upon a waiver of a constitutional right or discriminatorily withholds such a benefit from individuals who exercise such right, the state must

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22. 418 U.S. 298 (1974). *Lehman* involved a political candidate who attempted to purchase advertising on the rapid transit system owned by the city. The city refused his request because of its policy of not permitting political advertising. *See* 29 Cal. 3d at 266, 625 P.2d at 787, 172 Cal. Rptr. at 874.

23. 65 Cal. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401(1966). *See* note 11 *supra*. In *Bagley*, a hospital employee refused to discontinue her participation in a campaign to recall certain members of the Board of Directors. Her activities involved circulating recall petitions and distributing literature which were confined to her off-duty hours. The Board dismissed her pursuant to a government code section prohibiting public employees from taking an active part in political campaigns. The California Supreme Court struck down the statute as overbroad. *See* Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 171 P.2d 885 (1946); *see also* notes 29 & 30 *infra* & accompanying text.

24. 413 U.S. 548 (1973). The constitutionality of the provisions of the Hatch Act (5 U.S.C. § 7324 (a)(2)) forbidding federal employees to "take an active part in political management or in political campaigns" was upheld by the Supreme Court. The court specifically held that these provisions were not vague and overbroad.

25. 29 Cal. 3d at 267, 625 P.2d at 787, 172 Cal. Rptr. at 874 (*Myers* court quoting the *McRae* decision).

> The California courts . . . have acknowledged both the practical importance of many governmental benefits to individual recipients and the corresponding likelihood that a discriminatory benefit program will effectively nullify important constitutional rights. Thus, California holdings uniformly confirm that the absence of an "additional obstacle" to the exercise of one's constitutional rights does not eliminate the government's burden of demonstrating the propriety of the condition or limitation under the *Bagley* test.

Id. at 268, 625 P.2d at 788, 172 Cal. Rptr. at 875.

26. *Id.*

27. Bagley v. Washington Township Hospital Dist., 65 Cal. 3d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (1966).

demonstrate the propriety of the condition in terms of the governing three-part test."[28]

B. The Bagley Test

The three-part *Bagley* test establishes the standard of scrutiny to be used in determining the constitutionality of certain limitations or restrictions imposed on an individual's constitutional rights. The test does not apply to situations in which the state has no obligation to provide benefits, but rather applies to the situation in which the state has decided to make such benefits available, but withholds the benefits from qualified individuals solely because they choose to exercise a constitutional right.

In *Danskin v. San Diego Unified School District*,[29] the foundation for the *Bagley* test was established. In *Danskin* the state had established a program that allowed private organizations to use public school buildings for public meetings, but excluded other nonfavored groups from using the same facilities. The court held:

> The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. Nor can it make the privilege of holding them dependent on conditions that would deprive any members of the public of their constitutional rights.[30]

In *Myers*, the Attorney General argued that because the state is not obligated to provide benefits in controversy, it may exclude certain recipients solely because they seek to exercise a constitutional right.[31] However, since *Danskin*, the California courts have repeatedly rejected such an argument.[32]

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28. 29 Cal. 3d at 269, 625 P.2d at 788, 172 Cal. Rptr. at 875.
29. 28 Cal. 2d 536, 171 P.2d 885 (1946).
30. *Id.* at 545-46, 171 P.2d at 891.
31. *Id.* at 263, 625 P.2d at 784-85, 172 Cal. Rptr. at 871-72, where the court sums up the Attorney General's argument as follows:

> [T]he state violates no constitutional precept when it does not directly prohibit the protected activity but simply declines to extend a public benefit—in this case publicly funded medical care—to those who choose to exercise their constitutional right in a manner the state does not approve and does not wish to subsidize.

Id.

32. The California courts have "applied the legal principles underlying the *Danskin* decision in a wide variety of factual settings, involving a host of different 'public benefit' programs which conditioned the receipt of benefits on the waiver or forfeiture of a broad range of constitutional rights." *Id.* at 264, 625 P.2d at 785, 172 Cal. Rptr. at 872. *See, e.g.*, City of Carmel-By-the-Sea v. Young, 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970) (public benefit program at issue was access to public employment); Wirta v. Alameda-Contra Costa Transit District, 68 Cal. 2d 51,

The *Bagley* decision itself involved a nurse's aide who was discharged pursuant to former Government Code Section 3205[33] when she refused to continue her off duty pamphleting and petition circulation activities. The court struck down the statute as unconstitutional and established the three-part test that the state must satisfy in order to justify such a scheme.[34]

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434 P.2d 982, 64 Cal. Rptr. 430 (1967) (public benefit program at issue was access to a public forum); Parrish v. Civil Service Commission of the County of Alameda, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964) (public benefit program at issue was access to welfare benefits); Binet-Montessori, Inc. v. San Francisco Unified School District, 98 Cal. App. 3d 991, 160 Cal. Rptr. 38 (1979) (public benefit program at issue was access to public property); Atkisson v. Kern County Housing Authority, 59 Cal. App. 3d 89, 130 Cal. Rptr. 375 (1976) (public benefit program at issue was access to public housing); Thornton v. Dept. of Human Resource Development, 32 Cal. App. 3d 180, 107 Cal. Rptr. 892 (1973) (public benefit program at issue was access to unemployment benefits).

The court points out that this does not mean that the government may never condition benefits on the nonassertion of constitutional rights, but rather, as stated in *Bagley*: "Just as we have rejected the fallacious argument that the power of government to impose such conditions know no limit, so must we acknowledge that government may, *when circumstances inexorably so require*, impose conditions upon the enjoyment of publicly conferred benefits despite a resulting qualification of constitutional rights." 29 Cal. 3d at 264 n.15, 625 P.2d at 786 n.15, 172 Cal. Rptr. at 873 n.15 (emphasis in original).

33. Former CAL. GOVT. CODE § 3205 which related to participation by civil servants in political campaigns, was repealed by statute in 1976. Former Government Code section 3205 provides: "No . . . employee . . . of a local agency shall take an active part in any campaign . . . for or against any ballot measure relating to the recall of any elected official of the local agency."

34. 65 Cal. 2d at 505-07, 421 P.2d at 414-15, 55 Cal. Rptr. at 406-07.
The court expressed the three-part test that the state must satisfy as follows:

> [The state] must establish that the imposed conditions relate to the purpose of the legislation which confers the benefit or privilege. . . .
>
> Not only must the conditions annexed to the enjoyment of a publicly-conferred benefit reasonably tend to further the purpose sought by conferment of that benefit, but also the utility of imposing the conditions must manifestly outweigh any resulting impairment of constitutional rights . . . .
>
> [I]n imposing conditions upon the enjoyment of publicly-conferred benefits, . . . the state must establish the unavailability of less offensive alternatives, and demonstrate that the conditions are drawn with narrow specificity, restricting the exercise of constitutional rights only to the extent necessary to maintain the integrity of the program which confers the benefits.

Id. The court stated that it drew upon prior holdings and scholarly legal commentaries to develop this test, *see* note 25 *supra*. The commentaries include O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached* 54 CAL. L. REV. 443 (1966); Linde, *Constitutional Rights in the Public Sector* 40 WASH. L. REV. 10 (1965); Note, *Unconstitutional Conditions* 73 HARV. L. REV. 1595 (1960); Willcox, *Invasions of the First Amendment Through Conditioned Public Spending* 41 CORNELL L. Q. 12 (1955); Hale, *Unconstitutional Conditions and Constitutional Rights* 35 COLUM. L. REV. 321 (1935); Powell, *The Right to Work for the State* 16 COLUM. L. REV. 99 (1916).

III. Case Analysis

The court analyzed the facts in *Myers* to determine whether the state could meet the three-part constitutional standard test established in *Bagley*:

A. *Do the Conditions Imposed Relate to the Purpose of the Legislation?*

The first part of this test requires the state to "establish that the imposed conditions relate to the purposes of the legislation which confers the benefit or privilege."[35] The purpose of the Medi-Cal program is set forth in the California Welfare and Institutions Code which states: "The purpose [of the Medi-Cal program] is to afford health care and related remedial or preventive services to recipients of public assistance and to medically indigent aged and other persons. . . ."[36] Therefore, in order to meet the first part of this test, the State must establish that the restrictions imposed help "alleviate the hardship and suffering incurred by those who cannot afford needed medical care by enabling them to obtain such medical treatment."[37] Because the restrictions allow funding for abortions only in very limited circum-

35. 65 Cal. 2d at 505-06, 421 P.2d at 414, 55 Cal. Rptr. at 406. As previously noted in this case analysis, an important requirement for applying the *Bagley* test is that some benefit or privilege be conferred. The *Bagley* court elaborated on this requirement by quoting a portion of Justice Frankfurter's concurring and dissenting opinion in American Communications Ass'n v. Doads, 339 U.S. 382, 417 (1950): "Congress may withhold all sorts of facilities for a better life, but if it affords them it cannot make them available in an obviously arbitrary way or exact surrender of freedoms unrelated to the purpose of the facilities." 65 Cal. 2d at 506, 421 P.2d at 414, 55 Cal. Rptr. at 406.

The *Myers* court also noted that in most of the California public benefit cases, the restriction had at least some relation to the purpose of the program. In *Bagley*, (*see* note 19 *supra*), the restrictions were on first amendment activities by those who obtained the benefit of public employment. The restrictions were apparently intended to curtail those activities thought to interfere with effective performance of the public employee's job. In *Parrish* (*see* note 15 *supra*), the restrictions related to the elimination of fraud in the welfare system.

36. Cal. Welf. & Inst. Code § 14000 (West 1980).

37. 29 Cal. 3d at 271-72, 625 P.2d at 790, 172 Cal. Rptr. at 877. The court compares the denial of benefits in this case with a California case decided over 25 years ago: Housing Authority v. Cordova, 130 Cal. App. 2d Supp. 883, 279 P.2d 213 (1955). In *Cordova*, the Los Angeles Housing Authority had a policy of excluding so-called subversives from public supported low rent housing projects. The *Cordova* court found the exclusionary policy unconstitutional: "The purpose of the [housing act] is to eradicate slums and provide housing for persons of low-income class . . . . It is evident that the exclusion of otherwise qualified persons solely because of membership in organizations designated as subversive by the Attorney

stances, the court held that these restrictions "directly impede this fundamental purpose."[38]

The court noted that the only way the State can show a relationship between the Budget Act limitations and the purpose of the Medi-Cal program is by claiming that Medi-Cal seeks to protect the life and health of the fetus.[39] However, as discussed in the second part of the test, such an objective "impermissibly denigrates the woman's right to choice."[40] "Both California and federal authorities establish that, at least prior to viability, the state may not subordinate a woman's own medical interests or her right of procreative choice to the interests of the fetus."[41] The court then turned to the second part of the *Bagley* test.

B. Balancing the Utility of Imposing Restrictions against the Resulting Impairment of Constitutional Rights

The second part of the *Bagley* test requires the State to demonstrate that the "utility of imposing the conditions . . . manifestly outweigh[s] any resulting impairment of constitutional rights."[42] The court began by examining the nature and importance of the constitutional rights at issue.[43] Both the right to life and the right

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General has no tendency whatever to further such purpose." 130 Cal. App. 2d Supp. at 888, 279 P.2d at 218.

38. 29 Cal. 3d at 272, 625 P.2d at 790, 172 Cal. Rptr. at 877. The court notes that even if an abortion represents the appropriate medical treatment, the statute virtually barred payment and thus subjected the woman to significant health hazards, and in some cases death. *Id. See* 29 Cal. 3d at 272 n.21, 625 P.2d at 790-91 n.21, 172 Cal. Rptr. at 877-78 n.21, where the court makes reference to an extensive factual hearing by the trial court in *McRae* and sets out certain hazards to the health of indigent women presented by the California Budget Act limitations.

39. *Id.* at 273, 625 P.2d at 791, 172 Cal. Rptr. at 878.

40. *Id.*

41. *Id.*

42. 65 Cal. 2d at 506, 421 P.2d at 415, 55 Cal. Rptr. at 407. In undertaking this analysis, the court notes that it

> must realistically assess the importance of the state interest served by the restrictions and the degree to which the restrictions actually serve such interest; further [it] must carefully evaluate the importance of the constitutional right at stake and gauge the extent to which the individual's ability to exercise that right is threatened or impaired, as a practical matter, by the specific statutory restrictions or conditions at issue.

29 Cal. 3d at 273-74, 625 P.2d at 791-92, 172 Cal. Rptr. at 878-79.

43. This approach was derived from cases subsequent to *Bagley*. *See, e.g.*, City of Carmel-by-the-Sea v. Young, 2 Cal. 3d 259, 265-72, 446 P.2d 225, 229-35, 85 Cal. Rptr. 1, 5-11 (1970) (a financial disclosure law required every public officer and each candidate for state or local office to file a statement as to the nature and extent of investments in excess of $10,000); Parrish v. Civil Service Comm'n, 66 Cal. 2d 260, 270-74, 425 P.2d 223, 230-32, 57 Cal. Rptr. 623, 630-32 (1967) (social worker discharged for insubordination for declining to participate in raid of welfare recipients' homes); Finot v. Pasadena City Bd. of Education, 250 Cal. App. 2d 189, 199-

of procreative choice were recognized.[44] With respect to the right to life, the court noted that childbirth and abortion involve a potential risk to the pregnant woman's life and the preservation of her personal health.[45] With respect to the woman's right of procreative choice,[46] the court, citing *People v. Belous*,[47] stated that the restrictions at issue undermine the right of privacy as guaranteed by the California Constitution[48] in addition to her right of procreative choice.[49] The court concluded that these rights are

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202, 58 Cal. Rptr. 520, 527-29 (1967) (tenured teacher transferred to home teaching because he insisted on wearing a beard). *See also* note 16 *supra*.

For a discussion of this balancing process in general, *See* O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CAL. L. REV. 443 (1966); Comment, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144 (1968).

44. "The rights involved . . . are the woman's rights to life and to choose whether to bear children." People v. Belous, 71 Cal. 2d 954, 963, 458 P.2d 194, 199, 80 Cal. Rptr. 354, 359 (1969).

45. "In California, law and medicine recognize that therapeutic abortion is a legitimate medical treatment which may be necessary for the preservation of a pregnant woman's life and health." Ballard v. Anderson, 4 Cal. 3d 873, 879, 484 P.2d 1345, 1349, 95 Cal. Rptr 1, 5 (1971).

46. The court also cites Tribe, American Constitutional Law §§ 15-10 at 924 (1977), for the proposition that the constitutional right of procreation choice is essential for a woman's ability to retain personal control over her body:

> If a man is the involuntary source of a child—if he is forbidden, for example, to practice contraception—the violation of his personality is profound; the decision that one want to engage in sexual intercourse but does not want to parent another human being may reflect the deepest of personal convictions. But if a woman is forced to bear a child—not simply to provide an ovum, but to carry the child to term—the invasion is incalculably greater . . . . [I]t is difficult to imagine a clearer case of bodily intrusion, even if the original conception was in some sense voluntary.

29 Cal. 3d at 274, 625 P.2d at 792, 172 Cal. Rptr. at 879.

47. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969). In *Belous*, a doctor gave out the phone number of another doctor who performed abortions in Tijuana to a heavily distraught couple threatening to have an abortion one way or another. The doctor was arrested pursuant to former California Penal Code Section 274 which provided for imprisonment for anyone helping to procure the miscarriage of a woman unless necessary to preserve her life. The court held that the statute could not withstand the constitutional challenge of vagueness.

48. Cal. Const., art. 1, § 1.

49. "The fundamental right of the woman to choose whether to bear children follows from the Supreme Court's and this court's repeated acknowledgement of a 'right of privacy' or 'liberty' in matters related to marriage, family and sex." 71 Cal. 2d at 963, 458 P.2d at 194, 80 Cal. Rptr. at 359.

"[I]f the right of privacy means anything, it is the right of the *individual* . . . to be free from unwarranted governmental intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (original italics).

The *Myers* court also states that "[t]his right of personal choice is central to a woman's control not only of her own body, but also to the control of her social role

"clearly among the most intimate and fundamental of all constitutional rights."[50]

The extent to which the limitations in controversy would impair these aforementioned rights was then examined. Various factors inherent in the program itself were cited to support the finding that the actual impairment was severe.[51] Since medical expenses under the Medi-Cal program are available only to the poor, the only women affected are those who lack the ability to pay for an abortion on their own.[52] In this respect, the state is utilizing its resources to force these women to exercise their right of procreative choice in a manner approved by the state.[53]

Comparing prior California case law, the court noted that the present restrictions were significantly greater than those previously imposed and invalidated. In *Danskin*,[54] even though the restrictions imposed denied disfavored persons the use of public school buildings, it did not preclude them from holding meetings or disseminating their views to the public.[55] In *Bagley*,[56] the limitations restricted the public employees' free speech rights but did not preclude the individual from engaging in all political activity.[57]

Three interests are identified by the court as possible benefits which the state might derive from the restrictions in controversy: (1) conserving state expenditures; (2) encouraging childbirth and (3) protecting the potential life of the fetus. Under the *Bagley* test, these interests must manifestly outweigh the individual's rights and the impairment thereof.[58] With respect to conserving state expenditures, the court noted that "whatever money is

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and personal destiny." 29 Cal. 3d at 275, 625 P.2d at 792, 172 Cal. Rptr. at 879 (citing Karst, *The Supreme Court, 1976 Term: Toward Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57-58 (1977)).

50. 29 Cal. 3d at 275, 625 P.2d at 793, 172 Cal. Rptr. at 880.

51. *Id.* at 275-76, 625 P.2d at 793, 172 Cal. Rptr. at 880. The court noted that the limited availability of financing abortions through private charities is exemplified by the Medi-Cal program itself.

52. *Id.* at 275-76, 625 P.2d at 793, 172 Cal. Rptr. at 880.

53. Justice Brennan, in his dissenting opinion in *McRae*, had similar objections: "By funding all of the expenses associated with childbirth and none of the expenses incurred in terminating pregnancy, the Government literally makes an offer that the indigent woman cannot afford to refuse." 448 U.S. at 333-34.

54. *See* note 29 *supra* and accompanying text.

55. 29 Cal. 3d at 276, 625 P.2d at 793, 172 Cal. Rptr. at 880.

56. *See* notes 11 and 36 *supra*.

57. 29 Cal. 3d at 27, 625 P.2d at 79, 172 Cal. Rptr. at 881.

58. The court recognized that "only the most compelling of state interests could satisfy this test." 29 Cal. 3d at 276, 625 P.2d at 793, 172 Cal. Rptr. at 880. The court pointed out that this analysis clearly parallels the judicial scrutiny used to determine whether an enactment denies equal protection of the law. Since the court believed that no compelling state interest exists, the restrictions in controversy also violate equal protection principles. Because of the similarity of princi-

saved by refusing to fund abortions will be spent many times over in paying maternity care and childbirth expenses and supporting the children of indigent mothers."[59] Concerning the interest of encouraging childbirth, the court noted that the "California Legislature has not embraced a general policy of encouraging *unwanted* children"[60] since under the present provisions funds are authorized to pay for medical expenses for contraception and sterilization.[61] As for the third state interest of protecting the potential life of the fetus, the court believed this to be a legitimate interest underlying the funding restrictions in controversy. It recognized, however, that this interest contravenes the woman's right of procreative choice.[62] An important distinction was made by the court on this issue. It noted that a similar argument was advanced by the State of Texas in *Roe v. Wade*.[63]

In *Roe*, the Supreme Court distinguished between the State's interest in a viable versus a nonviable fetus,[64] by holding that prior to the third trimester the state may regulate only to protect the woman's health—not to protect the fetus.[65] The *Myers* court found that the Budget Act limitations fail to make this distinction; the limitations subordinate the woman's right of procreative choice to the lesser state interest of protecting a nonviable fetus.[66] In addition, the court noted that California decisions do not

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ples, however, the court saw no need to undertake a separate analysis of equal protection defects. *Id.* at 276 n.22, 625 P.2d at 793 n.22, 172 Cal. Rptr. at 880 n.22.

59. 29 Cal. 3d at 277, 625 P.2d at 794, 172 Cal. Rptr. at 881. The court also cites Williams v. Zbaraz, 448 U.S. 358 (1980), a companion case to *McRae*, where it was estimated that similar restrictions would impose an additional cost of $20,000,000 per year. In addition, the trial court in *Zbaraz* found the average cost of an abortion to be less than $150.00 while the average cost of childbirth exceeded $1,350.00. 29 Cal. 3d at 277 n.23, 25, 625 P.2d at 794 n.23, 25, 172 Cal. Rptr. at 881, 23, 25.

60. 29 Cal. 3d at 278, 625 P.2d at 795, 172 Cal. Rptr. at 882 (emphasis in original).

61. *Id.*

62. "[T]he state is not merely proposing to protect a fetus from general harm, but rather is asserting an interest in protecing a fetus vis-à-vis the woman to whom the fetus is an integral part. Such a claimed interest, of course, clashes head-on with the woman's own fundamental right of procreative choice." *Id.* at 279, 625 P.2d at 795, 172 Cal. Rptr. at 882.

63. 410 U.S. 113 (1973). The State of Texas argued that its asserted interest in protecting the fetus justified criminal proscriptions on abortion.

64. During the first two trimesters the state has no compelling interest in protecting the fetus. Therefore, prior to the third trimester, the state may regulate only to protect the woman's health. Only in the third trimester may the state enact restrictions to protect the fetus. 410 U.S. at 164-65.

65. *Id.*

66. "The Budget Act seeks to limit first and second trimester abortions, not for the permissible purpose of protecting the woman's health, but to protect the fetus

support the State's contention of an interest in protecting the potential life of the fetus. This interest was asserted in *Belous*,[67] where the court held that this interest was derived from statutes and rules that "required a live birth or reflect the interest of the parents."[68] Further support was found in the amendment to the California Constitution providing explicit protection for the right of privacy.[69] The right of procreative choice is an aspect of the right of privacy and, under the California Constitution, is at least as broad as that described in *Roe v. Wade*.[70] Therefore, the State's interest in protecting the fetus is subordinate to the woman's right of privacy.[71]

From the foregoing analysis, the court concluded that the alleged benefits do not manifestly outweigh the resulting impairment of constitutional rights. The state had therefore failed to meet the second part of the *Bagley* test.

C. *Less Offensive Alternatives for Achieving the State's Objective*

The third and final part of the *Bagley* test requires the State to adopt the least offensive alternative to achieve a legitimate state interest.[72] The court noted that if the Budget Act restrictions are intended to prevent indigent women from obtaining abortions, this third part failed because "the state's interest in protecting

. . . . In short, Roe v. Wade settled that protection of a nonviable fetus is not a compelling state interest." 29 Cal. 3d at 279-80, 625 P.2d at 795-96, 172 Cal. Rptr. at 882-83. The court continues by noting that McRae did not detract from that holding. Rather, the *McRae* holding was based on the court's finding that no new obstacle to abortion was imposed. "That proposition, as we have explained, is inconsistent with California constitutional law." *Id.* at 280, 625 P.2d at 796, 172 Cal. Rptr. at 883.

67. *See* note 47 *supra*.

68. 71 Cal. 2d at 967-68, 458 P.2d at 202, 80 Cal. Rptr. at 362.

69. *See* note 48 *supra*.

70. The court cites City of Santa Barbara v. Adamson, 27 Cal. 3d 123, 610 P.2d 436, 164 Cal. Rptr. 539 (1980), wherein the court discusses the breadth of the federal right of privacy, concluding that it appears to be narrower than the right to privacy under the California Constitution. *Id.* at 130 n.3, 610 P.2d at 440 n.3, 164 Cal. Rptr. at 543 n.3.

71. 29 Cal. 3d at 280-81, 625 P.2d at 796, 172 Cal. Rptr. at 883. In addition, the court found that even if the state could assert a compelling interest, it doubted whether these restrictions could pass equal protection scrutiny since the state has not undertaken to protect all fetuses by promoting their interest over the constitutional rights of all women. *Id.* at 281, 625 P.2d at 796, 172 Cal. Rptr. at 883. *See* note 58 *supra*. The court also notes that it has been more critical of restrictions on the constitutional rights of the poor than it has been on the rest of society. *Id.* (citing Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976) and In re Antazo, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970).

72. The court notes that this requirement also parallels judicial scrutiny under equal protection principles. 29 Cal. 3d at 282 n.28, 625 P.2d at 797 n.28, 172 Cal. Rptr. at 884 n.28. *See also* note 18 *supra*.

the fetus cannot be pursued by subordinating the woman's right of procreative choice."[73] The Attorney General, in an effort to avoid this result, had asserted that the restrictions are an effort to aid poor women who have already decided to bear a child but cannot afford the expenses of childbirth.[74] This argument was summarily dismissed by the court "since the state could readily meet the needs of indigent women without burdening their right of procreative choice simply by funding impartially the expenses of childbirth and abortion."[75] The court therefore, found that the third part of the test had also not been satisfied.

IV. IMPACT

The *Myers* decision precludes the State from restricting Medi-Cal funding for abortions unless it can do so with respect to all women and all fetuses,[76] and can demonstrate a compelling state interest for its action.[77] The decision itself is limited to Medi-Cal funding; however, the rationale can be extended to any attempted restriction on abortion. Since the right of procreative choice is a fundamental right under the California Constitution,[78] the State may only restrict this right by demonstrating a compelling state interest.[79] In addition, the court adopted the *Roe v. Wade* rationale that, prior to the third trimester, the state's interest in protecting the fetus is subordinate to the woman's right of privacy.[80] Prior to the third trimester the State may only regulate to protect the woman's health. Thus, if the State's interest is to protect the

73. 29 Cal. 3d at 283, 625 P.2d at 797, 172 Cal. Rptr. at 884. The court is merely noting that such a purpose would not survive the second part of the Bagley test.
74. *Id.*
75. *Id.* In addition, the court contended that the legislative background of the statute belies the Attorney General's suggestion because no additional aid is provided for those who choose to have a child, but rather curtails the funds previously available to those who decide to have an abortion. *Id.* at 283, 625 P.2d at 798, 172 Cal. Rptr. at 885. The court cites The Pregnancy Freedom of Choice Act, CAL. WELF. & INST. CODE § 16145 *et seq* (West 1980) for an example of a program designed to aid indigent women who choose to bear children without infringing upon the rights of those who choose abortion. *Id.* at 283 n.29, 625 P.2d at 797-98 n.29, 172 Cal. Rptr. at 884-85 n.29.
76. *See* note 72 *supra.*
77. *See* note 58 *supra.*
78. *See* notes 42 and 49 *supra.*
79. "[A] woman's right to choose may be infringed only by regulations necessary to further a compelling interest." 29 Cal. 3d at 280, 625 P.2d at 796, 172 Cal. Rptr. at 883, *citing* People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).
80. *See* notes 61-66 *supra* and accompanying text.

fetus, it can place restrictions on abortion only during the third trimester.[81]

Myers reaffirms that whenever the state undertakes to provide benefits to the public, the three-part *Bagley* test will be used to scrutinize any action by the state that attempts to withhold those benefits from an otherwise qualified individual solely because the individual chooses to exercise a constitutionally protected right. As the court noted, such action may be subject to equal protection scrutiny as well.[82]

The *Myers* decision will affect countless numbers of pregnant women on Medi-Cal, who would otherwise be forced to choose between having the child or, if possible, finding another source of funding. An alternative holding would have undoubtedly had a marked social, as well as economic, impact.[83]

V. CONCLUSION

The *Myers* decision is easily distinguishable from *McRae*. Each decision is based upon divergent premises. *McRae* was decided under the federal constitution. *Myers* was based on the guarantees of the California Constitution, which have consistently afforded greater protection to California citizens. Secondly, *McRae* used a minimum scrutiny test; the court merely looked to see whether any new obstacle to abortion was imposed. *Myers*, however, employed the strict scrutiny *Bagley* test, which is similar to an equal protection analysis. *Myers* is best viewed as the latest in a series of cases exemplifying the California Supreme Court's adherence to guaranteeing the highest degree of constitutional protection to its citizens.

B. ARTICLE VII, SECTION 1, 2, & 3.

1. *The Constitutionality of the State-Employee Relations Act of 1977:* **Pacific Legal Foundation v. Brown**

The California Supreme Court case of *Pacific Legal Foundation v. Brown*[1] involved a constitutional challenge to the State Employer-Employee Relations Act (SEERA) of 1977.[2] The challenge centered on whether the SEERA confers certain powers on the legislature that are specifically reserved in the California Consti-

81. *Id.*
82. *See* note 58 *supra*.
83. *See* notes 49 and 59 *supra*.

1. 29 Cal. 3d 168, 624 P.2d 1215, 172 Cal. Rptr. 487 (1981).
2. CAL. GOV'T CODE §§ 3512-24 (West 1980).

tution for the State Personnel Board.[3] Specifically, the issues addressed in the action were: first, whether SEERA would conflict with the merit principle prescribed in Article VII of the California Constitution;[4] second, whether SEERA controvenes Article VII by allowing the legislature and the Governor to fix salaries, rather than allowing the State Personnel Board to do so;[5] third, whether provisions of SEERA granting the Public Employees Relations Board (PERB) jurisdiction to investigate and devise remedies for unfair practices are contrary to the jurisdiction granted the State Personnel Board under Article VII;[6] and, last, the petitioner's contention that under SEERA, there was an unlawful delegation of legislative authority and an infringement of the gubernatorial veto power.[7]

The court began its analysis by providing a history of the acts leading up to the SEERA provisions and a general policy discussion regarding the need for continuing legislation in the area of employer-employee relations.[8] The court carefully outlined the

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3. Certain powers are reserved for the State Personnel Board. CAL. CONST. art. VII, §§ 1, 2 & 3. The pertinent portion of section one states: "(a) the civil service includes every officer and employee of the state except as otherwise provided in this Constitution. (b) In the civil service permanent appointment and promotion shall be made under a general system based on merit ascertained by competitive examination." Section two states:

> (a) there is a Personnel Board of 5 members appointed by the Governor and approved by the Senate, a majority of membership concurring, for a 10-year term and until their successors are appointed and qualified . . . .

(c) The Board shall appoint and prescribe compensation for an executive officer who shall be a member of the civil service but not a member of the board. Section three states that, "(a) the board shall enforce the civil service statutes and, by a majority vote of all its members, shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions. (b) The executive officer shall adminster the civil service statutes under rules of the board."

4. 29 Cal. 3d at 174, 624 P.2d at 1217, 172 Cal. Rptr. at 489. *See* CAL. CONST. art. VII, § 1(b).

5. 29 Cal. 3d at 174, 624 P.2d at 1218, 172 Cal. Rptr. at 490. *See* CAL. CONST. art. VII, § 3(a).

6. 29 Cal. 3d at 175, 624 P.2d at 1218, 172 Cal. Rptr. at 490. *See* CAL. CONST. art VII, § 3(a).

7. 29 Cal. 3d at 506, 624 P.2d at 1234, 172 Cal. Rptr. at 506.

8. For several reasons the court concluded that SEERA modifies the George Brown Act, *see* CAL. GOV'T CODE §§ 3525-36 (West 1980), by strengthening the role of employees. First, SEERA provides exclusive representation on matters of employment relations by employee organizations, whose members are elected by a majority of employees in designated bargaining units. Second, the SEERA requires that the Governor and employee representatives meet in good faith. Finally, any agreements reached must be reduced to "a written memorandum of understanding." 29 Cal. 3d at 177-78, 624 P.2d at 1220, 172 Cal. Rptr at 492.

rationale and the legislative intent of SEERA and noted that the legislative intent was significant in upholding the constitutionality of SEERA.[9]

The petitioners' arguments[10] centered on the conflict between SEERA and Article VII. The first argument was rejected because the expressed "sole aim" of the original ballot argument accompanying the Act was to follow the constitutional mandate of Article VII.[11] This intent to follow the constitutional mandate was particularly evident in the preamble to SEERA.[12] The petitioners' second argument was dismissed as groundless because the court found that Article VII did not, and has never, assigned the responsibility of salary fixing to the State Personnel Board. Instead, the court found that the Board could proscribe classifications of jobs, but that this function did not encompass actual salary fixing.[13] The court relied upon numerous California cases for the premise that it has always been a legitimate function to fix salaries.[14]

The petitioner's third argument was centered on a challenge to the SEERA constitutionality, focusing on a proposed jurisdictional conflict with the PERB.[15] The court, however, stated that, in many areas, there was no overlap with the State Personnel

9. 29 Cal. 3d at 202, 624 P.2d at 1235, 172 Cal. Rptr. at 507.

10. *See* notes 4-7 *supra* and accompanying text.

11. The ballot argument stated that "[t]he purpose of this constitutional amendment is to promote efficiency and economy in State government. The sole aim of the act is to prohibit appointments and promotion in State service except on the basis of merit, efficiency and fitness ascertained by competitive examination." 29 Cal. 3d at 182, 624 P.2d at 1222, 172 Cal. Rptr. at 494.

12. California Government Code section 3512 states that "[n]othing in this chapter shall be construed to controvene the spirit or intent of the merit principle in state employment, nor to limit the entitlements of state civil services employees, . . . provided by Article VII of the California Constitution or by laws or rules enacted pursuant thereto." CAL. GOV'T CODE § 3512 (West 1980).

13. 29 Cal. 3d at 186-96 624 P.2d at 1225-31, 172 Cal. Rptr. at 497-503.

14. *See* State Trial Attorneys Ass'n v. State, 63 Cal. App. 3d 298, 303, 133 Cal. Rptr. 712, 715 (1976); California State Employees' Ass'n v. State, 32 Cal. App. 3d 103, 107-08, 108 Cal. Rptr. 60, 63-64 (1973); Procter v. S.F. Port Authority, 266 Cal. App., 2d 675, 72 Cal. Rptr. 248 (1968); Raymond v. Christen, 24 Cal. App. 2d 92, 74 P.2d 536 (1937).

The one case cited by the petitioners in support of their position was specifically disapproved. 29 Cal. 3d at 192, 624 P.2d at 1229, 172 Cal. Rptr. at 501. The decision relied upon by the petitioners, Fair Political Practices Comm'n v. State Personnel Bd., 77 Cal. App. 3d 52, 143 Cal. Rptr. 393 (1978), did contain language that would allow the State Personnel Board to fix salaries. This case was disapproved to the extent it conferred such authority, for their "power does not include the power to set salaries." 29 Cal. 3d at 192, 624 P.2d at 1229, 172 Cal. Rptr. at 501.

15. Specifically, the petitioners argued "that the provisions of SEERA granting PERB jurisdiction to investigate and devise remedies for unfair practices are irreconcilably in conflict with the State Personnel Board's jurisdiction to 'review disciplinary actions' under article VII, section 3, subdivision (a)" of the California Constitution. 29 Cal. 3d at 196, 624 P.2d at 1231, 172 Cal. Rptr. at 503.

Board's "disciplinary action" jurisdiction, and, even in those areas where there may be an overlap, rules of construction are sufficient to resolve the matter and would prevail.[16] The court expressed the view that harmony, not conflict, was expected between the separate authorities. Numerous analogies and examples were used by the court to show a growing pattern of harmonizing principles in dealing with overlapping jurisdictions.[17]

The petitioners' final argument was summarily dismissed as being without merit because nothing in the SEERA would, in any way, controvene the precept of the gubernatorial veto power.[18] The court distinguished the type of areas to be dealt with by the SEERA from areas calling for fundamental policy considerations and found that there had been no wrongful delegation of power.[19]

In conclusion, the court upheld every challenged aspect of the SEERA and made clear that the intent behind the legislative enactment was a deciding factor in its decision.[20]

VIII. REAL PROPERTY LAW

A. Boundary Designation

1. *Designation of Property Lines of Real Property Adjoining Navigable Non-tidal Waters*: **California v. Superior Court of Lake County**

In *California v. Superior Court of Lake County*,[1] the court clari-

16. 29 Cal. 3d at 196-97, 624 P.2d at 1232, 172 Cal. Rptr. at 504.
17. For example, the Fair Employment and Housing Commission is afforded authority analogous to that authority afforded to PERB. CAL. GOV'T CODE §§ 12960-70 (West 1980). *See, e.g.*, Kaplan's Fruit & Produce Co. v. Superior Court, 26 Cal. 3d 60, 603 P.2d 1341, 160 Cal. Rptr. 745 (1979); San Diego Teachers Ass'n v. Superior Court, 24 Cal. 3d 1, 593 P.2d 838, 154 Cal. Rptr. 893 (1979); Vargus v. Municipal Court, 22 Cal. 3d 902, 587 P.2d 714, 150 Cal. Rptr. 918 (1978).
18. 29 Cal. 3d at 201-02, 624 P.2d at 1234-35, 172 Cal. Rptr. at 506-07.
19. *Id.* The court asserted that SEERA is concerned with matters regarding the "details of the wages, hours and working conditions of employees covered by the act," not with the deciding of fundamental policy questions. *Id.* at 201, 624 P.2d at 1234, 172 Cal. Rptr. at 506.
20. Justice Richardson authored a dissenting opinion in the case, stating that SEERA "is plainly unconstitutional as a gross infringement upon the powers of the State Personnel Board . . . ." 29 Cal. 3d at 203, 624 P.2d at 1235, 172 Cal. Rptr. at 507.

1. 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981). In this case, Lyon, the real party in interest, owned 800 acres along the shore of Clear Lake, 500 acres of which was known as Anderson Marsh. The water level of the marsh fluctuates

fied an ambiguous area of California water law by declaring that the owners of land along the shoreline of navigable, nontidal waters at one time had title to that land between the low and high water marks, but that such title was held subject to a public trust.

The dispute between the parties in this case centered on the interpretation of the confusing history of California case law. Lyon, owner of the marshland in question, asserted that the State had never acquired title to the beds underlying navigable, nontidal waters above the low water mark because, upon admission to the Union, it had adopted English common law, which held that the sovereign could make no claim to lands underlying nontidal waters.[2] Consequently, Lyon argued, when the state enacted section 830 of the California Civil Code in 1872, it determined to claim only that land underlying nontidal navigable water to the low water mark.[3]

In a cross-claim filed by the State, it was asserted that title to the high water mark of the marshlands was acquired by virtue of the State's sovereignty. The State further contended that section 830 of the Civil Code only set forth a rule of construction for deeds and did not lay down a rule of property law.

The California Supreme Court noted that although the State had adopted the common law of England upon its admission to the Union, it did not require courts to adhere to the English rules

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seasonally. Lyon, who wished to develop the property, sought a permit to repair a levee which would reclaim the marshland. The California Fish and Game Commission notified Lyon that his application could not be processed since the State claimed ownership of the marsh to the low water mark. When Lyon filed suit to quiet title and for declaratory relief, the State cross-claimed. The trial court held that no portion of the marsh above the low water mark was state property, but that the waters between the low and high water marks were subject to a public servitude or trust. This ruling has considerable importance in California, since it affects more than 4,000 miles of shoreline along thirty four navigable lakes and thirty one navigable streams.

2. In English common law, there were clear rules of ownership regarding the beds of tidal and nontidal waters. Only tidal waters were considered navigable while nontidal lakes and streams were privately owned, with ownership extending to the middle of the lake or stream. The beds of navigable waters belong to the crown, and the King held such property in a public trust. 29 Cal. 3d at 218, 625 P.2d at 243, 172 Cal. Rptr. at 700.

3. Section 830 of the California Civil Code reads that "[e]xcept where the grant under which the land is held indicates a different intent, the owner of the upland, . . . when it borders upon a navigable lake or stream, where there is no tide, . . . takes to the edge of the lake or stream, at low—water mark . . . ." CAL. CIV. CODE § 830 (West 1954). This is meant to be read in conjunction with § 670 of the Civil Code and § 2077 of the Code of Civil Procedure. Section 670 provides that the State is the owner of "all land below the water of a navigable lake or stream . . . ." CAL. CIV. CODE § 670 (West 1954). Section 2077 sets forth constructional rules in ambiguous cases, declaring that deeds to lands bordering navigable, nontidal lakes are to be construed as conveying the right of the granter to the low water mark. CAL. CIV. PRO. CODE § 2077 (West 1955).

if they were inapplicable to circumstances found in California.[4] The court also relied heavily upon the interpretations of section 830 by the State Land Commission,[5] other state administrative agencies, and the state legislature,[6] which have all consistently held that the State claimed ownership to the only low water mark.[7]

The second issue decided by the court concerned the nature of the public trust imposed upon the land. The nature of a public trust was described in *City of Berkeley v. Superior Court*,[8] where the court held that tidelands are owned by the public and that the State holds these lands in trust for the people for their use for commerce, navigation, fishing, and other purposes, and that this trust is retained even though title to the tidelands has been conveyed to private persons, unless the conveyance has promoted the purposes of the trust.

Lyon asserted that there had never been a doctrine that non-tidal, navigable waters were subject to such a trust. Rather, he asserted that they were subject to a recreational or navigational easement which allowed the public to use the waters only when above the low mark. Thus, the bed belonged solely to the riparian owner, such that when water receded back to the low mark, the public's right to use the area receded with it.

In response, the State argued that Article XV, section 4 of the California Constitution[9] provides for freedom of access to, and the

4. The court also noted that the English rule was obviously inappropriate as the nation expanded westward, where there were great rivers and lakes which were navigable in fact, even though they were not subject to the ebb and flow of the tide." 29 Cal. 3d at 218-19, 625 P.2d at 244, 172 Cal. Rptr. at 701. These distinctions, and the inapplicability of the common law to the conditions in much of the United States, were recognized by the United States Supreme Court in Propeller Genesee Chief v. Fitgheyn, 53 U.S. (12 How.) 443 (1857), and Barney v. Keokuk, 94 U.S. 324 (1876). In 1856, the California Supreme Court held that the tidal character of a body of water was not a proper test of its navagability. American Water Co. v. Amodin, 6 Cal. 443 (1856).

5. The files contain hundreds of letters stating or implying that the State's ownership extends waterward of the low water mark. 29 Cal. 3d at 225, 625 P.2d at 247, 172 Cal. Rptr. at 704.

6. The State conveyed to Lake County its title to Clear Lake, in trust. The grant assumes that the State takes to the low water mark. *Id.* at 225, 625 P.2d at 248, 172 Cal. Rptr. at 705.

7. *See* 43 Op. Cal. Att'y Gen. 291 (1964); 30 Op. Cal. Att'y Gen. 262 (1957); 23 Op. Cal. Att'y Gen. 306 (1954); 23 Op. Cal. Att'y Gen. 97 (1954).

8. 26 Cal. 3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

9. The California Constitution states that:

No individual, partnership, or corporation, claiming or possessing the

right of navigation upon, waters that are navigable, with no distinction made as to whether the waters are tidal or nontidal. The court, citing *Illinois Central Railroad Company v. Illinois*,[10] held that the public trust doctrine is equally applicable to nontidal as well as tidal waters.

A further argument offered by Lyon was that with respect to the area between the low and high water marks, the public trust applies only to the water itself, and not to the land underneath. The court saw no justification for such a proposition, and held that Lyon's view of the trust was much too narrow and failed to recognize the public's right to recreational and navigational uses of California waterways.[11]

The final argument offered by Lyon was that his ownership of the marsh to the low water mark constituted a rule of property, and that to impress the property with a trust amounted to a compensable taking of private property.[12] The Court dismissed this

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> frontage or tidal lands of . . . navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CAL. CONST. art. XV, § 2.

Numerous cases hold that California owns the land under navigable water in trust, without distinction as to whether the waters are tidal or nontidal. *See* Colberg, Inc. v. California, 67 Cal. 2d 408, 432 P.2d 3, 62 Cal. Rptr. 401 (1967); Boone v. Kingsbury, 206 Cal. 148, 273 P. 797 (1928); People v. Gold Run D & M Co., 66 Cal. 138, 4 P. 1152 (1884).

10. 146 U.S. 387 (1892). *Illinois Central* involved a grant from the state of 1,000 acres of the bed of Lake Michigan (the entire harbor of the City of Chicago) to the Illinois Central Railroad. The Supreme Court rejected the premise that the doctrine of a public trust was inapplicable to Lake Michigan simply because there was no appreciable tide. "The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide." *Id.* at 436. Lyon attempted to distinguish *Illinois Central* on the ground that Lake Michigan is an enormous body of water essential to the commercial vitality of the Great Lakes region. The California Supreme Court responded by noting that because no distinctions are made when applying the trust doctrine between large and small bodies of tidal water, none should be made between large and small bodies of nontidal water. 29 Cal. 3d at 228, 625 P.2d 249-50, 172 Cal. Rptr. at 706-07.

11. Lyon asserted that because tidelands are subject to inundation on a daily basis and nontidal waters are inundated only seasonally, tidelands are constantly subject to use for commerce, navigation, and fishing, while the land between the low and high marks of nontidal water is useful during only a limited portion of the year, thus greatly reducing the necessity for a public trust. 29 Cal. 3d at 240, 625 P.2d at 257, 172 Cal. Rptr. at 708.

12. *See* Abbott v. City of Los Angeles, 50 Cal. 2d 438, 326 P.2d 484 (1958). Here, the court defined a rule of property as:

> A settled rule or principle, resting usually on precedents or a course of decisions, regulating the ownership or devolution of property. . . . The principle appears to be an extension of the "stare decisis" rule, which . . .

argument, emphasizing that Lyon was not deprived of the use of the lands between low and high water, and that he may use the area for any purpose not incompatible with the public interest.[13]

Justice Clark filed a strong opinion, in which he both concurred and dissented with the court's holding. He noted that, in this case, there was an important distinction to be made between tidal and nontidal waters since much of California's rich farmland is reclaimed marshland, and that the benefits derived from the establishment of the trust were strongly outweighed by the removal of these areas from agricultural productivity.[14]

2. *Designation of Property Lines of Property Adjoining Navigable Non-Tidal Waters:*

California v. Superior Court of Placer County

In *California v. Superior Court of Placer County*,[1] the California

seems to apply with peculiar force and strictness to decisions which have determined questions respecting real property and vested rights . . . .

Id. at 456, 326 P.2d at 494.

13. 29 Cal. 3d at 232, 625 P.2d at 252, 172 Cal. Rptr. at 709.

14. The court stated that:

Application of the trust doctrine to the shorezone is contrary to California public policy. Rather than precluding farming . . . use of the shorezone, the policy has been to encourage reclamation and farming . . . of these properties.

Protection of parts of our historic shorezone for the purposes permitted by the trust is a worthy endeavor but it should not be accomplished with a blunderbuss that confiscates thousands—perhaps millions—of titles, and jeopardizes existing use of . . . farm lands.

Id. at 238, 625 P.2d at 256, 172 Cal. Rptr. at 713.

1. 29 Cal. 3d 240, 625 P.2d 256, 172 Cal. Rptr. 713 (1981). Shoreline owners of Lake Tahoe filed an action for declaratory relief and inverse condemnation and claimed violation of their civil rights pursuant to 42 U.S.C. § 1983 (1976), when the State Lands Commission proposed to record claims of ownership of property between high and low water in navigable nontidal lakes and rivers throughout the State. The plaintiffs' alleged ownership of the lands and claimed that the State wrongfully asserted a public trust. The trial court granted plaintiffs' motion for partial summary judgment, ruling that "no portion of the property involved in this action landward of the last natural low water mark of Lake Tahoe is or ever was sovereign property of the State or subject to the common law public trust for commerce, navigation and fishing. . . ." *Id.* at 243-244, 625 P.2d at 258, 172 Cal. Rptr. at 715. The trial court denied the People's motions for partial summary judgment whereupon the People sought a preemptory writ of mandate to direct the trial court to vacate its order and grant the People's order. *Id.*

The issues in this case are the same as those in State of California v. Superior Court (Lyon), 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981), with the additional two issues discussed above. In *Lyon*, a landowner filed an action against

Supreme Court held that the doctrine of estoppel will not be applied against the government if the result would nullify a strong public policy adopted for the benefit of the public.[2] The court further held that the appropriate standard by which to measure the boundary between public and private ownership of a body of water[3] is the current level of the lake, not the last natural low water mark of the lake, as held by the trial court.[4]

In addressing the estoppel issue, the court noted the four elements necessary to apply the doctrine of equitable estoppel.[5] If the state was barred from asserting a public trust in the lands, the result would be to nullify a strong rule of policy adopted for the benefit of the public.[6] In support, the court reasoned that the shorezone is a fragile and complex resource providing the environment with various species of plants and wildlife. Numerous studies and reports document the adverse effects of reclamation and development of these areas.[7] The need for protection of the

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the state seeking to quiet title to marshland along the shore of a navigable lake. The trial court held in favor of the landowner. The Supreme Court of California rejected the landowner's contention that he held title to the high water mark, but held that he had title to the low water mark. The court further held that nontidal waters were subject to the public trust. Thus the landowner's title to such lands was impressed with the public trust and he could use such land in any that was not incompatible with the public's interest.

2. *See, e.g.*, City of Long Beach v. Mansell, 3 Cal. 3d 462, 493, 476 P.2d 423, 91 Cal. Rptr. 23 (1970); County of San Diego v. Cal. Water etc. Co., 30 Cal. 2d 817, 829-830, 186 P.2d 124 (1947).

3. Lake Tahoe is the body of water in question in the present case.

4. The last natural water mark was prior to the construction of a dam in 1870.

5. As Justice Sullivan stated in City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970), there are four elements necessary to apply the doctrine:

> (1) the party to be estopped must be apprised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury.

Id. at 489, 476 P.2d at 442, 91 Cal. Rptr. at 42.

6. Under the public trust, land is owned by the state "in trust for the public, for their use for commerce, navigation, fishing, recreation or for the purpose of preserving the property in its natural state." State of California v. Superior Court (Lyon), 29 Cal. 3d at 226, 625 P.2d at 248, 172 Cal. Rptr. 705 (1981). The public trust applies to the land in question. 43 *Op. Cal. Att'y Gen.* 288, 294 (1964). The fact a private landowner has title to tidewaters does not establish that the ownership is free of the public interest. See, e.g., People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913).

7. *See, e.g.*, U.S. Dept. of Agriculture, Forest Service (1973), General Plan for Management of Nat. Forest Lands, Lake Tahoe Basin, Review Draft, Lake Tahoe Management Unit, South Lake Tahoe 1, 2; California Dept. Fish and Game, Fish and Wildlife Res. of Anderson Marsh, Clear Lake, Lake County (1974); California Dept. Fish and Game, 1 Fish and Wildlife Plan 14 (1966).

Justice McComb regarding the public use of tidelands:

> There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—

shorezone was recognized by the legislature in its enactment of various statutes designed to protect the region.[8] The court did not agree with the plaintiffs' assertions that the public interest in preserving the lake would be enhanced by private rather than public ownership and that there are regulations limiting the owner's use which are adequate to protect the public's interest.[9] The court noted that since four thousand miles of California lakes and streams will be affected, the shorezone of Lake Tahoe is not the only concern. Thus, preservation of the public trust allows state flexibility in determining the appropriate use of the land. Police power has not proved to be an effective means of protection thus far. The court concluded that the state may not be estopped from asserting the rights of the public in those lands.[10]

In addressing the issue of the boundary between public and private ownership,[11] the court agreed with the state that the measuring of the boundary line between public and private ownership which existed prior to the dam's construction, as asserted under the plaintiffs' proposed standard, would create an evidentiary problem. In addition, the dam has been in existence since 1870

> is a preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.

8. CAL. PUB. RES. CODE §§ 5093.50, 5811 (West Supp. 1981).

§ 5093.50 provides that:

> It is the policy of the State of California that certain rivers which possess extraordinary scenic, recreational, fishery or wildlife values, shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of Section 3 of Article XIV of the State Constitution. It is the purpose of this chapter to create a California Wild and Scenic Rivers System to be administered in accordance with the provisions of this chapter.

§5811 provides that:

> the remaining wetlands of this state are of increasingly critical economic, aesthetic, and scientific value to the people of California, and . . . there is need for an affirmative and sustained public policy and program directed at their preservation, restoration, and enhancement, in order that such wetlands shall continue in perpetuity to meet the needs of the people.

9. Plaintiffs' contend that the problems at Lake Tahoe are related to a large influx of people. This influx contributes to pollution and overuse of the beach and forest areas. The owners further contend that the best preserved areas are privately owned.

10. 29 Cal. 3d at 247, 625 P.2d at 260, 172 Cal. Rptr. at 717 (1981).

11. The issue of whether the 1870 water mark or the current water level is the appropriate standard; the court has no direct authority to rely on. 29 Cal. 3d at 247, 625 P.2d at 260, 172 Cal. Rptr. at 717 (1981).

and as such, the period required for acquisition of property by prescriptive rights has passed.[12] Other jurisdictions have held that a landowner loses ownership of property covered by water resulting from construction of a dam if the period for prescriptive rights of acquisition has passed.[13] The artificial condition is deemed to pass from private ownership to the same trust as lands covered by navigable lakes. The maintenance of the artificial condition is enforceable by the state as well as the private owners.[14] The appropriate standard by which to measure the boundary between public and private ownership is the current level of the lake.

The plaintiffs, per the ruling, are permitted to use the shorezone for purposes which are compatible with the public trust. Landowners may continue to use previously built structures in the shorezone as long as the use is not inconsistent with the reasonable needs of the trust. If inconsistent, the plaintiffs' will be compensated for the improvements they constructed.[15]

The minority believes that the public trust applies only to tide and submerged lands, not to shorezones.[16] In *City of Long Beach v. Mansell*,[17] it was established that in appropriate circumstances, the people could be estopped from asserting a trust when the resulting injustice would outweigh public policy. The homeowners and farmers would suffer "great injustice" which outweighs the public trust.

STEPHEN H. DOORLAG

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12. CAL. CIV. CODE § 1007 (West Supp. 1981); CAL. CIV. PROC. CODE § 325 (West 1954).

13. *See, e.g.*, State v. Parker, 132 Ark. 316, 200 S.W. 1014, 1016 (1918), State v. Sorenson, 222 Iowa 1248, 271 N.W. 234, 238-39 (1937).

14. State v. Sorenson, 222 Iowa 1248, 271 N.W. 234 (1937); Chowchilla Farms Inc. v. Martin, 219 Cal. 1, 18, 25 P.2d 435 (1933).

15. CAL. PUB. RES. CODE § 6312 (West 1977); Illinois Central Railroad v. Illinois, 146 U.S. 387, 455 (1892), City of Berkeley v. Superior Court, 26 Cal. 3d 515, 534, 606 P.2d 362, 162 Cal. Rptr. 327 (1980).

16. *See, e.g.*, Clark concurring and dissenting opinion, State of California v. Superior Court (Lyon). 29 Cal. 3d 210, 625 P.2d 239, 172 Cal. Rptr. 696 (1981).

17. City of Long Beach v. Mansell, 3 Cal. 3d 462, 476 P.2d 423, 91 Cal. Rptr. 23 (1970).