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The California Supreme Court Survey: A Review of Decisions: July 1981-December 1981

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

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I. CIVIL PROCEDURE

A. *Lis Pendens During Appeal—Essential elements Required on a Post Judgment Motion to Expunge:* **Peery v. Superior Court**

In *Peery v. Superior Court of Santa Clara County*,[1] the California Supreme Court was given the opportunity to consider various authorities[2] concerning post-judgment motions to expunge a lis pendens based on allegations of bad faith or improper purpose.[3]

The court noted that although only two courts of appeal had considered the issue of post-judgment motions to expunge a lis pendens based on bad faith, they had reached "sharply conflicting conclusions."[4] These two courts had agreed on the appropriate procedure and statutory criteria for ruling on such motions. The only difference between the two decisions was the point in the trial process at which they evaluated these criteria.[5] In *United Professional Planning, Inc. v. Superior Court*,[6] one court of appeal focused only on the plaintiff's motive in commencing the action.[7] On the other hand, the court of appeal in *California-Hawaii Development, Inc. v. Superior Court*,[8] concluded that the plaintiff's motives throughout the course of the litigation and on appeal are to be considered in evaluating a motion to expunge a lis pendens.[9]

In *Peery*, the California Supreme Court followed the line of reasoning established by *California-Hawaii*.[10] The court justified

1. 29 Cal. 3d 837, 633 P.2d 198, 176 Cal. Rptr. 533 (1981).

2. The court noted that only two courts of appeal have considered post-judgment motions to expunge based on such circumstances. *Id.* at 841-42, 633 P.2d at 201, 176 Cal. Rptr. at 536.

3. The post-judgment motion was a motion to expunge a notice of lis pendens. The lis pendens was recorded when Beneficial Standard Properties sued Marriott Corporation for specific performance on an alleged contract to convey real property to Beneficial. Marriott then sold the property to Peery, who brought a suit against Beneficial to obtain declaratory relief from the cloud on the title resulting from the Beneficial-Marriott action. After Peery's suit was consolidated with the original suit, summary judgment was granted to Peery and Marriott. Beneficial then appealed, and Peery made a motion to expunge the lis pendens.

4. *Id.* at 842, 633 P.2d at 201, 176 Cal. Rptr. at 536.

5. *Id.* Both courts held "that for purposes of lis pendens a case is still pending while an appeal is taken." *Id.* Therefore, unless a statutory ground for expungement was established, the lis pendens would remain on record during the pendency of the appeal. *Id.*

6. 9 Cal. App. 3d 377, 88 Cal. Rptr. 551 (1970).

7. *Id.*

8. 102 Cal. App. 3d 293, 162 Cal. Rptr. 365 (1980).

9. *Id.*

10. *See* note 8 *supra* and accompanying text. One of the major reasons that

this rationale by referring to the legislative history behind section 409 of the Code of Civil Procedure[11] dealing with lis pendens. The court noted that it would offend common sense if the law was intended to require good faith only at the outset of the trial process.[12]

Another area of sharp disagreement between the two approaches taken by the courts of appeal concerned the extent to which the merits of the case and trial proceedings could be considered in ruling on the post-judgment lis pendens.[13] Again, the *Peery* court followed the *California-Hawaii* approach but refined the case's nebulous standard.[14] In prior cases, courts had held that a minitrial on the merits of a case to decide a motion to expunge a lis pendens was inappropriate in the prejudgment stage.[15] In *Peery*, however, the court noted that in a post-judgment context, the court is "more inclined to allow consideration of the merits"[16] reflected in the trial court's findings and judgment.[17]

As a result of *Peery*[18], in considering motions to expunge a lis pendens in a post-judgment setting, appellate courts must now consider the plaintiff's motives throughout the entire trial process. Furthermore, the merits of the trial court ruling can be considered and should play an important role in determining whether a post-judgment motion to expunge a lis pendens should be granted. This will result in greater protection for property owners who have a lis pendens recorded against them.

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the *Peery* court accepted the *California-Hawaii* approach was that it gave strong support to property owners by giving them power to escape malicious attempts to force unwarranted settlements through the use of lis pendens. 29 Cal. 3d at 843, 633 P.2d at 202, 176 Cal. Rptr. at 537.

11. CAL. CIV. PROC. CODE § 409 (West Supp. 1981).

12. 29 Cal. 3d at 843, 633 P.2d at 202, 176 Cal. Rptr. at 537.

13. This disagreement arose because of the court's different approaches concerning the point of reference to the plaintiff's motives. The *United Professional* court focused only on the plaintiff's motives in commencing the suit. Therefore, any incidents after the commencement of the suit were seen as irrelevant. As might be expected, the *California-Hawaii* court took the opposite view and considered the merits of the case. *Id.*

14. Peery v. Superior Court of Santa Clara County, *id.* at 844, 633 P.2d at 202, 176 Cal. Rptr. at 537. The court clarified the standard in relation to the test at the pre-judgment step as enunciated in *McLean v. Superior Court*, 29 Cal. 3d 524, 629 P.2d 495, 174 Cal. Rptr. 694 (1981).

15. *See, e.g.*, Malcolm v. Superior Court, 29 Cal. 3d 518, 629 P.2d 495, 174 Cal. Rptr. 694 (1981).

16. 29 Cal. 3d at 844, 633 P.2d at 202, 176 Cal. Rptr. at 537.

17. In making this point, the court stated that "[t]he judgment is an important tool for determining the motives of the party bringing the appeal." *Id.*

18. In *Peery*, the California Supreme Court issued a peremptory writ of mandate to the Santa Clara Superior Court commanding it to vacate its denial of the motion to expunge and to reconsider the motion in light of the motive and substantive allegations of the parties.

II. CLASS ACTIONS

A. *Effect of Failing to Demand a Determination of a Class Action:* California Employment Development Department v. Superior Court

In *California Employment Development Department v. Superior Court*,[1] the California Supreme Court examined the effect of a defendant's failure to object to a determination on the merits of a case prior to challenging the certification of the case as a class action. The defendant demurred to the plaintiff's complaint on two grounds: first, that the plaintiff failed to state a cause of action, and second, that the class should not be certified.[2] The trial court sustained the defendant's demurrer with respect to his contention that the plaintiff had failed to state a cause of action. However, the trial court failed to address the defendant's challenges to the class action.[3] At the appellate level, the court of appeal reversed the decision of the trial court, holding that section 1264 of the Unemployment Insurance Code was unconstitutional.[4]

After that ruling on the merits, the plaintiff filed a motion to have the case certified as a class action. The defendant opposed the motion on the ground that a class could not be certified after a decision had been made on the merits.[5] The trial court held that

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1. 30 Cal. 3d 256, 636 P.2d 575, 178 Cal. Rptr. 612 (1981). The majority opinion was written by Justice Kaus with Chief Justice Bird and Justices Tobriner, Mosk, Richardson, Newman and Broussard concurring.

The real party in interest, Betty Ann Boren (plaintiff), challenged the validity of former § 1264 of the Unemployment Insurance Code because it denied unemployment compensation to employees "who did not provide 'the sole or major support of his or her family' and who left his or her job because of 'marital or domestic duties.'" *Id.* at 259, 636 P.2d at 577, 178 Cal. Rptr. at 613. The plaintiff brought a class action seeking "(1) declaratory judgment that the statute was invalid, (2) injunctive relief to restrain defendants from enforcing [the statute], and (3) mandate to compel defendants to pay plaintiff 'and all other persons similarly situated the unemployment insurance benefits to which they are entitled.'" *Id.* at 260, 636 P.2d at 577, 178 Cal. Rptr. at 613.

2. *Id.* at 260, 636 P.2d at 577, 178 Cal. Rptr. at 613-14.

3. *Id.* at 260, 636 P.2d at 578, 178 Cal. Rptr. at 614. This appeared to be the defendant's pitfall because when the supreme court addressed this issue, it seemed to imply that the defendant had a duty to force the court to rule on the certification of the class prior to its determination on the merits. *See id.* at 623 n.7, 636 P.2d at 579 n.7, 178 Cal. Rptr. at 615 n.7; note 6 *infra* and accompanying text.

4. *Id.* at 260, 636 P.2d at 578, 178 Cal. Rptr. at 614. Prior to the court of appeal's decision, the legislature repealed Unemployment Insurance Code § 1264. CAL. UNEMP. INS. CODE § 1264, *repealed by* 1976 Cal. Stat. 5249, ch. 1169, § 1.

5. 30 Cal. 3d at 261, 636 P.2d at 578, 178 Cal. Rptr. at 614. The defendant also argued that the administrative burdens (*i.e.*, identifying class members and pro-

the defendant waived his right to have a pre-merit determination of the class when he proceeded to litigate the general demurrer.[6] Additionally, the supreme court noted at the outset that if the defendant's opposition to the motion were sustained, the net effect would be to limit monetary relief to the plaintiff.[7]

The court began its analysis by examining the defendant's contention that he had the right to have the class certification issues resolved before the merits of the action were decided. Relying on an earlier decision,[8] the court held that where a defendant "fails to object to or acquiesces in a determination of the merits" before the class action issues are resolved, he waives his right to a pre-merit determination of the class action issues.[9]

The court next addressed the defendants' contention that there had in fact been an objection to the lower court's determination of the merits before certification of the class. The court summarily rejected that argument,[10] noting that the defendant may have intentionally refrained from challenging the class certification with hopes that the plaintiff's claim would be dismissed at an early stage of the proceeding, thereby eliminating the defendant's notification and discovery costs.[11] The court concluded by emphasizing that a class action is particularly appropriate in cases such as this, where a large number of people have been denied governmental benefits because of an invalid statute.[12]

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viding adequate relief) of maintaining a class action outweighed the benefits that would result therefrom. *Id.*

6. *Id.* at 261, 636 P.2d at 578, 178 Cal. Rptr. at 614.

7. See *id.* at 259 n.1, 636 P.2d at 577 n.1, 178 Cal. Rptr. at 613 n.1.

8. Civil Serv. Employees Ins. Co. v. Super. Ct., 22 Cal. 3d 362, 584 P.2d 497, 149 Cal. Rptr. 360 (1978).

9. 30 Cal. 3d at 262, 636 P.2d at 578-79, 178 Cal. Rptr. at 615.

10. *Id.* The court found that nothing in the demurrer or the points and authorities suggested that the "defendants were requesting the trial court to postpone its resolution of the nonclass action aspects of the demurrer until after a determination of the class action issues." *Id.* at 263, 636 P.2d at 580, 178 Cal. Rptr. at 616.

11. *Id.* The court observed that after this action was filed, a trial court in another action upheld the validity of the same statute at issue in the present case. Accordingly, the court concluded the defendant may have concluded that the most efficient manner to resolve the lawsuit was to rely on its demurrer. *Id.* at 264-65, 636 P.2d at 580, 178 Cal. Rptr. at 616.

12. *Id.* at 265, 636 P.2d at 581, 178 Cal. Rptr. at 617. The court also noted the same is true when benefits are denied because of an invalid administrative ruling or regulation. *Id.*

III. CONSTITUTIONAL LAW

A. *Legislative Grant to Workers' Compensation Board to Discipline Attorneys Is Unconstitutional:* **Hustedt v. Workers' Compensation Appeals Board; Katz v. Workers' Compensation Appeals Board**

In the companion cases of *Hustedt v. Workers' Compensation Appeals Board*[1] and *Katz v. Workers' Compensation Appeals Board*,[2] the California Supreme Court abolished the statutory authority[3] of the Workers' Compensation Appeals Board to discipline and suspend attorneys practicing before the Board. The offending statute, section 4907 of the Labor Code,[4] was enacted by the legislature in 1929,[5] pursuant to article XIV, section 4 of the California Constitution,[6] which gave power to the legislature to make laws and provide for the efficient administration of the workers' compensation system. The court held that the disciplining of attorneys is not a necessary function of the workers' com-

1. 30 Cal. 3d 329, 636 P.2d 1139, 178 Cal. Rptr. 801 (1982). The majority opinion was written by Chief Justice Bird, with Justices Tobriner, Mosk, Richardson, Broussard, and White concurring. Justice Newman concurred and dissented.

2. 30 Cal. 3d 353, 636 P.2d 1153, 178 Cal. Rptr. 815 (1982). The court was aligned the same in *Katz* as it was in *Hustedt*. *See* note 1 *supra*.

3. In pertinent part, § 4907 states:

> [t]he privilege of any person, *including attorneys* . . . to appear in any proceeding as a representative of any party before the appeals board, or any of its referees, may, after a hearing, be removed, denied, or suspended by the appeals board for a violation of this chapter or for other good cause.

CAL. LAB. CODE § 4907 (West 1971) (emphasis added).

4. *See* note 3 *supra*.

5. The statute was originally enacted in 1923 and in its original form provided for the disciplining by the Board of any persons *other* than attorneys who appeared before it. The statute was amended in 1929 so as to empower the Board to discipline licensed attorneys. *See* 30 Cal. 3d at 335 n.3, 636 P.2d at 1142 n.3, 178 Cal. Rptr. at 804 n.3. The *Hustedt* action was filed challenging the statute as amended. *See* notes 9-11 *infra* and accompanying text.

6. In pertinent part article XIV, section 4, of the California Constitution states:

> The Legislature is hereby expressly vested with plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation[.] . . . A complete system of workers' compensation includes adequate. . .and full provision for vesting power, authority and jurisdiction in an administrative body with all the requisite governmental functions to determine any dispute. . .arising under such legislation. . .[in order to] accomplish substantial justice in all cases expeditiously, inexpensively, and without encumberance of any character[.] . . .

CAL. CONST. art. XIV, § 4 (West Supp. 1982).

pensation system nor of the Board in carrying out its duties with regard to the proper distribution of workers' compensation.[7]

The petitioner, Hustedt, attacked the grant of power in section 4907 as invalid under the separation of powers doctrine.[8] The supreme court agreed. The *Hustedt* court noted that, in its original form, section 4907 did not include a provision enabling the Board to discipline attorneys; they were specifically exempted from supervision by the Board.[9] However, in 1929 the statute was amended to give the power of discipline over "*[a]ny party before the appeals board. . .*for a violation of this chapter or for other good cause."[10] Thus, the explicit power to *remove* or *suspend* attorneys from practicing before the appeals board was given to the Board.[11] Both the Board and petitioner agreed that the 1929 amendment could be characterized as a regulation on the practice of law,[12] a regulation which the petitioner argued was entirely within the power of the judiciary to oversee.[13]

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7. The court noted that "the only argument advanced by the Board in support of section 4907 is that the power to discipline attorneys is necessary for the expeditious resolution of workers' compensation claims." 30 Cal. 3d at 344, 636 P.2d at 1147, 178 Cal. Rptr. at 809. This language seems only to reaffirm the legislature's intent to provide workers with a less burdensome and costly mechanism for obtaining relief from risks of the workplace. *See* Grillo, *Fifty Years of Workmens' Compensation—A Historical Review*, 38 CONN. B.J. 239, 239-40 (1964).

8. 30 Cal. 3d at 336, 636 P.2d at 1142, 178 Cal. Rptr. at 804. Petitioner argued that "[a]rticle XIV, section 4 . . . does not provide a constitutional basis for the grant of this judicial power to the Board by the Legislature." *Id.*

The controversy resulting in the action was precipitated by the following facts. Hustedt, involved in a proceeding before the Board, received notice of the date for a conference with Workers' Compensation Judge Robins. An associate appeared and agreed to the postponement of the conference to March 26 at 9:00 a.m. Later, Hustedt advised Judge Robins that he could make that time. Robins told petitioner that *someone* would have to be present, or he would initiate contempt proceedings against Hustedt. No one appeared on behalf of Hustedt at 9:00 a.m., but Hustedt did file a petition at 8:00 a.m. that same morning to disqualify Robins because of bias and prejudice. Robins recused himself in order to prevent delay, and because the petition was so inflammatory he felt he could not continue on the case. Robins then recommended that the Board initiate contempt proceedings and disciplinary suspension action against Hustedt, which it did. Hustedt then filed for a writ of prohibition against the Board from proceeding on contempt and disciplinary actions. *Id.* at 333-35, 636 P.2d at 1140-41, 178 Cal. Rptr. at 802-03.

9. *See* note 5 *supra*.

10. 30 Cal. 3d at 335, 636 P.2d at 1142, 178 Cal. Rptr. 804 (emphasis added). *See also* note 3 *supra*.

11. *See* note 3 *supra*.

12. 30 Cal. 3d at 335, 636 P.2d at 1142, 178 Cal. Rptr. at 804. The court adopted the reasoning of Baron v. City of Los Angeles, 2 Cal. 3d 535, 469 P.2d 353, 86 Cal. Rptr. 673 (1970) which stated that it is not so much the legal trappings of a courtroom that dictate the presence of the practice of law, but the fact that one is involved in a representative capacity, engaging in those activities which constitute the practice of law. *Id.* at 543, 469 P.2d at 367, 86 Cal. Rptr. at 684.

13. 30 Cal. 3d at 336, 636 P.2d at 1142, 178 Cal. Rptr. 804. Hustedt relied on article VI, section 1 of the California Constitution, which had been interpreted to grant the courts all the necessary power to properly oversee the judicial branch.

The supreme court affirmed the validity of the petitioner's argument, declaring that the "[d]isciplin[ing] [of] attorneys, has long been recognized to be among the inherent powers of the article VI courts."[14] However, the separation of power between the judiciary and the legislature was not a hard and fast line over which neither branch could step. The court acknowledged the decision in *State Bar of California v. Superior Court*[15] and recognized that the legislature had traditionally been allowed to regulate such things as "membership, character and conduct of those. . .engaging in the legal profession. . ."[16] in accordance with public concern and under the police power of the state.[17]

The amicable coexistence of the several branches of government is destroyed when one branch overreaches another. Thus, the *Hustedt* court applied the criteria outlined in *Brydonjack v. State Bar*[18] to determine whether the legislature had overreached its authority in granting disciplinary power to the Board. The *Brydonjack* court stated that the legislature's actions must "not defeat or materially impair the exercise of [the] functions"[19] which are granted to the courts in the constitution.

The *Hustedt* court found that the grant of power to the Board did materially impair the exercise of authority granted to the courts in attorney disciplinary matters.[20] Although the Board contended that its grant and subsequent exercise of power was similar to the authority vested in the State Bar, the court dis-

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Since there are no special limitations on this grant of power, it is exclusive. *See* Brydonjack v. State Bar, 208, Cal. 439, 442, 281 P. 1018, 1021 (1929) (Supreme Court exercised authority to overrule recommendation of state bar to deny attorney the privilege of practicing in California).

14. 30 Cal. 3d 336, 636 P.2d 1142, 178 Cal. Rptr. 804. The courts established under article VI of the California Constitution include: The supreme court, the district courts of appeal, the superior courts, the municipal courts and the justice courts. *See generally* CAL. CONST. art. VI. The power of the Courts to discipline attorneys is logical in light of the fact that attorneys are characterized as officers of the court. *See, e.g.*, 30 Cal. 3d at 337 n.6, 636 P.2d at 1143 n.6, 178 Cal. Rptr. 805 n.6 (citing Ex Parte Garland, 71 U.S. (4 Wall.) 333, 378-79 (1866)).

15. 207 Cal. 323, 278 P.2d 432 (1929) (recognized the public's interest in having reasonable legislative regulation over the practice of law).

16. *Id.* at 331, 278 P.2d at 443.

17. 30 Cal. 3d at 337 n.7, 636 P.2d at 1143 n.7, 178 Cal. Rptr. at 805 n.7.

18. 208 Cal. 439, 281 P. 1018 (1929).

19. *Id.* at 444, 281 P. at 1023.

20. 30 Cal. 3d at 340, 636 P.2d at 1145, 178 Cal. Rptr. at 807. "[I]n enacting the 1929 amendment to section 4907, the Legislature overstepped the line [between legislative and judical zones of power]."

agreed.[21] The court declared that the differences between the State Bar Act and section 4907 were quite significant. Under the State Bar Act,[22] the supreme court retained its original jurisdiction over attorney disciplinary proceedings.[23] However, under the workers' compensation statutes, the Board's implementation of a suspension or any other sanction could be merely reviewed by the court.[24] Additionally, these statutes do not permit the court to hold a trial de novo or exercise its independent judgment on the evidence.[25] Thus, there was no question that the grant of power by the legislature in section 4907 had materially impaired the original jurisdiction of the supreme court in matters of attorney discipline.[26] Therefore, the legislature had overreached the bounds of its power under the separation of powers doctirne by enacting the 1929 amendment to section 4907.[27]

Although granting disciplinary authority to the Board was not found to be within the legislature's inherent police power, it was incumbent upon the court to determine whether this power had come from another source, such as article XIV, section 4 of the California Constitution.[28] The Board contended that because the legislature was constitutionaly "[v]ested with *plenary powers*, unlimited by any provision of [the California] Constitution, to *create and enforce a complete system of workers' compensation*, by appropriate legislation. . . ,"[29] the enactment of section 4907 was authorized.[30]

The court framed its inquiry as whether the Board's disciplinary power was necessary to the implementation of the objectives of establishing a "complete system of workers' compensation." The court observed that on its face article XIV, section 4, did not

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21. 30 Cal. 3d at 338, 636 P.2d at 1144, 178 Cal. Rptr. at 806.

22. *See* CAL. BUS. & PROF. CODE § 6000 (West Supp. 1982).

23. The *Brydonjack* court affirmed the constitutionality of the State Bar Act. *See* note 18 *supra*.

24. *See* CAL. LAB. CODE § 5952. The *Hustedt* court also recognized that although the State Bar may recommend a disciplinary action to the court, "[f]inal action can only be taken by. . .[the supreme] court." 30 Cal. 3d at 339, 636 P.2d at 1144, 178 Cal. Rptr. at 806 (quoting Brotsky v. State Bar, 57 Cal. 2d 287, 300-01, 388 P.2d 697, 710-11, 19 Cal. Rptr. 153, 164-66 (1962)).

25. *See* CAL. LAB. CODE § 5952 (West 1971).

26. 30 Cal. 3d at 341, 636 P.2d at 1145-46, 178 Cal. Rptr. at 807-08. The court also reviewed a public policy argument and one key study by the American Bar Association which stated that a disciplinary system enforced by several authorities throughout a state has proven ineffective. Consequently, a uniform system of discipline would provide a better means of regulating the practice of law. *Id.*

27. *See* note 20 *supra*.

28. Id. at 341-42, 636 P.2d at 1146, 178 Cal. Rptr. at 807.

29. CAL. CONST. art. XIV, § 4. *See* note 6 *supra* and accompanying text.

30. In addition, article XIV section 4 speaks about the establishment of "an administrative body with all requisite governmental functions. . . ." CAL. CONST. art. XIV, § 4.

appear to require Board authority to discipline attorneys.[31] The Board's mandated objective under the legislation was to settle claims "expeditiously, inexpensively, and without encumberance. . . ."[32] However, the court could not find a necessary connection between a conferred ability to discipline attorneys and the "expeditious" settlement of cases before the board. Among the major factors the court considered in arriving at this conclusion were: the recognition that the discipline of attorneys tends to be very time consuming and that there was a mechanism already in existence for handling such matters;[33] that no other administrative agency had such power; and finally, that effective control of Board proceedings could be maintained through the use of contempt proceedings[34] insuring that they are expeditious and without encumberance. Thus, the *Hustedt* court found no independent authority under article XIV, section 4, for the Board's authority to discipline attorneys appearing before it.[35]

Petitioner Hustedt also challenged the Board's authority to bring contempt proceedings against him.[36] However, the court found that the Board was well within its authority to seek contempt proceedings against him based upon the allegations that he intentionally interfered with the proceedings, that he failed to appear, and that he made knowingly false statements to disqualify a judge.[37] In addition, since the Board was proceeding according to valid statutory authority[38] with regard to the contempt proceeding, the court affirmed the Board's ability to bring these charges against him.

In the companion case, *Katz v. Workers' Compensation Appeals*

31. 30 Cal. 3d at 343, 636 P.2d at 1147, 178 Cal. Rptr. at 809.

32. CAL. CONST., art. XIV, § 4.

33. The court pointed out that "supervision of attorneys is [so] time-consuming and burdensome that the State Bar Act was passed and jurisdiction over the disciplining of attorneys was consolidated in this court." 30 Cal. 3d at 345, 636 P.2d at 1148, 178 Cal. Rptr. at 810.

34. *See* CAL. LAB. CODE §§ 132, 134 (West 1971).

35. 30 Cal. 3d at 346, 636 P.2d at 1149, 178 Cal. Rptr. at 811.

36. Petitioner based his challenge on the following grounds: that petitioner was denied a speedy trial; that the Board must first look to the merits of the petition for disqualification; and, that there was a failure by the Board to assert that his statements were knowingly false. *Id.*

37. *Id.* at 348, 636 P.2d at 1151, 178 Cal. Rptr. at 813. *See* note 7 *supra*.

38. *See* note 34 *supra*. The petitioner did not challenge the constitutionality of such power. *See* 30 Cal. 3d at 346 n.14, 636 P.2d at 1149 n.14, 178 Cal. Rptr. at 811 n.14.

Board,[39] the court stated that because the issue involved was identical to *Hustedt*, all disciplinary action against Katz had to necessarily be declared null and void in light of the overreaching of the legislature in enacting section 4907.[40]

The California Supreme Court has invalidated section 4907 of the Labor Code as an impermissible grant of power by the legislature to the Board.[41] By its decision, the court has maintained the public's interest in having uniform disciplinary procedures for attorneys.

B. *Constitutional challenge to statute authorizing license revocation upon refusal to submit to a blood alcohol test:* Hernandez v. Department of Motor Vehicles

Ernesto Hernandez challenged the validity of California Vehicle Code section 13353, the implied consent law which requires an automobile driver to submit to a chemical sobriety test upon justified request by a police officer,[1] in the case of *Hernandez v. Department of Motor Vehicles*.[2] The California Supreme Court rejected the argument that there is a fundamental "right to drive",

39. 30 Cal. 3d 353, 636 P.2d 1153, 178 Cal. Rptr. 815. The facts of *Katz* are as follows: The petitioner had failed to notify the Board that an advance fee had been received from his client as was required. Since this had happened before and Katz had been warned at that time, and due to the fact that he put the money into his own account rather than in a trust account for the client, the Board suspended Katz from practice for 45 days. Katz violated this suspension and the Board suspended him for 18 months. Katz appealed, challenging the constitutionality of section 4907. *Id.* at 555-57, 636 P.2d at 1153-55, 178 Cal. Rptr. at 814-17.

40. 30 Cal. 3d at 357, 636 P.2d at 1155, 178 Cal. Rptr. at 817.

41. In both *Hustedt* and *Katz* Justice Newman dissented, adopting a concurring opinion from the court of appeals below. The thrust of this dissenting argument was that a comparison of the respective attorney discipline powers between the supreme court and the Board revealed that the power of the Board was substantially less, in that it could only bar practice before itself, whereas the power of the supreme court was indeed plenary, *i.e.*, it had the power to institute disbarment proceedings. Thus, arguably, the regulation exercised by the Workers' Compensation Appeals Board was not regulatory of the "practice of law" and not prempted by the specific language of the State Bar Act. 30 Cal. 3d at 349-51, 636 P.2d at 1151-52, 178 Cal. Rptr. at 813-14.

1. Section 13353 provides:

> (b) If any such person refuses the officer's request to submit to, or fails to complete, a chemical test, the department, upon receipt of the officer's sworn statement that he had *reasonable cause to believe* such a person had been driving a Motor Vehicle upon a highway or upon other than a highway in areas which are open to the general public while under the influence of intoxicating liquor and that the person had *refused to submit to . . . the test* after being requested by the officer, *shall suspend his privilege to operate a motor vehicle for a period of six months.*

CAL. VEH. CODE § 13353 (West 1971) (amended 1981) (emphasis added).

2. Hernandez v. Department of Motor Vehicles, 30 Cal. 3d 70, 634 P.2d 917, 177 Cal. Rptr. 566 (1981). Tobriner, J., wrote the majority opinion with Richardson, Tamura, and Ashby, J.J., concurring. A separate concurring opinion was written

and consequently did not apply strict scrutiny to test the Constitutional validity of the "implied consent" law.

On New Years Eve in 1977, Ernesto Hernandez was pulled over by a city policeman after he observed Hernandez driving erratically on a public street.[3] After stopping, Hernandez stumbled out of his vehicle. The officer noted not only the usual physical signs of drunkenness, but also the fact that a strong odor of alcohol was emanating from Hernandez. After administering field sobriety tests, the officer was convinced that Hernandez was inebriated.

Hernandez was then informed of the "implied consent" law,[4] but he refused to take any of the three alternative tests offered therein.[5] As a result, Hernandez was arrested on a drunk driving charge. Thirty days later, on January 30, 1978, Hernandez was informed that his driver's license was to be revoked pursuant to Vehicle Code section 13353.[6] Hernandez challenged the statute on substantive due process grounds, but the trial court rejected his argument. He subsequently appealed to the California Supreme Court.[7]

History indicates that Hernandez was doomed to fail in his challenge of the implied consent law in California. Since the enactment of the law in 1966, it has faced challenges to its validity based on nearly every conceivable legal argument. In *Finley v. Orr*,[8] the defendant was detained by the police for suspected drunkenness. When he failed to pass field sobriety tests, the defendant was arrested and informed of the implied consent law. The defendant agreed to take a breathalyzer test but then refused to blow into the mouthpiece. At the license suspension hearing, he contended that the admission of his refusal to take an intoxication test was a violation of his right against self-incrimination.

The *Finley* court resolved the matter in favor of the implied consent law. The court held that the defendant did not have a constitutional right to refuse to take an intoxication test because the right against self-incrimination protects against only verbal

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by Newman, J. A dissenting opinion was written by Mosk, J., with Bird, C.J., concurring.

3. 30 Cal. 3d at 74, 634 P.2d at 919, 177 Cal. Rptr. at 568.

4. *See* note 1 *supra*.

5. A person may choose a breath, urine or blood test. CAL. VEH. CODE § 13353(a) (West 1971) (amended 1980).

6. *See* note 1 *supra*.

7. *See* 30 Cal. 3d at 74-76, 634 P.2d at 919-20, 177 Cal. Rptr. at 568-69.

8. 262 Cal. App. 2d 656, 69 Cal. Rptr. 137 (1968).

evidence compelled from the mouth of the defendant.[9] In this case, the defendant's actions, not his words, signaled his refusal to take the test.

The appellant in *Westmoreland v. Chapman*[10] contested the implied consent law on the grounds that it was an illegal search and seizure. The *Westmoreland* court rejected such an argument, stating that license suspension was a court sanction, and therefore did not come with attendant criminal safeguards such as having an attorney present, "inasmuch as such tests do not violate one's right against self-incrimination."[11]

Various cases also record the presence of equal protection challenges against the implied consent law. *Walker v. Department of Motor Vehicles*[12] is one such case. There, the defendant alleged that the implied consent law was a denial of equal protection because a driver who refused to take the test had his license automatically revoked, while license revocation was only discretionary for one who took the test and failed it. The *Walker* court declared that there were actually two separate classes: those who refuse to take the test and violate section 13353, and those who drive under the influence and are subject to all the penalties of that section.[13] Therefore, within either class, one is provided with equal treatment.

An additional equal protection challenge was brought forth in *Anderson v. Cozens*.[14] The defendant asserted that licensed drivers were the only state licensees whose license the state could revoked without a hearing as required by the Administrative Procedures Act. The *Anderson* court responded by saying that the state had a compelling interest in differentiating between the treatment of licensed drivers and other licensees of the state. Due to the "carnage and slaughter on California freeways and byways caused by drunk drivers," . . . considered in conjunction

9. 262 Cal. App. 2d at 663, 69 Cal. Rptr. at 141. The *Finley* court actually made no distinction between the holding that either a verbal or nonverbal refusal would be valid as evidence against the defendant and not violate the right of self incrimination. *Id.*

10. 268 Cal. App. 2d 1, 74 Cal. Rptr. 363 (1968) (driver refused to take tests without personal physician present).

11. *Id.* at 4, 74 Cal. Rptr. at 365.

12. 274 Cal. App. 2d 793, 79 Cal. Rptr. 433 (1969).

13. *Id.* at 796, 79 Cal. Rptr. at 435. The *Walker* court stated that one will receive the particular treatment that comes as a result of being a member of that class. In addition, the purpose of each sanction, the civil suspension and the criminal punishment, is to achieve specific but separate ends. *Id.* For criminal penalties, a person is presumed intoxicated if there is 0.10 percent alcohol in the blood, or higher. *See* CAL. VEH. CODE § 23126 (West 1971) (current version at CAL. VEH. CODE § 23152 (West Supp. 1982)).

14. 60 Cal. App. 3d 130, 131 Cal. Rptr. 256 (1976) (driver refused to take any of three intoxication tests after being informed of implied consent law).

with the over 16,000,000 motor vehicles being operated in California, . . . the state can hold hearings in a cost efficient manner through the Department of Motor Vehicles rather than pursuant to the Administrative Procedures Act.[15]

The final attack against the implied consent law prior to *Hernandez* was based upon an alleged procedural due process violation, in *Funke v. Department of Motor Vehicles*.[16] The court declared that the Department of Motor Vehicles (DMV) procedure for suspension of a driver's license did not deprive a driver of procedural due process. This procedure allowed a driver's license to be revoked simply upon receipt by the DMV of an affidavit signed by the arresting officer saying that the defendant refused to take an intoxication test. However, administrative standards for the introduction of evidence are different because they deal with civil penalties, and the driver can always request a pre-suspension hearing to contest the officer's statement.[17]

Justice Tobriner began the *Hernandez* decision by reviewing the premise upon which the implied consent law is based. Both state and federal courts have upheld the right of police to forcibly extract blood from a suspected drunk driver.[18] However, the California Legislature, in an effort to achieve that same end in a more civil fashion, enacted California Vehicle Code section 13353, the implied consent law. Under section 13353, the driver who does not submit to either a blood, urine, or breath test,[19] will receive a six-

15. *Id.* at 143-44, 131 Cal. Rptr. at 264. The court noted that although the state had a compelling state interest in separating treatment for driver's licenses and other state licenses, all that would have been required was a legitimate state interest. Id. at 144, 131 Cal. Rptr. 264-65.

16. 1 Cal. App. 3d 449, 81 Cal. Rptr. 662 (1969). The legislature did build several procedural safeguards into the implied consent law: 1) an officer must inform a motorist of the consequences of his failure to comply; 2) uniform standards for administering the tests had to be adopted; 3) hearing procedures were established to allow a driver to contest suspension of the driving privilege; and 4) an officer must alert a motorist to the three possible tests available. 60 Cal. App. 3d at 133 n.1, 131 Cal. Rptr. at 257 n.1.

17. *Id.* at 456, 81 Cal. Rptr. at 666. The defendant failed to request a hearing although one was available to him. *Id.*

18. *See* People v. Duroncelay 48 Cal. 2d 766, 312 P.2d 690 (1952) (forcibly taken blood test results allowed in as evidence against defendant). *See also* Schmerber v. California 384 U.S. 757 (1966) (same).

19. *See* note 5 *supra*. Justice Newman presented some interesting figures. In 1980, 26,171 drivers had their licenses suspended because they refused to take any of the three tests under the implied consent law. A considerably larger number, 215,718, were convicted of drunk driving. 30 Cal. 3d at 85, 634 P.2d at 925, 177 Cal. Rptr. at 574. However, these figures seem only to add fuel to the fire, indicating

month suspension of his driver's license. In most cases, the threat of that penalty will undoubtedly lead to compliance. Such a legislative scheme avoids the potentially violent situation where a police officer must forcibly extract a blood sample. In addition, evidence regarding the degree of intoxication would be safeguarded.[20]

In *Hernandez*, the petitioner's argument was novel because he contended that driving was a fundamental right. Under the dictates of substantive due process, a legislature can only impair fundamental right if there is a complete absence of alternative means to achieve its end. The petitioner asserted that since there was a reasonable alternative available, section 13353 was unconstitutional.[21]

A "fundamental right" challenge to the implied consent law was a matter of first impression. The court expressed wonder at the fact that the petitioner could lose "sight of one of the principle lessons of the past half-century of American constitutional law."[22] This lesson originated when the courts established a policy of refusing to declare "unwise" acts of the legislature as constitutionally unsound. Rather, courts have applied a "means-to-end test"[23] when confronted with a challenge to legislation motivated by health and safety concerns.[24] In order to uphold the wisdom of the legislature, the only requirement for this deferential standard of review is a reasonable relation to a legitimate governmental purpose.[25] Justice Tobriner observed that there was ample case precedent to support a holding that a state's interest in apprehending drunk drivers has a rational relationship to the state's concern for the health and safety of all other sober highway

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the seriousness of the drunk driving problem and the state's interest in combating it.

20. 30 Cal. 3d at 77, 634 P.2d at 920, 177 Cal. Rptr. at 659.

21. *Id.* at 76, 634 P.2d at 920, 177 Cal. Rptr. at 569. Rather than an automatic suspension of the driver's license, Hernandez claimed that a refusal to take a test should result in a presumption of intoxication at a subsequent criminal proceeding. This would accomplish the state objective in a less restrictive manner than destroying the right to drive.

22. *Id.* at 78, 634 P.2d at 921, 177 Cal. Rptr. at 570. *See* Wilke & Holzheiser, Inc. v. Department of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966) (police power legislation must be rationally related to a legitimate state end).

23. This was sometimes called a deferential or restrained due process standard of review, and was applied to legislative regulation for health and safety purposes. *See* 30 Cal. 3d at 84, 634 P.2d at 925, 177 Cal. Rptr. at 574.

24. This policy is espoused in California in Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control, 65 Cal. 2d 349, 420 P.2d 735, 55 Cal. Rptr. 23 (1966) and more recently in Hale v. Morgan, 22 Cal. 3d 388, 584 P.2d 512, 149 Cal. Rptr. 375 (1978).

25. 30 Cal. 3d at 78, 634 P.2d at 921, 177 Cal. Rptr. at 570. *See also* note 23 *supra*.

drivers.[26]

Next, the court noted cases where a substantive due process attack had been launched against section 13353. The case of *Spurlock v. Department of Motor Vehicles*[27] held that unless a law impacted on a specific right guaranteed in the constitution, affected the political processes, or impacted upon a discrete and insular minority, the law need only withstand a deferential level of review.[28] The supreme court cited another recent case which dealt directly with the issue of whether the "right to drive" could be considered fundamental. In *McGlothlen v. Department of Motor Vehicles*,[29] a lower court stated that the "right to drive a motor vehicle on the public highways is not such a fundamental right as to require strict scrutiny of any law which appears to classify the driving privileges of persons . . . and to necessitate a compelling state interest before such classification may be justified."[30] *McGlothlen* illustrates a tendency to reject the argument that the right to drive is fundamental.[31]

The petitioner challenged the validity of those cases and stated that whenever a property or liberty interest is found to exist, "that interest becomes a 'fundamental constitutional right' so that legislative measures regulating such an interest are necessarily subject to strict scrutiny."[32] However, the court considered this to be an unfounded argument. Justice Tobriner declared that such

26. 30 Cal. 3d at 79, 634 P.2d at 921, 177 Cal. Rptr. at 570. *See also* Escobedo v. State of California, 35 Cal. 2d 870 222 P.2d 1 (1950), *modified by* Rios v. Cozens, 7 Cal. 3d 792, 499 P.2d 979, 103 Cal. Rptr. 299 (1972). This case still stands as confirmation by the Supreme Court of California that the legislature is well within its power to regulate highway users in order to promote the safety of all. *Id.* From the time that motor vehicle registration was first required in 1905 to the present, the legislature has maintained a constant interest in providing safe and efficient road systems, as well as policing those roadways to prevent harm caused by highway users. The drunk driver was one source of harm which the legislature sought to control by enacting the implied consent law. Anderson v. Cozens, 60 Cal. App. 3d at 133-34 n.1, 131 Cal. Rptr. at 257-58 n.1 (1976).

27. 1 Cal. App. 3d 821, 82 Cal. Rptr. 42 (1969) (held that § 13353 does not impact on a fundamental right).

28. *Id.* at 830, 82 Cal. Rptr. at 47.

29. 71 Cal. App. 3d 1005, 140 Cal. Rptr. 168 (1977) (right to drive is not fundamental and therefore strict scrutiny is not required).

30. 30 Cal. 3d at 80, 634 P.2d at 922, 177 Cal. Rptr. at 571. (quoting McGlothlen v. Department of Motor Vehicles, 71 Cal. App. 3d 1009, 1021, 140 Cal. Rptr. 168, 178 (1978).

31. The *Hernandez* court noted that there was no case authority to lend credence to the assertion that the right to drive should be declared a fundamental right. 30 Cal. 3d at 79-80 n.9, 634 P.2d at 922 n.9, 177 Cal. Rptr. at 571 n.9.

32. *Id.* at 81, 634 P.2d at 923, 177 Cal. Rptr. at 572.

property rights were not subject to strict review under a substantive due process attack. The proper approach was to presume the legitimacy of such legislation and subject it instead to the usual deferential review.[33]

In addition, the court noted petitioner's misguided reliance on two companion cases, *Bixby v. Pierno*[34] and *Strumsky v. San Diego*.[35] The petitioner used the *Bixby* and *Strumsky* holdings to support his contention that strict review must be given to any right which can be classified as a "property right."[36] The court, however, explained that the *Bixby-Strumsky* line actually stood for the proposition that courts must be accorded great latitude in reviewing administratively adjudicated matters pertaining to property rights. The *Bixby-Strumsky* rationale states that those property rights which have "an impact on the individual [that is] 'sufficiently vital . . .' " should be classified as fundamental. The petitioner incorrectly assumed that the right to drive was a "fundamental" right which triggered a higher level of review.[37]

Simply stated, only sufficiently vital fundamental rights are accorded a full and independent review in a judicial court after having been infringed upon by an administrative adjudication. However, the challenge to a statute which actually outlines the substantive law allowing a driver's license to be suspended is an entirely different matter. In that case, one must challenge the law as not being reasonably related to a legitimate state interest, thereby applying a rational basis standard, and not a strict scrutiny test.[38]

Justice Tobriner concluded that the police power of the state was properly exercised when the apprehension of drunk drivers

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33. *Id.* at 80-81, 634 P.2d at 922-23, 177 Cal. Rptr. at 571-72.

34. 4 Cal. 3d 130, 481 P.2d 242, 93 Cal. Rptr. 234 (1971) (independent judicial review required after administrative hearing on vested property or liberty rights).

35. 11 Cal. 3d 28, 520 P.2d 29, 112 Cal. Rptr. 805 (1974) (reaffirmation of *Bixby*).

36. As noted in Board of Regents v. Roth, 408 U.S. 564 (1972), " '[l]iberty' and 'property' are broad and majestic terms." *Id.* at 571. Acknowledging that property interests were not created by the Constitution, the Court stated that they "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577. Undoubtedly, the granting of a license to drive presents such a property interest. However, this benefit is not bestowed without qualifications. Every individual must implicitly consent to the taking of an intoxication test if he or she uses the state highways and is stopped for suspicion of drunk driving.

37. 30 Cal. 3d at 82-83, 634 P.2d at 924, 177 Cal. Rptr. at 573. The court seems to suggest that the petitioner misconstrued the term independent review. The court cleared up any confusion by stating that direction regarding the kind of review a court should administer can only be applied when it is reviewing administrative decisions impacting on vested rights. *Id.*

38. *Id.* at 84, 634 P.2d at 925, 177 Cal. Rptr. at 574.

was implemented by the implied consent law. The law withstands a "restrained" substantive due process standard of review and is therefore constitutional.[39] Since the right to drive may be a fundamental right for procedural due process purposes, but not a fundamental right requiring strict scrutiny under substantive due process, the petitioner's case was without merit.

In attacking the implied consent law, the claim in *Hernandez* placed two alternatives before the court: (1) validate the constitutionality of the implied consent law, or, (2) strike down the implied consent law as causing a return to the methods of forcibly extracting blood samples from belligerent, intoxicated drivers. The court chose to uphold the constitutionality of the "implied consent" law, and refused to classify the right to drive as fundamental.

However, even if the court may feel compelled at some later date to hold as fundamental the right to drive, it is doubtful whether the implied consent law would even then be struck down, as it is possible to conclude there is a compelling state interest supporting the implied consent law. There are over 16,170,000 vehicles on the roads of California, and there are thousands of people who drive while under the influence of alcohol. These and other facts are strong support for showing the presence of a compelling state interest.[40] In 1980 alone, 215,718 persons were convicted of drunk driving.[41]

It seems clear that what the petitioner tried to assert as a fundamental right was not his right to drive, but his right to drive in an inebriated condition. Since Ernesto Hernandez made his living from driving,[42] it is therefore odd that he expected to be treated leniently when he abused the conditions of his license to drive. An appropriate analogy can be drawn. When a professional, licensed by the state, disobeys the conditions on which the state has granted that license, his license can be revoked. Simi-

39. *Id.* However, the dissent did not take such a view. Justice Mosk contended that the ability to drive was so important that it should be declared as fundamental. Thus, a strict scrutiny level of review should be applied. However, Justice Mosk did not venture to say that such a level of review would have changed the outcome of this case. 30 Cal. 3d at 86-87, 634 P.2d at 926-27, 177 Cal. Rptr. at 575-76 (Mosk, J., dissenting).

40. *See* note 26 *supra*.

41. 30 Cal. 3d at 85, 634 P.2d at 925, 177 Cal. Rptr. at 574.

42. *Id.* at 76 n.6, 634 P.2d at 919 n.6, 177 Cal. Rptr. at 568 n.6.

larly, Hernandez violated a condition of his driver's license. Yet, he contended that he had an absolute right to continue to drive, overriding the health and safety concerns of other individuals using the highways.

C. *The Establishment Clause and the California Textbook Loan Programs:* California Teachers Association v. Riles

In *California Teachers Association v. Riles*,[1] the California Supreme Court considered certain constitutional issues as a matter of first impression. In a consolidated appeal, the California Teachers Association challenged the constitutionality of sections 60315 and 60246 of the California Education Code[2], charging that the section violated the establishment clause of the United States Constitution[3] and the California Constitution.[4] The court found the statutes to be in violation of the California Constitution.

The constitutional challenge to sections 60315[5] and 60246[6] questioned a "textbook loan program," wherein the State of California

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1. 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981). The opinion of the court was written by Justice Mosk. Chief Justice Bird and Justices Tobriner, Richardson, Newman, Staniforth, and Weiner concurred in the opinion. Justices Staniforth and Weiner were appointed by the Chairperson of the Judicial Council. *Id.* at 813, 632 P.2d at 964, 176 Cal. Rptr. at 311.

2. CAL. EDUC. CODE, §§ 60246, 60315 (West Supp. 1982).

3. U.S. CONST., amend. I. The first amendment states that "[c]ongress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

4. The California Constitution provides: "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools . . . ." CAL. CONST., art. IX, § 8. Section 5 of art. XVI was also challenged because it forbids the legislature from granting "anything to or in aid of" any religious sect or school or "to help to support" any school controlled by a sectarian denomination or church. CAL. CONST., art. XVI, § 35.

5. CAL. EDUC. CODE § 60315 (West 1982) provides:

> The Superintendent of Public Instruction shall lend to pupils entitled to attend the public elementary schools of the district, but in attendance at a school other than a public school under the provisions of Section 48222, the following items adopted by the state board for use in the public elementary schools:
>
> (a) Textbooks and textbook substitutes for pupil use.
> (b) Educational material for pupil use.
> (c) Tests for pupil use.
> (d) Instructional materials systems for pupil use.
> (e) Instructional materials sets for pupil use.
>
> No charge shall be made to any pupil for the use of such adopted materials. Items shall be loaned pursuant to this section only after, and to the same extent that, items are made available to students in attendance in public elementary schools. However, no cash allotment may be made to any nonpublic school.
>
> Items shall be loaned for the use of nonpublic elementary school students after the nonpublic school student certifies to the State Superintendent of Public Instruction that such items are desired and will be used in

made available, on a loan basis, textbooks[7] and other instructional materials and systems to nonprofit, nonpublic schools, Evidence was presented which demonstrated that from the inception of the program in the 1973-74 academic year to the 1976-77 academic year, the cost of the program increased from approximately $1.5 million to more than $2 million. The evidence also showed that, in 1975, eighty-seven percent of the schools participating in the textbook loan program were "religious" schools. Furthermore, sixty-seven percent of the eighty-seven percent were operated by the Catholic church.[8]

In evaluating the constitutionality of the two provisions, the court first turned to cases decided by the United States Supreme Court on the issue.[9] After an historical evaluation of the approach used by the United States Supreme Court, the court concluded that the prevailing test dealing with the loaning of

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a nonpublic elementary school by the nonpublic elementary school student.

Id. It should be noted that although § 60315 allowed the state to lend instructional materials and text books to students the lending program was confined to textbooks. Furthermore, although the section does not by its terms confine the program to nonprofit, nonpublic schools, other provisions make it clear that the program only extends to nonprofit schools. 29 Cal. 3d at 796-97 n.1, 632 P.2d at 953-54 n.1, 176 Cal. Rptr. at 300-310 n.1.

6. CAL. EDUC. CODE, § 60246 (West Supp. 1982) provides:

> The State Controller shall during each fiscal year, commencing with the 1978-79 fiscal year, transfer from the General Fund of the state to the State Instructional Materials Fund, an amount of thirteen dollars and thirty cents ($13.30) per pupil in the average daily attendance in the public and nonpublic elementary schools during the preceding fiscal year, as certified by the Superintendent of Public Instruction, except that this amount shall be adjusted annually in conformance with the Consumer Price Index, all items of the Bureau of Labor Statistics of the United States Department of Labor, measured for the calendar year next preceding the fiscal year to which it applies. For purposes of this section, average daily attendance in the nonpublic schools shall be the enrollment reported pursuant to Section 33190.

Id.

7. In order to obtain the textbooks, the parents of the student must sign a general request for textbooks. The names of the books on the forms are entered on the form by the school. After receiving the forms, the State Department of Education forwards the books directly to the schools. The books in turn are redistributed each year to students until the books are obsolete or worn out. 29 Cal. 3d at 800, 632 P.2d at 956, 176 Cal. Rptr. at 303.

8. *Id.* at 799, 632 P.2d at 955, 176 Cal. Rptr. at 302. The court noted that these religious schools require students to receive religious instruction, attend religious services during the school day, and participate in prayers and religious ceremonies. *Id.* at 800, 632 P.2d at 956, 176 Cal. Rptr. at 303.

9. *Id.* at 801, 632 P.2d at 956-57, 176 Cal. Rptr. at 303.

textbooks was the three-pronged "child benefit" theory.[10] The "child benefit" theory holds that the financial benefit provided by textbook loan programs is primarily to the school children and their parents rather than to parochial schools; neither funds nor books were furnished to the schools, and ownership of the books remained "at least technically" with the state.[11]

Before rejecting an application of the "child benefit" test, the *Riles* court levelled severe criticism at "the dissonent decisions of the United States Supreme Court" following the liberal "child benefit" rule.[12] The court noted "practically every proper expenditure for school purposes aids the child"[13] and could, therefore, arguably fall with the "child benefit" test. The court also noted that application of the test "in most instances . . . leads to results which are logically indefensible."[14] Finally, the court declared the arguments against upholding statutes by virtue of the "child benefit" theory were not relevant in *Riles*. The textbook loan program authorized by section 60315 did not qualify under the "child benefit" theory because "it [could not] be characterized as providing sectarian schools with only indirect, remote, and incidental benefits."[15] After all, the books were supplied for use in the school, and the court was unable to make a distinction as to "whether they were loaned to the students for use in the school, or to the school for use by the students."[16] In either circumstance, the court noted, *both* the child and the school benefitted[17] from the program, and that benefit was inseparable.

The California Supreme Court then observed that the California Constitution's prohibition against financing sectarian schools[18] is not confined solely to support for the religious studies of those schools. The prohibition extends to any financing of sec-

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10. *Id.* at 802, 632 P.2d at 957, 176 Cal. Rptr. at 303-304.

11. *Id.* *See* Board of Educ. v. Allen, 392 U.S. 236, 244, 248 (1968).

12. 29 Cal. 3d at 807, 632 P.2d at 960, 176 Cal. Rptr. at 307.

13. *Id.* The court noted that the "child benefit" theory had been criticized by courts and commentators on the ground that it proves too much. *See, e.g.*, Bloom v. School Comm. of Springfield, 379 N.E.2d 578, 582-83 Mass. (1978); Dickman v. School Dist. of No. 62C, 232 Ore. 238, 366 P.2d 533, 539-40 (1961); McDonald v. School Bd., 90 S.D. 599, 246 N.W.2d 93, 98 (1976); Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 NW. U. L. REV., 333, 347-48 (1950); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CAL. L. REV. 260, 313 (1968); Note 36, *Constitutional Law—Textbook Lending Statute Benefits All School Children and Does Not Aid or Establish Religion*, GEO. WASH. L. REV. 246, 248 (1967); Note, *Public Funds for Sectarian Schools*, 60 HARV. L. REV. 793, 799-800 (1947).

14. 29 Cal. 3d at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309.

15. *Id.*

16. 29 Cal. 3d at 810, 632 P.2d at 962-63, 176 Cal. Rptr. at 309, 310.

17. *Id.*

18. *See* note 4 *supra*.

ular instruction.[19] The test rather would be to assess whether a program only indirectly benefits parochial schools and then to consider the character of the benefit conferred by the program.[20]

As a result of the *Riles*, California once again is breaking new ground in the area of constitutional rights. The reaches of the California Constitution are not determined by a quick determination of whether financing of sectarian schools is for their religious studies. Instead, the California test is now more refined. First it must be determined whether or not the benefits of parochial schools on account of the public financing of a textbook loan program are direct or indirect. After that inquiry has been completed, the court will then examine the character and nature of those benefits.

D. *Threats to Achieve Social and Political Goals; California Penal Code Section 422 Void for Vagueness:* **People v. Mirmirani**

In *People v. Mirmirani*,[1] the California Supreme Court was confronted with the issue of whether sections 422 and 422.5[2] of the California Penal Code were unconstitutionally vague. These sections make it a felony to threaten to commit crimes "in order to

19. 29 Cal. 3d at 812, 632 P.2d at 964, 176 Cal. Rptr. at 311. Jurisdictions with similar provisions in their own constitutions have also refused to make such a distinction. *See, e.g.*, Gaffney v. State Dept. of Educ., 192 Neb. 358, 220 N.W.2d 550 (1974); Dickman v. School Dist. No. 62C, 232 Ore, 238, 366 P.2d 533, 540-42 (1961).

20. 29 Cal. 3d at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309.

1. 30 Cal. 3d 375, 636 P.2d 1130, 178 Cal. Rptr. 792 (1981).

2. CAL. PENAL CODE, §§ 422, 422.5 (West Supp. 1982).

Section 422 provides:

> Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with intent to terrorize another or with reckless disregard of the risk of terrorizing another, and who thereby either:
>
> (a) Causes another person reasonably to be sustained fear for his or her or their immediate family's safety;
>
> (b) Causes the evacuation of a building, place of assembly, or facility used in public transportation;
>
> (c) Interferes with essential public services; or
>
> (d) Otherwise causes serious disruption of public activities, is guilty of a felony and shall be punished by imprisonment in the state prison.

Section 422.5 provides:

> As used in this title, "terrorize" means to creat a climate of fear and intimidation by means of threats or violent ation causing sustained fear for personal safety in order to achieve social or political goals.

achieve social or political goals."[3] In declaring these statutory sections unconstitutional, the court overturned the ruling of a magistrate who held that a "personal vendetta"[4] is a "social goal" within the meaning of the section.[5] The court noted there is a requisite degree of certainty required in legislation especially in legislation dealing with criminal law.[6] The court also noted that when a criminal statute impacts on first amendment rights, greater precision in the statute should be required in order to withstand a vagueness challenge.[7] The court then applied stricter standards to the statute because of its potentially inhibiting effect on free speech.

In determining whether or not the sections were actually vague, the court looked first to the language of the statute and found the term "social and political goals" had no legal meaning.[8] The court also noted that because the common meaning of the terms did not provide clear lines by which officials, judges, and juries could understand what conduct these terms prohibited, the words must be considered unconstitutionally vague.[9]

In an attempt to find the legislative meaning of the terms "social or political goal," the courts next examined the legislative history of sections 422 and 422.5. Again the court found the meaning of the terms to be vague, this time because of the statute's "sketchy legislative history."[10]

In its final analysis of the statute, the court looked to prior California decisions construing the statutory language but found no case law interpreting the statute.[11] Finally, the court refused any

3. The alleged violation of the statute arose when Mr. Mirmirani threatened to kill the children of two Los Angeles Police officers who had previously arrested him for possession of marijuana. As a result, Mirmirani was arrested and charged with two violations of California Penal Code § 422(a). An information was filed against Mirmirani. A motion to set aside the information was granted, and the district attorney appealed. Mirmirani then challenged the constitutionality of §§ 422 and 422.5.

4. 30 Cal. 3d at 380, 636 P.2d at 1133, 178 Cal. Rptr. at 795.

5. It should be noted that during arguments on Mirmirani's motions, even the district attorney conceded that the statute was vague by stating he did not know what the words "to achieve social or political goals" meant. *Id.* at 380-81, 636 P.2d at 1133, 178 Cal. Rptr. at 795.

6. *Id.* at 382-83, 636 P.2d at 1134, 178 Cal. Rptr. at 796 (1981). Due process requires that each person be informed as to what the state commands or forbids in its laws in terms such that men of common intelligence need not be required to guess as to that law's meaning. *See* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939). Furthermore, this issue of due process includes other constitutional problems dealing with fair notice and explicit standards of enforcement.

7. 30 Cal. 3d at 383, 636 P.2d at 1134, 178 Cal. Rptr. at 796.

8. See note 4 *supra* and accompanying text.

9. 30 Cal. 3d at 382, 636 P.2d at 1134, 178 Cal. Rptr. at 796.

10. *Id.* at 384-85, 636 P.2d at 1135, 1136, 178 Cal. Rptr. at 797-98.

11. *Id.* at 382, 636 P.2d at 1134, 178 Cal. Rptr. at 796.

contention which attempted to sever the unconstitutionally vague language from the statute[12] and struck the entire statute down as being unconstitutionally vague.[13]

As a result of the court's ruling in *Mirmirani*, sections 422 and 422.5 of the California Penal Code are no longer available for use in the prosecution of those who have threatened to commit crimes to achieve social or political goals. The provisions of these sections, in order to be useful for the courts, must be carefully redrawn by the legislature to avoid unconstitutional vagueness.

IV. CRIMINAL LAW

A. *Implied Malice Must Be Proven to Convict on a Charge of Assault With Intent to Commit Murder:* **People v. Johnson**

The California Supreme Court[1] reversed a conviction of assault with intent to commit murder and affirmed a conviction of assault with a deadly weapon in *People v. Johnson*.[2] At issue in the case were the instructions[3] given to the jury by the trial court regard-

12. *Id.* at 387, 636 P.2d at 1137, 178 Cal. Rptr. at 799.
13. *Id.* at 388, 636 P.2d at 1138, 178 Cal. Rptr. at 800.

1. The majority opinion was written by Justice Richardson, with Justice Tobriner, Mosk, Newman, Kaus, and Broussard concurring. Chief Justice Bird concurred in the judgment only.

2. 30 Cal. 3d 444, 637 P.2d 676, 179 Cal. Rptr. 209 (1981). Leo Mata, who was drunk and arguing with friends about his ability to drive, was standing in the middle of a residential street causing cars to slow or stop and manuever around him. The defendant was forced to stop. Mata and the defendant, who was still in his car, exchanged angry words. Mata then reached into the defendant's car through a partially opened window. At this time, the defendant fired two shots through the window at Mata. Mata was severely injured. The defendant's car was found at his father's house and was searched. The police found two live and two spent cartridges in the car. The police then proceeded to defendant's girlfriend's house. The girlfriend allowed the police to enter her residence, and the police found the defendant sleeping next to a loaded gun. The defendant was subsequently convicted after the trial court refused to suppress evidence found in the car or girlfriend's house. The defendant was found guilty of assault with intent to commit murder and assault with a deadly weapon. 30 Cal. 3d at 446-47, 637 P.2d at 677, 179 Cal. Rptr. at 210.

3. *Id.* at 448, 637 P.2d at 678, 209 Cal. Rptr. at 211. the pertinent part of the jury instructions are:

> Malice is express when there is manifested an intent to unlawfully kill a human-being.
>
> *Malice is implied* when the killing results from an act *involving a high degree of probability that it will result in death, which act is done for base, antisocial purpose and with a wanton disregard for human life* by which

ing the consequences of a finding of implied malice. In addition, the defendant contended that the police search of his car was unlawful and that any evidence obtained thereby should have been suppressed.[4] The defendant also contended that evidence gathered when police entered a building without a warrant to arrest him was similarly inadmissible.[5]

The *Johnson* court, relying on its recent decision in *People v. Murtishaw*,[6] found "that the trial court erroneously instructed [the jury], using language which permitted the jury to imply malice."[7] The *Murtishaw* case discussed the inappropriate application of jury instruction No. 8.11,[8] "within the context of a charge of assault with intent to commit murder."[9] The Murtishaw court pointed out that utilization of this instruction could allow a jury to find the presence of implied malice and could make possible a finding that a defendant was guilty of assault with intent to commit murder *despite the absence of a specific intent to kill*. This is inconsistent, however, in that a necessary element in proving assault with a specific intent to commit murder is the presence of a specific intent to kill.[10] If malice could only be implied, it would be logically impossible to show the required element of *specific* intent.[11]

Primarily, the *Johnson* court reviewed and reaffirmed its prior holding in *Murtishaw*.[12] However, the court did diverge from the *Murtishaw* decision in finding that the administration of those particular instructions caused reversible error in the case of the

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is meant an awareness of a duty imposed by law not to commit such acts followed by the commission of the forbidden act despite that awareness.

California Jury Instructions, Criminal, No. 8.11 (emphasis added).

4. 30 Cal. 3d at 449, 450, 637 P.2d at 679, 179 Cal. Rptr. at 212. The court found no merit in the contention. *See* notes 16-20 *infra* and accompanying text.

5. 30 Cal. 3d at 451, 637 P.2d at 684, 179 Cal. Rptr. at 213. The court also refuted this contention. *See* notes 21-24 *infra* and accompanying text.

6. 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981).

7. 30 Cal. 3d at 448, 637 P.2d at 678, 179 Cal. Rptr. at 211. *See* note 3 *supra*.

8. *See* note 3 *supra*.

9. 30 Cal. 3d at 448, 637 P.2d at 678, 179 Cal. Rptr. at 211.

10. *Id.* (citing People v. Murtishaw, 29 Cal. 3d at 764, 631 P.2d at 477, 175 Cal. Rptr. at 771.

11. In terms of homicide, deliberate intent is express malice. *See* CAL. PENAL CODE § 188 (West 1981). Therefore, the necessity of using implied malice would indicate a lack of express malice, *i.e.*, lack of specific intent. This would preclude any conviction requiring a specific intent, or, if a specific intent were shown in addition to an asserted showing of implied malice, the showing of the implied malice would be cumulative. Cumulative evidence is subject to exclusion at the discretion of the trial judge. *See, e.g.*, Hamling v. United States, 418 U.S. 87 (1974), *reh. denied* 419 U.S. 885; People v. Newton, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970); People v. Chapman, 261 Cal. App. 2d 149, 67 Cal. Rptr. 601 (1968). *See also* CAL. EVID. CODE § 352 (West 1981).

12. 30 Cal. 3d at 448, 637 P.2d at 678, 179 Cal. Rptr. at 211.

present defendant.[13] The jury had found the defendant guilty of assault with a deadly weapon and assault with intent to commit murder. The former charge did not require a finding of a specific intent to kill.[14] Since the jury was instructed that *either* a specific intent to kill or implied malice could support a conviction of assault with intent to commit murder,[15] it was conceivable that they found that the defendant did not harbor a specific intent to kill. Absent the particular finding of a specific intent, the court held that the conviction of assault with intent to commit murder could not stand.[16]

The court then turned to the issue of whether evidence obtained by searching the defendant's car was admissible.[17] Although the defendant contended that the vehicle was stationary and that there was no risk to any possible evidence contained in the car, the court disagreed. Relying on *People v. Dumas*[18] and *Wimberly v. Superior Court*[19], the court explained that a warrantless search of defendant's car was valid if the police had probable cause and exigent circumstances were present. The court stated that the probable cause element was met because officers not only had a description of the car from witnesses, but they observed a shattered window and a spent cartridge in the car.[20] The exigent circumstances requirement was met by the following: "(1) police pursuit of an armed and dangerous suspect; (2) the danger posed to the officers and public at large by the possibility that a weapon remained in the car; and (3) the danger of removal

13. *Id.* at 449, 637 P.2d at 678, 179 Cal. Rptr. at 211.

14. *Id.* "[T]he jury could have found defendant guilty without finding the necessary 'express' malice demonstrated by an 'intent unlawfully to kill a human being.'" *Id. See also* note 3 *supra*.

15. *See* note 3 *supra*.

16. 30 Cal. 3d at 449, 637 P.2d at 678, 179 Cal. Rptr. at 211.

17. *Id.* at 449, 637 P.2d at 679, 179 Cal. Rptr. at 212. The specific evidence the defendant wanted suppressed was the cartridges found in his car. *See* note 2 *supra*.

18. 9 Cal. 3d 871, 512 P.2d 1208, 109 Cal. Rptr. 304 (1973) (failure to obtain search warrant for defendant's car and residence did not preclude admission of evidence).

19. 16 Cal. 3d 557, 547 P.2d 417, 128 Cal. Rptr. 641 (1976) (warrantless search of auto stopped for speeding, resulting in discovery of illicit drugs, not violative of procedural due process).

20. 30 Cal. 3d at 450-51, 637 P.2d at 679, 179 Cal. Rptr. at 212. In addition to having a description of the car, upon arriving at the house where the car was parked, the police noticed that unlike other cars this car had no frost on the hood. This indicated that the car had recently been driven. However, the defendant's father told police that the car had been parked there all day. *Id.*

or loss of the evidence from the vehicle."[21] Therefore, probable cause and exigent circumstances were present to satisfy a valid warrantless search of the defendant's car.

The court held that the defendant's warrantless arrest, made inside his girlfriend's residence,[22] was valid. Noting that warrantless arrests within private dwellings are constitutional provided that there are exigent circumstances present, such as hot pursuit,[23] the *Johnson* court found that "[h]ere, the officers were in expeditious pursuit which was continuous and direct,"[24] and therefore the exigent circumstances requirement was met.[25] As a result, the trial court's decision to admit evidence found during the arrest was upheld.

The *Johnson* decision affirms and expands the court's *Murtishaw* decision while following traditional lines of search and seizure paradigms.

B. *A Trial Judge's Discretion to Waive the Operation of "Special Circumstances" under the Death Penalty Statute:* **People v. Williams**

In California, the penalty for a defendant found guilty of murder in the first degree, under certain special circumstances,[1] is death or confinement for life without the possibility of parole. In

21. 30 Cal. 3d at 451, 637 P.2d at 680, 179 Cal. Rptr. at 213. In considering the presence of exigent circumstances to search the vehicle, the court seemed to weigh the fact that all the evidence found in the car came from the passenger compartment. Thus, unlike the search of a trunk or glove compartment, this search invaded an area in which the defendant had the least expectation of privacy. *Id.*

22. Oddly enough, neither the prosecution nor the defense brought up the fact that the defendant's girlfriend voluntarily allowed the police to enter her residence. Thus, the court could not decide the validity of the arrest on that point. 30 Cal. 3d at 452, 637 P.2d at 680, 179 Cal. Rptr. at 213.

23. *Id.* (quoting People v. Escudero, 23 Cal. 3d 800, 592 P.2d 312, 152 Cal. Rptr. 825 (1979)).

24. *Id.* at 452, 637 P.2d at 680, 179 Cal. Rptr. at 213.

25. Neither party to this action contested the existence of probable cause for the police to arrest the defendant. *Id.*

1. CAL. PENAL CODE § 190.2 (West Supp. 1982) provides in pertinent part:

> (a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4, to be true:
>
> . . . .
>
> (17) The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission

People v. Williams,[2] the California Supreme Court expressly declared that a trial judge has the discretionary power to dismiss a finding of special circumstances and can thereby eliminate the "without the possibility of parole" portion of the sentence.[3]

Williams was charged with committing murder during the course of a burglary. Additionally, she was charged with two counts of burglary and three counts of robbery. After being convicted on all counts,[4] Williams was sentenced to life imprisonment without the possibility of parole because of a finding of special circumstances under section 190.2[5] of the Penal Code.

At the sentencing hearing, the trial judge stated that he felt that life imprisonment without the possibility of parole was appropriate for some of the defendants who were involved in the burglary. However, he stated that a life sentence without parole was not proper for Williams because she was "much less culpable" than the other defendants.[6] Nevertheless, since he did not feel that it was within his discretion to dismiss the finding of special circum-

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of, or the immediate flight after committing or attempting to commit the following felonies:
(i) Robbery in violation of Section 211.
(ii) Kidnapping in violation of Sections 207 and 209.
(iii) Rape in violation of Section 261.
(iv) Sodomy in violation of Section 286.
(v) The performance of a lewd or lascivious act upon person of a child under the age of 14 in violation of Section 288.
(vi) Oral copulation in violation of Section 288.
(vii) Burglary in the first or second degree in violation of Section 460.
(viii) Arson in violation of Section 447.
(ix) Train wrecking in violation of Section 219.

Id.

2. 30 Cal. 3d 470, 637 P.2d 1029, 179 Cal. Rptr. 443 (1981). The majority opinion was written by Chief Justice Bird, with Tobriner, Mosk, Newman, and Broussard concurring; Justice Richardson concurred in part with the majority opinion.

3. *Id.*

4. The first trial ended in a mistrial after the jury was unable to reach a verdict on any of the counts. In the second trial Williams was convicted on all counts.

5. CAL. PENAL CODE § 190.2 (West Supp. 1982).

6. 30 Cal. 3d at 477, 637 P.2d at 1032, 179 Cal. Rptr. at 446. In order to understand the court's "scaling" of culpability, a brief analysis of the facts is necessary. This case arises out of two incidents in which the defendant Williams and several others entered two homes and robbed the owners. In the second incident, after entering the home and finding an older woman in her bedroom, Williams applied a ligature to her mouth and then tied another around her head to secure the first. When the elderly woman refused to cooperate and continued to make noise, Williams observed one of her partners, Eddie Palmer, strike the woman. After leaving the home, Eddie Palmer told Williams that he had stabbed the old woman with a knife.

stances, the trial judge sentenced Ms. Williams to life imprisonment without parole.

In declaring that a trial court judge has the discretionary power to stay the execution of special circumstances for purposes of sentencing, the California Supreme Court relied on section 1385 of the Penal Code.[7] After an extended historical analysis of section 1835, the court found that it can be used in this manner, although such is not specifically provided by the section.

The recognition of a trial court's power to dismiss an action, modernly codified in section 1385, existed in statutory form as early as 1850.[8] The court's interpretations of section 1385 have expanded the section's applicability far beyond the normal meaning of its express language. For example, in *People v. Burke*,[9] the court held that, in the interest of justice, a trial court may strike, set aside, or dismiss a charge of a prior conviction under section 1385 in order to avoid a statutorily increased penalty because of a prior conviction.[10]

After attempts by the legislature to limit the court's finding in *Burke*,[11] the court in *People v. Superior Court*[12] held that "the discretion of a trial judge [under Section 1385] is absolute except where the Legislature has specifically curtailed it."[13] In this case the California Supreme Court listed several policies underlying section 1385. Among these policies was the idea that justice

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7. CAL. PENAL CODE § 1385 (West Supp. 1982). This section provides that:

> The judge or magistrate may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

8. 1850 Cal. Stat. 119, § 629. With slight provisional changes, this provision became section 1385 when the Penal Code was enacted in 1872.

9. 47 Cal. 2d 45, 301 P.2d 241 (1956).

10. *Id.* at 50, 301 P.2d at 244.

11. In *Burke*, the defendant was charged with a violation of the Health & Safety Code § 11500 for possessing marijuana. After the court's decision in *Burke*, the legislature specifically set down (in former CAL. HEALTH & SAFETY CODE § 11718) the requirement that a trial court could not dismiss a finding of a prior conviction unless the prosecution requested it to do so. 30 Cal. 3d at 479, 637 P.2d 1034, 179 Cal. Rptr. 448. This statute was upheld in People v. Sidener, 58 Cal. 2d 645, 375 P.2d 641, 25 Cal. Rptr. 697 (1962), but it was later overturned in People v. Tenorio, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970). In *Tenorio*, the court specifically held that:

> [w]hen a decision to prosecute has been made, the process which leads to acquittal or to sentencing is fundamentally judicial in nature . . . . The judicial power is compromised when a judge, who believes that a charge should be dismissed in the interest of justice, wishes to exercise the power to dismiss but finds that before he may do so he must bargain with the prosecutor.

Id. at 94, 473 P.2d 996, 89 Cal. Rptr. 252.

12. 69 Cal. 2d 491, 502, 446 P.2d 138, 72 Cal. Rptr. 330 (1968).

13. *Id.* at 502, 446 P.2d at 145 72 Cal. Rptr. at 337.

would best be served by recognizing the discretion of the trial judge, "who viewed the witness and heard the conflicting testimony."[14]

This rule of statutory construction was also applied by an appeals court in *People v. Dorsey*.[15] Finally, in *People v. Tanner*,[16] the court reaffirmed the line of statutory construction initiated in *Burke*.

Once the court had firmly established the fact that section 1385 permits dismissals in the interest of justice whenever the legislature has not clearly evidenced a contrary intent, it was prepared to deal with the specific construction of the special circumstances statute. The issue addressed by the court in *Williams* was whether or not to hold section 1385 applicable to a case involving special circumstances. The court noted that there was no distinction between the previous statutory language and the special circumstances statute, as they all provided for an additional sentence based on a finding of additional factors.[17] In examining the legislative history of the special circumstances statute, the Court found that there was no evidence that the legislature intended to limit the application of Section 1385.

After noting this absence of legislative expression, the court held that a trial court may, in the exercise of its discretion, stay an execution of the special circumstances statute which requires a sentence without parole.[18] This holding will result in a further relaxation of sentencing procedures and a lesser degree of uniformity[19] in the sentences given for murders occurring with special circumstances.[20]

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14. *Id.* at 505, 446 P.2d at 147 72 Cal. Rptr. at 339.

15. 28 Cal. App. 3d 15, 104 Cal. Rptr. 326 (1972). The appeals court held that a trial court has within its discretion the power to dismiss an entire charge after a guilty verdict in order to avoid certain enhancements to a sentence.

16. 24 Cal. 3d 514, 596 P.2d 328, 156 Cal. Rptr. 450 (1979).

17. 30 Cal. 3d at 484, 637 P.2d at 1036, 179 Cal. Rptr. at 450.

18. *Id.*

19. One of the court's major arguments was based on the idea that "mandatory, arbitrary or rigid sentencing procedures invariably lead to unjust results." The court also noted that society receives maximum protection when the sentencing is handled according to the "disposition of the offender" in each case. Following this line of reasoning, it would seem that the decision in *Williams* would contribute to the overall protection of society in spite of its implications to the contrary. *Id.* at 482, 637 P.2d at 1035, 179 Cal. Rptr. at 449.

20. It should also be noted that the court refused to accept another argument challenging the use of section 1385 of the Penal Code with these facts. It was argued that the use of the word "shall" in the special circumstances statute was suf-

C. *Non-violent felonies — a five-year term maximum on the total of subordinate prison terms:* **People v. Hernandez**

The California Supreme Court in People v. Hernandez *refused to extend the rationale of its previous decision in* People v. Harvey. *The* People v. Harvey *holding precluded any attempt to define a violent felony under the broad language of Section 667.5(c)(8) of the Penal Code for purposes of calculating enhancements to the subordinate term of imprisonment for consecutive offenses. In* People v. Hernandez, *however, the court ruled that, for purposes of determining a maximum on the total of subordinate terms, the broad language of Section 667.5(c)(8) could be used to define violent felonies for which no maximum would be used.*

I. INTRODUCTION

In an attempt to clarify confusion surrounding its decision in *People v. Harvey*[1], the California Supreme Court, in *People v. Hernandez*[2] made it clear that in spite of the *Harvey* decision, paragraph 8 of Section 667.5(c) of the Penal Code is to be interpreted as describing violent felonies for purposes of determining the maximum time allowed to be imposed for subordinate prison terms. In so ruling, the court would have created a dichotomy between the statutory definition of "violent felonies" for purposes of determining enhancements to a subordinate term and the definition used for purposes of determining whether or not a maximum ceiling is to be imposed on the total subordinate terms of imprisonment. This dichotomy, however, was avoided by recent amendments to the Penal Code passed as a direct result of the court's misinterpretation of legislative intent in *People v. Harvey*.[3]

II. SECTION 1170:1: CONSECUTIVE TERMS OF IMPRISONMENT

In California, when a person is convicted of more than one felony, regardless of whether or not the conviction arises from the same proceeding or court, Section 1170.1[4] or the Penal Code allows a consecutive term of imprisonment to be imposed by the court. When a consecutive term of imprisonment for all of the convictions is imposed, it is determined by finding the sum of the principle term, the subordinate term and any additional term im-

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ficient evidence of an intent to preclude a trial court from exercising its discretionary power under section 1385 of the Penal Code. The court, in granting the trial courts more discretion, rejected this argument. *Id.* at 485-90, 637 P.2d at 1037-1041, 179 Cal. Rptr. at 451-54.

1. 25 Cal. 3d 754, 602 P.2d 396, 159 Cal. Rptr. 696 (1979).
2. 30 Cal. 3d 462, 637 P.2d 706, 179 Cal. Rptr. 239 (1981).
3. *Id.* at 466, 637 P.2d at 709, 179 Cal. Rptr. at 243 n.7.
4. CAL. PENAL CODE § 1170.1 (West 1980).

posed pursuant to Cal. Penal Code § 667.5.[5]

The principle term for imprisonment is defined as the sum of the greatest term of imprisonment imposed by the court for any of the convictions including certain enhancements.[6] For purposes of determining the subordinate term, however, Section 1170.1 cross references itself twice to Section 667.5. The first cross reference to Section 667.5 deals with enhancements and their effect on the calculation of subordinate term. The second cross reference then deals with a potential five-year maximum on the total of subordinate terms.

A. Cross Reference I: Enhancements and Calculation of the Subordinate Term

The first cross reference to Section 667.5 by Section 1170.1 deals with the effect that certain enhancements will have on the subordinate term. The subordinate term will always consist of at least one-third of the middle term of imprisonment prescribed for each felony conviction for which a consecutive term was added. If the consecutive offense is listed as a violent felony under Section 667.5 subdivision (c) then one-third of the enhancements imposed by the consecutive offense will be added to the subordinate term. If however, the consecutive offense is not listed as a violent felony under 667.5(c), then no enhancements will be added to the subordinate term for the consecutive felonies.

As previously mentioned, Section 667.5(c) lists the felonies which are considered to be violent felonies. The relevant part of 667.5 subdivision (c) reads:

> For the purpose of this section, "violent felony" shall mean any of the following:
> "(1) Murder or voluntary manslaughter.
> "(2) Mayhem.

5. CAL. PENAL CODE § 667.5 (West 1979-1980). Section 667.5(c) lists offenses which are termed to be violent felonies. It should be noted here also that any additional term imposed pursuant to 667.5 is also included in the sum for determining the aggregate term of imprisonment for purposes of explaining People v. Hernandez, however this particular reference to CAL. PENAL CODE § 667.5 by Section 1170.1 is irrelevant.

6. Enhancements serve as additional terms of punishment by enhancing a term of imprisonment anywhere from 1 to 5 years. They are imposed pursuant to Sections 12022, 12022.3, 12202.5, 12022.6, 122022.7, or 12022.8 of the Penal Code. These sections provide enhancements to a prison term for the use of a firearm, inflicting of great bodily injury or damage to property in certain specific kinds of crimes.

"(3) Rape as defined in subdivisions (2) and (3) of Section 261.

"(4) Sodomy by force, violence, duress, menace or threat of great bodily harm.

"(5) Oral copulation by force, violence, duress, menace, or threat of great bodily harm.

"(6) Lewd acts on a child under 14 as defined in Section 288.

"(7) Any felony punishable by death or imprisonment in the state prison for life.

"(8) Any other felony in which the defendant inflicts great bodily injury on any person other than an accomplice which has been charged and proven as provided for in Section 12022.7 on or after July 1, 1977, or as specified prior to July 1, 1977, in Sections 213, 264, and 461, or any felony in which the defendant uses a firearm which use has been charged and proved as provided in Section 12022.5."

In view of the broad language used in paragraph 8 it would appear that almost any conviction involving the use of a firearm would fall within its meaning. However, the California Supreme Court in *People v. Harvey* refused to recognize a robbery with the use of a firearm as falling within the meaning of paragraph eight.

In *Harvey*, the defendant, Michael Harvey, was charged and convicted on two counts of robbery with the use of a firearm. As part of the bargain for his entering a guilty plea, a third count charging him with an unrelated robbery was dismissed. After his conviction, Harvey was sentenced to a term of seven years and eight months in a state prison. The relevant parts of the aggregate sentence for purposes of this brief note relate to the subordinate term which was imposed for count two. These parts of the aggregate sentence consisted of a one-year consecutive term for the robbery charged on count two as well as an 8-month enhancement of count two for use of the firearm.[7] The major issue faced by the court in *Harvey* was whether robbery with the use of a firearm qualifies under Section 667.5(c) of the Penal Code as a violent felony. If it qualified as such a crime, then the eight-month enhancement for count two would be proper. If it did not, however, qualify as a crime listed in 667.5(c), then the subordinate term would be required by Section 1170.1 to exclude any enhancements.

In determining whether or not robbery with firearm use qualified by reason of the broad language of paragraph 8 of Section 667.5, the court looked to the legislative intent underlying Section

7. The principle term for count one consisted of a four-year "upper" term for the robbery charged in count one as well as a two-year enhancement of count one. Although not relevant to this note, the California Supreme Court held that in selecting the upper term of four years for the principle term, the lower court had erred by considering some aspects of the third count which had been dismissed in exchange for a plea of guilty. People v. Harvey, 25 Cal. 3d 754, 757, 602 P.2d 396, 398, 154 Cal. Rptr. 696, 699 (1979).

1170.1(a).[8] In determining the legislative intent, the court noted that it was evident that the legislative intent underlying Section 1170.1 subdivision (c) was "to allow enhancement of the consecutive offense only in certain limited situations, namely, when the conduct for which such an enhancement is sought [in this case robbery] occurred in the course of the commission of a violent felony [listed in Section 667.5(c)]."[9] After determining that it was beyond the legislative intent to include the broad description of paragraph 8 in the list of violent felonies, the *Harvey* court ruled that, in effect, the general offenses listed in paragraph 8 were not subject to enhancements.[10]

B. Cross Reference II: the Potential Maximum on Subordinate Sentences

The second cross reference made by Section 1170.1 of the Penal Code to Section 667.5(c) refers to a maximum five-year ceiling on the total of subordinate terms. It was in *People v. Hernandez*[11] that the court addressed this second cross reference.

A major development in the California Legislature occurred between the court's ruling in *Harvey* and its consideration of *People v. Hernandez*. The Legislature, unhappy with the judicial interpretation of 1170.1, sought to amend it in May of 1980. They were

8. It is also evident that the court was impressed with an argument made by the defendant that the reading of Section 1170.1(c) as permitting enhancements solely for the use of a firearm in the commission of a felony would create a "troublesome anomoly." The anomoly would arise because if interpreted so, Section 1170.1 would permit the enhancement of a subordinate sentence in any case involving the use of a firearm thereby seemingly making the statute's cross reference to the various crimes listed in 667.5(c) useless and unnecessary. This inconsistency noted the court, "would also extend to enhancements under Section 12022.7 (infliction of great bodily injury), for these enhancements are also included in the statutory definition of violent felonies under Section 667.5, subdivision (c)(8)." *Id.* at 761.

9. 25 Cal. 3d at 760, 602 P.2d at 399, 159 Cal. Rptr. at 701.

10. The California Legislature was displeased enough with the *Harvey* court's interpretation of the intent behind Section 667.5 that in 1980 it approved an amendment to the section specifically expressing the legislative intent that the violent felonies described in paragraph 8 of subdivision (c) should be included for the calculation of subordinate prison terms and enhancements. Stats. 1980, ch. 132, § 2.

11. The specific facts leading to the conviction of Hernandez were brought into court as a result of a confession made by Hernandez. Briefly, between January 3 and January 17, 1980 Hernandez robbed seven people. Six of the robberies were performed by Hernandez at gunpoint shooting two of his victims in the face, blinding one of them. He assaulted another of his victims and shot at a person who pursued him from the scene of the robberies. These offenses occurred before the 1980 amendments to Section 1170.1 (Stats. 1980, ch. 132, § 2) became effective.

specifically unhappy about judicial interpretation "to exclude specific violent felonies from calculation of a subordinate state prison term."[12] The new amendment to Section 1170.1 expressed in specific language that for purposes of calculating the subordinate term, the definition of violent crimes in Section 675.5(c) included these offenses described in paragraph eight of subdivision (c). The Legislature had in effect reversed the holding in *People v. Harvey* by the new amendment to Section 1170.1

The court in *People v. Hernandez* noted at the outset however, that the offenses in question occurred before the 1980 amendments to Section 1170.1 became effective. Section 1170.1 of the Penal Code, before the 1980 amendments provided in relevant part that "in no case shall the total of subordinate terms for consecutive offenses not listed in subdivision (c) of Section 667.5 exceed five years.

In *Hernandez*, the defendant Ernesto Hernandez was convicted by a jury on eleven of thirteen charged felony counts including mayhem, robbery and assault with a deadly weapon, plus a total of 8 enhancements for firearm use and infliction of great bodily injury.[13] The trial court followed the mandate of *People v. Harvey*[14] and did not use the enhancements in imposing the consecutive sentences for the robbery and assault counts. The only enhancement was to the sentences for mayhem.[15]

The *Hernandez* court however, in interpreting the second cross reference made to Section 667.5(c) by Section 1170.1, completely reversed its thinking and logic from that followed in *Harvey*. Hernandez contended that none of the offenses for which he was convicted[16] except mayhem were listed in subdivision (c) of Section 667.5, and therefore, the total of subordinate terms for his consecutive offenses could not exceed five years. The total consecutive terms which were imposed on Hernandez however, totalled ten

12. Presumably the Legislature was unhappy with the California Supreme Court's interpretation of the legislative intent behind Section 1170.1 in People v. Harvey, 25 Cal. 3d 754, 602 P.2d 396, 159 Cal. Rptr. 969 (1979).

13. *See* note 11 *supra* and accompanying text.

14. The decision in People v. Harvey was followed because the new amendments to Section 1170.1 had not become effective when the crimes were committed.

15. The subordinate term and enhancements for mayhem were "one-third of the middle term (sixteen months), plus one-third of the two-year enhancement for firearm use (eight months), resulting in a two-year subordinate term for the offense. Absent the *Harvey* interpretation the total term would have been 25 years.

16. Hernandez was convicted on one count of mayhem with firearm use, seven counts of robbery, all but one being by use of a firearm or bodily injury or both and two counts of assault with a deadly weapon. 30 Cal. 3d 462, 466, 637 P.2d 706, 709, 179 Cal. Rptr. 239, 241 (1981).

years[17] and the total number of consecutive terms imposed for crimes not listed in subdivision (c) of Section 667.5 totalled eight.[18]

The *Hernandez* court refused to extend the *Harvey* rationale of recognizing only seven of the eight offenses listed in 667.5(c) for enhancements to these qualifying for a maximum of five years. The court then proceeded to distinguish the two different uses of the definition by stating that in *Hernandez*, unlike *Harvey*, "the use of the statutory definition in 667.5 to permit unlimited total subordinate terms for consecutive offenses is entirely harmonious with the related provisions." The court specifically noted that there would be no "inconsistency or redundancy in interpreting Section 1170.1 to permit unlimited subordinate terms for the enumerated crimes in subdivision (c) as well as for any other felony when great bodily injury was inflicted or in which a firearm was used."[19]

The court then concluded that all of Hernandez' convictions which fell within paragraph eight of Section 667.5(c) came within the statutory definition of violent crimes and that Hernandez was not therefore entitled to the benefit of the five year limitation on the total subordinate term.

III. IMPACT

The court noted that the conclusion in *Hernandez* was reached without reference to the 1980 amendment of Section 1170.1. It was also noted that these amendments had come in response to the

17. The consecutive terms were imposed as follows: one count of mayhem with firearm use — two years; one count of robbery with firearm use and great bodily injury — one year; one count of robbery — one year; one count of assault with a deadly weapon with firearm use — one year; four counts of robbery with firearm use — one year each; and finally, one count of assault with a deadly weapon — one year. It should be noted that the principle term of imprisonment imposed on Hernandez was for 10 years also bringing his total sentence to 20 years. *Id.*

18. This supposition that a total of eight years were imposed for crimes not listed in Section 667.5(c) assumes that the definition for purposes of totalling the years would have followed the court's ruling in Harvey, and not included any of the felonies described under paragraph 8. However, as will be seen the court rejects the *Harvey* definition for purposes of defining which crimes will be considered to be subject to the maximum of five years in consecutive-subordinate terms.

19. 30 Cal. 3d at 464, 637 P.2d at 707, 179 Cal. Rptr. at 242 (1979). In order to fully appreciate the court's rationale for the dichotomy, *see* note 8 *supra* and accompanying text.

Harvey decision.[20] In the absence of the amendments overturning the *Harvey* rationale, *Hernandez* would have created a tremendous dichotomy in the same statute with respect to a single definition. A violent felony would be seemingly all inclusive of crimes committed with the use of a firearm for purposes of determining the total amount of years allowed in consecutive terms. On the other hand, for purposes of determining enhancements, a "violent felony" would consist of a significantly smaller group of offenses. The amendment to Section 1170.1, however, precludes the occurrence of any such dichotomy by stating specific legislative intent concerning the definition of violent crimes for the determination of enhancements. The result of the amendments will be greater precision in the law and a higher degree of consistency between the two rulings of the California Supreme Court while in the absence of the amendments rather, the result would have been the creation of an unclear dichotomy.

D. *The distinctions and interrelations between vehicular manslaughter and implied malice:* **People v. Watson**

In *People v. Watson*,[1] the California Supreme Court clarified the difference between the application of the vehicular manslaughter statute[2] and a second degree murder charge based on implied malice.[3] It was specifically argued by the defendant Watson that the legislature had intended to separately classify and punish all vehicular homicide as manslaughter.[4] In response to this argument, the court noted that although the terms "gross negligence"[5] and "implied malice"[6] are similar in requiring an awareness of a

20. 30 Cal. 3d at 467, 637 P.2d at 709, 179 Cal. Rptr. at 243 (1979).

1. 30 Cal. 3d 290, 637 P.2d 279, 179 Cal. Rptr. 43 (1981).

2. CAL. PENAL CODE, § 192 (West Supp. 1982).

3. CAL. PENAL CODE, §§ 187-89 (West Supp. 1982).

4. The facts giving rise to this prosecution occurred in the early morning hours of January 3, 1979. Watson consumed large quantities of alcohol in a bar. After leaving the bar, he drove through a red light and avoided a collision with another car by skidding to a stop in the middle of the intersection. After this near collision, Watson drove away at high speed and struck another vehicle in the next intersection. Expert testimony based on skid marks and other evidence estimated that Watson was traveling 84 miles per hour. At the point of impact, it was estimated that his speed was approximately 70 miles per hour. As a result of the collision, the driver of the other car and her six year old daughter were killed. Watson's blood alcohol content was .23 percent, which is more than twice the necessary percentage deemed to constitute legal intoxication.

5. Gross negligence is the requisite culpability for vehicular manslaughter. It has been defined as "the exercise of so slight a degree of care as to raise a presumption of conscious indifference as to the consequences." 30 Cal. 3d at 296, 637 P.2d at 283, 179 Cal. Rptr. at 47, 50. See also People v. Costa, 40 Cal. 2d 160, 252 P.2d 1 (1953).

6. Malice is the requisite culpability for murder in the second degree as well

risk of harm, they differ in the degree of awareness.

The court noted another difference in the tests used to determine the appropriate charge. "Gross negligence" is found by applying a reasonable person test, while "implied malice" is found by determining whether the defendant subjectively appreciated the risk involved.[7] The court also rejected Watson's argument by referring to the legislative history of the vehicular manslaughter statute. It found that section 192(3)(a) of the Penal Code was enacted not to separately classify and punish all vehicular homicides, but rather to prosecute vehicular homicides which resulted from grossly negligent conduct, without precluding the possibility of a murder charge when the circumstances reveal a more aggravated culpability.[8]

The court also struck down an alternative argument based on the preemption rule of *In re Williamson*.[9] Watson argued that since the murder statute deals generally with the killing of a human being while the vehicular manslaughter statute deals specifically with the killing by the instrumentality of a vehicle, the vehicular statute must be applied under the rule announced in *Williamson*.[10] The court refused to accept Watson's argument because in order to apply the *Williamson* preemption rule, either each element of the general statute must correspond to elements on the face of the special statute, or it must appear from the statutory context that a violation of the special statute will necessarily result in a violation of the general statute.[11] The court found

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as in first degree. Malice may be implied "when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life." 30 Cal. 3d at 296, 637 P.2d at 283, 179 Cal. Rptr. at 47. See also People v. Sedino 10 Cal. 3d 703, 722-23, 518 P.2d 913, 112 Cal. Rptr. 1 (1974), *modified by* People v. Flannel, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979).

7. 30 Cal. 3d at 296-97, 637 P.2d at 283, 179 Cal. Rptr. at 47.

8. *Id.* The court felt that this was evident by the fact that the legislature specifically rejected a standard substantially similar to implied malice for use in the vehicular homicide statute. *Id.*

9. *In re* Williamson, 43 Cal. 2d 651, 276 P.2d 593 (1954). In *Williamson*, the court stated that: "[W]here the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment." *Id.* at 654, 276 P.2d at 594.

10. *See* note 9 *supra*.

11. 30 Cal. 3d at 295-96, 279 P.2d at 282-83, 43 Cal. Rptr. at 46. *See also* People v. Jenkins, 28 Cal. 3d 494, 502, 620 P.2d 587, 592, 170 Cal. Rptr. 1, 6 (1980).

that neither of these two conditions were met and that the *Williamson* preemption doctrine therefore did not apply.

In conclusion, the court specifically found that the more specific vehicular manslaughter statute did not preclude application of the more general murder statute. After finding Watson to have had sufficient culpability to constitute implied malice, the court reversed a dismissal by the lower court.

V. CRIMINAL PROCEDURE

A. *Conduct Credits in the California Youth Authority and Juvenile Hall:* People v. Austin; In re Ricky H.

People v. Austin[1] and *In re Ricky H.*[2] were companion cases involving equal protection challenges to the denial of conduct credits[3] for defendants sentenced to the California Youth Authority and to juvenile hall. In *Austin*, the California Supreme Court held that the refusal to grant conduct credits to defendants sentenced to the custody of the California Youth Authority does not violate the defendants' rights to equal protection of the law.[4] The court in *In re Ricky H.* reached the same conclusion with respect to defendants who are sentenced to the custody of juvenile hall.[5]

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1. 30 Cal. 3d 155, 636 P.2d 1, 178 Cal. Rptr. 312 (1981). (Richardson, J., wrote the majority opinion with Tobriner, Mosk, Hanson, and Morris, J.J., concurring. Bird, C.J., and Newman, J., wrote separate dissenting opinions.).

2. 30 Cal. 3d 176, 636 P.2d 13, 178 Cal. Rptr. 324 (1981). (Bird, C.J., wrote the majority opinion with Tobriner, Mosk, Richardson, Newman, Lillie and Fleming, J.J., concurring.).

3. *See* CAL. PENAL CODE §§ 2930-2932 (West Supp. 1981). These statutes provide a description of the rules under which a person under the confinement of the Department of Corrections may have his or her term reduced by up to one-third. Specifically, up to three months reduction of sentence for every eight months served is given for the forbearance of participation in such activities as assaultive behavior, inciting of riots, or destruction of government property. Up to one month reduction of term for every eight months served is given for participation in work, educational, vocational or theraputic activities.

4. 30 Cal. 3d at 165-66, 636 P.2d at 7, 178 Cal. Rptr. at 318. After being convicted of burglary and having his probation revoked as a result of his pleading guilty to receiving stolen property, the defendant, Roy Frank Austin, was sentenced to the California Youth Authority. *Id.* at 157-58, 636 P.2d at 2, 178 Cal. Rptr. at 313. Austin challenged the court's refusal to give him presentence good time and participation credits. *Id.* at 158, 636 P.2d at 2, 178 Cal. Rptr. at 313. In support of his argument Austin also contended that the principles of equal protection entitled him to conduct credits for the time he served at the California Youth Authority. *Id.*

5. 30 Cal. 3d at 190, 636 P.2d at 21-22, 178 Cal. Rptr. at 332-33. The defendant, Ricky H., was sentenced to the California Youth Authority when, temporarily assigned to juvenile hall while awaiting a dispositional hearing for four counts of burglary, he assaulted a counselor while attempting to escape from juvenile hall. *Id.* at 180, 636 P.2d at 15-16, 178 Cal. Rptr. at 326. Ricky H. argued that he was entitled to conduct credits for the period he spent in juvenile hall on two grounds:

In *Austin*, the defendant, invoking equal protection principles,[6] primarily relied on the holdings in *People v. Olivas*,[7] where the California Supreme Court had held that a defendant who was committed to the California Youth Authority could not be confined longer than a defendant sent to prison for committing the same type of crime.[8] The *Austin* court, however, distinguished *Olivas* as involving a "maximum period for which a youthful offender might be held,"[9] whereas in *Austin*, the issue involved the method whereby a defendant might be released prior to the expiration of his full sentence.[10] The court further distinguished *Olivas* by examining the underlying purpose of imprisonment, as compared to the commission of youthful defendants to the purpose of the California Youth Authority. The court noted that under the Determinate Sentencing Act,[11] the legislature declared that the purpose of imprisonment is punishment.[12] The purpose of commitment to the California Youth Authority, however, is not punishment, but rather to train and rehabilitate young persons who have committed crimes.[13]

The *Austin* court observed that in prisons, conduct credits serve to "encourage conformity with prison regulations, provide

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(1) as a matter of statutory entitlement under CAL. WELF. & INST. CODE § 726 (West 1980), and (2) denial of conduct credits is a violation of equal protection under the State and Federal Constitutions. 30 Cal. 3d at 186, 636 P.2d at 19, 178 Cal. Rptr. at 330.

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

7. 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976).

8. *See id.* at 257, 551 P.2d at 389, 131 Cal. Rptr. at 69. The court in *Olivas* held that the sentencing scheme resulted in a denial of equal protection under the California and United States Constitutions. *Id.* Additionally, the court held that there was no compelling state interest to justify the denial. *Id.*

9. 30 Cal. 3d 162, 636 P.2d at 5, 178 Cal. Rptr. at 316.

10. *Id.*

11. CAL. PENAL CODE, § 1170 (West Supp. 1979-1980).

12. 30 Cal. 3d at 163, 636 P.2d at 5, 178 Cal. Rptr. at 316. *See* CAL. PENAL CODE, § 1170 (West Supp. 1980) which provides in pertinent part:

> The Legislature finds and declares that the *purpose of imprisonment* for crime *is punishment* . . . . The Legislature further finds and declares that the elimination of disparity and the provision of uniformity of sentences can best be achieved by *determinate* sentences fixed by statute in proportion to the seriousness of the offense . . . .

Id. (Emphasis added.)

13. 30 Cal. 3d at 163, 636 P.2d at 5-6, 178 Cal. Rptr. at 16-17. *See* CAL. WELF. & INST. CODE, § 1700 (West 1972) which provides in pertinent part: "The purpose of [the Youth Authority Act] is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses." *Id.*

incentives to refrain from criminal, particularly assaultive, conduct, and to encourage participation in 'rehabilitative' activities."[14] The court also stated that since the purpose of adult sentencing is punative,[15] rehabilitation is no longer a standard for release.[16] In contrast, California Youth Authority commitments[17] are of indeterminate duration[18] and committees may be released earlier—or later—than their imprisoned counterparts. The court then concluded that because of the indeterminate nature of California Youth Authority commitments and the compelling state interest in rehabilitation, the refusal to grant conduct credits[19] to the defendant did not offend the principles of equal protection.[20] Finally, the court foreclosed later challenges on a similar subject by holding that its decision regarding conduct credits "applies equally to presentencing conduct credit claimed by those in [Youth Authority] confinement."[21]

In re Ricky H. was heard as a companion case to *Austin*, and

14. 30 Cal. 3d at 163, 636 P.2d at 6, 178 Cal. Rptr. at 317. *See* People v. Reynolds, 116 Cal. App. 3d 141, 147, 171 Cal. Rptr. 461, 464 (1981); People v. Soffell, 25 Cal. 3d 223, 233, 599 P.2d 92, 97, 157 Cal. Rptr. 897, 903 (1979).

15. *See* note 11 *supra*.

16. *See* 30 Cal. 3d at 164, 636 P.2d at 6, 178 Cal. Rptr. at 317. *See also In re* Eric J., 25 Cal. 3d 522, 532, 601 P.2d 549, 554, 159 Cal. Rptr. 317, 321-22 (1980).

17. 30 Cal. 3d at 164, 636 P.2d at 6, 178 Cal. Rptr. at 317. Committment to the California Youth Authority is provided as follows:

> After certification to the Governor as provided in this article a court may commit to the authority any person convicted of a public offense who comes within subdivisions (a), (b), and (c), or subdivisions (a), (b), and (d), below:
>
> (a) Is found to be less than 21 years of age at the time of apprehension.
>
> (b) Is not sentenced to death, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment.
>
> (c) Is not granted probation.
>
> (d) Was granted probation and probation is revoked and terminated.
>
> The Youth Authority shall accept a person committed to it pursuant to this article if it believes that the person can be materially benefited by its reformatory and educational discipline, and if it has adequate facilities to provide such care.

CAL. WELF. & INST. CODE, § 1731.5 (West 1972).

18. *Id.*

19. Conduct credits are granted to adults who are sentenced to prison under CAL. PENAL CODE, §§ 2930-32 (West Supp. 1970-1980).

20. 30 Cal. 3d at 165-66, 636 P.2d at 7, 178 Cal. Rptr. at 318. In holding that the denial of conduct credits does not offend equal protection, the court also emphasized that the parole board has discretionary power to consider behavioral factors. *Id.* at 166, 636 P.2d at 7, 178 Cal. Rptr. at 318.

21. *Id.* (emphasis added). *Compare* People v. Sage, 26 Cal. 3d 498, 611 P.2d 874, 165 Cal. Rptr. 280 (1980). (because of the automatic nature of award of conduct credits to prison terms, denial of conduct credits for presentence jail custody violated equal protection where denial resulted in longer incarceration than in cases where person only spent time in prison).

addressed conduct credits for time spent in juvenile hall. In accord with its decision in *Austin*, the court held that denial of conduct credits to defendants in juvenile hall does not violate the principles of equal protection[22] under either the United States or the California Constitutions.[23] However, the defendant in *In re Ricky H.*, in addition to presenting equal protection arguments, also contended that section 726 of the California Welfare and Institution Code[24] implies that juveniles are entitled to conduct credit.[25] The court responded to the defendant's contention by noting that section 726 expressly excludes the consideration of "good behavior" in determining the period of commitment, thus effectively precluding the viability of a conduct credit system for juvenile hall internees.[26] Ultimately, the court concluded that denying conduct credits for time spent in juvenile hall did not violate the principles of equal protection.[27]

In *People v. Austin* and *In re Ricky H.*, the court distinguished previous cases where it had upheld equal protection challenges to disparities in treatment that exist between defendants sentenced to prison, defendants sentenced to the California Youth Authority, and defendants sentenced to juvenile hall. Additionally, in both *Austin* and *In re Ricky H.*, the court found that the denial of conduct credits was supported by statutory authority. Thus, by relying primarily on the rehabilitative purposes underlying the California Youth Authority and juvenile hall,[28] the court concluded that the denial of conduct credits did not violate equal protection of the laws.

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22. *See* note 5 *supra*.

23. The court held that the rationale of *Austin* "applies equally to [the defendant] whose confinement is also for the purposes of treatment and rehabilitation." 30 Cal. 3d at 190, 636 P.2d at 22, 178 Cal. Rptr. at 333.

24. CAL. WELF. & INST. CODE, § 726 (West Supp. 1980) provides that "a minor may not be held in physical confinement for a period in excess of the maximum term of imprisonment which could be imposed upon an adult" convicted of the same offense. The code also proscribes considerations used in determining the length of the juvenile's confinement. *Id.*

25. 30 Cal. 3d at 186, 636 P.2d at 19, 178 Cal. Rptr. at 330.

26. *Id.* at 187-88, 636 P.2d at 20, 178 Cal. Rptr. at 331. *See* WELF. & INST. CODE, § 726 (West Supp. 1980).

27. *See* 30 Cal. 3d at 190, 636 P.2d at 22, 178 Cal. Rptr. at 333.

28. *See* notes 12 & 23 *supra* and accompanying text.

B. *Defendant's Access to Jury Records:* **People v. Murtishaw**

In *People v. Murtishaw*,[1] the California Supreme Court developed a rule of criminal procedure which gives trial judges discretion to grant to defense counsel the same access to jury records and reports of investigations as the prosecution.[2] Briefly, People v. Murtishaw dealt with a murder conviction in which the defendant was sentenced to die.[3] There was an automatic appeal to the Supreme Court.[4] Several weeks prior to the trial, the defense counsel moved to discover records and reports containing information which the prosecution had compiled on prospective jurors.[5] The reports compiled by the prosecutor contained information showing how the prospective jurors had voted in prior cases, and also showed any arrest records they might have had.[6] The prosecution denied the defense access to these reports.

Both the defendant and the court recognized that numerous cases[7] have held that it is not error for a trial court to deny a defendant access to prosecution jury records.[8] These decisions are based on two grounds. First, there is uncertainty whether defendants derive any significant advantage from access to jury records and investigations.[9] Second, it is felt that defendants can obtain much of the information sought through voir dire of the individual

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1. 29 Cal. 3d 733, 631 P.2d 446, 175 Cal. Rptr. 738 (1981) (Tobriner, J., writing the majority opinion with Bird, C.J., and Mosk, Newman, Reynoso, and Grodin, J.J., concurring. Richardson, J., wrote a concurring and dissenting opinion.).

2. *Id.* at 766-67, 631 P.2d at 405, 175 Cal. Rptr. at 757.

3. The defendant and his brother-in-law went shooting in the Mojave desert and encountered four college students who were filming a movie for a cinema class. Since the defendant's car had broken down, the students agreed to drive the two to a gas station when they were finished filming. However, as the students were preparing to leave, the defendant began shooting at them. The defendant emptied the clip to his gun, reloaded, and again began to fire. One of the students managed to go for help; however, when the police arrived, two of the students were dead. A third student died two days later from bullet wounds to the head. The defendant subsequently pled not guilty to the murders on the basis of diminished capacity. Nevertheless, he was convicted of three counts of premeditated murder and sentenced to death. Upon an automatic appeal, the supreme court affirmed the judgment of the lower court in all respects, except as to the penalty which the court reversed due to testimony in the penalty phase which was found to be prejudicial. *Id.* at 775, 631 P.2d at 471, 175 Cal. Rptr. at 763.

4. CAL. PENAL CODE § 1239(b) (West Supp. 1980).

5. 29 Cal. 3d at 765, 631 P.2d at 465, 175 Cal. Rptr. at 757. In the alternative, the defense requested $1000 so they could conduct a similar investigation. *Id.*

6. *Id.*

7. *See* People v. Castro, 99 Cal. App. 3d 191, 198-99, 160 Cal. Rptr. 156, 160 (1979); People v. Brawley, 1 Cal. 3d 277, 293-94, 461 P.2d 361, 370-71, 82 Cal. Rptr. 161, 170-71 (1969); People v. Airheart, 262 Cal. App. 2d 673, 679-81, 68 Cal. Rptr. 857, 861-62 (1968).

8. 29 Cal. 3d at 766, 631 P.2d at 465, 175 Cal. Rptr. at 757.

9. *Id.*

jurors.[10]

The supreme court, however, found that neither of these two grounds supported the denial of jury records to defendants in this case for two reasons. First, the court noted that even an expanded voir dire of a juror will not reveal what other persons, including friends, neighbors, employers, and fellow jurors in previous cases, think of the juror.[11] Next, the court noted that by denying a defendant access to information which is available to the prosecutor, the prosecutor will thereby gain a significant advantage in exercising preemptory challenges.[12] The court held that, although the rule established by the court applied to all future cases, not applying it in the present case did not constitute reversible error.[13] The effect of the *Murtishaw* decision is thus to grant trial judges the discretion to allow defendants to discover the records and investigation reports held by prosecutors on prospective jurors. This, in turn, provides defendants with information which might be otherwise unavailable and serves to eliminate any significant advantage which might be gained by prosecutors in exercising preemptory challenges.[14]

C. *Pretrial Line-ups:* **People v. Bains**

In *People v. Bains*,[1] the California Supreme Court examined a conflict between a local rule of the Los Angeles Superior Court and a rule established by the supreme court in *Evans v. Superior Court*.[2] Both rules involve the time limit imposed on a defendant

10. *Id.*

11. *Id.* at 766 n.26, 631 P.2d at 465 n.26, 175 Cal. Rptr. at 757 n.26 (citing People v. Williams, 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981)).

12. *Id.* at 766 n.27, 631 P.2d at 465 n.27, 175 Cal. Rptr. at 757 n.27 (citing People v. Brawley, 1 Cal. 3d 277, 293, 461 P.2d 361, 370, 82 Cal. Rptr. 161, 170 (1969)).

13. *Id.* at 767, 635 P.2d at 466, 175 Cal. Rptr. at 758.

14. *See* note 12 *supra*.

1. 30 Cal. 3d 143, 635 P.2d 455, 177 Cal. Rptr. 861 (1981). Justice Richardson wrote the majority opinion with Justices Tobriner, Mosk, Newman, and Schauer concurring. Chief Justice Bird wrote a dissenting opinion. Briefly, the facts of the case are as follows: the defendants confronted the victims as they were leaving a party. After taking the victims' valuables at gunpoint, the defendants were observed leaving the scene in a green Ford Maverick. The victims stopped a passing police car, informed the officers of the robbery, and then followed the police car in pursuit of the defendants. When the defendant's automobile was stopped, the victims identified the defendant as the robber. Defendant Jones was in possession of one of the victim's coats, and two female occupants in the defendant's car were in possession of a chain and a ring identified as being taken from one of the victims.

2. 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974).

when making a motion for a pretrial lineup. The *Bains* decision holds that, in spite of specific time limits articulated by the rules of a superior court, a trial court has the broad discretion to deny untimely motions for pretrial lineups.

The rules of the Los Angeles Superior Court Criminal Division require that at the time of arraignment a pretrial conference hearing shall be set within thirty days[3] of the date of the arraignment.[4] This rule requires that all pretrial motions, including motions for pretrial lineups, be made at that pretrial conference.[5] The defendant in *Bains* contended that since he was arraigned on February 13, 1979, and he offered his motion for a pretrial lineup on March 15, 1979, he had satisfied the requirements of the local rule by making his motion within thirty days of his arraignment.[6] Although the court recognized that the defendant's motion had satisfied the requirements of the Los Angeles Superior Court,[7] the court examined whether the defendant's motion satisfied the supreme court's holding in *Evans*.

The *Evans* court held that upon timely request, a defendant has a right to a pretrial lineup so that any doubts as to whether he was mistakenly identified may be resolved.[8] Attempting to define "timely request," the *Evans* court stated that the motion for a pretrial lineup should be made to a "trial judge *or* magistrate . . . as soon after *arrest or arraignment* as practicable."[9] The court added that the trial court has *broad discretion* to deny any untimely motion.[10] Under the *Evans* holding, the defendant would be re-

3. It should be noted that in computing the number of days, the court only considers days in which it is in session.

4. 30 Cal. 3d at 148, 635 P.2d at 458, 177 Cal. Rptr. at 458.

5. *Id.*

6. *Id.* at 864. The defendant was arrested on December 30, 1978 and had a preliminary examination on January 30, 1979.

7. *Id.*.

8. 11 Cal. 3d at 625, 522 P.2d at 686, 114 Cal. Rptr. at 126. The *Evans* court noted that the right to a pretrial lineup is a due process requirement which arises only when the eyewitness identification is a "material issue" in the case, and there is a "reasonable likelihood" of mistaken identification. *Id.* The prosecution in the instant case conceded that the defendant had made a sufficient factual showing to raise a material issue and justify a pretrial lineup. 30 Cal. 3d at 148, 635 P.2d at 458, 177 Cal. Rptr. at 864. The court also recognized the validity of the defendant's contention, noting that since the robbery occurred late at night and the victims had been drinking, they exhibited confusion as to which defendant had the gun. Since several other cars were seen leaving the party at the time of the robbery, there was an increased possibility of mistaken identification. *Id.*

9. 11 Cal. 3d at 626, 522 P.2d at 687, 114 Cal. Rptr. at 127 (emphasis added). In the present case the defendant was arrested on December 30, 1978, had a preliminary examination on January 30, 1979, and was arraigned on February 13, 1979. The defendant's request for a pretrial lineup came more than forty-four days after arrest, and the lineup itself was requested for a date over two and one-half months after his arrest. 30 Cal. 3d at 147, 635 P.2d at 457, 177 Cal. Rptr. at 863.

10. Id. (emphasis added). Additionally, as to the question of timeliness, the

quired to raise the motion as soon as practicable after his arrest.

The *Bains* court pointed out that the defendant had ample opportunity to raise the motion before the pretrial hearing. Forty-four days had elapsed between the arrest and the arraignment.[11] While the defendant attempted to excuse his delay by reason of the Los Angeles Superior Court rules,[12] the court placed more weight on the broad discretion of the trial court than it did on the binding effect of the superior court rules, concluding that the trial court did not abuse its discretion when it denied the defendant's motion as untimely.[13]

The effect of the *Bains* decision is to require defendants requesting pre-trial lineups to adhere not only to local court rules, but concurrently to the overriding discretionary standard of timeliness as articulated in *Evans v. Superior Court*. If the arraignment does not take place in an expeditious fashion following arrest, the *Bains* holding indicates that it is the responsibility of the defendant to move for a pre-trial lineup within a period, not to exceed forty-four days,[14] regardless of whether the defendant has been arraigned.

The *Bains* holding further emphasizes that a critical determination as to the timeliness of a request for a pre-trial lineup is whether there has been a prior official confrontation between the accused and the victim. Thus, the decision in *People v. Bains* stands for the proposition that previously articulated judicial standards of timeliness will displace local court rules in determining the propriety of a defendant's motion for a pretrial lineup.

Bains court noted that the rule in *Evans* articulated that the motion could be made before a magistrate as well as a judge. Defendant Bains, although in custody for forty-four days without arraignment, failed to avail himself of the opportunity to present his motion for a pretrial motion to a magistrate. The court found this fact to militate heavily against the defendant in the issue of whether his motion for pretrial lineup, made on March 15, 1979, seventy-five days after arrest, was timely. 30 Cal. 3d at 147-48, 635 P.2d at 457-58, 177 Cal. Rptr. at 863-64. 11 Cal. 3d at 626, 522 P.2d at 687, 114 Cal. Rptr. at 127. The *Evans* decision further stated that in most cases a late request for a pretrial lineup will be denied unless the defendant can show good cause for the delay. *Id.* The *Bains* court pointed out that after the preliminary hearing has taken place, the value of the pretrial lineup is diminished by the direct confrontation between the defendant and his accusors. 30 Cal. 3d at 148, 635 P.2d at 458, 177 Cal. Rptr. at 864.

11. *See* note 9 *supra*.
12. *Id. See* note 9 *supra* and accompanying text.
13. 30 Cal. 3d at 149, 635 P.2d at 458, 177 Cal. Rptr. at 864.
14. *See* note 9 *supra*.

D. *Prosecutorial Discovery:* People v. Collie

I. INTRODUCTION

The California Supreme Court, in *People v. Collie*,[1] refused to develop a prosecutorial discovery scheme which would allow prosecutors to obtain evidence compiled by the defendant. The court reexamined its holding in *Prudhomme v. Superior Court*,[2] where the court had indicated in dicta that prosecutorial discovery is not always prohibited. The court delineated a test to determine the circumstances in which prosecutorial discovery had been permitted.[3] In an effort to clear up confusion arising from the *Prudhomme* dicta,[4] the *Collie* court declined, absent explicit authorization by the legislature, to articulate a framework on which prosecutorial discovery could be based. Justice Mosk appeared to be convinced that the court could not develop a discovery system which would resolve the conflicting constitutional issues.

Defendant Collie had been convicted of attempted first degree murder of his wife, attempted second degree murder of his daughter, and forcible sodomy.[5] The defendant visited his estranged wife early in the evening, and when she refused to engage in sexual intercourse with him, he bound her hands and feet and forcibly sodomized her. After the defendant left the house, Mrs. Collie freed herself and discovered that the stove was turned on while the burners were unlit. She also found a lighted candle in the dining room surrounded by combustible material.

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1. 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981) Justice Mosk wrote for the majority with Chief Justice Bird and Justices Tobriner, Abbe, and Newman concurring. Justices Richardson and Andreen concurred and dissented. Justice Richardson concurred in the judgment but dissented in the portion of the decision precluding any further prosecutorial discovery. Justice Andreen concurred in Justice Richardson's opinion.

2. 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970).

3. *See* notes 19-24 *infra* and accompanying text.

4. *See* notes 24 and 44 *infra* and accompanying text.

5. 30 Cal. 3d at 49, 634 P.2d at 536, 177 Cal. Rptr. at 460. The court of appeal, and subsequently the California Supreme Court, affirmed the defendant's convictions for attempted first degree murder and forcible sodomy. However, both the court of appeal and the Supreme Court reversed the defendant's conviction of attempted second degree murder. The court of appeal concluded the trial court erred in instructing the jury it could convict of attempted second degree murder despite the absence of specific intent to kill. *Id.* at 62, 634 P.2d at 545, 177 Cal. Rptr. at 469. The trial court had instructed the jury that the defendant could be convicted on a finding of implied malice. Implied malice, however, cannot coexist with the specific intent to kill necessary for a conviction of first degree murder. *Id.* at 61, 634 P.2d at 544-45, 177 Cal. Rptr. at 468-69; *see also* People v. Mize, 80 Cal. 41, 43, 22 P. 80, 81 (1889). The instruction on implied malice may have confused the jury by suggesting a conviction could be made without finding a specific intent to kill. 30 Cal. 3d at 61, 634 P.2d at 545, 177 Cal. Rptr. at 469.

Contrary to Mrs. Collie's testimony at trial that the defendant left the house at about midnight, the defendant testified that on the evening in question, he arrived at the house of a Ms. Morris and then went to a neighborhood bar.[6] When Ms. Morris was called as a defense witness to corroborate the defendant's testimony, she testified that she had previously spoken with a defense investigator. The prosecutor subsequently sought discovery of any notes taken by the defense investigator with respect to his conversation with Ms. Morris. The superior court ordered discovery,[7] over petitioner's objection that such discovery would violate the work product doctrine.[8] The court of appeal affirmed. Ruling that the court's conclusion regarding the work product doctrine was harmless error, the California Supreme Court extended the work product doctrine to apply to criminal cases.[9]

The defendant also argued that the discovery order violated his

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6. 30 Cal. 3d at 49, 634 P.2d at 536, 177 Cal. Rptr. at 460. The petitioner testified that after having consensual intercourse with his wife, at around 8:30 p.m., he informed her that he would be moving out of her home. After leaving the house, he went to a neighborhood bar to call Ms. Morris and then bought some ice cream at a store before traveling by bus to Ms. Morris' apartment.

7. Code of Civil Procedure § 2016 provides in pertinent part:

> (b) All matters which are privileged against disclosure upon the trial under the law of this state are privileged against disclosure through any discovery procedure.
>
> . . . .
>
> The work product of an attorney shall not be discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing his claim or defense or will result in an injustice, and *any writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories shall not be discoverable under any circumstances*.
>
> . . . .
>
> (g) It is the policy of this state (i) to preserve the rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of such cases and (ii) to prevent an attorney from taking undue advantage of his adversary's industry or efforts.

CAL. CIV. PROC. CODE § 2016 (West Supp. 1981) (emphasis added).

8. In ruling that the investigator's notes were not protected by the work product doctrine, the court of appeal in *Collie* relied on other appellate court decisions holding that the discovery statutes in the Code of Civil Procedure only apply to civil actions. People v. Collie, 110 Cal. App. 3d 104, 112, 167 Cal. Rptr. 720, 724 (1980). *See* People v. Chavez, 33 Cal. App. 3d 454, 458, 109 Cal. Rptr. 157, 161 (1973) (Code of Civil Procedure §2016 only applies to civil cases); Clark v. Superior Court, 190 Cal. App. 2d 739, 742, 12 Cal. Rptr. 191 (1961) (statutes permitting discovery in civil cases do not apply to criminal cases).

9. *See* note 69 *infra* and accompanying text.

privilege against self-incrimination under *Prudhomme*.[10] Although one is generally precluded from raising on appeal a privilege not raised at trial,[11] the supreme court analyzed the merits of the defendant's argument involving the privilege.[12] The court concluded, however, that the error committed by the trial court in allowing discovery of the incriminating evidence was harmless.[13] Because the *Collie* court ruled that any error committed was harmless, it did not alter the holding of the court of appeal. The decision did, however, make significant changes in the protection afforded defendants' rights in criminal cases by extending the work product doctrine and by refusing to formulate a system of prosecutorial discovery.

II. HISTORICAL ANALYSIS

Before resolving the issue of whether the discovery order violated the work product doctrine or the defendant's privilege against self-incrimination,[14] Justice Mosk analyzed the development of prosecutorial discovery in California.[15] California courts have held that the purpose of discovery, in both civil and criminal trials, is to ascertain the truth.[16] While early common law cases held that the defendant could not compel discovery of documents

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10. *See* note 14 *infra* and accompanying text.

11. The court of appeal reasoned that the defendant's failure to invoke the privilege against self-incrimination at trial resulted in a waiver of the privilege. Accordingly, the court ruled that inquiry into the self-incrimination issue was not reviewable on appeal. People v. Collie, 110 Cal. App. 3d at 111-12, 167 Cal. Rptr. at 724 (1980), *vacated*, 30 Cal. 3d 43, 634 P.2d 534, 177 Cal. Rptr. 458 (1981) (the court relied on CAL. EVID. CODE § 353 (West, 1966); B. WITKIN, CALIFORNIA PROCEDURE §§ 276-80 (2d ed. 1971)).

12. The defendant raised the privilege against self-incrimination through an indirect approach. 30 Cal. 3d at 49, 634 P.2d at 537, 177 Cal. Rptr. at 461; *see* note 34 *infra* and accompanying text.

13. The court reasoned that because Ms. Morris testified to collateral matters, her testimony did not harm the defendant's case. 30 Cal. 3d at 58, 634 P.2d at 542, 177 Cal. Rptr. at 466.

14. U.S. CONST. amend. V; CAL. CONST. art. 1, § 13. The *Prudhomme* decision, which was at issue in *Collie*, relied solely on federal constitutional principles and failed to touch on California constitutional principles. *See also* 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129; CAL. PENAL CODE § 1324 (West 1982); CAL. EVID. CODE §§ 930, 940 (West 1966).

15. 30 Cal. 3d at 50-53, 634 P.2d at 537-39, 177 Cal. Rptr. 461-63.

16. Jones v. Superior Court, 58 Cal. 2d 56, 58, 372 P.2d 919, 920, 22 Cal. Rptr. 879, 880 (1962); People v. Estrada, 54 Cal. 2d 713, 716, 355 P.2d 641, 642, 7 Cal. Rptr. 897, 898 (1960); People v. Cooper, 53 Cal. 2d 755, 768-71, 349 P.2d 964, 972-74, 3 Cal. Rptr. 148, 156-58 (1960); Cash v. Superior Court, 53 Cal. 2d 72, 74-76, 346 P.2d 407, 408-09 (1959); Funk v. Superior Court, 52 Cal. 2d 423, 424-25, 340 P.2d 593, 594 (1959); People v. Durazo, 52 Cal. 2d 354, 356, 340 P.2d 594, 596 (1959); People v. Riser, 47 Cal. 2d 566, 585-88, 305 P.2d 1, 13-14 (1957), *rev'd on other grounds*, People v. Morse, 60 Cal. 2d 631, 648-49, 388 P.2d 33, 44, 36 Cal. Rptr. 201, 212 (1963) (improper jury instruction).

in the possession of the prosecution,[17] later cases held that the defendant's interests in discovery are outweighed by the interest of the state where discovery would "throw light on the issues in the case."[18]

Relying on those early cases, the *Jones v. Superior Court*[19] decision became the catalyst for a wide range of prosecutorial discovery by declaring discovery should not be a "one-way street." That language was interpreted by courts as establishing a broad principle of reciprocal discovery[20] and resulted in numerous discovery orders directed at defendants.[21] In a case intended to limit the number of discovery orders resulting from *Jones*, the *Prudhomme* court held that prosecutorial discovery orders would not be permitted if they would lighten the prosecutor's burden of proving his case in chief.[22] Concerned with protecting the defendant's constitutional rights,[23] the dicta in *Prudhomme* stated that before the trial court may order discovery, it must find that the information to be discovered will not have a tendency to incriminate the defendant.[24]

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17. *Riser*, 47 Cal. 2d at 585-86, 305 P.2d at 13. The court stated the defendant should have access to all relevant evidence "[a]bsent some governmental requirement that [the] information be kept confidential for the purposes of effective law enforcement." *Id.* at 586, 305 P.2d at 130.

18. *Jones*, 58 Cal. 2d at 58, 372 P.2d at 920, 22 Cal. Rptr. at 880 (citing People v. Riser, 47 Cal. 2d 566, 585-86, 305 P.2d 1, 13 (1956)). *See also* 6 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §1859(g), at 475 (3d ed. 1940).

19. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879 (1962). The *Jones* court allowed the prosecution to discover the names of witnesses to be called at trial and any reports and x-rays intended to be introduced into evidence in support of the defendant's affirmative defense of impotency in a rape charge. *Id.* at 61, 372 P.2d at 922, 22 Cal. Rptr. at 882. The court reasoned that the discovery did not violate the privilege against self-incrimination or the attorney client privilege because such discovery required only that the defendant reveal information he would ultimately disclose at trial anyway. *Id.*

20. *Collie*, 30 Cal. 3d at 50, 634 P.2d at 537, 177 Cal. Rptr. at 461. Discovery by the prosecution would be reciprocal because earlier cases had granted discovery to the defendant to promote the ascertainment of the truth. *See* Cash v. Superior Court, 53 Cal. 2d 72, 346 P.2d 407 (1959); Funk v. Superior Court, 52 Cal. 2d 423, 340 P.2d 593 (1959); Powell v. Superior Court, 48 Cal. 2d 704, 312 P.2d 698 (1957).

21. *See* People v. Thornton, 88 Cal. App. 3d 795, 152 Cal. Rptr. 77 (1979); People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr., 283 (1975); People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr., 157 (1973); People v. Bias, 31 Cal. App. 3d 663, 107 Cal. Rptr., 519 (1973).

22. 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133.

23. *See* note 14 *supra*.

24. *See also* 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133. *See also* Hoffman v. United States, 341 U.S. 479, 486-88 (1951).

In cases subsequent to the *Prudhomme* decision, the courts of appeal began to allow prosecutorial discovery of prior statements by defense witnesses when the statements were to be used solely for the purpose of impeachment.[25] Although all courts took precautions to insure that the statements did not incriminate the defendant,[26] the courts were not in agreement with respect to the reasons justifying prosecutorial discovery.[27] An underlying consideration all courts were confronted with when deciding the extent to which prosecutorial discovery orders should be permitted was the effect on the privilege against self-incrimination.[28]

The *Collie* court also addressed the applicability of the work product doctrine, which had heretofore been limited to civil trials.[29] Although prior to *Collie* the California courts had not applied the work product doctrine to criminal cases, state[30] and federal[31] courts had recognized the doctrine's value and, in increasing numbers, have applied it to criminal cases.

III. Case Analysis

Justice Mosk set the tone of the majority's opinion when he noted that the *Prudhomme* opinion has caused nothing but confusion and has resulted in the development of prosecutorial discovery procedures by the courts of appeal without guidance from the California Supreme Court.[32] Accordingly, the opinion was primarily directed at the conflicts facing judicial attempts to develop a prosecutorial discovery scheme.

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25. *See* People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975); People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973); People v. Bias, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973).

26. The courts utilized screening procedures in which the trial court reviewed the evidence and allowed discovery of impeaching evidence while screening out the incriminatory evidence. *See Collie*, 30 Cal. 3d at 52, 634 P.2d at 539, 177 Cal. Rptr. at 463.

27. *Id.*

28. The *Collie* court noted that several courts of appeal have struggled with the problem of limiting the constitutional privilege against self incrimination to effectuate the goal of "effective prosecution." 30 Cal. 3d at 52, 634 P.2d at 538, 177 Cal. Rptr. at 462. *See* note 25 *supra* for the court of appeal cases.

29. *Collie*, 110 Cal. App. 3d at 112, 167 Cal. Rptr. at 724. *See* also *Collie*, 30 Cal. at 59, 634 P.2d at 543, 177 Cal. Rptr. 467 (the court noted that although the doctrine has been applied to civil trials, neither the courts nor the legislature have applied it to criminal cases).

30. *See, e.g.*, United States v. Nobles, 422 U.S. 225 (1975).

31. *See, e.g.*, A. v. District of Second Judicial District., 550 P.2d 315 (Colo. 1976); O'Connor v. Johnson, 287 N.W.2d 400 (Minn. 1979); Couser v. State, 282 Md. 125, 383 A.2d 389 (1978).

32. 30 Cal. 3d at 48, 634 P.2d at 536, 177 Cal. Rptr. at 460.

A. The Privilege Against Self Incrimination

The *Collie* court recognized that the defendant's failure at trial to assert the privilege against self incrimination precluded any subsequent assertion on appeal.[33] However, because the defendant argued that his attorney's failure to object to the discovery constituted ineffective assistance of counsel, the court was able to examine what, under ordinary circumstances, would not be reviewable by the court.[34] As a result, the court was able to reexamine *Jones* and *Prudhomme*.[35] The court was also able to utilize the wisdom of *Reynolds v. Superior Court*,[36] a case which expressed the need for judicial restraint in formulating prosecutorial discovery schemes.[37] Upon reexamination of *Prudhomme*, Justice Mosk stated that *Reynolds* dictated the preclusion of any further attempts by the judicial system to formulate a system of prosecutorial discovery.[38]

The *Reynolds* court had before it a discovery order requiring the defendant to disclose the identity of any person who would be called as an alibi witness. Abstaining from approving or formulating any notice-of-alibi procedures in the absence of legislative guidance,[39] the *Reynolds* court decided that the constitutional issues surrounding notice-of-alibi procedures made them especially suitable for legislative resolution.

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33. *Id.* at 49, 634 P.2d at 536, 177 Cal. Rptr. at 460.

34. After noting that the defendant could not raise the privilege on appeal because he failed to raise it at trial, *id.*, the court recognized the defendant's argument that he received ineffective assistance of counsel (i.e., his attorney failed to object to the discovery on the basis of *Prudhomme*) as an indirect assertion of the privilege. *Id.* at 49-50, 634 P.2d at 537, 177 Cal. Rptr. at 461. The court examined whether the discovery order violated the privilege against self incrimination under *Prudhomme* before it decided whether the failure to assert the privilege deprived the defendant of a potentially meritorious defense. *Id.*

35. *See* note 33 *supra*.

36. 12 Cal. 3d 834, 528 P.2d 45, 117 Cal. Rptr. 437 (1974).

37. *See* note 41 *infra* and accompanying text.

38. 30 Cal. 3d at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465. The court stated that "[a]lthough we refrain from establishing discovery rules related to testimonial evidence, we leave intact the firmly established precedents that . . . allow mandatory production of nontestimonial evidence, such as fingerprints, blood samples, breath samples, appearances in line-ups, and handwriting and voice exemplars." *Id.* at 55 n.7, 634 P.2d at 541 n.7, 177 Cal. Rptr. at 465 n.7.

39. 12 Cal. 3d at 846, 528 P.2d at 52-53, 117 Cal. Rptr. at 444-45. While the *Reynolds* court noted that it would find it easier to pass judgment on *notice-of-alibi* procedures developed by the legislature, *id.*, the *Collie* court had "grave doubts" that a valid *prosecutorial discovery* role could be devised. 30 Cal. 3d at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465 (emphasis added).

In deciding whether to apply *Prudhomme* or *Reynolds*, Justice Mosk chose not to select the *Prudhomme* decision because it failed to assess the difficult responsibility placed on the courts when performing the rule-making function.[40] Justice Mosk was impressed with the judicial restraint displayed by Chief Justice Wright in *Reynolds* in distinguishing between the formulation of judicial procedures *"necessary"* to protect fundamental constitutional guarantees and those judicial procedures which are merely *"permitted"* by the Constitution.[41] While constitutional principles must conversely limit the formulation of criminal procedures enacted merely because they are permitted by the constitution.[42]

In the *Collie* opinion Justice Mosk appeared to imply that the prosecutorial discovery procedures at issue were not *"necessary"* procedures, but rather merely *"permitted"* ones because they arose out of the *Jones* conclusion that discovery should not be a "one way street."[43] The court's dicta[44] in *Prudhomme* also

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40. 30 Cal. 3d at 55-56, 634 P.2d at 541, 177 Cal. Rptr. at 465.

41. Justice Mosk characterized the *Reynolds* opinion as a "model of judicial restraint." *Id.* at 51, 634 P.2d at 537, 177 Cal. Rptr. at 461.

42. 12 Cal. 3d at 845-46, 528 P.2d at 52, 117 Cal. Rptr. at 444. The court appeared to be saying that judicial procedures *permitted* by the constitution, which may seem to be socially desirable, are nevertheless not required by the Constitution and therefore must be limited by constitutional safeguards. It is, however, quite another thing for the court to prescribe judicial procedures necessary to protect some fundamental constitutional principle or individual where the Constitution dictates the development. *Id.*

The *Renyolds* court cited cases in which judicially developed procedures were necessary. *See, e.g.*, People v. Rhodes, 12 Cal. 3d 180, 524 P.2d 363, 115 Cal. Rptr. 235 (1979) (judicially declared rule of criminal procedure prohibiting a city attorney with prosecutorial responsibility from defending persons accused of crimes *necessary* to insure the defendant's constitutional right of effective assistance of counsel); People v. Vickers, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972) (judicially declared rule of criminal procedure requiring a probationer to be entitled to counsel at a formal probation revocation hearing *necessary* to safeguard probationer's interest); Bryan v. Superior Court, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972) (judicially declared rule of criminal procedure that admissions made in connection with juvenile proceeding could not be used against a minor in criminal prosecution order by juvenile court *necessary* to prevent frustrating rehabilitative policy of the juvenile system) (emphasis added).

43. Although *Jones* was the catalyst to prosecutorial discovery, the court there recognized that the privilege against self-incrimination would limit an order of prosecutorial discovery. 58 Cal. 2d 56, 372 P.2d 919, 22 Cal. Rptr. 879. It would logically follow that if the privilege against self-incrimination can limit prosecutorial discovery, it is the privilege against self-incrimination which is *necessary* under the Constitution and prosecutorial discovery which is merely *permitted*.

44. Although *Prudhomme* limited *Jones* by precluding discovery where it might "lighten the prosecution's burden of proving his case in chief," 2 Cal. 3d at 326, 466 P.2d at 677, 85 Cal. Rptr. at 133, the court's discussion left open the possibility of prosecutorial discovery where it may present "no substantial hazards of self-incrimination. . . ." *Id.* at 327, 466 P.2d at 678, 85 Cal. Rptr. at 133. Similar to the court in *Jones*, the *Prudhomme* court also recognized that the privilege against self-incrimination would limit a prosecutorial discovery order. Accordingly, the court's dicta merely *permits* discovery. *See* note 43 *supra*.

seemed to suggest that prosecutorial discovery is merely *permitted* by the Constitution and therefore under *Reynolds* may likewise be limited by the Constitution.

The aspects of the constitutional privilege limiting prosecutorial discovery which the courts of appeal have struggled the most with is the privilege against self-incrimination.[45] The *Collie* decision examined three court of appeal cases[46] which had previously confronted the conflict between "permitting" prosecutorial discovery to ensure effective prosecution and limiting prosecutorial discovery to protect the defendant's privilege against self incrimination.[47] Each case upheld prosecutorial discovery where the discovered material was to be used solely for impeachment purposes.[48] To protect against the discovery of incriminating evidence, the cases approved screening procedures to separate out the impeaching material.[49] However, despite the precautions utilized by the courts of appeal to shield the defendant from self-incrimination, the *Collie* court was concerned by the absence of agreement among the justices on the justification for "permitting" prosecutorial discovery.[50] Three distinct justifications have been proffered by the courts:[51] the privilege is personal and does not apply to third parties;[52] mere impeaching statements do not incriminate because they do not aid in proving the prosecutor's case in chief;[53] and the privilege is waived when the third party testifies.[54] Justice Mosk concluded that the disparity of justifica-

45. *See* note 28 *supra* and accompanying text.

46. *See* note 25 *supra*.

47. 30 Cal. 3d at 52, 634 P.2d at 539, 177 Cal. Rptr. at 463. Justice Mosk appeared to be concerned with only infringement by prosecutorial orders on the privilege against self-incrimination.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. People v. Ayers, 51 Cal. App. 3d 370, 124 Cal. Rptr. 283 (1975). The *Collie* court noted that this justification was based on federal precedent, (*see* United States v. Nobles, 422 U.S. 225 (1975); Williams v. Florida, 399 U.S. 78 (1970)), but was undercut by Allen v. Superior Court, 18 Cal. 3d 520, 557 P.2d 65, 134 Cal. Rptr. 774 (1976), which demonstrated a more solicitous attitude toward the privilege against self-incrimination in California. 30 Cal. 3d at 53, 634 P.2d at 539, 177 Cal. Rptr. at 463.

53. People v. Chavez, 33 Cal. App. 3d 454, 109 Cal. Rptr. 157 (1973). The *Collie* court noted that this justification "would allow discovery of information that directly incriminates the defendant so long as it is within the scope of [his] direct testimony. . . ." 30 Cal. 3d at 53, 634 P.2d at 539, 177 Cal. Rptr. at 463.

54. People v. Bias, 31 Cal. App. 3d 663, 107 Cal. Rptr. 519 (1973). The *Collie*

tions for prosecutorial discovery orders among the courts of appeal showed that the constitutionality of prosecutorial discovery is as subject to question as was the notice-of-alibi procedures confronted by the *Reynolds* court.[55]

The *Collie* court concluded that the formulation of a prosecutorial discovery scheme would encounter "almost insurmountable hurdles" under the California Constitution.[56] In contrast, the United States Supreme Court has found that such a scheme does not violate the privilege against self-incrimination under the United States Constitution.[57] Additionally, the United States Supreme Court has established a due process requirement of reciprocity of discovery in criminal cases.[58] However, the *Collie* court concluded that federal court decisions were not binding on it because the California Supreme Court has taken a more solicitous attitude toward the privilege against self-incrimination.[59]

In *Collie*, the court held that allowing the prosecutor to discover all relevant evidence, as the attorney general urged, would penalize the defendant whose attorney diligently gathered evidence,[60] and compromise the defendant's right to "competent and vigorous legal representation."[61] The *Collie* court concluded that *Reynolds* dictated the court to preclude the formulation of a principle upon which prosecutorial discovery could be based.[62] Because it is the role of the court to review rules, the court noted that it should not also define rules on which it might ultimately be asked to pass judgment.[63]

B. The Work Product Doctrine

Justice Mosk began his analysis of the work product doctrine[64] by noting that, until *Collie*, neither the courts nor the legislature had held the doctrine applicable in criminal cases[65] even though it had been applied in criminal cases by the federal courts, as well

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court observed that this approach would limit discovery to statements that impeach the witness. 30 Cal. 3d at 53, 634 P.2d at 539, 177 Cal. Rptr. at 463.

55. *Id.*

56. *Id.* at 54, 634 P.2d at 540, 177 Cal. Rptr. at 464.

57. United States v. Nobles, 422 U.S. 225, 233-34 (1975).

58. Wardius v. Oregon, 412 U.S. 470 (1973).

59. Justice Mosk observed that *Allen* reaffirmed the more solicitous attitude toward the privilege against self-incrimination which was expressed by the court in *Prudhomme*. 30 Cal. 3d at 51-52 n.2, 634 P.2d at 538 n.2, 177 Cal. Rptr. at 462 n.2.

60. *Id.* at 55, 634 P.2d at 540, 177 Cal. Rptr. at 464.

61. *Id.* at 55 n.6, 634 P.2d at 540 n.6, 177 Cal. Rptr. at 464 n.6. *See also* CAL. CONST. art. 1, § 15.

62. 30 Cal. 3d at 55, 634 P.2d at 541, 177 Cal. Rptr. at 465.

63. *Id.* at 55-56, 634 P.2d at 541, 177 Cal. Rptr. at 465.

64. *See* note 7 *supra*.

65. 30 Cal. 3d at 59, 634 P.2d at 543, 177 Cal. Rptr. at 467.

as by some state courts.[66] Although the court of appeal in *Collie* held the work product doctrine applied only to civil cases, the court of appeal had assumed arguendo that even if the doctrine did apply to criminal cases, the defendant failed to show that the investigator's notes reflected the " 'impressions, conclusions, opinions, or legal research or theories' of his attorney."[67] Because the work product doctrine takes into account the practical realities of litigation, it contemplates that attorneys need to rely on investigators in compiling evidence.[68] Accordingly, the Supreme Court overruled the decision of the court of appeal by expressly holding the work product doctrine to be applicable to criminal cases and, additionally, to the work product of defense investigators.[69]

In analyzing the applicability of the work product doctrine to defense investigator's notes, Justice Mosk stated that while it is difficult to perceive how the policy of the work product doctrine could be served by protecting work which does not contain thoughts or impressions, courts should be careful not to make hasty decisions in concluding that the work is not protected as thoughts or impressions.[70] After this note of caution, he concluded that although the investigator's notes should have been protected by the doctrine, no prejudicial effect resulted from their revelation.[71]

IV. Case Impact

The majority's decision clearly precludes trial courts from framing prosecutorial discovery orders. The court also limited its own ability to set forth a "unitary principle on which discovery by the People can be based."[72] Although the specific issue before the court was whether a prosecutor may discover "pretrial statements made by defense witnesses to defense investigators,"[73] the *Collie*

66. *See* notes 30 and 31 *supra* and accompanying text.
67. 110 Cal. App. 3d at 112-13, 167 Cal. Rptr. at 724.
68. Because attorneys often rely on investigators when preparing for trial, the doctrine must protect material prepared by both the attorney and his agent. 30 Cal. 3d at 59, 634 P.2d at 543, 177 Cal. Rptr. at 467 (quoting *Nobles*, 422 U.S. at 238-39).
69. 30 Cal. 3d at 59, 634 P.2d at 543, 177 Cal. Rptr. at 467.
70. *Id.* at 60, 634 P.2d at 543-44, 177 Cal. Rptr. at 467-68. For a discussion of the applicability of the work product doctrine in criminal law, see Note, *"Work Product" In Criminal Discovery* WASH. U.L.Q. 321 (1966).
71. 30 Cal. 3d at 60-61, 634 P.2d at 544, 177 Cal. Rptr. at 468.
72. *Id.* at 55, 634 P.2d at 541, 177 Cal. Rptr. at 465.
73. 30 Cal. 3d at 48, 634 P.2d at 536, 177 Cal. Rptr. at 460.

decision is broader than this and encompasses all forms of prosecutorial discovery.[74] Although it has been stated that *Prudhomme* limited *Jones* to its facts,[75] the *Collie* decision has impliedly overruled *Jones*, such that a case with identical facts to *Jones* would not be upheld.[76] The court has also impliedly overruled the *Prudhomme* decision by going from a strict rule prohibiting discovery unless there is no possible risk it will incriminate the defendant, to an absolute rule prohibiting prosecutorial discovery in the absence of legislation.[77] This decision effectively prohibits prosecutorial discovery even where there is no possibility of self-incrimination and deprives the trier of fact of the assistance of relevant nonincriminating information.[78] However, in spite of the harshness of the decision, it appears to leave open the possibility of prosecutorial discovery which is *necessary* under the constitution.[79]

While the *Collie* majority was of the opinion that a system of prosecutorial discovery is beyond the power of the court to formulate because of the complexity of the constitutional issues,[80] Justice Richardson, in his concurrence, stated the *Collie* decision is a complete abdication of the court's responsibility to resolve constitutional issues.[81] Justice Richardson also asserted that in addition to precluding courts from developing prosecutorial discovery

74. While the specific issue addressed by the court was whether a prosecutor may discover pretrial statements made by defense witnesses, the practical effect of the court's decision is to preclude any type of prosecutorial discovery, even if it is constitutionally sound and does not violate the privilege against self-incrimination.

75. 30 Cal. 3d at 50, 634 P.2d at 537, 177 Cal. Rptr. at 461.

76. Since the *Collie* decision prohibits courts from formulating prosecutorial discovery orders, 30 Cal. 3d at 55, 634 P.2d at 541, 177 Cal. Rptr. at 465, a discovery order identical to that in *Jones* would fail simply because it is judicially formulated.

77. Justice Richardson, dissenting, believed that the majority's decision "tilts the evidentiary scales against the People" by replacing *Prudhomme's* test—no possible risk of incriminating the defendant with an *absolute prohibition* of prosecutorial discovery in the absence of legislation. *Id.* at 68, 634 P.2d at 549, 177 Cal. Rptr. at 473 (emphasis in original).

78. *Id.* at 68, 634 P.2d at 549, 177 Cal. Rptr. at 473.

79. If the determinative factors governing the constitutionality of judicial discovery orders are (1) whether it is necessary under the constitution, *see* note 42 *supra* and accompanying text, (2) whether it violates the privilege against self-incrimination, *see* note 47 *supra* and accompanying text, it is unclear whether a prosecutorial discovery order which satisfied these concerns would be upheld.

80. 30 Cal. 3d at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465.

81. *Id.* at 65, 634 P.2d at 547, 177 Cal. Rptr. at 471. Justice Richardson's response to the court's decision to let the legislature decide the issue was that, in *Jones*, Justice Traynor anticipated the court's abdication and stated: "[n]or is it any less appropriate . . . for the courts to develop the rules governing discovery in the absence of express legislation authorizing such discovery." *Id.* at 65-66, 634 P.2d at 547, 177 Cal. Rptr. at 471 (quoting Jones v. Superior Court, 58 Cal. 2d at 59, 372 P.2d at 920-21, 22 Cal. Rptr. at 880-81).

procedures, the *Collie* decision is also a warning to the legislature to refrain from developing such procedures.[82]

V. CONCLUSION

The *Collie* court relied primarily on its decision in *Reynolds*, which advocated judicial restraint in developing discovery procedures. Retreating from its decisions in *Jones* and *Prudhomme*, where it had attempted to articulate rules for prosecutorial discovery, the court chose instead to follow *Reynolds* and refused to extend its decision in *Prudhomme*.

The decision contrasted the formulation of prosecutorial discovery rules with the development of notice-of-alibi procedures. Noting that the development of prosecutorial discovery rules involved complex constitutional issues similar to those which perplexed notice-of-alibi procedures, the *Collie* decision placed much weight on the fact that both the courts and the legislature were unable to develop constitutionally viable notice-of-alibi procedures and had abandoned any further attempts to do so.[83]

The California Supreme Court's decision in *Collie* has clearly precluded judicial formulation of prosecutorial discovery orders under almost any circumstances.[84] The court has left the responsibility of promulgating such orders to the legislature, while cautioning that the legislature will encounter the same problems as the court in formulating rules for prosecutorial discovery.[85]

E. *Use of Pretrial Identifications to Support Convictions:* **People v. Ford**

The California Supreme Court held in *People v. Ford*[1] that a pretrial identification may be sufficient to support a conviction,

82. 30 Cal. 3d at 66, 634 P.2d at 547, 177 Cal. Rptr. at 471. Justice Richardson argued that *Collie* could have satisfied *Prudhomme's* test of whether the discovery would aid in proving the prosecutor's case in chief; the notes were useful only to impeach the witness. *Id.* at 67, 634 P.2d at 548, 177 Cal. Rptr. at 472.

83. *See id.* at 52 n.3, 634 P.2d at 538 n.3, 177 Cal. Rptr. at 462 n.3.

84. *See* note 79 *supra* and accompanying text.

85. 30 Cal. 3d at 56, 634 P.2d at 541, 177 Cal. Rptr. at 465.

1. 30 Cal. 3d 209, 635 P.2d 1176, 178 Cal. Rptr. 196 (1981). The majority opinion was written by Justice Mosk with Justices Tobriner, Richardson, Newman, Work, and McClosky concurring. Chief Justice Bird wrote a dissenting opinion.

The defendant was convicted of six counts of armed robbery and possession of a concealable firearm. Count three involved the armed robbery of a store owned by the victim, who later appeared as a witness.

even if the witness later repudiates his pretrial identification at the trial.[2] The *Ford* court distinguished two earlier cases, *People v. Gould*[3] and *People v. Chavez*,[4] which were factually similar to *Ford*.

In *Ford*, the defendant invoked the *Gould* rule which held that when there is no other evidence connecting the defendant to the crime, an extrajudicial identification which cannot be confirmed at trial is insufficient to support a conviction.[5] The Attorney General, on the other hand, invoked the rule of *Chavez*. The Chavez court had held that a pretrial identification may be sufficient to support a conviction, if it is made under oath and there is evidence from which the jury can credit the witness' testimony at the preliminary examination over his testimony at trial.[6]

The court in *Ford* chose to rely on *Chavez* because in both *Chavez* and *Ford* there were positive identifications at formal hearings.[7] The formal hearing provides accuracy and truthworthiness because it includes the opportunity for cross examination,[8] which, the court noted, was lacking in the extrajudicial examination involved in *Gould*.[9] The court then stated that it is the trustworthiness of the formal preliminary examination which allows the jury to credit a witness' prior testimony over his testimony at trial.[10]

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2. The court held that a pretrial identification which is made under oath and is subject to cross examination in a formal judicial proceeding, is sufficient to support a conviction. *Id.* at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199. The court also noted that an identification of the defendant at a prior trial, which was related to the present action, also supported a conviction. *Id.* at n.5. The witness' pretrial identification was reliable because, throughout the course of the robbery, he had ample opportunity to observe the defendant's identity. *Id.* at 212 n.1, 635 P.2d at 1177 n.1, 178 Cal. Rptr. at 197 n.1.

3. 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960).

4. 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762 (1980).

5. 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273.

6. 26 Cal. 3d 334, 605 P.2d 401, 161 Cal. Rptr. 762.

7. 30 Cal. 3d at 213-14, 635 P.2d at 1178, 178 Cal. Rptr. at 198.

8. *Id.* at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199. The court noted that in the present case, as in *Chavez*, the witnesses' testimony at the formal preliminary hearing was not weakened by cross examination. *Id.* at 213, 635 P.2d at 1178, 178 Cal. Rptr. at 198.

9. Extrajudicial identifications, such as those in *Gould* and its progeny, lack accuracy and trustworthiness. *Id.* at 215, 635 P.2d at 1179, 178 Cal. Rptr. at 199. *See In re* Johnny G., 25 Cal. 3d 543, 601 P.2d 196, 159 Cal. Rptr. 180 (1979) (prior identification made by victim on street after dazed from an assault); People v. Gould, 54 Cal. 2d 621, 354 P.2d 865, 7 Cal. Rptr. 273 (1960) (prior identification made by examining photographs); *In re* Eugene M., 55 Cal. App. 3d 650, 127 Cal. Rptr. 851 (1976) (prior identification made while witness was confused and under police threats to charge him with murder.

10. *See* 30 Cal. 3d at 213-14, 635 P.2d at 1178, 178 Cal. Rptr. at 198. The court noted that in both *Chavez* and the present case the witnesses had *positively* identified the defendants but later repudiated the identification at the trials. However, the witness in *Chavez* denied ever seeing the defendant before, while the witness in the present case could not remember. The court's decision to allow the prelimi-

F. *Newly discovered evidence and lawyer incompetency are sufficient to issue a writ of habeas corpus:* In re Gordon Robert Hall

On the night of February 25, 1978, Gordon Robert Hall was identified as the killer of Jesse Ortiz[1] "in a hastily-assembled street corner line-up."[2] This identification was followed by a conviction of first-degree murder and a sentence of life imprisonment. *In re Gordon Robert Hall*[3] came before the California Supreme Court when Hall petitioned for a writ of habeas corpus on the basis of newly discovered evidence.[4] The court assigned a referee the

nary hearing testimony to support the conviction was based on the court's concern that in the period between the preliminary hearing and the trial, the witness had become reluctant to testify. There was evidence that the defendant in *Ford* had conversed with the witness prior to the day that he was scheduled to testify. 30 Cal. 3d at 213 n.2, 635 P.2d at 1178 n.2, 178 Cal. Rptr. at 198 n.2.

1. The long and complex facts of this case are as follows: On the evening of February 25, 1978, Victor Lara and his two adopted brothers, Jesse and Daniel, stopped their car and were standing near the car while engaging in a domestic argument (unrelated to this case). As a gray car passed by slowly, Victor and Daniel tried to coax Jesse into their own car in order to leave. One of the two persons in the gray car shouted at the brothers. The gray car came to a stop half a block away and the two occupants, described by the Lara brothers as Chicanos, approximately the same height, approached. When the Lara brothers told the strangers to mind their own business, one of the Chicano fired several shots past the brothers. Assuming they were blanks, the brothers approached the two Chicanos. At this time, a white car pulled up, and several people emerged. One of these people jumped Daniel and began to wrestle. Suddenly, several shots were fired, wounding Victor and Daniel, and killing Jesse. The two cars then sped away.

The police quickly found the gray car parked at a nearby residence where a party was going on. Police surrounded the house and took all males as suspects. They presented several four to six-man lineups for the Lara brothers to view. Gordon Robert Hall, who had tried to flee from the party but was unsuccessful, was handcuffed and bare-chested when the police brought him before the brothers. Daniel and Victor identified Hall as the killer of their brother, Jesse.

After the conviction for first degree murder and the imposition of a life sentence, Gordon Robert Hall retained new counsel. Encouraged by the subsequent discovery of new evidence and the reopening of the case by two homicide detectives, Hall petitioned the supreme court for a writ of habeas corpus based on the newly discovered evidence. The referee, Joseph Kelly, a retired Santa Clara County Superior Court Judge, recommended that the petition be granted. *In re Gordon Robert Hall*, 30 Cal. 3d 408, 413-15, 637 P.2d 690, 695-97, 179 Cal. Rptr. 223, 224-25 (1981). *See also Youth's Murder Conviction an Error, Report Concludes*, L.A. Times, June 19, 1981, § 1, at 3, col. 5.

2. L.A. Times, June 19, 1981, § 1, at 3, col. 5.

3. 30 Cal. 3d 408, 637 P.2d 690, 179 Cal. Rptr. 223 (1981). The majority opinion was written by Mosk, J., with Tobriner, Richardson, Newman, Brousard and Tamura, J.J., concurring. Bird, C.J., wrote a separate concurring opinion.

4. In the present case, Hall's petition included many newly discovered facts as well as a charge of inadequate representation at trial.

task of determining the answers to six issues stemming from Hall's petition.[5] The referee found that there was credible, newly discovered evidence which undermined the prosecution's case. In addition, the referee concluded that Hall lacked an adequate defense at trial because his attorney failed to properly investigate the case and did not challenge the questionable identification procedures.[6]

In beginning its review, the supreme court pointed out that it was not necessarily bound by the findings of the referee. However, if there was ample or substantial evidence to support the referee's findings, they were to be given great weight.[7] The court held that there was credible evidence to support the findings and conclusions of the referee and that the writ should issue.[8] The

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> One seeking to challenge a criminal conviction by habeas corpus concerns himself with only one rule in preparing his application, but compliance with this rule is essential. The petitioner must state the facts upon which the illegality of his conviction is based and his reasons for any delay in raising the question.

Granucci, *Review of Criminal Convictions by Habeas Corpus in California*, 15 HAST. L.J. 189, 191 (1963). In this article, Granucci deals exclusively with the availability of the writ to review a final judgment of conviction. He observes that its use is not intended as a substitute for review on appeal. The writ of habeas corpus is meant as a supplement to appellate review. *Id.* at 189. Indeed, Hall had appealed his conviction, only to have the court of appeals rule that not only would the conviction stand, but that Hall had been competently represented by counsel. *See* note 2 *supra*.

5. The six issues are as follows:

> (1) What new evidence, if any, has been discovered?
> (2) Should such evidence, if any, be credited?
> (3) Would such evidence, if credited, undermine the entire case of the prosecution?
> (4) Would such evidence, if credited, establish that false evidence, substantially material or probative on the issue of guilt, was introduced against petitioner at trial?
> (5) Did petitioner's trial counsel inadequately represent him (i.e. did counsel fail to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate) either:
> (a) By failing to challenge the identification procedures employed by the police on the night of the crimes and arrest; or
> (b) By failing to diligently investigate petitioner's case prior to trial and seek out witnesses on his behalf?
> (6) If either (5)(a) or (5)(b) is answered in the affirmative, did trial counsel's failure to act deprive petitioner of a potentially meritorious defense?"

30 Cal. 3d at 415-16, 637 P.2d at 697, 179 Cal. Rptr. at 226.

6. *See* notes 30-38 *infra* and accompanying text. By the time the referee had made his findings and conclusions and the California Supreme Court had released Gordon Robert Hall from custody, he had already served three years in prison. *Id.* at 435, 637 P.2d at 717, 179 Cal. Rptr. at 238. This fact did not go unnoticed by the court. Although the majority of the court dealt with the legal issues involved, Chief Justice Bird addressed the compelling "human costs that result when those in authority within the judicial system fail to follow the rule of law." *Id.*

7. *Id.* at 416, 637 P.2d at 698, 179 Cal. Rptr. at 226 (quoting *In re* Branch, 70 Cal. 2d 200, 203 n.1, 449 P.2d 174, 175 n.1, 74 Cal. Rptr. 238, 239 n.1 (1969)).

8. *Id.* at 416, 637 P.2d at 698, 179 Cal. Rptr. at 226.

court then began its analysis of the newly discovered as evidence presented at the hearing. The evidence was as follows: (1) the Lara brothers recanted their testimony as erroneous and named Oscar Sanchez as the gunman;[9] (2) testimony of an eye-witness, previously unknown, identified Oscar Sanchez and Alfred Reyes as the two assailants;[10] (3) Alfred Reyes named Oscar Sanchez as the driver of their car and said nothing to show the petitioner's involvement;[11] (4) a cellmate of Oscar Sanchez, who was jailed on another matter after the petitioner was convicted, testified to overhearing Sanchez brag about the shooting and the fact that someone else was blamed for it;[12] and (5) one known witness, Ms. Courture, stated that she was afraid to tell the whole truth at trial, but could do so now.[13] "In sum, of the five eyewitnesses who testified at the habeas corpus hearing, three asserted that Sanchez was the gunman, one stated that petitioner definitely was not the gunman, although she did not know who was, and all

9. *Id.* at 417, 637 P.2d at 699, 179 Cal. Rptr. at 226-27. Height was a crucial consideration in the recantation as both Daniel and Victor had stated that the two Chicanos who had approached them were approximately the same height (approximately 5 feet 7 inches to 5 feet 8 inches). The petitioner stood five feet one inch. *Id.*

10. *Id.* at 418, 637 P.2d at 700, 179 Cal. Rptr. at 227-28. The witness was a woman who was in the back seat of the white car which arrived on the scene shortly before the shooting. *See* note 1 *supra*. She testified that she thought Oscar Sanchez fired the gun. Both Alfred Reyes, whom she identified as being at the scene, and Oscar Sanchez were acquaintances of hers. 30 Cal. 3d 418, 637 P.2d 700, 179 Cal. Rptr. 227-28.

11. *Id.* at 418-19, 637 P.2d at 700, 179 Cal. Rptr. at 227-28. Alfred Reyes testified to being unconscious at the time of the shooting, claiming he had stopped to help a motorist in distress and was somehow knocked out. Importantly, he stated that Oscar Sanchez was the driver of the car. *Id.* This added to the implication that the petitioner was not present at the scene.

12. *Id.* at 419, 637 P.2d at 701, 179 Cal. Rptr. at 228. After hearing his cellmate talk about the crime, the witness contacted Hall's attorney even though he feared for his own life. Prompted by the fact that "he [Sanchez] was cold—cold-hearted. Just like it was, you know, nothing. [S]o I wanted to come forward on it, do anything I could to help." *Id.*

13. *Id.* Ms. Couture was pregnant at the time and was an acquaintance of Alfred Reyes. Her fear of retaliation caused her to withhold information at the trial. This aspect of her testimony was deemed to be new evidence, but the full testimony concerning the events that occurred that night was held to be cumulative. Thus, the petitioner was able to rely on the cumulative evidence because he had already introduced newly discovered evidence sufficient to place his guilt in question. Because of the petitioner's "diminutive stature," which Ms. Couture had not noticed at trial, she was unable to say he was definitely not at the scene of the murder; Alfred Reyes and his companion that night were about the same height. *Id.* at 420-21, 637 P.2d at 702-03, 179 Cal. Rptr. at 228-29. *See also* note 9 *supra*.

five denied having seen petitioner during the incident."[14] The court concluded that this new evidence substantially undermined the prosecution's case.[15]

However, Justice Mosk was quick to point out the distinction between new evidence and cumulative evidence, or that which was known, or could have been known, at trial. New evidence must first be presented to raise doubt concerning the guilt of the defendant. Only after that has been done may the petitioner present any cumulative evidence which exonerates him from guilt in the crime.[16] The court acknowledged the above evidence as newly discovered, and labeled it as cumulative.[17]

The Attorney General attacked the referee's evidentiary findings on two points. First, since the hearing was closed, the testimony was unreliable. Secondly, the evidence produced at the hearing did not establish the petitioner's innocence. It simply showed he was not the gunman, but failed to show he was not otherwise involved.[18] With regard to the reliability of witness testimony, the court held that the referee "was careful to weigh the credibility of the witnesses . . . ."[19] The court also noted that the Attorney General expressed no such concern when he argued in a recent case that prosecutors should have the right to request closed preliminary hearings when *their* witnesses are reluctant to testify for fear of public exposure or reprisal.[20]

In answering the second contention advanced by the Attorney General, the court relied on its interpretation of language from *In re Weber*,[21] which stated that new evidence must "[point] unerringly to innocence"[22] before the petitioner has met his burden of

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14. *Id.* at 421, 637 P.2d at 703, 179 Cal. Rptr. at 229.

15. *Id.*

16. *Id.* at 420, 637 P.2d at 702, 179 Cal. Rptr. at 228-29. The court discussed the policy underlying the ability of the defendant to introduce cumulative evidence. " '[I]t is so fundamentally unfair for an *innocent* person to be incarcerated that he should not be denied relief simply because of his failure at trial to present exculpatory evidence'." *Id.* (quoting *In re* Branch, 70 Cal. 2d 200, 214, 449 P.2d 174, 188, 74 Cal. Rptr. 238, 247-48 (1969)) (emphasis added). However, the potential abuse of the writ of habeas corpus is prevented because a defendant must first introduce new evidence which refutes the prosecution's case. *See* notes 13-15 *supra* and accompanying text.

17. Among the cumulative evidence was testimony by an ex-girlfriend of Sanchez' that he had told her he was the gunman. While being transported to the preliminary hearing, Sanchez confessed to committing the crime to the petitioner, and several persons at the party said they had seen Sanchez wearing a green trench coat similar to one described by the witnesses. For a detailed list of the evidence, *see* 30 Cal. 3d at 421, 637 P.2d at 703, 179 Cal. Rptr. at 229.

18. *Id.* at 422-23, 637 P.2d at 704-05, 179 Cal. Rptr. at 230-31.

19. *Id.* at 423, 637 P.2d at 705, 179 Cal. Rptr. at 230-31.

20. *Id.* at 423, n.4, 637 P.2d at 705, n.4, 179 Cal. Rptr. at 230, n.4.

21. 11 Cal. 3d 703, 523 P.2d 229, 114 Cal. Rptr. 429 (1974).

22. *Id.* at 724, 523 P.2d at 250, 114 Cal. Rptr. at 443.

proof. The statement was clarified by explaining that the defendant must not only refute each and every point in the prosecution's case, but must also prove that there was no conceivable basis upon which the prosecution could advance its charge of guilt. The court in *Hall* declared that petitioner had quite satisfactorily destroyed the underlying theory of the prosecution's case.[23]

Since a writ of habeas corpus in California is governed by Penal Code section 1473,[24] certain burdens must be met as required by the statute. Although the referee found that the petitioner did not sustain his burden of proof in showing that "false evidence"[25] was introduced against him at trial, the supreme court found that petitioner had nevertheless satisfied this burden.[26] A defendant no longer must show that the evidence against him was perjured or that the prosecution was aware of the falseness of the evidence; he must only that the evidence was false.[27] The original testimony of the witnesses at the trial, which was later recanted,[28] satisfied the requirement of section 1473 that false evidence be introduced against the defendant. Thus, the petitioner had met the burden of proof under section 1473.

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23. 30 Cal. 3d at 423, 637 P.2d at 705, 179 Cal. Rptr. at 230-31. The testimony of the Lara brothers was crucial to the prosecution's case. However, the petitioner presented evidence that they had recanted that testimony and that they now named Oscar Sanchez as the killer. Thus, the underlying foundation of the prosecution's case was destroyed. *See also* Granucci, *supra* note 4, at 190.

24. The pertinent language from the statute is:

> a) Every person unlawfully imprisoned or restrained of his liberty, under any pretense whatever may prosecute a writ of habeas corpus, to inquire into the cause of such imprisonment or restraint.
>
> b) A writ of habeas corpus may be prosecuted for, but not limited to, the following reasons:
>
> (1) False evidence that is *substantially material or probative on the issue of guilt or punishment* was introduced against a person at any hearing or trial relating to his incarceration . . .
>
> d) Nothing in this section shall be construed as limiting the grounds for which a writ of habeas corpus may be prosecuted or as precluding the use of any other remedies.

CAL. PENAL CODE §1473 (West 1980).

25. *Id.*

26. The court concluded that the referee had not considered the changes in the statute brought about by the amended section (b)(1), which requires that the false evidence be only material or probative with regard to the issue of guilt. *See also* note 24 *supra*.

27. 30 Cal. 3d at 424, 637 P.2d at 706, 179 Cal. Rptr. at 231. CAL. PENAL CODE § 1473 was amended in 1975. The additions, subsections (b), (c), and (d), specifically state a petitioner's burden in seeking a writ of habeas corpus. *See* note 24 *supra*.

28. *See* note 9 *supra* and accompanying text.

In the second part of the court's opinion, the issues of the competency of defense counsel and the absence of a meritorious defense on behalf of the petitioner were resolved by the court. In a fairly lengthy analysis, certain facts either not investigated or ignored by the defense counsel in support of the petitioner's case were exposed.[29] The court concluded its analysis in this question by stating that defense counsel had inadequately carried out his obligation to his client by foregoing the use of a trained investigator, relying on police investigators, not interviewing dozens of potential witnesses the police had located, and turning over potential defense witnesses to the police for further investigation.[30] Additionally, the court found that the defense counsel's advocacy at trial was equally inadequate,[31] and that evidence which was brought to his attention by the petitioner's family was ignored even though it could have establish doubt as to the petitioner's guilt.[32]

Perhaps the most blatant failing of defense counsel was his absence of an attack on the pretrial identification procedures.[33] The court, guided by the *People v. Nation*[34] principle which states "that a penetrating concern as to the propriety of a pretrial identification should be a commonplace consideration to any attorney engaged in criminal trials,"[35] found that defense counsel had completely ignored the issue.[36] In observing that the procedure used in the present case was extraordinarily suggestive, and that a competent defense attorney would have challenged the identifica-

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29. 30 Cal. 3d at 424-26, 637 P.2d at 706-08, 179 Cal. Rptr. at 231-233.

30. *Id.*

31. *Id.* at 428, 637 P.2d at 710, 179 Cal. Rptr. at 233. The court cited People v. Rodriguez, 73 Cal. App. 3d 1023, 141 Cal. Rptr. 118 (1977), for the proposition that when weak evidence is presented to support a defendant's alibi and such an alibi could have been bolstered by greater investigative efforts, it does not preclude a conclusion that the defense of an alibi was, in effect, withdrawn.

32. 30 Cal. 3d at 428-29, 637 P.2d at 710-11, 179 Cal. Rptr. 233-34. Although the petitioner's family told defense counsel that Sanchez had made threats to the family and had admitted to an ex-girlfriend that he killed Jesse Ortiz, this information was not pursued.

33. *Id.* at 430-31, 637 P.2d at 712-13, 179 Cal. Rptr. at 234-36. The petitioner was singled out and brought from an opposite direction; he was bare-chested after police had recovered the trench coat inside the house; petitioner was the only suspect handcuffed at the time. The court listed many other facts tending to show the questionable validity of the identification procedures. *Id.*

34. 26 Cal. 3d 169, 604 P.2d 1051, 161 Cal. Rptr. 299 (1980).

35. 30 Cal. 3d at 433, 637 P.2d at 715, 179 Cal. Rptr. at 236 (quoting People v. Nation, 26 Cal. 3d 169, 179, 604 P.2d 1051, 1061, 161 Cal. Rptr. 299, 309 (1980)). The petitioner's counsel, John H. Whyte, was a seasoned lawyer and was a certified criminal law specialist. *Id.* at 424, 637 P.2d at 706, 179 Cal. Rptr. at 231.

36. Defense counsel stated specifically that "there wasn't anything wrong with it [the identification], and I felt that they [the prosecution] would practically close the door with the only small argument I would have with the jury . . . ." *Id.* at 432, 637 P.2d at 714, 179 Cal. Rptr. at 236.

tion, the court concluded that the petitioner was denied a meritorious defense.[37]

Gordon Robert Hall is now a free man, but that fact will not erase the three years he spent in prison. Unfortunately, the justice system did not work for Hall. A case of mistaken identity, compounded by incompetent counsel, resulted in Hall's incarceration. Perhaps *In re Gordon Robert Hall* should serve as a compelling reminder that "[r]epresentation of an accused murderer is a mammoth responsibility."[38]

G. *Trial court must give adequate reasons showing that a Mentally Disordered Sex Offender will not benefit from treatment:* **People v. Lock**

A trial court must state its reasons for not permitting a mentally disordered sex offender (MDSO)[1] to be committed to a state health facility rather than a prison, according to *People v. Lock*.[2] The *Lock* case involved an MDSO who had been sentenced to a prison term. The supreme court reversed the lower court's decision, finding an abuse of discretion by the trial judge.[3] The *Lock*

37. The court cited as authority People v. Farley, 90 Cal. App. 3d 851, 153 Cal. Rptr. 695 (1979) (reversal of conviction required when counsel did not appropriately attack the validity of the identification procedures).

38. 30 Cal. 3d at 434, 637 P.2d at 716, 179 Cal. Rptr. at 237.

1. A mentally disordered sex offender (MDSO) is defined as "any person who by reason of mental defect, disease, or disorder, is predisposed to the commission of sexual offenses to such a degree that he is dangerous to the health and safety of others." CAL. WELF. & INST. CODE § 6300 (West 1972).

2. 30 Cal. 3d 454, 637 P.2d 292, 179 Cal. Rptr. 56 (1981). The majority opinion was written by Kaus, J., and expressed the findings of a unanimous court.

3. The defendant, a school teacher, pleaded guilty to a charge of lewd and lascivious acts upon a male under 14 years old. The trial judge suspended criminal proceedings and convened a medical commissioner to review the possibility that defendant might qualify as an MDSO. Prior to the suspension of criminal proceedings, a probation report had indicated that the defendant should have treatment, preferably on an out-patient basis. At the MDSO hearing, the medical experts found the defendant to be an MDSO, and suggested, as did the probation report, treatment on an out-patient basis. The trial judge found that the medical testimony established the defendant's status as an MDSO. However, instead of asking what treatment would benefit the defendant, the court questioned the defendant's counsel as to why the defendant should not go to prison. Counsel for the defendant asked for probation rather than incarceration, but the trial judge sentenced defendant to prison. His reason for doing so was his concern for children should the defendant be allowed back out on the streets. The defendant appealed, claiming abuse of discretion in his sentence to prison rather than to treatment.

court discussed the correct procedures[4] to determine the existence of an MDSO under California statutes, as well as the appropriate sentencing procedures upon a finding that the defendant was, in fact, an MDSO.[5]

Section 6316 of the Welfare and Institutions Code provides a series of steps for the trial court to follow in this area.[6] The *Lock* court stated that the first step is to determine whether the defendant is an MDSO. Secondly, the trial court must make a finding as to whether the defendant would benefit from treatment in a state health institution.[7] If the trial court finds a negative answer to either of the above queries, the defendant must be returned to criminal proceedings.[8] However, the court declared that if the defendant was an MDSO and that he could benefit from treatment, there were two alternatives which the trial court may exercise within the parameter of its discretion:[9] commit him as an MDSO or return him to criminal court.[10]

In the present case, the trial court made a valid determination that the defendant was an MDSO. However, the judge did not reasonably set forth grounds upon which he could base a finding that the defendant would not benefit from treatment.[11] The supreme court observed that statutory enactments compel the trial court to state sufficient reasons in the record when exercis-

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4. *See* note 6 *infra*.

5. 30 Cal. 3d at 459, 637 P.2d at 297, 179 Cal. Rptr. at 59.

6. CAL. WELF. & INST. CODE § 6316 (West 1972) states in pertinent part:

> If, after examination and hearing, the court finds that the person is a mentally disordered sex offender and that the *person could benefit* by treatment in a state hospital, or other mental health facility the court in its discretion has the alternative to return the person to the criminal court for further disposition, or may make an order committing the person to the county mental health director for placement. . . . If . . . the court finds that the person . . . will not benefit by . . . treatment in a state hospital or facility . . . the person [will] be returned to the court in which the original charge was tried to await further action with reference to such criminal charge.

Id. (emphasis added).

7. 30 Cal. 3d at 458, 637 P.2d at 296, 179 Cal. Rptr. at 58. *See also* note 4 *supra*.

8. *Id.*

9. The court observed that the only limitation placed upon judicial discretion in this area was the stated legislative policy in CAL. WELF. & INST. CODE § 6250; that an MDSO be treated as a sick person rather than a criminal. 30 Cal. 3d at 458, 637 P.2d at 296, 179 Cal. Rptr. at 59.

10. *Id.* at 458, 637 P.2d at 296, 179 Cal. Rptr. at 59.

11. 30 Cal. 3d at 460, 637 P.2d at 298, 179 Cal. Rptr. at 60. Although the court noted the semantics involved in the judge stating reasons for not putting the defendant on probation, and further noted that the judge did not state reasons why treatment would not benefit the defendant, the supreme court found that the reasons given on both points were not adequate. The statutory requirement, that sentencing be supported by reasons in the record, was not found. *Id. See* text accompanying notes 9 & 14-18 *infra*.

ing its discretionary sentencing power.[12] In addition, the *Lock* court cited a chance for "meaningful review" of lower court decisions as the legislative purpose behind such statutes.[13] Thus, the trial court had not carried out its duties of complying with the legislative purpose of supplying the supreme court with an adequate record of findings and conclusions for review.[14]

The court also found that after the trial court made the determination that the defendant was an MDSO, the next inquiry was to consider " 'why he [the defendant] shouldn't go to prison.' "[15] At that time, however, according to section 6316, the trial court was supposed to determine whether the defendant would benefit from treatment rather than incarceration.[16] The trial court did not make adequate findings on that issue. Stating only that teachers should not be allowed to continue molesting children, the trial court sentenced the defendant to a prison term.[17] Because of the insufficiency of findings and the fact that the particular trial judge appeared not to understand the full facts surrounding the MDSO program, the supreme court found an abuse of discretion by the trial court.[18] The defendant's case was remanded to the trial court for appropriate sentencing under the guidelines of the supreme court.[19]

The *Lock* decision was instrumental in delineating the procedures involved in sentencing MDSO's. In addition, the court

12. 30 Cal. 3d at 459, 637 P.2d at 297, 179 Cal. Rptr. at 59. Section 1170(c) states in pertinent part: "the court shall state the reasons for its sentence choice on the record at the time of the sentencing." CAL. PENAL CODE § 1170(c) (West 1972). Although an MDSO is not technically a criminal, the court found the sentencing of an MDSO to fall under the purview of § 1170(c). *See also* note 9 *supra*.

13. The defendant can hardly be afforded a meaningful review of his sentence when the trial judge states only that " '[b]ecause he committed the offense against children [and] [h]e's a teacher,' " the defendant should go to prison rather than treatment. " 'That's what I base it on . . . I think it's about time teachers quit doing these things to kids in our schools.' " 30 Cal. 3d at 457, 637 P.2d at 295, 179 Cal. Rptr. at 58.

14. *See* note 16 and accompanying text *infra*.

15. 30 Cal. 3d at 459, 637 P.2d at 297, 179 Cal. Rptr. at 59. *See* notes 9 & 11 *supra*.

16. *See* text accompanying notes 4-9 *supra*. *See also* note 10 *supra*.

17. 30 Cal. 3d at 460, 637 P.2d at 298, 179 Cal. Rptr. at 60. *See* note 13 *supra*.

18. The trial court's believed that the defendant would not be confined but would be allowed to seek treatment as an out-patient under an MDSO program. However, at the time of this decision, § 6316 did not offer the alternative of assigning an MDSO defendant to an out-patient program. *Id.* at 458 n.6, 637 P.2d at 296, n.6, 179 Cal. Rptr. at 59 n.6.

19. *Id.* at 461, 637 P.2d at 298, 179 Cal. Rptr. at 60.

stressed the legislative policy of requiring sentencing decisions to be reasonably supported by findings and conclusions in the record.

H. *Determinate sentencing laws are not retroactively applied:* In re William Wilson

The California Supreme Court ordered a lower court to deny a petition for a writ of habeus corpus in the case of *In re William Wilson*.[1] The state argued that the trial court had retrospectively applied the determinate sentencing law (DSL)[2] in computing defendant's parole period, even though the legislature had specifically intended the law to be prospective in application.[3]

In a short historical analysis, the court noted the changes made when the legislature enacted the DSL, including the repeal of the earlier indeterminate sentencing law (ISL). The theory behind the ISL was that a prisoner serving a life term, who was subsequently released on parole, would continue to serve the life term sentence while under the supervision of the parole authorities.[4] However, in 1976, the legislature codified a new policy regarding criminal incarceration and rehabilitation. The prison sentence was no longer thought to serve exclusively as punishment, but could also include a period of rehabilitation during which the criminal would be allowed to readjust to society.[5] This would be

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1. 30 Cal. 3d 438, 637 P.2d 674, 179 Cal. Rptr. 207 (1981) (Richardson, J., wrote the opinion for a unanimous court).

2. CAL. PENAL CODE § 3000 (West 1982) states in pertinent part:

(a) [a]t the expiration of a term of imprisonment . . . the inmate shall be released on parole for a period not exceeding three years . . .

(b) [for an] inmate sentenced under Section 1168, the period of parole shall not exceed three years in the case of an inmate imprisoned under a life sentence . . .

(d) [i]n no case may a prisoner sentenced pursuant to subdivision (b) of Section 1168 be retained under parole . . . for a period longer than four years from the date of his initial parole.

Id. The trial court noted that, although the three and four-year limits were amended in 1978 to five and seven years, respectively, the four-year maximum limit applied to the defendant. 30 Cal. 3d at 441, 637 P.2d 677, 179 Cal. Rptr. at 208.

3. *See* note 11 *infra* and accompanying text. The facts of the case are understood easily in the following chronological format: (1) Wilson was convicted of first degree murder, and a life sentence was imposed under indeterminate sentencing law (ISL) on December 16, 1960; (2) initial parole was on October 22, 1975; (3) parole was revoked and Wilson back in prison August 5, 1976; (4) while in prison, the DSL was enacted, July 1, 1977; (5) Wilson was paroled again on December 22, 1977; and, (6) Wilson was rearrested and scheduled for a parole revocation hearing on November 18, 1979.

Wilson contended that the DSL, giving him a maximum parole period of four years, dictated that he was free from any supervisorial custody on October 22, 1979, four years from his initial parole. He petitioned for and received a writ of habeas corpus from the trial court. The state appealed.

4. 30 Cal. 3d at 440, 637 P.2d 676, 179 Cal. Rptr. at 207-08.

5. *Id.* at 441, 637 P.2d at 677, 179 Cal. Rptr. at 208. Section 3000 states in the

accomplished through setting specific periods of parole in addition to the term of punishment.[6]

When the DSL went into effect on July 1, 1977, the defendant, William Wilson, was in prison. He had initially been released on parole in October of 1975. However, that parole was revoked and defendant was not released again until after the passage of the DSL in December, 1977.[7] The defendant contended that the initial parole in October, 1975, did not toll his four-year maximum period of parole, and therefore, he should have been released from custody in October, 1979.[8] However, the supreme court found that the DSL also applied to the defendant's second parole beginning in December, 1977.

As enacted, the DSL gave the defendant a four-year maximum parole period.[9] However, the conclusion of the supreme court with regard to whether the initial or second parole was the beginning of that four-year period turned on an amendment to the DSL that the legislature adopted before it actually became law on July 1, 1977. Section 3000, subsection (d) of the California Penal Code originally stated that the parole period " 'shall be computed from the date of initial parole, and shall be a period chronologically determined . . . .' "[10] This section, however, was amended before July 1, 1977 to read that the parole period for the purposes of determinate sentencing "[s]hall be computed from the date of initial parole, or July 1, 1977, whichever is later, and shall be a period chronologically determined . . . ."[11] The court thus decided that the legislature intended only parole periods beginning after July 1, 1977 to fall under the DSL.[12] The initial parole of the defendant in 1975 did not fall under the jurisdiction of the DSL, and he was

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introduction that parole "[f]ollowing incarceration is critical to successful *reintegration of the offender into society and to positive citizenship*." CAL. PENAL CODE § 3000 (West 1982) (emphasis added).

6. 30 Cal. 3d at 442, 637 P.2d at 678, 179 Cal. Rptr. at 208-09. This intent to separate the parole period as a period of readjustment from the imprisonment period was manifested in § 3000 of the Penal Code, by setting specific lengths for parole. *See* note 5 *supra*.

7. *See* note 3 *supra*.

8. 30 Cal. 3d at 440, 637 P.2d at 676, 179 Cal. Rptr. at 207-08. *See* note 9 *infra*.

9. The court determined that the defendant was given a four-year maximum parole period after July 1, 1977, pursuant to CAL. PENAL CODE § 3000(d). *See* note 2 *supra*.

10. 30 Cal. 3d at 441, 637 P.2d at 676, 179 Cal. Rptr. at 209.

11. CAL. PENAL CODE § 3000(d) (West 1982). *See* note 2 *supra*.

12. 30 Cal. 3d at 442, 637 P.2d at 678, 179 Cal. Rptr. at 208-09. "The Legislature thereby explicitly provided that the relevant date for computing a parole term

therefore forced to begin his four-year parole period in December of 1977.

The court also analyzed the practical effects of accepting the defendant's application of the DSL. The following example illustrates the court's reasoning. An individual sentenced to life imprisonment under the ISL could look forward to being on parole for the rest of his life.[13] Suppose this individual was: (1) incarcerated in 1960; (2) initially paroled 1968; (3) parole revoked in 1970 and back in prison; (4) paroled again 1973; (5) parole revoked in 1976 and back in prison; and, (6) in prison during the passage of the DSL on July 1, 1977. Although this individual had shown an inability to adapt successfully to a life outside of prison, he would be free to leave as of July 1, 1977. Under the DSL, if it were to be applied retroactively, his initial parole in 1968 would begin the four-year maximum parole period, which would end in 1972. It is this individual, unable to cope with life in society, that caused Justice Richardson to express concern. "[T]hese prisoners, who frequently are the most serious offenders, would not be subject to any parole supervision upon their release despite the Legislature's express provision for such supervision."[14]

The court, in reaching its decision, looked at the specific legislative intent, the language of the DSL itself, and the practical effect which following the defendant's recommendation would have. Consistent with the DSL as specifically amended by the legislature to preclude retroactive application, the court ruled against the defendant.

I. *Calculating the Time Limit on Arraignment Procedures under Penal Code § 895:* **Landrum v. Superior Court**

The California Supreme Court, in *Landrum v. Superior Court*,[1]

[under the DSL] . . . was the parole release date following the operative date (July 1, 1977) of the new act." *Id.*

13. *See* note 4 *supra* and accompanying text.

14. 30 Cal. 3d at 442, 637 P.2d at 678, 179 Cal. Rptr. at 208-09.

1. 30 Cal. 3d 1, 634 P.2d 352, 177 Cal. Rptr. 325 (1981). Chief Justice Bird wrote the majority opinion, with Justices Mosk, Feinberg, and Newsom concurring. A separate concurring and dissenting opinion was written by Tobriner, Richardson and Newman.

The defendant was arrested on January 28, 1980 for burglary. He was held in custody until January 31, 1980, when he was arraigned and pled "not guilty" to the charge. The defendant remained in custody and was scheduled for a preliminary hearing on February 14, 1980. On that day, the complaint against the defendant was dismissed by the magistrate, but a new complaint alleging the same charge was filed. As a result, the defendant was re-arrested before he was released from custody.

On February 15, 1980, the defendant was once again arraigned. He pled "not guilty," and a preliminary hearing was set for February 29, 1980. At this hearing,

clarified the ability of a magistrate to dismiss a felony complaint. Confusion had resulted among the lower courts with regard to the powers of a magistrate[2] after the supreme court's opinion in *People v. Peters*.[3] The *Landrum* court overturned the *Peters* decision and held that, pursuant to Penal Code section 1385, a magistrate could properly dismiss a complaint in the interests of justice.[4]

The defendant in *Landrum* was arrested, arraigned, and held for a preliminary hearing two consecutive times on the same charge.[5] The defendant was dismissed after the first preliminary hearing, but he was immediately re-arrested. At his second preliminary hearing, the defendant contended that any charges brought against him at that point constituted a violation of Penal Code section 859(b).[6] This section set a limit on the time period a felony defendant could be held in custody between the arraignment or plea and the preliminary hearing. That time limit is ten court days.[7]

The defendant contended that this ten day period began running with his initial arraignment and continued, through the successive arrest and arraignment, until the second preliminary hearing, which was nineteen court days later.[8] Relying on the supreme court's holding in *Peters* that a magistrate could not dismiss a complaint, the defendant contended that the dismissal

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the defendant argued that pursuant to section 859(b) of the Penal Code the magistrate had no jurisdiction over him. The defendant contended that the 10 day period had already lapsed since his initial arraignment and plea on January 31, 1980, on these specific charges.

2. Under section 1385 of the Penal Code, a court could dismiss a felony charge in the interests of justice. There was some question as to whether a magistrate was a "court" within the meaning of this section. The supreme court, in People v. Peters, 21 Cal. 3d 749, 581 P.2d 651, 147 Cal. Rptr. 646 (1978), held that a magistrate did not fall within the meaning of the word "court." *See also* CAL. PENAL CODE § 1385 (West 1971). However, a magistrate was given authority under section 871 of the Penal Code to discharge a defendant when there was a lack of sufficient evidence against the defendant at the preliminary hearing. 30 Cal. 3d at 17, 634 P.2d at 362, 177 Cal.Rptr. at 335.

3. 21 Cal. 3d 749, 581 P.2d 651, 147 Cal. Rptr. 646 (1978). *See* note 2 *supra*.

4. *See* note 2 *supra*.

5. *See* note 1 *supra*.

6. In pertinent part, section 859(b) reads:

> [D]efendant and the people have the right to a preliminary examination at the earliest possible time, and unless both waive that right . . . the preliminary examination shall be held within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later.

CAL. PENAL CODE § 859(b) (West 1971).

7. *Id.*

8. *See* note 1 *supra*.

from the first arrest and custody period was invalid. Thus, the defendant reasoned that there was a violation of section 859(b) when he was not given a preliminary hearing ten court days after the initial arraignment on January 31, 1980.[9]

The *Landrum* court noted that the defendant's argument was untenable in that it:

> leads inexorably to an absurd procedure whereby once the 10-court-day limit has been exceeded, there is *no procedure by which the magistrate can terminate the action* without holding an untimely preliminary examination, from which any holding order would be vulnerable to a defendant's motion to dismiss in superior court.[10]

Realizing that this could not possibly have been the intent of the Legislature, because it would result in undue delay and expense,[11] the court next examined the district attorney's argument.

The district attorney had argued that the proceedings fell within the requirements of section 859(b). This argument was based on the fact that the defendant's preliminary hearing was held within ten days of the arraignment on the second complaint and relied on the validity of the magistrate's dismissal of the first complaint[12] pursuant to Penal Code section 871.[13] Section 871 provides that if there is not sufficient proof presented in a preliminary hearing, the magistrate has the authority to dismiss. The court rejected this argument, however, declaring that "[t]his result is totally inconsistent with the legislative policies which are evident in section 859(b)."[14]

The practical effect of the district attorney's interpretation would lead to the possibility that felons who are unable to post bond could remain in custody indefinitely. As had been done in *Landrum*, all that would be necessary to achieve this effect is to have the proper paperwork filed every ten days.[15] Rather than accept this result, the court reaffirmed its previous decisions declaring that section 871 requires that a magistrate may dismiss a complaint only when the proof presented is deemed insufficient

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9. 30 Cal. 3d at 7, 634 P.2d at 355, 177 Cal. Rptr. at 328.

10. *Id.* at 7-8, 634 P.2d at 355, 177 Cal. Rptr. at 328 (emphasis added).

11. The court realized that the magistrate's hearing would be essentially useless, yet it was required since the magistrate was no longer allowed to dismiss a felony complaint pursuant to *Peters*. The same hearing would have to be held again if there was another attempt at prosecution. *Id.* at 9, 634 P.2d at 356, 177 Cal. Rptr. at 329.

12. *Id.* at 10, P.2d at 357, Cal. Rptr. at 330.

13. The pertinent part of section 871 states: "[i]f *after hearing the proofs*, it appears . . . that no public offense has been committed . . . the magistrate must order the defendant to be discharged . . . ." CAL. PENAL CODE § 871 (West 1971) (emphasis added).

14. 30 Cal. 3d at 11, 634 P.2d at 358, 177 Cal. Rptr. at 331.

15. *Id.*

to hold a defendant.[16]

Thus, the court refused to follow the district attorney's argument or the defendant's contention, as "each [was] untenable and [led] to results that [could not] have been intended by the Legislature."[17] Moreover, the court was forced to repudiate its decision in *Peters*, after noting that the lower courts were unable to reconcile that decision with the application of Section 859(b).[18] Rather than repeal section 859(b), the court chose to overrule its decision in *Peters*.[19]

With its *Landrum* decision, the court acknowledged the authority of a magistrate to dismiss a felony complaint pursuant to section 1385. The immediate result was that the defendant's first dismissal by the magistrate was valid. Therefore, the period of time from his second arraignment to the preliminary hearing was within the statutory limit of ten days and did not result in a violation of section 859(b).[20]

J. *The* Miranda *Policies and Requirements as They Relate to Department Store Detectives:* **In re Deborah C.**

In the case of *In re Deborah C*,[1] the California Supreme Court was given the opportunity to further clarify the applicability of *Miranda v. Arizona*[2] to California law.

The case arose in the context of an appeal from a consolidated proceeding of the juvenile court. The factual circumstances involve two occasions on which the defendant was observed shoplifting in a department store. After being confronted by a security agent on each occasion, she was detained for a period of time, and thereafter she confessed to the incidents.

After recognizing that *Miranda* governs custodial investigations, the court noted that California courts have primarily lim-

16. *See* Coleman v. Superior Court, 116 Cal. App. 3d 431, 172 Cal. Rptr. 135 (1981) (section 871 requires *some* proof to be given before magistrate may dismiss); Simmons v. Municipal Court, 109 Cal. App. 3d 15, 167 Cal. Rptr. 608 (1980).
17. 30 Cal. 3d at 7, 634 P.2d at 355, 177 Cal. Rptr. at 328.
18. *Id.* at 12, 634 P.2d at 358, 177 Cal. Rptr. at 331.
19. *Id.* at 14, 634 P.2d at 359, 177 Cal. Rptr. at 332.
20. *Id.* at 15, 634 P.2d at 360, 177 Cal. Rptr. at 333.

1. 30 Cal. 3d 125, 635 P.2d 446, 177 Cal. Rptr. 852 (1981). The majority opinion, written by Justice Newman, was joined by Justices Tobriner, Richardson and Wiener. Chief Justice Bird and Justice Mosk each wrote separate concurring opinions.
2. 384 U.S. 436 (1966).

ited its application to cases concerning " 'law enforcement officials', their agents, and agents of the court, while the suspect is in official custody."[3] The court further noted that "a private citizen is not required to advise another individual of his rights before questioning him."[4]

By engaging in a policy analysis of the *Miranda* decision, the court found that routine detention and questioning by plainclothes store detectives present a substantially different situation than was present in *Miranda*. *Miranda* responded to historical problems created by misuse of police authority to extract confessions through force, duress, and lengthy incommunicado interrogation.[5] In California, store employees have only limited powers of detention.[6] Unless they represent themselves as police officers, these employees do not have the psychological advantage of official authority which *Miranda* and its progeny sought to avoid.[7]

Another reason that the court felt that the underlying policies of *Miranda* did not warrant its application in this situation was the presence of evidence that retailers generally exercise restraint and release most shoplifters without police involvement.[8]

A major part of the court's policy comparison between *Miranda* interrogation and detention by plainclothes detectives concerned the nature of the detention. The court ruled that "*Miranda* criticized police preference for confessions over independent investigation."[9] In the case of *In re Deborah C*, however, and cases like it, arrests were generally citizens' arrests or were only encouraged after the suspects were "actually seen by store employees leaving the premises with unbought merchandise."[10] Therefore, since shoplifting convictions most often depend on eyewitness testimony and physical evidence rather than on statements made by the suspects, the court noted that store detectives

3. 30 Cal. 3d at 130, 635 P.2d at 448, 177 Cal. Rptr. at 854 (citations omitted).

4. *Id.* at 130-31, 635 P.2d at 448, 177 Cal. Rptr. at 854.

5. *Id.* at 132, 635 P.2d at 855, 177 Cal. Rptr. at 449.

6. In California, the power of store employees with respect to detaining customers is significantly limited by statute. CAL. PENAL CODE § 490.5 (West 1980). A merchant may detain for reasonable time and investigate on probable cause. Citizens' arrests are also governed by CAL. PENAL CODE § 847 (West 1980). The arresting citizen must deliver suspect to police or magistrate without unreasonable delay.

7. It has been feared that this psychological advantage of authority can be used as a major tool of coercion. 30 Cal. 3d at 133, 635 P.2d at 449-50, 177 Cal. Rptr. at 855-56.

8. The court cited a national study in which more than half of the store representatives contacted said that "the store policy was to release most shoplifters without police involvement." *See* Note, *Merchant's Response to Shoplifting: An Empirical Study*, 28 STAN. L. REV. 589, 604 (1976).

9. 30 Cal. 3d at 133, 635 P.2d at 450, 177 Cal. Rptr. at 856.

10. *Id.*

have less incentive to extract confessions from their suspects.[11] This lack of incentive to extract confessions was a major policy reason influencing the *Deborah C.* court not to extend the *Miranda* requirements to store detectives in California.[12] Finally, in refusing to extend *Miranda*'s applicability, the court noted that other jurisdictions have also refused to extend *Miranda* to privately employed personnel.[13]

In holding that a plainclothes private detective is not required to follow *Miranda* procedures before soliciting incriminating statements, the court was careful to note that nothing in its holding was intended to imply any disapproval[14] or limitation of its analysis in *People v. Zelinski*.[15] *Zelinski* involved a "color of law analysis" in response to arguments that illegal searches by private guards did not constitute search and seizure not affected by the fourth amendment.[16] Under *Zelinski*, persons who routinely use state police powers of detention and arrest act under color of law as police agents. *Zelinski*, however, avoided holding that security guards are police surrogates for all judicial purposes. The *Deborah C.* court distinguished *Zelinski* by stating that in *Zelinski* the "store detectives trespassed by exceeding the limited powers of private search granted by statute."[17] In the case of *In re Deborah C*, the store detective merely detained the suspect and asked questions. The court specifically noted that there is nothing illegal about asking questions.[18]

After finding that the major policies underlying *Miranda* and its progeny were inapplicable and that there was no evidence on any issues arising under *Zelinski*, the court held that a plainclothes private detective may detain a suspect and is not required to follow *Miranda* procedures before attempting to extract incriminating statements for use against the suspect.[19]

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11. *Id.* at 134, 635 P.2d at 450, 177 Cal. Rptr. at 856.
12. *Id.*
13. *Id.* The court noted specifically that these other jurisdictions include the second, ninth, and tenth circuits, as well as many state jurisdictions, including Illinois, Nevada, New Jersey, and Ohio.
14. *Id.* at 134 n.5, 635 P.2d at 450 n.5, 177 Cal. Rptr. at 856 n.5.
15. 24 Cal. 3d 357, 594 P.2d 1000, 155 Cal. Rptr. 575 (1979).
16. *Id.*
17. 30 Cal. 3d at 131, 635 P.2d at 448, 177 Cal. Rptr. at 854.
18. *Id.* at 132, 635 P.2d at 449, 177 Cal. Rptr. at 855.
19. It should be noted that the court refused to accept the argument that the detective, by observing the suspect in a fitting room, infringed on the suspect's reasonable expectation of privacy. This argument was rejected on the grounds

K. *Suppression of Evidence:* People v. Superior Court

In *People v. Superior Court*,[1] the California Supreme Court reviewed an affidavit to determine whether it contained sufficient facts to justify a search warrant and to assess the defendant's contention[2] that evidence acquired during a search should be suppressed. The warrant under review in the case produced evidence which led to the arrest and conviction of Juan Corona for the brutal murders of twenty-five migrant farm workers found buried in fields in northern California.

The warrant under review[3] was issued after nine bodies were discovered buried on two neighboring ranches.[4] The Court noted that a warrant may be set aside only if the affidavit does not establish probable cause for the search.[5] Additionally, the court stated that in order to demonstrate probable cause for the search, the affidavit must state facts which make it "substantially probable" that the specific property sought is located at the "particular place for which the warrant is sought."[6]

After noting the affidavit was hastily prepared and left more to inference than was desirable or necessary,[7] the court applied the

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that, by design, a fitting room is hardly a place where one can expect privacy. Furthermore, the court noted that retailers face a shoplifting epidemic, and to hold differently would not be "wise policy". *Id.* at 138, 635 P.2d at 453, 177 Cal. Rptr. at 859.

1. 30 Cal. 3d 193, 636 P.2d 23, 178 Cal. Rptr. 334 (1981). Justice Richardson wrote the majority opinion with Justices Tobriner, Mosk, Newman, Kaus, and Broussard concurring. Chief Justice Bird wrote a concurring opinion.

2. Defendant Juan Corona was the real party in interest in this case. After reversal of his conviction on 25 counts of first degree murder because his trial counsel was incompetent and had a conflict of interest, Corona was permitted to relitigate his challenges to search warrants which had produced evidence that ultimately led to his conviction. *Id.* at 197-98, 636 P.2d at 24-25, 178 Cal. Rptr. at 335-36.

3. Although six search warrants were originally at issue, the state stipulated it would not use any evidence seized under the third through sixth warrants, and the defendant stipulated to the admission of evidence seized under the second warrant. As a result, the only issue in this case was the admissibility of evidence seized under the first warrant. *Id.* at 199, 636 P.2d at 26, 178 Cal. Rptr. at 337.

4. *Id.* at 202, 636 P.2d at 28, 178 Cal. Rptr. at 339.

5. *Id.* at 203, 636 P.2d at 29, 178 Cal. Rptr. at 339 (citing Skelton v. Superior Court, 1 Cal. 3d 144, 150, 460 P.2d 685, 688, 81 Cal. Rptr. 613, 616 (1969); People v. Superior Court, 91 Cal. App. 3d 463, 470, 154 Cal. Rptr. 157, 160 (1979)).

6. 30 Cal. 3d at 204, 636 P.2d at 29, 178 Cal. Rptr. at 340 (quoting People v. Cook, 22 Cal. 2d 67, 84 n.6, 583 P.2d 130, 139 n.6, 148 Cal. Rptr. 605, 614 n.6 (1978)).

7. 30 Cal. 3d at 206, 636 P.2d at 31, 178 Cal. Rptr. at 342. The affidavit stated that at 9:00 p.m. on May 25, 1971, the evening of the day on which eight bodies were discovered at the Sullivan Ranch, the officers began surveillance of defendant Corona's van. The officers followed the van to a residence (later identified as a mess hall building) on the Sullivan Ranch and then subsequently observed what appeared to be the defendant entering the residence. *Id.* at 204-05 & n.7, 636 P.2d at 29-30 & n.7, 178 Cal. Rptr. at 340 & n.7. The court of appeal's opinion noted from the facts stated in the affidavit that the trial court had reasoned that the defendant's

principle that preference should be accorded to warrants in doubtful or marginal cases.[8] The court concluded the affidavit for the first warrant supplied sufficient probable cause to search the mess hall,[9] and therefore, the trial court erred in suppressing the evidence from that building.[10]

VI. INDIAN LAW

A. *Aboriginal Title and Hunting Rights:* In re Andrew Wilson

In *In re Wilson*,[1] the California Supreme Court considered whether the extinguishment of an Indian tribe's title to, or right to occupy, aboriginal[2] territory operated to extinguish the tribe's aboriginal hunting rights.[3]

"connection to the mess hall building consisted (1) of his status as a labor contractor at Sullivan Ranch, and (2) the fact that his vehicle was seen parked near the building for 15 minutes on the night of the day that eight bodies were discovered buried on the ranch property." *Id.* at 205, 636 P.2d at 30, 178 Cal. Rptr. at 341. Although the trial court found that the affidavit was insufficient to justify a search of the mess hall building, the court of appeal's decision, examined the state's contention that because the defendant was a labor contractor at the ranch, he had access to the buildings on the ranch. Additionally, the state argued that the presence of the defendant's van outside of the mess hall justified an inference that the defendant entered the building either in furtherance of his business as a labor contractor or "to transfer, conceal, or dispose of criminal evidence in the van or at the crime scene." *Id.* at 206, 636 P.2d at 30-31, 178 Cal. Rptr. at 341.

8. *Id.* at 206-07, 636 P.2d at 31, 178 Cal. Rptr. at 342. The principle that preference should be accorded to warrants in doubtful or marginal cases was set forth by the United States Supreme Court in United States v. Ventressa, 380 U.S. 102, 109 (1965).

9. 30 Cal. 3d at 207, 636 P.2d at 31, 178 Cal. Rptr. at 342. The defendant argued that the warrant did not authorize the seizure of a gun and ammunition found in the mess hall. However, the court noted that the warrant did authorize the seizure of any blood stained weapons. Because there was either rust or blood on the gun, the court held that the trial court erred in suppressing the gun and ammunition found in the mess hall. *Id.*

10. *Id.*

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1. 30 Cal. 3d 21, 634 P.2d 363, 177 Cal. Rptr. 336 (1981). Andrew Wilson, a member of the Atsugewi Branch of the Pit River Indians was apprehended by a game warden with two deer carcasses. When apprehended, Wilson was on lands within the aboriginal territory of the Pit River Indians. Wilson was then cited for unlawful possession of deer taken in closed season. This action arises in the context of a habeas corpus action.

2. For a discussion of aboriginal title, *see generally* Newton, *At the Whim of the Sovereign: Aboriginal Title Reconsidered*, 31 HASTINGS L.J. 1215 (1980).

3. 30 Cal. 3d at 24, 634 P.2d at 365, 177 Cal. Rptr. at 338. This issue arose as a result of Wilson's contention that the aboriginal hunting rights of the Pit River Indians were not mere incidents of Indian title but rather, were separate and apart

Wilson attempted to argue that the aboriginal hunting rights of the Pit River Indian Tribe had not been extinguished. If sufficiently proven, this would have required the state to prove that its hunting regulation met the applicable standard set forth by the federal government in order to be applicable to Wilson.[4]

In ruling on the case, the California Supreme Court found that hunting and fishing rights are incident to the right of occupancy.[5] The right of occupancy, the court observed, arises in connection with aboriginal title rights.[6] The court then concluded after a historical analysis, that the Pit River Tribe's right to occupy their aboriginal lands had been absolutely and unconditionally extinguished by Congress.[7] As a result, because the Pit River Indians had not retained any occupancy or hunting rights, the state was not required to make any special showing to justify application of its hunting regulations to Pit River Indians within their own aboriginal territory.[8]

Finally, the court expressed regret for its inability to remake history in light of the great injustices suffered by the American Indians. The court commended a course of granting relief to either the legislature or to the Fish and Game Commission by stating: "emotion and sympathy, however well intentioned, cannot play a role in the court's resolution of this legal issue."[9]

As a result of the court's ruling in *Wilson*, there will be greater certainty as to the nature of the Pit River Indian title. It is not only clear that the aboriginal title to Pit River Tribal Lands was unconditionally extinguished, but it is also clear that such an unconditional extinguishment also operates to extinguish aboriginal hunting rights on Indian lands.

VII. INSURANCE LAW

A. *The Effect of Public Utilities Commission Insurance Requirements on an Insurer's Liability:* **Samson v. Transamerica Insurance Company**

In the case of Samson v. Transamerica Insurance Company, *the California*

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therefrom and can only be extinguished by a specific congressional mandate. *Id.* at 25, 634 P.2d at 365, 177 Cal. Rptr. at 338.

4. *Id.* at 23-24, 634 P.2d at 365, 177 Cal. Rptr. at 338.
5. *Id.* at 29-30, 634 P.2d at 368-69, 177 Cal. Rptr. at 341.
6. *Id.* at 26, 634 P.2d at 366, 177 Cal. Rptr. at 339.
7. *Id.* at 35, 634 P.2d at 372, 177 Cal. Rptr. at 345.
8. *Id.* at 35-36, 634 P.2d at 372-73, 177 Cal. Rptr. at 345-46.
9. *Id.* at 36, 634 P.2d at 373, 177 Cal. Rptr. at 346.

Supreme Court held that an insurance policy endorsement and a Public Utility Commission order governing mandatory insurance, which were incorporated into the underlying insurance policy, operated to insure not only the truck used by a highway carrier to transport property, but also a pickup truck which was used for services incidental to the transportation of property.

I. INTRODUCTION

The California Supreme Court, in *Samson v. Transamerica Insurance Company*,[1] was asked to determine whether an insurance policy, obtained by a radial highway common carrier[2] pursuant to an order of the Public Utilities Commission (P.U.C.), covers a pickup truck used for services incidental to the transportation of property, in addition to covering the truck actually transporting the property. Although the supreme court had never addressed this issue, previous lower court decisions had held the P.U.C.'s endorsement does in fact extend liability insurance to all vehicles used to assist the highway carrier in the transportation of property.[3]

The *Samson* case arose when one of the defendants, Dale Vagle, was driving his pickup truck on the wrong side of the road and collided head-on with a car driven by the plaintiffs.[4] Vagle used his truck in connection with his business as a highway carrier. Mrs. Samson, who was in the other car, was killed, and her husband and two children, the plaintiffs, were seriously injured. Vagle's pickup truck was insured by State Farm Mutual Automobile Insurance Company (State Farm) for $100,000. Vagle also owned an International tractor truck which was licensed by the

1. 30 Cal. 3d 220, 636 P.2d 32, 178 Cal. Rptr. 343 (1981). The opinion was written by Chief Justice Bird with Justices Tobriner, Mosk, Richardson, Newman, Kaus, and Broussard concurring.

2. A radial highway common carrier is a carrier which does not operate over fixed routes. Atchison, Topeka & Santa Fe R.R. Co. v. Flintkote Co., 256 Cal. App. 2d 764, 771, 64 Cal. Rptr. 675, 680 (1967). The classification of radial highway common carrier was repealed in 1977. CAL. PUB. UTIL. CODE § 3516, *repealed by* ch. 840, § 3, 1977 Cal. Stat. 2519. However, this case has a far reaching effect because the insurance requirements for permit carriers apply to all carriers regulated by the Public Utilities Code. *See* notes 5, and 7 *infra* and accompanying text.

3. *See* notes 28-30 *infra* and accompanying text.

4. 30 Cal. 3d at 224-25, 636 P.2d at 35, 178 Cal. Rptr. at 345. At the time of the accident, Vagle was on a personal errand. However, there was undisputed evidence that the pickup truck had commercial license plates and was used regularly in Vagle's trucking business to carry spare parts for the tractor truck, equipment, and wide load signs, fetch parts, look for work, and locate routes for transporting wide loads. *Id.* at 226, 636 P.2d at 36, 178 Cal. Rptr. at 346-47.

P.U.C.[5] to transport property for compensation.[6] As a condition to doing business as a highway carrier, the Public Utilities Code requires that a carrier procure liability insurance.[7] Accordingly, Vagle's tractor truck was insured with Transamerica Insurance Company for $300,000.[8] The central issue presented in *Samson*

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5. The Public Utilities Code provides: "[n]o highway carrier . . . shall engage in the business of transportation of property for compensation by motor vehicle on any public highway in this State without first having obtained from the commission a permit authorizing such operation." CAL. PUB. UTIL. CODE § 3571 (West Supp. 1981-82).

6. 30 Cal. 3d at 224-25, 636 P.2d at 35, 178 Cal. Rptr. at 346.

7. At the time of the accident, the requirements that highway carriers procure liability insurance were contained in CAL. PUB. UTIL. CODE §§ 3631, and 3632, together with General Order Number 100-H (the requirements are currently set forth exclusively within CAL. PUB. UTIL. CODE §§ 3631, 3632 (West 1975)). *See* note 27 *infra*. The requirements in effect at the time of the accident are set out below:

CAL. PUB. UTIL. CODE § 3631 originally provided in pertinent part:

> The commission shall, in granting permits pursuant to this chapter, require the highway carrier to procure, and continue in effect during the life of the permit, *adequate protection*, as provided in Section 3632, against liability imposed by law upon the highway carrier for the payment of damages *for personal bodily injuries, including death* resulting therefrom . . . and protection [against liability for] damages or destruction of property . . . .

1951 Cal. Stat. 2116-17 (emphasis added). *Cf.* note 27 *infra* (current version of § 3631).

CAL. PUB. UTIL. CODE § 3632 originally provided in pertinent part: "The protection required under Section 3631 shall be evidenced . . . [b]y the deposit with the commission, covering each vehicle *used or to be used under the permit* applied for, . . . (1) [o]f a policy of insurance, issued by a company licensed to write such insurance in the State, . . ." *Id.* at 2117 (emphasis added). *Cf.* note 27 *infra* (current version of § 3632).

General Order No. 100-H provides in pertinent part:

> (1) Every highway carrier . . . shall provide and thereafter continue in effect, so long as they may be engaged in conducting such operations, adequate protection against liability imposed by law upon such carriers for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than one hundred thousand dollars ($100,000) on account of bodily injuries to, or death of, one person; and protection against total liability of such carriers on account of bodily injuries to, or death of *more than one person* as a result of any one accident, but subject to the same limitation for each person, in the amount of *not less than three hundred thousand dollars* ($300,000) and protection in the amount of not less than fifty thousand dollars ($50,000) for one accident resulting in damage to or destruction of property other than property being transported by such carrier for any shipper or consignee, whether the property of one or more than one claimant.
>
> (3) *The protection* required under Sections (1) and (2) hereof *shall be evidenced by the deposit with the Public Utilities Commission, covering each vehicle used or to be used in conducting the services performed by each such highway carrier, . . . of a policy or policies of public liability and property damage insurance*, issued by a company licensed to write such insurance in the State of California, or by nonadmitted insurers subject to Section 1763 of the Insurance Code, if such policies meet the rules promulgated therefor by the Commission; or of a bond of a surety company licensed to write surety bonds in the State of California.

30 Cal. at 226, 636 P.2d at 36 n.3, 178 Cal. Rptr. at 346 n.3 (emphasis added).

8. 30 Cal. 3d at 225, 636 P.2d at 35, 178 Cal. Rptr. at 346.

was whether the specific language contained in the endorsement[9] of the Transamerica policy and General Order No. 100-H[10] operated to extend the insurance coverage of the tractor truck to the pickup truck.[11]

After Vagle pleaded guilty to vehicular manslaughter,[12] the plaintiffs filed suit against him for personal injuries and wrongful death.[13] Although State Farm assigned an attorney to the case, it advised Vagle to obtain a personal attorney because his liability was likely to exceed the $100,000 limit of the State Farm policy.[14] Transamerica refused to defend Vagle, contending the pickup truck was not covered under the insurance policy.[15] In the personal injury action that followed, Vagle presented no defense, and the trial court awarded $725,000 to the plaintiffs.[16] Vagle then assigned to the plaintiffs his cause of action against Transamerica.[17] After a settlement offer was refused by Transamerica, numerous

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9. The Transamerica insurance policy contained an endorsement which had been prepared by the P.U.C. The endorsement conformed the policy to the requirements of the Public Utilities Code and provided in pertinent part:

> *The policy to which this endorsement is attached* is an Automobile Bodily Injured Liability and Property Damage Liability policy and *is hereby amended to assure compliance* by the insured, as a motor carrier of property, *with General Order No. 100-Series* and the pertinent rules and regulations of the Public Utilities Commission of the State of California.
>
> In consideration of the premium stated in the policy to which this endorsement is attached, *the Company hereby agrees to pay*, within the limits of liability hereinafter provided, *any final judgment* rendered against the insured for bodily injury to or death of any person, or loss of or damage to property of others . . . *resulting from the operation, maintenance, or use of motor vehicles for which a certificate of public convenience and necessity or permit is required* or has been issued to the insured by the Public Utilities Commission of the State of California, *regardless of whether such motor vehicles are specifically described in the policy or not.*

Id. at 225 n.2, 636 P.2d at 35 n.2, 178 Cal. Rptr. at 346 n.2 (emphasis added).

10. *See* note 7 *supra*.

11. 30 Cal. 3d at 230, 636 P.2d at 38, 178 Cal. Rptr. at 349.

12. *Id.* at 224, 636 P.2d at 35, 178 Cal. Rptr. at 345.

13. *Id.* at 226, 636 P.2d at 36, 178 Cal. Rptr. at 347.

14. *Id.*

15. When Transamerica was contacted by the plaintiff's attorney, the insurance agent who sold Vagle the policy denied that the pickup truck was covered by the policy. *Id.* at 227, 636 P.2d at 36, 178 Cal. Rptr. at 347. The Transamerica insurance agent also told Vagle that any contention that the pickup truck was covered was "ridiculous." *Id.* Additionally, the western zone liability manager suggested that Transamerica "keep out of [the action] and have no conversation with anyone." *Id.* at 228, 636 P.2d at 37, 178 Cal. Rptr. at 348.

16. *Id.*

17. *Id.* at 229, 636 P.2d at 37, 178 Cal. Rptr. at 348. Prior to the personal injury action, State Farm agreed to pay its $100,000 policy limit, and, in return, the plaintiffs "signed a 'covenant not to execute' against Vagle." *Id.* at 228, 636 P.2d at 37,

pleadings ensued,[18] and the plaintiffs eventually moved for summary judgment against Transamerica.[19]

After extensive statutory analysis,[20] the supreme court affirmed the trial court's grant of summary judgment by concluding that the pickup truck was covered under the Transamerica policy.[21] Further, the court found no merit in Transamerica's argument that even if the pickup truck was covered for business purposes, it was not covered when used for a personal errand.[22] The court examined Transamerica's contention that it did not have an opportunity to litigate the amount of damages. After a thorough examination of the factual issues of the case, the court concluded that Transamerica had sufficient notice of the pending litigation, declined to litigate the case, wrongly rejected a reasonable settlement offer, and was therefor liable for the entire judgment.[23]

II. HISTORICAL ANALYSIS

The Public Utilities Code requires all highway carriers to obtain a permit in order to transport property for compensation.[24] As a condition to the grant of a permit, the Code requires highway carriers to have "adequate protection" against liability and deposit with the P.U.C. a copy of an insurance policy which meets the pertinent requirements of the Public Utilities Code.[25] To enforce those requirements, General Order Number 100-H set minimum liability limits for each policy of $100,000 for bodily injuries or death to one person, $300,000 for bodily injuries or death to more than one person, and $50,000 for property damage.[26] However, rather than attaining enforcement through a general order, the current Public Utility Code provisions have incorporated the minimum liability limits and, at the same time, have lowered minimum amounts of liability insurance that highway carriers are

178 Cal. Rptr. at 348. Additionally, Vagle agreed to assign to the plaintiffs his rights against Transamerica. *Id.*

18. The plaintiffs filed suit against Transamerica, seeking the insurance policy limit of $300,000 and "$325,000 for a bad faith refusal to settle." *Id.* at 229, 636 P.2d at 37, 178 Cal. Rptr. at 348. "Transamerica cross complained against the [plaintiffs], Vagle, the [plaintiff's] attorney, State Farm, and State Farm's attorney, claiming collusion and bad faith." *Id.*

19. *Id.* The trial court awarded the plaintiffs the outstanding $625,000 on the judgment. *Id.* at 236, 636 P.2d at 42, 178 Cal. Rptr. at 353.

20. *Id.* at 230-35, 636 P.2d at 38-41, 178 Cal. Rptr. at 349-52.

21. *Id.* at 236, 636 P.2d at 42, 178 Cal. Rptr. at 353.

22. *Id.*

23. *Id.* at 243, 636 P.2d at 46, 178 Cal. Rptr. at 357.

24. CAL. PUB. UTIL. CODE § 3571 (West Supp. 1981-82). *See* note 5 *supra* and accompanying text.

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

26. 30 Cal. 3d at 230, 636 P.2d at 38, 178 Cal. Rptr. at 349; *see* note 7 *supra*.

required to obtain.[27]

There have been relatively few lower court cases holding that the insurance requirements of the Public Utility Code for highway carriers, together with insurance policy endorsements, extend insurance coverage to vehicles not specifically mentioned in the policy. In *Travelers Indemnity Company v. Colonial Insurance*,[28] a case similar to *Samson*, an appellate court examined an insurance policy endorsement that extended coverage to all vehicles for which "a permit . . . ha[d] been issued." *Travlers Indemnity Company* involved a forklift which performed services *incidental* to the transportation of property. However, as in *Samson*, the court held that the endorsement extended coverage to all vehicles used in the carrier's business.[29] Two other cases have held that vehicles used under a carrier's permit, even though they were not covered in the underlying insurance policy, were covered under the endorsement to the policy.[30] Although those two

27. The current Public Utilities Code provides in pertinent part:

> The commission shall, in granting permits pursuant to this chapter, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as provided in Section 3632, against liability imposed by law upon the highway carrier for the payment of damages for pesonal bodily injuries, including death resulting therefrom, in the amount of *not less than fifteen thousand dollars* ($15,000) on account of bodily injuries to, or death of, *one person*; and protection against a total liability of the highway carrier on account of bodily injuries to, or death of, *more than one person*, as a result of any one accident, in the amount of *not less than thirty thousand dollars* ($30,000); and protection in an amount of not less than ten thousand dollars ($10,000) for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant.

CAL. PUB. UTIL. CODE § 3631 (West 1975) (emphasis added).

> The protection required under Section 3631 shall be evidenced either:
>
> By the deposit with the commission, covering each vehicle used or to be used under the permit applied for,
>
> (1) Of a policy of insurance, issued by a company licensed to write such insurance in the state, or by nonadmitted insurers subject to Section 1763 of the Insurance Code, if such policies meet the rules promulgated therefor by the commission; or
>
> (2) Of a bond of a surety company licensed to write surety bonds in the state; or
>
> (3) Of such evidence of qualification of the carrier as a self-insurer as may be authorized by the commission.

CAL. PUB. UTIL. CODE § 3632 (West 1975).

28. 242 Cal. App. 2d 227, 241, 51 Cal. Rptr. 724, 732 (1966).

29. See *id.* at 241, 51 Cal. Rptr. at 732-33.

30. California Packing Corp. v. Transport Indem. Co., 275 Cal. App. 2d 363, 370-71, 80 Cal. Rptr. 150, 155 (1969). *California Packing* was factually distinguishable from *Samson* because it involved a vehicle which, although it was not covered by the insurance policy, was used to transport property; the pickup truck in *Samson*

cases were not similar factually to the present case, the court in *Samson* pointed out that their rationales supported the proposition "that the *endorsement* includes coverage for all vehicles used in a carrier's business operations."[31]

III. Case Analysis

Chief Justice Bird began her analysis by examining the P.U.C. requirements for insurance, together with the insurance policy endorsement of the Transamerica. The Chief Justice noted at the outset that the endorsement comported to be in compliance with the P.U.C. requirements.[32] Further, the endorsement stated the insurer would pay any final judgment rendered against the insured resulting from the use of any motor vehicle for which a permit is required, regardless of whether the vehicle is specifically described in the policy.[33]

The court noted that when insurance is required by law, the general rule of construction is that the statutory provisions are incorporated into the insurance contract.[34] The court stated this rule was directly applicable but pointed out that the insurance policy endorsement specifically referred to the regulations of the P.U.C. Therefore, "the requirements of the Public Utilities Code and of General Order No. 100-H were made part of the insurance contract."[35] Accordingly, the court concluded "the insurance contract must be interpreted by reference both to its express terms, and to the relevant statutory and P.U.C. provisions."[36]

With the above interpretations in mind, the court first addressed Transamerica's contention that the insurance policy endorsement and the general order should receive strict

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was not used to transport property. However, as was the result in *Samson*, the appellate court in *California Packing* found that despite the fact the insurance policy did not provide coverage, the endorsement of the insurance policy did provide such coverage. *Id.* at 370-71, 80 Cal. Rptr. at 155). Giordano v. American Fidel. and Cas. Co., 97 Cal. App. 2d 309, 311-12, 217 P.2d 444, 446-47 (1950) was also factually dissimilar to *Samson* because it involved a vehicle which was used to transport property; the pickup truck in *Samson* was not used to transport property. However, the *Giordano* court did find that although the vehicle was not covered under the insurance policy, it was covered by the endorsement to the insurance policy. *Id.*

31. 30 Cal. 3d at 236, 636 P.2d at 42, 178 Cal. Rptr. at 352-53 (emphasis added).

32. The endorsement specifically stated that the policy is amended by the endorsement to assure compliance with the regulations of the P.U.C. *Id.* at 230, 636 P.2d at 38, 178 Cal. Rptr. at 349.

33. *Id.* at 230-31, 636 P.2d at 38-19, 178 Cal. Rptr. at 349.

34. *Id.* at 231, 636 P.2d at 39, 178 Cal. Rptr. at 349.

35. *Id.* at 231, 636 P.2d at 39, 178 Cal. Rptr. at 350.

36. *Id.* The court observed that any ambiguities in the statutory or insurance policy language must be resolved by referring to the policy behind the statute. *Id.*

interpretation.[37] Transamerica argued that the P.U.C. is only concerned with vehicles which actually transport property and with "mammoth trucks" which, because of their size, pose special dangers to the public.[38] Accordingly, Transamerica argued, the pick-up truck would not be subject to regulation by the P.U.C.[39] The supreme court responded to that contention by noting that neither the Public Utilities Code, P.U.C. decisions, nor P.U.C. orders supported such a narrow view of the purposes for which the P.U.C. regulates highway carriers.[40] The court referred to the Highway Carriers Act in support of its position that the Act must be construed broadly because the transportation of property over public highways affects the public.[41] The court also cited case law which had held the purpose of carrier regulation to be protection of the public against "improperly maintained equipment" and "inadequate insurance."[42] Those authorities demonstrate a purpose of public protection, the court reasoned, and thus the regulations of the P.U.C. must be construed with regard to a broad mandate to protect the public.[43]

The court observed, however, that the insurance requirement of the P.U.C. has a two-fold purpose. Not only is the requirement designed to protect the public from uncompensated injury, but it is also to protect the carrier from judgments that could destroy the carrier's business.[44] The court reasoned that neither purpose would be served by narrowly construing the statute to impose the insurance requirement on only those vehicles actually transporting property.[45] Furthermore, the court found that the P.U.C. was

37. *Id.* at 232, 636 P.2d at 39, 178 Cal. Rptr. at 350.

38. *Id.*

39. *Id.* at 232, 636 P.2d at 40, 178 Cal. Rptr. at 350.

40. *Id.* at 232-33, 636 P.2d at 40, 178 Cal. Rptr. at 350.

41. The court noted the Highway Carrier's Act begins by stating "[t]he use of public highways for the transportation of property . . . is a business affected with a *public interest*." *Id.* at 233, 636 P.2d at 40, 178 Cal. Rptr. at 351 (quoting CAL. PUB. UTIL. CODE § 3502 (West 1975)).

42. *Id.* In Keller v. Thornton Canning Co., 66 Cal. 2d 963, 967, 429 P.2d 156, 158, 59 Cal. Rptr. 836, 838 (1967) the supreme court stated: "[t]he paramount purpose of the regulation of the carriers is the protection of the public against . . . improperly maintained equipment, inadequate insurance, and poor service."

43. 30 Cal. 3d at 233, 636 P.2d at 40, 178 Cal. Rptr. at 351.

44. *Id.* (citing Argonaut Ins. Co. v. Transport Indem. Co., 6 Cal. 3d 496, 504, 492 P.2d 673, 677, 99 Cal. Rptr. 617, 621 (1972)).

45. 30 Cal. 3d at 233, 636 P.2d at 40, 178 Cal. Rptr. at 351. The court recognized that "[a]ll vehicles are potentially dangerous," and to limit insurance protection to only those vehicles used to transport property "would leave a substantial area of the carrier's business operation unprotected." *Id.*

correct in concluding the insurance requirement is necessary to protect both the public and highway carriers.[46]

Referring to Transamerica's argument that the pickup truck was not regulated by the Public Utilities Code because the P.U.C. only regulated large tractor trucks, the court found such a distinction irrelevant because the insurance requirement was posed forty-six years ago, when large tractor trucks were uncommon and of little concern.[47] Further, the requirement today applies to all businesses that "transport property" for compensation.[48] Under the Code, the phrase "transportation of property" is broadly construed to include "every service in connection with or incidental to the transportation of property . . . ."[49] That broad interpretation has been construed to include "such ancillary services as packaging coins after transporting them, stringing pipe, disassembling and reassembling oil well derricks, and preparing mobile homes for transportation and setting them up for occupancy."[50] Therefore, the court concluded that the phrase "transportation of property" clearly included the services performed by Vagle's pickup truck.[51]

Along the same line of analysis, the court reasoned that because the services of the truck fell within the phrase "transportation of property," the truck was also "used in conducting the services [Vagle] performed" as a carrier.[52] Having previously concluded that the truck was covered under the insurance policy endorsement,[53] the court reasoned that this justified including the pickup truck within the general order.[54] In such a manner, the court decided the pickup truck was covered under the Transamerica insurance policy.[55]

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46. *Id.*

47. *Id.* at 234, 636 P.2d at 40, 178 Cal. Rptr. at 351.

48. *Id.*

49. *Id.* at 234, 636 P.2d at 41, 178 Cal. Rptr. at 351-52 (quoting CAL. PUB. UTIL. CODE § 209 (West 1975)).

50. *Id.* at 234, 636 P.2d at 41, 178 Cal. Rptr. at 352 (citations omitted). *See also In re* White, 80 Cal. P.U.C. 386, 390 (1976); Central Home Movers, 78 Cal. P.U.C. 218, 224-25 (1975).

51. 30 Cal. 3d at 235, 636 P.2d at 41, 178 Cal. Rptr. at 352. The court noted "transportation of property" has been called a "broad functional" definition by the P.U.C. *Id.* (Citing Armored Transport Inc., 72 Cal. P.U.C. 554, 557 (1971).)

52. 30 Cal. 3d at 235, 636 P.2d at 41, 178 Cal. Rptr. at 352.

53. *See* text accompanying note 35 *supra*.

54. More specifically, the court stated that the pickup truck "was included within the scope of the general order as well as the endorsement." 30 Cal. 3d at 235, 636 P.2d at 41, 178 Cal. Rptr. at 352. Therefore, the court concluded that because the truck was included within the scope of both the general order and the endorsement, and the general order and endorsement were incorporated into the insurance policy, the pickup truck was covered by the Transamerica insurance policy. *Id.*

55. *Id. See* note 54 *supra*. The court swiftly disposed of Transamerica's argu-

The court next addressed Transamerica's appeal from the trial court's summary judgment. Transamerica argued: (1) that it should have had an opportunity to litigate the amount of damages; (2) that it should be liable only up to $300,000 policy limit; and (3) that the trial court erred in granting summary judgment because there existed a triable issue as to the reasonableness of the settlement offer that Transamerica rejected.[56] Of the three contentions proferred by Transamerica, the court devoted the bulk of its discussion to the first.

With respect to the argument that it did not have an opportunity to litigate the amount of damages, Transamerica first asserted that it did not have notice of the trial date.[57] Although an insurer is not bound by the judgment unless it receives notice of the action,[58] once the insurer denies coverage to the insured, the insured's contractual obligation to notify the insurer ceases.[59] Despite attempts by Transamerica to convince the court that the denial of coverage was informal because it was made directly to Vagle and not his attorney,[60] the court found Vagle was denied coverage and thereby relieved of any obligation to notify Tran-

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ment that even if the pickup truck were covered for business purposes, it was not covered when being used for a personal errand. 30 Cal. 3d at 236, 636 P.2d at 42, 178 Cal. Rptr. at 353. In applying the well established rule that "exclusion in insurance policies must be 'phrased in clear and unmistakable language,' " *id.* (quoting California State Auto Ass'n Inter-Ins. Bureau v. Warwick, 17 Cal. 3d 190, 194, 550 P.2d 1056, 1058, 130 Cal. Rptr. 520, 522 (1976)), the court noted that nothing in the general order, the endorsement, or the insurance policy "excluded coverage for personal use . . . ." 30 Cal. 3d at 236, 636 P.2d at 42, 178 Cal. Rptr. at 353. Therefore, "[i]n the absence of express exclusion, coverage extends to all uses of the [pickup truck]." *Id.*

56. *Id.*

57. *Id.* at 238, 636 P.2d at 43, 178 Cal. Rptr. at 354.

58. *Id.* (citing Clemmer v. Hartford Ins. Co., 22 Cal. 3d 865, 884, 587 P.2d 1098, 1108, 151 Cal. Rptr. 285, 295 (1978)). In *Samson*, Vagle's duty to notify Transamerica of the pendency of the litigation arose out of the contractual terms of the insurance policy. 30 Cal. 3d at 238, 636 P.2d at 43, 178 Cal. Rptr. at 354. However, the duty ceased to exist when Vagle was denied insurance. *Id.* The court noted this conclusion does not prove to be unjust to Transamerica because at no time did Transamerica investigate the possibility of liability, and numerous memoranda denied the pickup truck was covered. Thus, there was no prejudice to the insurer because it did not show that it would have defended the lawsuit if it had been given notice. *Id.* at 238-39 n.11, 636 P.2d at 43 n.11, 178 Cal. Rptr. at 354 n.11.

59. *Id.* at 238, 636 P.2d at 43, 178 Cal. Rptr. at 354 (citing Drinnon v. Oliver, 24 Cal. App. 3d 571, 580, 101 Cal. Rptr. 120, 125 (1972)).

60. Transamerica attempted to argue that there was no denial of coverage because the denial was informal since it was made directly to Vagle rather than to his attorney. However, the court found that argument to be without merit. 30 Cal. 3d at 238, 636 P.2d at 43, 178 Cal. Rptr. at 354.

samerica of the action.[61] Transamerica also argued that because Vagle did not demand a defense, it did not refuse to defend him in the lawsuit but rather merely denied him coverage.[62] The court rejected that argument by noting Vagle was not required to demand a defense because Transamerica's duty to defend arose when it was informed of potential liability.[63]

The court next addressed Transamerica's claim that it should be liable for no more than the $300,000 policy limit. The court responded to that argument in a summary manner, noting that an insurer's refusal to accept a reasonable settlement offer can subject them to greater liability than the policy limits.[64]

Finally, the court addressed Transamerica's contention that the issue as to whether the company wrongfully rejected the settlement offer was a question of fact for a jury to decide, and thus the trial court erred in granting summary judgment. The supreme court noted that previous cases had held that the reasonableness of a settlement offer is a question of fact to be determined by the jury.[65] However, the supreme court, in *Johansen v. California State Automobile Association Inter-Insurance Bureau*,[66] narrowly defined a reasonable settlement offer by holding "*[t]he only permissible consideration in evaluating the reasonableness of the settlement offer [is] whether*, in light of the victim's injuries and the probable liability of the insured, *the ultimate judgment is likely to*

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61. *Id.* *See* note 58 *supra*.

62. *Id.* at 239, 636 P.2d at 44, 178 Cal. Rptr. at 355.

63. *Id.* (citing Gray v. Zurich Co., 65 Cal. 2d 263, 276-77, 419 P.2d 168, 176-77, 54 Cal. Rptr. 104, 112-13 (1966)).

64. 30 Cal. 3d at 237, 636 P.2d at 42, 178 Cal. Rptr. at 353. The court cited Johansen v. California State Auto Ass'n Inter-Ins. Bureau, 15 Cal. 3d 9, 12, 538 P.2d 744, 746, 123 Cal. Rptr. 288, 290 (1975), where the supreme court stated that:

> California authorities establish that an insurer who fails to accept a reasonable settlement offer within policy limits because it believes the policy does not provide coverage assumes the risk that it will be held liable for all damages resulting from such refusal, including damages in excess of applicable policy limits.

Furthermore, the *Johansen* court held that an insurer's erroneous belief of noncoverage, albeit in good faith, affords no defense to the refusal of a reasonable settlement offer. *Id.* at 16, 538 P.2d at 748, 123 Cal. Rptr. at 292.

After the personal injury judgment was entered, the plaintiff's attorney sent Transamerica an offer to compromise the outstanding $625,000 claim against Vagle for the Transamerica policy limit of $300,000. 30 Cal. 3d at 229, 636 P.2d at 37, 178 Cal. Rptr. at 348. The supreme court held that Transamerica's failure to respond was a wrongful rejection of the settlement offer. *Id.* at 243, 636 P.2d at 46, 178 Cal. Rptr. at 357.

65. 30 Cal. 3d at 242-43, 636 P.2d at 46, 178 Cal. Rptr. at 357 (citing Critz v. Farmers Ins. Group, 230 Cal. App. 2d 788, 796-97, 41 Cal. Rptr. 401, 405-06 (1964); Brown v. Guarantee Ins. Co., 155 Cal. App. 2d 679, 689, 319 P.2d 69, 75 (1957).

66. 15 Cal. 3d 9, 538 P.2d 744, 123 Cal. Rptr. 228 (1975).

exceed the amount of the settlement offer."[67] The court held that because a judgment had already been entered which exceeded the amount of the settlement offer, "the settlement offer was reasonable and was wrongly rejected by Transamerica."[68]

IV. CASE IMPACT

The impact of the *Samson* decision is far-reaching because its application to various factual situations appears unlimited. The court has held, by statutory construction, that the requirements of the Public Utilities Code are incorporated into the insurance contract.[69] Because the Public Utilities Code phrase "transportation of property" has been given broad interpretation,[70] the situations where an insurer may incur liability have been greatly increased.

The *Samson* court failed to define the boundaries of what services are incidental to the transportation of property and thereby covered under the insurance policy.[71] Companies who extend insurance to highway carriers and conform their policies to the requirements of the P.U.C. should be aware that their liability extends beyond the vehicle that actually transports the property. Additionally, an insurer who may desire to avoid this broad scope of liability may not find the task as easy as simply not incorporating the requirements of the P.U.C. into the endorsement. That avenue of liability avoidance may have been foreclosed by the *Samson* court's holding that the provisions of the Public Utilities Code are incorporated as a matters of law into the insurance contract.[72] Apparently, the purpose of incorporating the requirements of the Public Utilities Code into the insurance contract is to insure that the general policies behind the regulation of higway carriers are carried out.

Any argument that the *Samson* decision is of little significance because it involved "radial highway carriers" would be incorrect; the P.U.C. is concerned with regulating all highway carriers.[73]

67. 30 Cal. 3d at 243, 636 P.2d at 46, 178 Cal. Rptr. at 357 (emphasis in original) (quoting *Johansen*, 15 Cal. 3d at 16, 538 P.2d at 748, 123 Cal. Rptr. at 292).

68. 30 Cal. 3d at 243, 636 P.2d at 46, 178 Cal. Rptr. at 357.

69. *See* note 34 *supra* and accompanying text.

70. *See* notes 49-50 *supra* and accompanying text.

71. Although the court gave examples of services that are identical to the transportation of property, *see* note 49 *supra* and accompanying text, it failed to delineate a standard by which an insurer's liability may be determined.

72. *See* text accompanying note 71 *supra*.

73. There is no longer a classification of radial highway carrier. *See* note 2

The policy reasons for requiring insurance apply to all highway carriers. However, the decision is questionable when one tries to determine on what grounds the court ruled the pickup truck was covered by the insurance policy.[74] If the court based its decision on the ground that the provisions of the Public Utilities Code are incorporated as a matter of law into the policy,[75] then an insurer would be bound by the requirements of the code. If, on the other hand, the court's decision was made by finding that the insurance policy endorsement specifically incorporated the requirements of the Public Utilities Code into the policy,[76] an insurer may be able to avoid liability by declining to refer to the Public Utilities Code in its insurance policy and policy endorsements.

V. CONCLUSION

The *Samson* decision reflects the California Supreme Court's desire to protect both the carriers and the public from the dangers arising out of the lack of liability insurance. Relying on broad interpretations of what services are incidental to the transportation of property,[77] and the underlying purpose of the insurance requirement being the protection of the public,[78] the court found that a pickup truck which was used to perform services incidental to the transportation was also covered by the insurance policy.[79] Because the court did not delineate a standard to determine what services are incidental to the transportation of property,[80] it may soon find itself confronted with many variations on this same theme.

VIII. JUVENILE LAW

A. *Life sentence for rape and murder reversed because of defendant's age:* **People v. Davis**

Michael Davis was sixteen years old when found guilty of rape and murder. Pursuant to California penal code section 190,[1] spe-

supra. However, the insurance requirements still apply to highway carriers required to carry permits. *See* notes 5 and 27 *supra*.

74. The *Samson* court failed to specify whether its decision was based on the grounds that the statutory provisions were incorporated into the insurance policy as a matter of law, or because the policy endorsement referred specifically to the P.U.C. regulations, or both.

75. *See* note 34 *supra* and accompanying text.

76. *See* note 35 *supra* and accompanying text.

77. *See* note 50 *supra* and accompanying text.

78. *See* notes 41-43 46 *supra* and accompanying text.

79. 30 Cal. 3d at 235, 636 P.2d at 41, 178 Cal. Rptr. at 352.

80. *See* note 71 *supra*.

1. Former Penal Code §§ 190-190.5 authorized the death penalty and life im-

cial circumstances were pled and proved, qualifying Davis for either the death penalty or life imprisonment without possibility of parole. An adult defendant would normally then proceed to a sentencing hearing in order to determine which of the two sentences would be imposed. Where the defendant is a minor, however, distinct problems arise with the application of section 190. The California Supreme Court addressed these problems in *People v. Davis*.[2]

Although Michael Davis was tried before a jury as an adult, because he was a minor, a conflict developed when the trial court applied an automatic sentence of life imprisonment without parole. The trial court reasoned that because section 190 exempted minors from the death penalty, the only alternative sentence for a minor convicted of first degree murder with special circumstances was life imprisonment without possibility of parole.[3] The California Supreme Court, relying on the policies behind the disparate treatment of minors, disagreed.[4]

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prisonment without parole for first degree murder when there were special circumstances present. However, these 1977 death penalty statutes have been repealed. CAL. PENAL CODE §§ 190-190.5 *repealed by* Initiative Measure approved Nov. 7, 1978, 1977 Cal. Stat. 1256-62, ch. 316. The following California Penal Code sections are necessary to better understand the analysis of the *Davis* majority and dissent.

Section 190 "Every person guilty of murder in the first degree shall suffer death, . . . life without possibility of parole, or . . . confinement for life. The penalty to be applied . . . as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5 . . . ." *Id.*

Section 190.1 "A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases . . .," specifically the guilt, sanity and penalty phases. *Id.*

Section 190.2 "The penalty for a defendant found guilty of murder in the first degree shall be *death* or *confinement in the state prison for life without the possibility of parole* in any case in which one or more . . . special circumstances has been charged and specifically found . . . ." *Id.*

Section 190.3 "If the defendant has been found guilty of murder in the first degree and a special circumstance has been charged and found to be true, . . . the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole . . . ." *Id.*

Section 190.5 This section exempts two categories of offenders from the penalty of death. Subdivision (a) stated, "(n)otwithstanding any other provision of the law, the death penalty shall not be imposed upon any person who is under the age of 18 at the time of commission of the crime." *Id.*

2. 29 Cal. 3d 814, 633 P.2d 186, 176 Cal. Rptr. 521 (1981).
3. *Id.*
4. The majority opinion was written by Justice Mosk with Justices Tobriner,

Prior to 1899,[5] juveniles did not have a separate court system to address their problems and were tried in adult criminal courts. Convictions were rare, primarily because there was strong public opinion that it would be unjust to place a child into the terrible atmosphere and physical conditions which were the hallmark of prisons in the 1800's.[6] Concern for the conditions of incarceration helped launch a movement that culminated in the creation of a separate juvenile justice system.

However, the system was far from just and did not adequately remedy conditions of incarceration, which had been the impetus for treating juveniles differently. The juvenile court system, displaying a paternal attitude and philosophy of rehabilitation for youthful offenders, was remiss in providing due process safeguards, given as a matter of right to adult defendants in criminal courts.[7] The United States Supreme Court held that defendants in the juvenile system should be afforded safeguards of procedural due process. "There is evidence . . . that there may be grounds for concern that the child (a juvenile) receives the worst of both worlds: that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."[8] Accordingly, the Supreme Court extended some procedural safeguards to the juvenile system.[9]

Despite the United States Supreme Court's decisions, the rule in California still appeared to "refuse to grant minors . . . the same rights their adult counterparts enjoyed in criminal proceed-

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Newman, and Kingsley concurring. A separate concurring and dissenting opinion was filed by Justice Richardson with Justice Fainer concurring. Chief Justice Bird also filed a separate concurring and dissenting opinion. *Id.* at 815, 633 P.2d at 187, 176 Cal. Rptr. at 521.

5. Walker, *Introduction to the Juvenile System* in 1 *California Juvenile Court Practice* 1, 5 (1981). *See also* Reichel, *Nineteenth Century Societal Reactions to Juvenile Delinquents: Preliminary Notes for a Natural History*, 4 MID-AM. REV. OF SOC. 39 (1979).

6. *See* Fox, *Juvenile Justice Reform; An Historical Perspective*, 22 STAN. L. REV. 1187, 1194 (1970).

7. *See* Walker, *supra* note 5, at 8. Concern for due process was deemed inappropriate when the primary concern of the system was to determine the correct method of treatment for a juvenile offender. *Id.*

8. Kent v. United States, 383 U.S. 541, 556 (1966) (certification of juvenile for proceedings in adult court). Subsequently, in *In re* Gault, 387 U.S. 1 (1967), the Supreme Court declared that various aspects of the Bill of Rights pertain to juveniles in the juvenile court system. Those aspects include: notice of charges, representation, the right against self-incrimination, and the right to confront and cross-examine witnesses. *See also* Breed v. Jones, 421 U.S. 519 (1975) (double jeopardy applicable to juveniles); *In re* Winship, 397 U.S. 358 (1970) (standard of proof beyond a reasonable doubt in juvenile proceedings). *But cf.* McKeiver v. Pennsylvania, 403 U.S. 528 (1971) (no right to jury trial in juvenile court).

9. *Id.*

ings."[10] However, legislative reform and a review of the juvenile system resulted in improved conditions. "With the exception of the right to jury trial, a delinquency jurisdictional hearing (the juvenile court equivalent of a trial) in many counties in California is today virtually indistinguishable from a criminal trial."[11]

In *Davis* the defendant, Michael Davis, was tried as an adult with all of the attendant procedural safeguards. However, when sentencing him under section 190, the California Supreme Court could not forget that Michael Davis was still a minor.

Initially, the *Davis* court addressed several challenges to the legality of the defendant's confession and his ability to confront an important witness,[12] before turning to the major issue in the case of whether a juvenile can be sentenced to life without parole pursuant to a finding of special circumstances under section 190. The procedural challenges require an understanding of the facts.

Michael Davis was seen walking with and annoying the victim, a thirteen year old girl, in a park adjacent to his high school. Although the victim repeatedly told Davis to leave her alone, he continued to walk with her until she finally responded by hitting him with her notebook. Davis then grabbed the victim's hat and threw it into some nearby bushes. The victim went after the hat, and Davis followed her and proceeded to choke the victim into unconsciousness in the seclusion of the bushes. Thereupon, Davis raped the victim. When she began to regain consciousness and Davis realized she could identify him and expose his crimes, Davis strangled her.[13]

Police officers conducting the investigation called Davis to meet with him. Davis met the officers in the same park and voluntarily accompanied them to the police station, where the officers expressed a desire to talk in private. After admitting to being with the victim at the approximate time of the crime, but not to the crime itself, Davis was arrested and placed in custody. After refusing to take a lie detector test, Davis subsequently confessed to the murder of the young girl.[14]

The *Davis* court found that the defendant's confession was

10. *See* Walker, *supra* note 5, at 10.

11. *Id.* at 14. *See also In re* Perrone C., 26 Cal. 3d 49 603 P.2d 1300, 160 Cal. Rptr. 704 (1979) (availability of jury trial discussed).

12. 29 Cal. 3d at 819, 633 P.2d at 191, 176 Cal. Rptr. at 523.

13. *Id.*

14. *Id.* at 820-27, 633 P.2d at 192-99, 176 Cal. Rptr. at 523-27.

neither "the fruit" of an illegal seizure[15] nor of an arrest made without probable cause,[16] nor was it involuntarily made.[17] In dismissing the illegal seizure argument, the court relied on the fact that the defendant had *volunteered* to go down to the police station after having set up the meeting at the park. Importantly, the court found that the police, at the time of this meeting, did not intend to arrest the defendant, who was free to leave if he so desired.[18]

The *Davis* court also found that the police had probable cause to arrest the defendant after he had come to the station and admitted to being with the victim at the approximate time of the crime. In addition to several witnesses testifying to having seen the defendant with the victim, the defendant accurately described the victim's clothing and the contents of her notebook.[19] Thus, suspicion had already focused on the defendant, who was arrested only after he refused to take a lie detector test. All these facts, the court declared, "could engender in a person using ordinary care a strong suspicion that the defendant had committed the crime."[20]

While dealing with the defendant's assertion that his confession was involuntary, the court distinguished *People v. Pettingill*,[21] upon which the defendant relied. *Pettingill* held that all questioning should cease after a suspect asserts his right to remain silent."[22] The court argued that the defendant did not explicitly make any such blanket assertion. Instead, the defendant appeared only to object to taking a lie detector test. This was corroborated by defendant's own testimony: " 'Did you tell the

15. *Id.* at 820-22, 633 P.2d at 192-94, 176 Cal. Rptr. at 523-24. The defendant asserted that his transportation to the police station was an illegal search and seizure under the fourth amendment. *Id.*

16. *Id.* at 822-23, 633 P.2d at 194-95, 176 Cal. Rptr. at 524-25. The defendant contended that at the time the police arrested him, they lacked probable cause to do so. *Id.*

17. *Id.* at 823-26, 633 P.2d at 195-98, 176 Cal. Rptr. at 525-27. The defendant argued that despite his waiver of the Miranda rights before his confession, the decision in People v. Pettingill, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978) required his confession be labeled involuntary.

18. 29 Cal. 3d at 821, 633 P.2d at 194, 176 Cal. Rptr. at 524. Thus, the defendant erroneously relied on the case of Dunaway v. New York, 422 U.S. 200 (1978), which held that transportation of a defendant to the police station was an illegal search and seizure. In the *Dunaway* case, the police did not intend to let the defendant leave if he had desired to do so. Here, Davis was free to walk away from the meeting in the park as well as the meeting in the police station.

19. 29 Cal. 3d at 823, 633 P.2d at 195, 176 Cal. Rptr. at 525.

20. *Id.* This test was set out in People v. Harris, 15 Cal. 3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 (1975) and cited favorably in *Davis*.

21. 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978) (custodial interrogation must cease when suspect indicates desire to invoke fifth amendment).

22. *Id.*

polygraph man that you didn't want to take the test?' Defendant responded. 'Yes.' But when asked, 'Did you tell him that you didn't want to talk about the case?' he said, 'No.' "[23] In addition, the defendant did not seek the presence of an attorney or parent at this time.[24] Thus, the defendant's confession was deemed to have been given of his own volition and not as a result of coercive pressure applied by the authorities.[25]

The final alleged procedural impropriety was that the trial court admitted into evidence the testimony of a witness who testified at the preliminary hearing but was not present at the trial for cross-examination. The court negated this challenge by finding that the district attorney had shown due diligence in establishing that the witness was unavailable for trial.[26]

Sections 190-190.5, although imposing the death penalty for certain first degree murder charges, had not been applied to minors since 1921. However, the *Davis* court declared that, even though no explicit exemption from a life sentence without possibility of parole for minors was present in the statute, such a result must be implied from the language and the history of the statute.[27]

Justice Mosk, in analyzing sections 190-190.5 of the California Penal Code, determined that two possible interpretations could be made. The first possibility was that each section should be applied individually, resulting in some sections being applied in cases which did not involve the death penalty.[28] The alternative interpretation was to treat section 190.1 as the "cornerstone of the remaining provisions of the act, providing an overview of the procedure to be followed in first degree murder cases with allegations of special circumstances possibly justifying the death

23. 29 Cal. 3d at 825, 633 P.2d at 197, 176 Cal. Rptr. at 526-27. *See* note 21 *supra*.

24. This requirement is set forth in CAL. EVID. CODE § 1291 (West 1971).

25. *But see* People v. Lara, 67 Cal. 2d 365, 432 P.2d 202, 62 Cal. Rptr. at 586 (1967) (while there is general preference to have a attorney or parent present while questioning minor such is not mandatory).

26. The witness had reportedly left the country and all efforts to call or write to relatives had not led to the discovery of the witness's whereabouts. 29 Cal. 3d at 827, 633 P.2d at 199, 176 Cal. Rptr. at 527.

27. *Id.* at 827, 633 P.2d at 199, 176 Cal. Rptr. at 528. *See* note 1 *supra*.

28. 29 Cal. 3d at 828, 633 P.2d at 200, 176 Cal. Rptr. at 528. This interpretation was, of course, adopted by the trial court. A recent lower court decision followed this approach. *See* People v. Superior Court, 98 Cal. App. 3d 39, 159 Cal. Rptr. 310 (1979) (minors can be sentenced to life without possibility of parole pursuant to a finding of special circumstances).

penalty."[29]

Thus, under the second interpretation, section 190.1 would then limit the application of the remaining sections to cases where the death penalty could be applied.[30] Because a minor was exempted from the death penalty,[31] he or she would not be subject to sentences imposed by those sections.[32] Specifically, Davis would be exempted from section 190.2, which required that a person convicted of first degree murder with special circumstances present be sentenced to death *or* life imprisonment without possibility of parole.[33]

The court based its decision to adopt the second interpretation on several factors. Because the language of the statute was susceptible to differing interpretations, the court, "guided by well-settled principles of statutory interpretation,"[34] chose the construction which was most favorable to the defendant. Clearly Davis benefited by the interpretation that minors be exempted from the death sentence or life imprisonment without possibility of parole.[35] Under this interpretation, the general sentencing provisions of section 190 would apply to automatically sentence a minor convicted of first degree murder to life imprisonment.[36]

Another factor considered by the court was the intent of the legislature. The *Davis* court noted that in 1921 the legislature had specifically exempted minors from the death penalty. At that time, the alternative sentences for first degree murder were death or life imprisonment with the possibility of parole.[37] The court reasoned that the legislature, by excluding death as a penalty for minors convicted of first degree murder, had clearly shown that the only sentence applicable in that situation was life imprisonment with a possibility of parole. Likewise, in 1973, when the legislature made first degree murder with special circumstances present a separate category requiring the death penalty, minors

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29. 29 Cal. 3d at 828, 633 P.2d at 200, 176 Cal. Rptr. at 528.

30. The pertinent language states that proceedings are limited to "(a) case in which the death penalty may be imposed pursuant to this chapter." *See* note 1 *supra*.

31. *Id.*

32. *Id.*

33. *Id.* Thus, if the section following § 191.1 did not apply to minors, Davis would be able to avail himself of the general provisions in § 190 which allowed death, life imprisonment without parole, or life imprisonment upon a finding of first degree murder. With the first two sentences applying only to capital cases with special circumstances, a minor would be eligible for only the life imprisonment sentence.

34. 29 Cal. 3d at 828, 633 P.2d at 200, 176 Cal. Rptr. at 528.

35. *See* text accompanying notes 29-34 *supra*.

36. *See* note 33 *supra*.

37. 29 Cal. 3d at 829, 633 P.2d at 201, 176 Cal. Rptr. at 529.

were still exempt.[38] However, in 1977, the legislature amended that law to allow for mitigating circumstances and the imposition of *either* death or life without parole for first degree murder when special circumstances were present.[39] Most importantly, the legislature did nothing to suggest that it intended the new penalty of life without parole to be imposed on minors as an alternative to an ordinary life sentence.[40] The purpose of adding the alternative penalty, the court stated, was to remedy the unconstitutional effect of not allowing mitigating circumstances to decrease the harsh penalty in capital cases.[41]

The third factor the *Davis* court looked at was whether the interpretation of the statutory language would cause an inconsistent result.[42] Looking at the statute as a whole, the court found no reason to subject minors to life imprisonment without parole. The legislature had stated in section 190.1 that the procedures regarding special circumstances allegations should only be applied in cases where the death penalty was available.[43] Since the death penalty was not available for a minor, it followed that special circumstances could not be asserted in the case of a minor.[44] Thus, the court declared, the legislature need not put such restrictions in every subsequent section to exclude minors from harsh penalties because, when the statute was read as a whole, the restrictions in section 190.1 applied to all following sections.[45]

The court also noted with emphasis the lack of specific legislative direction in the statute declaring an express desire that the harshness of a minor's penalty be increased. The court interpreted sections 190-190.5 to favor the defendant. Thus, the court concluded that Davis' sentence must be reduced from life without possibility of parole to life imprisonment.[46]

38. *Id.* This change came about in 1972 because the statute was determined to be violative of the constitutional prohibition against cruel and unjust punishment. *See* People v. Anderson, 6 Cal. 3d 628, 556 P.2d 1101, 134 Cal. Rptr. 650 (1972) (automatic death penalty without opportunity to show mitigating circumstances in capital case deemed unconstitutional).

39. 29 Cal. 3d at 830, 633 P.2d at 202, 176 Cal. Rptr. at 529. *See* note 38 *supra*.

40. 29 Cal. 3d at 830, 633 P.2d at 202, 176 Cal. Rptr. at 530.

41. *Id. See* note 38 *supra*.

42. 29 Cal. 3d at 829, 633 P.2d at 201, 176 Cal. Rptr. at 529.

43. *Id.* at 831, 633 P.2d at 203, 176 Cal. Rptr. at 530. *See* note 1 *supra*.

44. *See* text accompanying notes 29-34 *supra*.

45. *See* note 1 *supra*.

46. 29 Cal. 3d at 832, 633 P.2d 204, 176 Cal. Rptr. at 531. The court had previously found there were no procedural improprieties and confirmed the validity of the defendant's confession. *See* text accompanying notes 12-26 *supra*.

Although the dissenting opinion persuasively argued that the statutory provisions of sections 190-190.5 must be interpreted to exempt minors *only* from the death penalty and not from a sentence of life without parole,[47] an ambiguity in the language of the section and the contrary intent of the statute justify the decision of the majority. Where a question arises as to the permissible penalties for a minor convicted of first degree murder, the majority opinion stated that a statute must be resolved in favor of the minor defendant.[48] In this manner, the legislature is free to express its intent, if contrary to the court's ruling in *Davis*, through the legislative process.

Further substantiating the *Davis* court decision to exclude minors from the application of special circumstances and its subsequent penalties was the long history of treating juvenile offenders in a way which stresses rehabilitation rather than punishment.[49] However, this policy appears to be changing. Some authorities call for reform of the juvenile system.[50] Others say the idea that crime can be prevented through early treatment of those who demonstrate predelinquency tendencies is now largely discredited, and the increase in juvenile crime in recent years has resulted in profound disillusionment with the rehabilitative capabilities of the juvenile justice system.[51]

However, any change in the policy toward the juvenile system should not come from the courts, but rather from the legislature. Although the state of the juvenile justice system is in transition, the *Davis* court has demonstrated that, until there is a clear expression to the contrary, minors will be treated in the criminal system with the hope that rehabilitation, rather than punishment, will serve to enable the juvenile offender to retake a meaningful place in society. This true even if, as in the Davis case, the juvenile offender is transferred to the adult criminal system for trial

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47. 29 Cal. 3d at 832-35, 633 P.2d at 204-07, 176 Cal. Rptr. at 531-33. (Richardson, J., dissenting). Justice Richardson argued that the specific language of § 190 ("Every person guilty of murder . . . .") and the command of § 190.2 (leaving the only sentencing options for first degree murder with special circumstances present as *death* or *life imprisonment without parole*) dictate that a minor is to be excluded only from the penalty of death. Therefore, the alternative penalty, under § 190.2 is life imprisonment without the possibility of parole. *Id.* *See* note 1 *supra*.

48. *See* text accompanying notes 34-36 *supra*.

49. *See* notes 5-11 *supra* and accompanying text. The court displayed its concern in the area of juvenile rehabilitation by stating that a minor "who is condemned to live virtually his entire life in ignorminious confinement, [would be] stripped of any opportunity or motive to redeem himself for an act attributable to the rash and immature judgment of youth." 29 Cal. 3d at 832 n.10, 633 P.2d at 204 n.10, 176 Cal. Rptr. at 531 n.10.

50. *See generally* Kaufman, *Juvenile Justice: A Plea for Reform*, N.Y. TIMES MAGAZINE, Oct. 14, 1979, at 42. *See also* Walker, *supra* note 5, at 14-15.

51. Walker, supra note 5, at 14.

and sentencing.[52]

IX. LABOR RELATIONS

A. *The Successorship Issue—Special Considerations in California:* Highland Ranch v. Agricultural Labor Relations Board; San Clemente Ranch v. Agricultural Labor Relations Board

The Agricultural Labor Relations Act[1] (ALRA) was enacted in California in 1975 to reflect the objectives of California state labor policy.[2] The California courts have recognized that the ALRA was modeled largely upon the National Labor Relations Act[3] (NLRA). As a result of this relationship, the California courts have looked extensively to administrative and judicial interpretations of the NLRA to aid in the interpretation of the ALRA. The California legislature specifically directed this method of analysis by explicitly providing that "the [ALRA] shall follow applicable precedents of the National Labor Relations Act as amended."[4]

The complexities of the California agricultural labor scheme have presented several problems for California courts attempting to apply federal case precedent. Examples of these difficulties surfaced in two cases before the California Supreme Court: *Highland Ranch v. Agricultural Labor Relations Board*[5] and *San Cle-*

52. Although there was no mention by the *Davis* court that the defendant was not under the jurisdiction of the juvenile courts, it must be assumed that the court took this into consideration in its deliberations.

If a minor is between 16 and 18 at the time of the crime (as was Davis), the probation department, judge, or the prosecution may request that the defendant be certified for trial in the adult criminal system. Thus, if the request is granted, the juvenile court then waives its jurisdiction over the defendant. CAL. WELF. & INST. CODE § 707(b) (West 1982). *See also* Wald, *Overview of the Delinquency System* in 1 CALIFORNIA JUVENILE COURT PRACTICE 17, 25 (1981).

1. CAL. LAB. CODE, §§ 1140-59 (West Supp. 1981-1982).

2. 29 Cal. 3d 874, 885, 633 P.2d 964, 971, 176 Cal. Rptr. 768, 775 (1981).

3. *See, e.g.*, Vista Verde Farms v. Agricultural Labor Relations Bd., 29 Cal. 3d 307, 625 P.2d 263, 172 Cal. Rptr. 720 (1981); Belridge Farms v. Agricultural Labor Relations Bd., 21 Cal. 3d 551, 580 P.2d 665, 147 Cal. Rptr. 165 (1978). It should be noted that section 1148 of the ALRA, specifically provides that "[t]he [ALRB] shall follow applicable precedents of the National Labor Relations Act (NLRA) as amended." CAL. LAB. CODE § 1148 (West Supp. 1981-1982). *See also* Levy, *The Agricultural Relations Act of 1975 — La Esperanza de California Para El Futuro*, 15 SANTA CLARA LAW REV. 783 (1975).

4. Vista Verde Farms v. Agricultural Labor Relations Bd., 29 Cal. 3d 307, 318, 625 P.2d 263, 268-69, 172 Cal. Rptr. 720, 725-26.

5. 29 Cal. 3d 848, 633 P.2d 949, 176 Cal. Rptr. 753. Highland Ranch was a 647

mente Ranch v. Agricultural Labor Relations Board.[6]

In *Highland Ranch*, the court considered the issue of unfair labor practices with respect to the obligations of an employer during the period of time in which a union's formal certification is pending.[7] The court applied the rationale supporting two sources of federal authority.[8] It was noted that although an employer is normally not required to bargain toward a comprehensive collective bargaining agreement during the period in which his challenges to a representation election are pending, neither is he free to unilaterally change the terms or conditions of employment during that time.[9]

Furthermore, the court noted that when an employer changes terms and conditions of employment during the period in which objections to an election are pending, without notifying the union and giving them some opportunity to express their views on the changes, he acts at his own peril.[10] The court stated that the policy supporting the federal precedents was to prevent unions from constraining themselves in future bargaining situations. The court noted that, such changes have the effect of bypassing, undermining, and undercutting the union's representative status. Referring to the second source of federal precedents, the court determined that when an employer decides to terminate or sell his business during an election challenge, his obligation to notify the

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acre farm leased from the United States Marine Corps at Camp Pendleton in Orange County, California. Many agricultural laborers worked at the ranch and lived in a rent-free labor camp that was owned and operated by Highland Ranch. In 1977, the United Farm Workers began to campaign with the workers at Highland Ranch. After much campaigning, the United Farm Workers filed for certification, which triggered an election under the terms of the ALRA. This election was eventually won by the United Farm Workers. Some time after the election, but before the formal certification of the union, Highland Ranch began negotiations to sell the ranch. It was finally sold to San Clemente the day *after* the union was formally certified. During the period of negotiations between Highland and San Clemente, Highland Ranch failed to provide the United Farm Workers with any information regarding the sale of the ranch. After Highland sold the ranch, complaints were filed by the ALRB charging Highland Ranch with unfair labor practice in having failed to notify or bargain with the union regarding the impending sale of the ranch.

6. 29 Cal. 3d 874, 633 P.2d 964, 176 Cal. Rptr. 768 (1981). The court's decision in *San Clemente Ranch* revolved around the same facts which gave rise to the decision in *Highland Ranch*, that is, the sale of an agricultural ranch.

7. 29 Cal. 3d at 857-58, 633 P.2d at 954-55, 176 Cal. Rptr. at 757-58.

8. Sunstrand Heat Transfer Inc. v. NLRB, 538 F.2d 1257, 1259. *See also* General Elec. Co., 163 NLRB Dec. (CCH) ¶ 198 (1967); Trinity Steel Co., Inc., 102 NLRB Dec. (CCH) ¶ 1470 (1953); Harbor Chevrolet Co., 93 NLRB Dec. (CCH) ¶ 1326 (1951).

9. 29 Cal. 3d at 856, 633 P.2d at 954, 176 Cal. Rptr. at 758 (quoting Mike O'Connor Chevrolet, 209 N.L.R.B. 701 (1974)), *rev'd on other grounds*, 512 F.2d 684 (8th Cir. 1975)).

10. 29 Cal. 3d at 856, 633 P.2d at 954-55, 176 Cal. Rptr. at 757.

union of his decision continues so that the union will have the power to bargain over the rights of the employees.[11]

The *Highland Ranch* court relied on both sources of federal authority. Highland had attempted to justify its lack of dealings with the union on the basis that any dealings with an uncertified union would have constituted unfair labor practices.[12] In rejecting this argument, and in upholding a finding of unfair labor practices, the court stated that such a result could not have been within the legislative intent of the ALRA.[13] An employer may not seize upon the absence of certification when he cannot reasonably doubt that the union, which has prevailed in a representative election, will be certified. He must, therefore, bargain over the effects of unilateral changes or be in danger of an unfair labor practice finding.[14]

After the ranch was purchased,[15] new legal issues arose, as San Clemente Ranch did not recognize the union[16] that was in the process of being certified when the sale of the ranch was being negotiated.

At the outset, the California Supreme Court noted that neither the ALRA nor the NLRA contains any specific statutory provisions addressing the issue of whether or not a subsequent owner succeeds to the obligations of a former owner.[17] The court re-

11. *Id.* at 857, 633 P.2d at 954, 177 Cal. Rptr. at 758.

12. Highland Ranch made the argument that dealing with the United Farm Workers before formal certification would be a violation of CAL. LAB. CODE § 1153(f) (West 1979-1980). Section 1153 enumerates the various employer unfair labor practices. Subdivision (f) provides that an employer may be guilty of unfair labor practices if he bargains with a labor organization that is not properly certified.

13. 29 Cal. 3d at 860, 633 P.2d at 956, 176 Cal. Rptr. at 760.

14. *Id.* at 862, 633 P.2d at 957, 176 Cal. Rptr. at 761.

15. San Clemente Ranch purchased and subsequently undertook the farming operation previously run by Highland Ranch.

16. At the time the ranch was purchased, San Clemente was aware that the United Farm Workers had won a representative election several months earlier. On the day before San Clemente signed the escrow papers, the union became officially certified as the exclusive bargaining representative for the ranch's agricultural employees. As a result of these facts, the court concluded that at the time the ranch was purchased, San Clemente was "fully cognizant of the union's relationship to the ranch." 29 Cal. 3d at 877, 633 P.2d at 966, 176 Cal. Rptr. at 770.

17. *Id.* at 883, 633 P.2d at 970, 176 Cal. Rptr. at 774. The court noted that in 1976, one year after the passing of the ALRA by the California legislature, the legislature enacted section 1127 of the Labor Code which addresses the successorship issue as it relates to clauses in collective bargaining agreements. Subdivision (c) of section 1177, however, specifically states that it shall not apply to employees who

viewed federal precedent[18] with respect to the successorship issue and noted that the United States Supreme Court has recognized that there can be "no single definition of 'successor' which [could be] applicable in every legal context."[19] The court noted that because of the great variety of factual circumstances in which successorship issues may arise, cases must be addressed individually on their own merits.[20]

Although the great weight of federal precedent embraces this case by case approach, the California Supreme Court noted that recent federal precedents "generally viewed a substantial continuity in the identity of the workforce . . . as a key factor in determining whether or not a new employer succeeds to the bargaining obligations of its successor."[21] The court found a substantial continuity in the workforce at San Clemente Ranch and noted that in a California agricultural setting there are additional factors which must be considered to determine the successorship issue.[22] The court stated that "[b]ecause a substantial turnover in an employer's workforce is a typical feature of California agriculture . . . a change in the composition of a successor employer's workforce does not necessarily have the same significance in this context as such a change may have in the industrial setting of the NLRA."[23]

The court then listed the criteria relevant to the successorship issue in California agricultural cases. These criteria were: (1) whether or not the operation remained almost identical; (2) whether or not the same land was being farmed; (3) whether or not the same equipment was being used by the subsequent owner; (4) whether or not crops were being processed in essentially the same manner; and finally (5) whether or not the employees in the bargaining unit performed the same tasks for the previous employer-owner.[24]

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are subject to the ALRA or the NLRA. 29 Cal. 3d at 883 n.11, 633 P.2d at 970 n.11, 176 Cal. Rptr. at 774 n.11.

18. *See* note 3 *supra* and accompanying text.

19. 29 Cal. 3d at 886, 633 P.2d at 972, 176 Cal. Rptr. at 776.

20. *Id. See also* Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 256 (1974); NLRB v. Burns Security Serv., 406 U.S. 272 (1972).

21. *Id.* at 888.

22. *Id.* at 890-91, 633 P.2d at 975, 176 Cal. Rptr. at 779. The necessity of these additional considerations is illustrated by several factors which make the California agricultural labor setting different from the traditional industrial setting governed by the NLRA. The court listed these factors as: "the seasonal nature of employment; the migration of employees throughout the state; the unskilled nature of the work; the prevalent use of labor contractors; and the 'day haul' system." *Id.*

23. 29 Cal. 3d at 891, 633 P.2d at 975, 176 Cal. Rptr. at 779.

24. *Id.*

As a result of the court's holding in *San Clemente*, the application of the ALRA will become more responsive to the needs of the California agricultural laborer. The California courts will now have a greater degree of guidance with respect to the successorship issue than is offered by federal precedents dealing largely with industrial NLRA cases. Finally, the California courts will be better equipped to resolve many of the local concerns and problems resulting from the plight of the California migrant farm worker.

X. LANDLORD-TENANT LAW

A. *Retaliatory Eviction as a Defense to Unlawful Detainer Actions:* Barela v. Superior Court

In the case of *Barela v. Superior Court*,[1] the California Supreme Court again eroded the summary nature of an unlawful detainer action.[2] This case arose when Alice Barela complained to police that her landlord, Leonardo Valdez, had sexually molested her nine-year-old daughter.[3] Seven days after the complaint was filed, Valdez raised Barela's rent from $200 per month to $650 per month. One month later, Valdez filed an unlawful detainer action due to the Barela's failure to pay rent.[4] That action was dismissed, however, because Valdez failed to serve the requisite thirty-day notice of rent increase.[5] Valdez then served Barela with thirty days' notice that her month-to-month tenancy would be terminated and initiated a new unlawful detainer action. After issuing findings of fact[6] the trial court granted Valdez relief. In so doing, the court denied Barela's affirmative defense that she was

1. 30 Cal. 3d 244, 636 P.2d 582, 178 Cal. Rptr. 618 (1981) (Bird, C.J., writing the opinion for a unanimous court, with Tobriner, Mosk, Richardson, Newman, Kaus, and Broussard, J.J., concurring.

2. CAL. CIV. PROC. CODE § 1161 (West Supp. 1980).

3. 30 Cal. 3d at 246, 636 P.2d at 582-83, 178 Cal. Rptr. at 619.

4. *Id.* at 246, 636 P.2d at 583, 178 Cal. Rptr. at 619. The court noted that prior to complaining to the police, Barela had occupied the house belonging to Valdez without any incidents.

5. *Id.*

6. The trial court issued the following findings of fact:

> This eviction of the defendant by the plaintiff was caused by the complaint of the defendant against the plaintiff to the police, the pending criminal trial against the plaintiff which was the result of defendant's complaint to the police led to a breakdown of the parties' ability to live peacefully in the same community.

Id.

being evicted for exercising a constitutionally protected right.[7] The trial court held that her affirmative defense was not supported by section 1942.5[8] of the California Civil Code or by the principles set forth by the California Supreme Court in *S.P. Growers Association v. Rodriguez*.[9]

Barela appealed and lost. Barela then petitioned for a writ of mandate, which was denied by the court of appeal.[10] The California Supreme Court then heard the case and ruled in Barela's favor, relying primarily on public policy which encourages citizens to report violations of the law to authorities.[11]

The purpose of an unlawful detainer action is to provide a summary remedy[12] to a landlord whose premises are wrongfully held by tenants.[13] The only issue cognizable by a court in such a proceeding is the right to possession.[14] Extrinsic issues raised as counterclaims or cross-complaints are not permissible.[15] However, a landlord seeking to regain possession must strictly comply with the statute when bringing an unlawful detainer action.[16]

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7. *Id.* at 247-48, 636 P.2d at 583, 178 Cal. Rptr. at 619.

8. CAL. CIV. CODE § 1942.5 (c) (West Supp. 1980) provides:

> *It shall be unlawful for a lessor to increase rent*, decrease services, cause a lessee to quit involuntarily, *bring an action to recover possession*, or threaten to do any such acts, *for the purpose of retaliating against the lessee because he or she* has lawfully organized or participated in a lessee's association or an organization advocating lessee's rights or *has lawfully and peaceably exercised any rights under the law*. In an action brought by or against the lessee pursuant to this subdivision, the lessee shall bear the burden of providing evidence that the lessor's conduct was, in fact, retaliatory.

Id. (Emphasis added.)

9. 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976). *See* note 24 *infra* and accompanying text.

10. 30 Cal. 3d at 248, 636 P.2d at 583, 178 Cal. Rptr. at 619.

11. *Id.*

12. Vella v. Hudgins, 20 Cal. 3d 251, 255, 572 P.2d 28, 30, 142 Cal. Rptr. 414, 416 (1977); De La Vara v. Municipal Court, 98 Cal. App. 3d 638, 640, 159 Cal. Rptr. 648, 649 (1980); Vasey v. California Dance Co., 70 Cal. App. 3d 742, 746, 139 Cal. Rptr. 72, 74 (1977); Childs v. Eltinge, 29 Cal. App. 3d 843, 853, 105 Cal. Rptr. 864, 871 (1973); Union Oil Co. v. Chandler, 4 Cal. App. 3d 716, 721, 84 Cal. Rptr. 756, 760 (1970).

13. Vella v. Hudgins, 20 Cal. 3d 251, 255, 572 P.2d 28, 30, 142 Cal. Rptr. 414, 416 (1977) ("only claims bearing directly upon the right of immediate possession are cognizable"); Green v. Superior Court, 10 Cal. 3d 616, 634, 517 P.2d 1168, 1180, 111 Cal. Rptr. 704, (1974) (in an unlawful detainer proceeding, only "issues directly relevant to the ultimate question of possession" may be raised); Vasey v. California Dance Co., 70 Cal. App. 3d 742, 746-47, 139 Cal. Rptr. 72, 74 (1977) ("[t]he sole issue before the court is the right to possession"). "The reason for this rule is that . . . the injecting of other issues extrinsic to the right of possession may defeat the very purpose of the statute." Lakeside Park Ass'n v. Keithly, 43 Cal. App. 2d 418, 422, 110 P.2d 1055, 1058 (1941).

14. 30 Cal. 3d at 249, 636 P.2d at 583, 178 Cal. Rptr. at 620.

15. Union Oil Co. v. Chandler, 4 Cal. App. 3d 716, 721, 84 Cal. Rptr. 756, 760 (1970).

16. Vasey v. California Dance Co., 70 Cal. App. 3d 742, 746, 130 Cal. Rptr. 72, 74 (1977).

The intention that unlawful detainer actions be summary has been increasingly eroded. A major force in the erosion of the summary nature of unlawful detainer actions has been the availability of the affirmative defense of retaliatory eviction.[17] Retaliatory eviction was first recognized as an affirmative defense to an unlawful detainer action in *Schweiger v. Superior Court*.[18] In *Schweiger*, the California Supreme Court held that a tenant could not be evicted in retaliation for exercising his statutory right to "repair and deduct".[19] Following *Schweiger*, in *Green v. Superior Court*,[20] the court further eroded the summary nature of an unlawful detainer action by allowing a tenant to raise a landlord's breach of warranty of habitability as an affirmative defense.[21]

Although these cases were detrimental to the summary nature of an unlawful detainer action, the case of *S.P. Growers Association v. Rodriguez*[22] had an even greater impact. The fact situation in *S.P. Growers Association* went beyond retaliation for the mere voicing of complaints about the condition of tenancies, to an eviction in retaliation for the filing of a federal lawsuit. In that case, the supreme court allowed the defendant to raise as an affirmative defense the fact that the plaintiff was retaliating against them for filing a federal lawsuit under the Farm Labor Contractor Registration Act.[23] The court employed a balancing test to determine if "the interests in preserving the summary nature of the unlawful detainer proceeding outweigh[ed] the interests in furthering congressional policy."[24]

The plaintiff in *S.P. Growers Association* relied exclusively on the holding in *Union Oil Company v. Chandler*,[25] where a tenant unsuccessfully asserted retaliatory eviction as an affirmative de-

17. CAL. CIV. CODE § 1942.5 (c) (West Supp. 1980). *See also* note 8 *supra*.

18. 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

19. *Id.* at 517, 476 P.2d at 103, 90 Cal. Rptr. at 735. A tenant's right to "repair and deduct" is provided for by the CAL. CIV. CODE § 1942 (West Supp. 1980).

20. 10 Cal. 3d 616, 517 P.2d 1168, 17 Cal. Rptr. 704 (1974).

21. *Id.* at 632, 517 P.2d at 1178, 11 Cal. Rptr. at 714. Further, the court in *Green* stated that "nothing in the statutory scheme precludes a defendant from interposing an affirmative defense in an unlawful detainer proceeding." *Id.* at 632 n.16, 517 P.2d at 1178 n.16, 111 Cal. Rptr. 714 n.16.

22. 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 761 (1976).

23. *Id.* at 724, 552 P.2d at 723, 131 Cal. Rptr. at 763.

24. *Id.* at 728-29, 552 P.2d at 726-27, 131 Cal. Rptr. at 766-67. Although *S.P. Growers Ass'n.* involved a federal statute, the court was concerned that the public policy be protected, whether it "is enunciated by the Legislature or by Congress." *Id.* at 728, 552 P.2d at 726, 131 Cal. Rptr. at 766.

25. 4 Cal. App. 3d 716, 84 Cal. Rptr. 756 (1970).

fense.[26] The court in *Union Oil Company* concluded that the summary nature of the unlawful detainer action outweighed the need to litigate the complexities of the antitrust issues involved.[27] The plaintiff relied on *Union Oil Company* to support his position that the court should not hear the extraneous complex issues involved in the federal act.[28] The court, however, distinguished *Union Oil Company* by finding that *S.P. Growers Association* did not require the court to construe federal law as did *Union Oil Company*. Rather, the court in *S.P. Growers Association* simply had to determine whether the defendants were being evicted in retaliation for filing suit under a federal act.[29] Thus, it appears that when a tenant raises the defense of retaliatory eviction, the courts will apply a balancing test, and will weigh the state's interest in ensuring that unlawful detainer actions are summary against the public policies which are furthered in protecting the tenant from eviction.[30]

In addition to the common law defense, there also exists a statutory defense of retaliatory eviction.[31] In *Schweiger*, the California Supreme Court construed section 1942 of the California Civil Code to protect tenants who exercised their statutory right to repair and deduct.[32] In 1970, the same year as the *Schweiger* decision, the California Legislature enacted section 1942.5 of the California Civil code which prohibited landlords from evicting tenants for filing complaints about housing code violations or for exercising their right to "repair and deduct."[33] In 1979, the legislature repealed section 1942.5[34] and reenacted it with substantial modifications.[35] Those modifications included an extension of the time period during which a tenant is protected,[36] enlargement of the grounds for which retaliation is prohibited,[37] and a provision

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26. *Id.* at 726, 84 Cal. Rptr. at 763.
27. *Id.* at 726, 84 Cal. Rptr. at 763.
28. *See id.* at 729, 84 Cal. Rptr. at 767.
29. *Id.* The tenant in *Union Oil Co.* asserted the defense of retaliatory eviction on the grounds that he refused to impliment the plaintiff's price fixing scheme which violated federal antitrust laws. *Id.* at 726, 84 Cal. Rptr. at 763. Although the defense of retaliatory eviction would have been improper in *Union Oil Co.* because of the burdensome antitrust issues, it was proper in *S.P. Growers Ass'n.* since the court simply had to determine the eviction was in retaliation for filing the federal action. 17 Cal. 3d at 729, 552 P.2d at 727, 131 Cal. Rptr. at 761.
30. *Id.* at 724, 552 P.2d at 723, 131 Cal. Rptr. at 757. *See also* Barela v. Superior Court, 30 Cal. 3d 244, 250, 636 P.2d 582, 584, 178 Cal. Rptr. 618, 620.
31. *Id.* at 251, 636 P.2d at 585, 178 Cal. Rptr. at 621.
32. *See* note 19 *supra* and accompanying text.
33. CAL. CIV. CODE § 1942.5 (repealed 1979).
34. *See* note 33 *supra*.
35. CAL. CIV. CODE § 1942.5, *amended by* 1979 Cal. Stat. 652.
36. CAL. CIV. CODE § 1942.5(a) (West Supp. 1980).
37. CAL. CIV. CODE § 1942.5(c) (West Supp. 1980).

that the statutory remedies of section 1942.5 are in addition to, and not merely in lieu of, any other remedies provided by decisional or statutory law.[38] Thus, as the court noted in *Barela*, there are "two parallel and independent sources for the doctrine of retaliatory eviction" in California, the statutory scheme and the common law doctrine.[39]

Chief Justice Bird began her analysis in the *Barela* case by noting that section 1942.5 is remedial and is aimed at protecting tenants from abuse[40] and should therefore be liberally construed.[41] After observing that in California there exist two sources for raising the defense of retaliatory eviction, (statutory and common law), the court addressed the issue of the tenant's statutory remedy. Barela's sole argument in this case was that in reporting the crime to the police, she was exercising a legally protected right under section 1942.5 of the California Civil Code.[42] More specifically, Barela argued that the landlord Valdez could not evict her in retaliation for her filing a complaint with the police.[43] The court acknowledged the merit in this argument by noting California's long policy of protecting citizens who report crimes.[44] Additionally, in remedial legislation such as section 1942.5 of the Civil Code, there is an implicit intent to protect from intimidation those who report violations of the law.[45] The court noted that in section 136.1 of the California Penal Code, the legislature made a misdemeanor any attempt to dissuade the victim of any crime from reporting the same to the police.[46] Thus, due to the fact that the report of criminal activity by a citizen is a protected right, the court found that Barela's eviction violated Civil Code section 1942.5 which prohibits retaliatory eviction for the exercise of any

38. CAL. CIV. CODE § 1942.5(h) (West Supp. 1980).

39. 30 Cal. 3d at 251, 636 P.2d at 585, 178 Cal. Rptr. at 621.

40. *Id.*

41. *Id.* at 251, 636 P.2d at 585, 178 Cal. Rptr. at 621-22 (citing Kriz v. Taylor, 92 Cal. App. 302, 311, 154 Cal. Rptr. 824, 830 (1979)).

42. 30 Cal. 3d at 251-52, 636 P.2d at 586, 178 Cal. Rptr. at 622. *See* note 8 *supra*.

43. Barela relied on *In re* Quarles, 158 U.S. 532 (1895) to support her argument that not only was it her right, but her duty to report the violation of a law. *Id.* at 252, 636 P.2d at 586, 178 Cal. Rptr. at 622. *In re* Quarles held that "[i]t is the *duty and the right*, not only of every peace officer of the United States, but *of every citizen*, to assist in prosecuting, and in securing the punishment of, and breach of the peace of the United States." 158 U.S. at 535 (emphasis added).

44. 30 Cal. 3d at 252, 636 P.2d at 586, 178 Cal. Rptr. at 622.

45. *Id.*, *see also* Edwards v. Habib, 397 F.2d 687, 701-02 (P.C. Cir. 1968).

46. 30 Cal. 3d at 252 n.6, 636 P.2d at 586 n.6, 178 Cal. Rptr. at 622 n.6. *See also* CAL. PENAL CODE § 136.1 (a) (West Supp. 1980).

right protected by law.[47]

The court then proceeded to analyze the defense of retaliatory eviction under common law principles. The court applied the rule it had set forth in *S.P. Growers Assocation v. Rodriguez*,[48] and concluded that it had to apply a balancing test to "determine whether the public policies furthered by protecting the defendants from eviction out-weigh[ed] the interests in preserving the summary nature of unlawful detainer proceedings . . . ."[49] The court noted that the public policy which would be furthered by protecting Barela from eviction is one which encourages citizens to report crimes.[50] This strong policy would be in conflict with summary unlawful detainer actions if such actions could be used by landlords to punish tenants who report crimes.[51] Therefore, the court held that allowing the affirmative defense of retaliatory eviction in the present case would, comparatively speaking, do the least damage to the public policy interests involved.[52] Finally, the court noted that although some delay might occur in unlawful detainer actions by allowing the defense of retaliatory eviction, any delay would be justified by the important public policy which it furthered.[53]

The effect of the *Barela* decision will be to further erode the summary nature of unlawful detainer actions.[54] Under the statutory defense of retaliatory eviction, the court's decision does not appear to have extended beyond that which was contemplated by

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47. 30 Cal. 3d at 252, 636 P.2d at 586, 178 Cal. Rptr. at 622. *See* note 42 *supra*.

48. *See* text accompanying note 30 *supra*.

49. 30 Cal. 3d at 253, 636 P.2d at 586, 178 Cal. Rptr. at 622-23 (*quoting* S.P. Growers Ass'n v. Rodriguez, 17 Cal. 3d 719, 724, 552 P.2d 721, 723, 131 Cal. Rptr. 761, 763).

50. The court observed that the legislature had developed programs to encourage victims to report crimes. 30 Cal. 3d at 256, 636 P.2d at 586-87, 178 Cal. Rptr. at 623. *See also* CAL. GOV'T CODE §§ 13959-69, 29631-36, (West Supp. 1982); CAL. PENAL CODE §§ 13835-46 (West Supp. 1982).

51. 30 Cal. 3d at 253, 636 P.2d at 587, 178 Cal. Rptr. at 623. The court reasoned that if landlords were allowed to evict tenants in retaliation for reporting crimes, it would create a class of criminals "with a legally sanctioned means of punishing the victims or witnesses of their crime." *Id.*

52. *Id.* at 254, 636 P.2d at 587, 178 Cal. Rptr. at 623.

53. *Id.* The court added that the delay in this case would not involve the complex issues that confronted the court in *Union Oil Company* and resulted in the court prohibiting the defense of retaliatory eviction there. *Id. See* notes 27, 28 & 29 *supra* and accompanying text.

54. Despite the intent that the only issue cognizable by a court in an unlawful detainer proceeding be the right to possession, *see* note 14 *supra* and accompanying text, the issues that a tenant may raise with respect to the right to possession seem to be ever increasing. *See generally* Barela v. Superior Court, 30 Cal. 3d 244, 636 P.2d 582, 178 Cal. Rptr. 618 (1981); S.P. Growers Ass'n. v. Rodriguez, 17 Cal. 3d 719, 552 P.2d 721, 131 Cal. Rptr. 161 (1976); Green v. Superior Court, 10 Cal. 3d 616, 517 P.2d 1168, 11 Cal. Rptr. 704 (1974); Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970).

the legislature.[55] The language of the Civil Code is broad in that it prohibits landlords from using eviction as a means of retaliating against a tenant who exercises a right protected by law. In holding that the landlord, Valdez, could not, under the Civil Code, evict Barela for exercising a right protected by law, the court appears to have reached a conclusion which is consistent with the broad legislative prohibition against retaliatory evictions. With respect to the common law defense of retaliatory eviction, the court's decision is narrow. The court simply considered the need to have crimes reported as more important than the need for unlawful detainer actions to be summary. Thus, the court reiterated its earlier *S.P. Growers Association* balancing test, which compares the policies behind unlawful detainer actions with the need to protect renters from retaliatory evictions.

B. *The Interpretation and Clarification of Los Angeles Municipal Rent Control Ordinances:* **Klarfeld v. Berg**

In *Klarfeld v. Berg*,[1] the California Supreme Court addressed a Los Angeles Municipal Ordinance that provides for the control of rent increases in certain rental units.[2]

In August of 1978, The City of Los Angeles enacted the Rent Roll-Back Ordinance[3] to control exorbitant rentals in an effort to protect senior citizens and low income families. The ordinance was to be effective for a period of six months or until the City enacted ordinances regulating rents, whichever occurred first. In March 1979, the City adopted the Rental Stabilization Ordinance[4]

55. Protecting a tenant who reports a crime appears to fall within the broad language of CAL. CIV. CODE § 1942.5 (c) (West Supp. 1980). *See* note 8 *supra*.

1. 29 Cal. 3d 893, 633 P.2d 204, 176 Cal. Rptr. 539 (1981).

2. The Rent Roll-Back Ordinance was to roll back rental for "all dwelling units designed for rental use or actually rented . . . including single family dwellings and mobile homes. . . ." *Id.* at 895-99 n.1, 633 P.2d at 205-08 n.1, 176 Cal. Rptr. at 540-43 n.1.

3. LOS ANGELES, CAL., ORDINANCE 151.415 (1978). The stated purpose of the ordinance was to remedy the growing shortage of housing units in Los Angeles and the resulting exorbitant rentals, as well as to provide for the health and welfare of senior citizens and other persons having a low income. *Id.*

4. LOS ANGELES, CAL., MUNICIPAL CODE, Ch. XVI, Art. 1, § 151.00 (1979). This ordinance was an extension and refinement of the Rent Roll-Back Ordinance and was enacted for the same purposes. Although stating that it also applied to "rental units," the ordinance provided a much more detailed definition of the term. The definition included "all dwelling units, efficiency dwelling units, guest rooms, and suites in the City of Los Angeles, as defined in Section 12.03 [of the City's

as an extension and refinement of the Rent Roll-Back Ordinance.

The plaintiff resided in a retirement residence containing 301 private and semi-private rooms, none of which contained a kitchen. She paid a monthly rental charge of $555 which entitled her to three meals a day, snacks, linen and maid service, and cleaning services. The charge also covered a bi-weekly bus service to nearby appointments, and it entitled her to participate in recreational activities planned by the facility. Ms. Klarfeld was notified after the effective date of the Rent Roll-Back Ordinance, but prior to the enactment of the Rent Stabilization Ordinance, that her rent would be increased. After refusing to pay the increase, she was requested to leave the facility.

The *Klarfeld* court construed the Rent Roll-Back Ordinance by reading it together with the Stabilization Ordinance,[5] despite the fact that the alleged violation occurred before the enactment of the Stabilization Ordinance.[6] In so construing the combined provisions of the acts, the court found that Ms. Klarfeld's rental unit qualified within the meaning of the ordinance and that the rental increase was, therefore, in violation of the ordinance.

The court chose to disregard the fact that the plaintiff's rental charge included meals and other services. In so doing, the court noted that the Rent Stabilization measure specifically provided that "accommodations in hotels, motels, inns, tourist homes, and boarding and rooming houses"[7] are subject to its terms.[8] The

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Code] together with . . . all housing services, privileges, furnishings and facilities supplied in connection with the use or occupancy thereof, including garage and parking facilities." LOS ANGELES, CAL., MUNICIPAL CODE, Ch. XVI, Art. 1, §, §§ 151.02M, 152.120 (1979). It should be noted that section 12.03 of the Los Angeles Municipal Code defines a dwelling unit as "a group of two or more rooms, one of which is a kitchen, designed for occupancy by one family for living purposes." LOS ANGELES, CAL., MUNICIPAL CODE, Ch. XVI, Art. 1 § 12.03 (1979). This definition creates an important issue in this case. The defendant asserted that since Klarfeld's dwelling unit did not include a kitchen, it did not fall within the purview of the Rental Stabilization Ordinance. 29 Cal. 3d at 899, 633 P.2d at 208, 176 Cal. Rptr. at 543.

5. It first appears that a combined reading would require the court to find that Klarfeld's rental unit did not fall within the purview of the combined statute because it had no kitchen. The court noted, however, that such a reading of the additional provisions of the Stabilization Ordinance made it explicit that the term "rental units" included those units without kitchens.

6. It was urged that the court read the two statutes together based on a well established rule that "enactments with the same general purpose must be construed together to achieve a uniform and consistent legislative purpose, even though they have been enacted at different times." 29 Cal. 3d at 901, 633 P.2d at 208, 176 Cal. Rptr. at 544.

7. *Id.* at 902, 638 P.2d at 209, 176 Cal. Rptr. at 544.

8. The finding on this point seemed to be what impaired the defendant's argument. In the beginning, the defendant argued that the statutes should be read and interpreted together because there was no kitchen in Klarfeld's unit. In the end, however, when the court read the Rent Roll-Back and Rent Stabilization Or-

court then pointed out that it is "common knowledge that hotels and inns frequently provide many of the same amenities supplied [to Klarfeld by the retirement home]."[9]

The court concluded that the term "rental units," as used in the Rent Roll-Back and Rent Stabilization Ordinances, applies to a room in a retirement residence; even when the tenant receives such services as meals, transportation, and maid services, in addition to lodging, for a single charge.[10]

XI. REAL PROPERTY LAW

A. *Adverse Possession by Mistake:* Gilardi v. Hallam

In *Gilardi v. Hallam*,[1] the California Supreme Court overruled an appellate court decision and reaffirmed settled California law that in a claim of adverse possession, the requisite hostile possession may be satisfied through mistaken use. Five years before the commencement of this action, the defendants made improvements on a portion of an adjoining lot.[2] It was stipulated that the defendants mistakenly believed the improvements were made on their lot.[3] The trial court rejected the defendants' claim of adverse possession, finding that the defendants "did not intend to claim any land which did not belong to them."[4]

The court began its analysis by noting the elements necessary to establish title by adverse possession:[5] (1) tax payment, (2) open and notorious use or possession that is (3) continuous and uninterrupted, and is (4) hostile to the true owner, and made (5) under a claim of title. The court then stated that although the same elements are needed to establish a prescriptive easement,

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dinances together, this combined reading was most detrimental to the defendant's case because of the court's use of these other provisions. *Id.* at 901-02, 633 P.2d at 209, 176 Cal. Rptr. at 544.

9. 29 Cal. 3d at 902, 633 P.2d at 210, 176 Cal. Rptr. at 545.

10. *Id.*

1. 30 Cal. 3d 317, 636 P.2d 588, 178 Cal. Rptr. 624 (1981). Justice Broussard wrote the opinion for a unanimous court with Chief Justice Bird and Justices Tobriner, Mosk, Richardson, Newman, and Kaus concurring.

2. On a 15-foot wide strip of the adjoining lot the defendants installed "a sidewalk, sprinkler system, nine poplar trees, and a lawn." *Id.* at 320, 636 P.2d at 589, 178 Cal. Rptr. 626.

3. *Id.* at 321, 636 P.2d at 589-90, 178 Cal. Rptr. at 626.

4. *Id.* at 321, 636 P.2d at 590, 178 Cal. Rptr. at 626. The court also concluded the defendants "had not paid taxes on the disputed property." *Id.*

5. *Id.* *See* CAL. CIV. PROC. CODE §§ 322-25 (West 1954).

the "payment of taxes is required only if the easement has been separately assessed."[6]

The settled rule in California is that "hostility", required to establish adverse possession, may be met when the use occurs through mistake.[7] However, an exception to the mistake rule is recognized when the adverse possessor intends to withdraw such possession when the true property line is discovered.[8] The court discussed its decision in *Sorenson v. Costa*,[9] in which it addressed the relationship between the mistake rule and its exception. In interpreting *Sorenson*, the court found that it supported the position that adverse possession may be established even though possession is based on mistake.[10] Conversely, under the mistake exception,[11] to show that possession based on mistake is *not* hostile and adverse, substantial evidence that the adverse possessor expressly or impliedly had no intent to occupy the land belonging to another must be presented.[12]

The plaintiffs relied on *Berry v. Sbragia*,[13] where the court disallowed a claim of adverse possession because the possessors had "no intention of claiming any property that did not belong to them." The court noted *Berry* could be viewed as contrary to *Sorenson* because *Berry* could support the contention that evidence establishing that an occupier believed he owned the land could result in "a finding that he did not intend to claim the land if he was mistaken."[14] The occupier would thus fall under the mistake exception.[15] The court then disapproved of *Berry* to the extent that it was contrary to *Sorenson*,[16] concluding "that neither 'modern conditions'[17] nor the 'good-faith-improver statutes'[18] warrant

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6. *Id.* at 322, 636 P.2d at 590, 178 Cal. Rptr. at 626.
7. *Id.*
8. Woodward v. Faris, 109 Cal. 12, 17, 41 P. 781, 783 (1895).
9. 32 Cal. 2d 453, 196 P.2d 900 (1948).
10. 30 Cal. 3d at 323, 636 P.2d at 591, 178 Cal. Rptr. at 628.
11. *See* note 8 *supra* and accompanying text.
12. 30 Cal. 3d at 323-24, 636 P.2d at 591, 178 Cal. Rptr. at 628.
13. 76 Cal. App. 3d 876, 880, 143 Cal. Rptr. 318, 320 (1978).
14. 30 Cal. 3d at 324, 636 P.2d at 592, 178 Cal. Rptr. at 628.
15. *See* notes 11 and 8 *supra* and accompanying text.
16. 30 Cal. 3d at 326, 636 P.2d at 593, 178 Cal. Rptr. at 629.
17. The plaintiffs had argued the doctrine of adverse possession should be modified in light of modern conditions (*i.e.*, property is "now described by reference to subdivision lots" rather than by the use of metes and bounds descriptions). *Id.* at 324, 636 P.2d at 692, 178 Cal. Rptr. at 628. The court responded to this by noting that the modern justification is "to reduce to litigation and to protect the peace . . . ." *Id.* (*quoting* Finley v. Yuba County Water Dist., 99 Cal. App. 3d 691, 696-97, 160 Cal. Rptr. 423, 427 (1979)). Additionally, the court stated landowners must still resort to metes and bounds descriptions when ascertaining land "described by map and parcel number." 30 Cal. 3d at 325, 636 P.2d at 592, 178 Cal. Rptr. at 628.
18. Good-faith-improver statutes permit good faith improvers to maintain their

repudiation of *Sorenson*."[19]

Applying the elements necessary to establish a claim of adverse possession,[20] the court noted the stipulated facts required it to uphold the trial court's finding that there was no adverse possession because the defendants failed to pay taxes on the land.[21] However, the court recognized that the lack of tax payment would not bar a claim of prescriptive easement because taxes were not separately assessed.[22] However, the court remanded the case because the issue of prescriptive easement had not been briefed by the parties.[23]

XII. TORT LAW

A. *Landowner liability for harm caused to neighbor by natural condition on the land:* **Sprecher v. Adamson Companies**

In March of 1978, Peter Sprecher's home rotated and slid into his next-door neighbor's house, as a result of a landslide which began on another neighbor's property. In the ensuing litigation, the California Supreme Court abolished a common law rule that would have barred Sprecher from obtaining relief from the "owners" of the landslide for the damage it had caused.[1] Thus, in

improvements by compensating the true owner for his pecuniary loss, including attorneys' fees and any other "loss relating to the owner's prospective use of the property." *Id.* at 325, 636 P.2d at 592, 178 Cal. Rptr. at 628-29; CAL. CIV. PROC. CODE §§ 871.1, 871.3, 871.5 (West 1980). However, the court noted that in enacting the good-faith-improver statutes, there was no legislative intent to modify the adverse possession doctrine. 30 Cal. 3d at 325, 636 P.2d at 592, 178 Cal. Rptr. at 629.

19. *Id.* 30 Cal. 3d at 325, 636 P.2d at 593, 178 Cal. Rptr. at 629.

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

21. 30 Cal. 3d at 327, 636 P.2d at 593-94, 178 Cal. Rptr. at 630.

22. *Id.* at 327, 636 P.2d at 594, 178 Cal. Rptr. at 630. *See* note 6 *supra* and accompanying text.

23. *Id.* at 327-28, 636 P.2d at 594, 178 Cal. Rptr. at 630.

1. Sprecher v. Adamson Co., 30 Cal. 3d 358, 636 P.2d 1121, 178 Cal. Rptr. 783 (1981). The landslide was not the only problem Peter Sprecher had. After his own home collided with his neighbor's, that neighbor filed suit, seeking to enjoin Sprecher's home from encroaching upon her own. Perhaps out of frustration, if nothing else, Sprecher sued the "owner's" of the landslide, only to find that they were not responsible for the harm to his home caused by their landslide. Alleging negligence in controlling the landslide, Sprecher did not prevail. The trial court applied the common law rule which stated that an owner of land is not liable for damage caused to another by any natural condition existing on the owner's land. Unfortunately, this landslide was a natural condition on the land. The trial court granted summary judgment for the owners of the landslide. Sprecher then

Sprecher v. Adamson Companies,[2] the court extended to landowners the basic public policy that one must be responsible for injuries caused to another flowing from the absence of due care in the management of his property or possessions.[3]

The *Sprecher* court framed the issue as whether a possessor of land should be immunized from liability to persons outside his premises for harm caused by a natural condition of his land.[4] The court's discussion centered upon the justification of nonliability for a natural condition, as contrasted with liability according to ordinary negligence principles for an artificial condition on one's land.[5] The court began by restating the principle espoused in *Rowland v. Christian*[6] that, as a fundamental concept, all persons in California are liable for harm caused by their want of ordinary care.[7] Accordingly, the supreme court will depart from applying that principle only when public policy warrants such a result.[8]

In deciding whether departure from the ordinary principles of negligence was warranted, the supreme court reviewed the authority supporting the distinction between natural versus artificial conditions. Delving into the reasons behind nonliability for harm caused by natural conditions, the *Sprecher* court found that the rule was premised on the principle that one should not cause harm to another, but alternatively, one could not be forced to prevent harm.[9] Regardless of this distinction it must be abrogated by

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brought his case to the Supreme Court of California, seeking a repudiation of the common law doctrine in favor of modern ordinary negligence principles. *Id.* at 360-61, 636 P.2d at 1123-24, 178 Cal. Rptr. at 783-84.

2. *Id.* at 358, 636 P.2d at 1121, 178 Cal. Rptr. at 783 (1981). (majority opinion written by Bird, C.J., with Tobriner, Mosk, Newman, Work and McCloskey, J.J., concurring. Richardson, J., wrote a separate concurring opinion).

3. *Id.* at 371, 636 P.2d at 1134, 178 Cal. Rptr. at 790.

4. *Id.* at 362, 636 P.2d at 1125, 178 Cal. Rptr. at 784.

5. *Id.* The court labeled a natural condition as one not created or changed by any human action, and an artificial condition as a structure put upon the land. The latter included trees and any excavation. *Id.* at 362 nn.3 & 4, 636 P.2d at 1125 nn.3 & 4, 178 Cal. Rptr. at 784-85 nn.3 & 4.

6. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (struck down common law distinction between an invitee and a trespasser on the land, replacing it with a reasonable duty of care toward all based on possession and control).

7. This concept has been codified in CAL. CIV. CODE § 1714 (West 1973).

8. 30 Cal. 3d at 363, 636 P.2d at 1126, 178 Cal. Rptr. at 785 (citing Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968)). The *Rowland* court listed forseeability of harm, the connection between harm and defendant's conduct, the possibility of preventing future harm, the burden to the defendant to remedy the condition, and the ability to insure against the risk as some of the factors to consider in determining if defendant's actions were reasonable. *Id.*

9. Id. at 367, 636 P.2d at 1130, 178 Cal. Rptr. at 787-88. This rationale is commonly known as misfeasance versus nonfeasance. Misfeasance is present when one creates harm or the risk of harm to another. Nonfeasance occurs when one fails to intervene to prevent harm. Under the common law, the only time, that a person was liable for nonfeasance was if there was a special relationship between

the modern principle that possession gives rise to a duty of care.[10] The court found that California paralleled many jurisdictions in what appears to be a rejection of "the common law rule in its entirety and [a] replace[ment of] it with a single duty of reasonable care in the maintenance of property."[11]

Although the supreme court found several cases to support a duty owed by a landowner to his neighbor,[12] the court also observed that such a duty had not yet been recognized by the American Law Institute. In fact, the court challenged the declaration of the American Law Institute that a possessor of land has liability for natural conditions which cause harm to those on adjacent highways but not to one's neighbors.[13] The court declared that the practical effect of this would be that "[a] possessor of land would have a duty of care toward strangers but not toward his neighbors."[14] The court reasoned further that possession of land, having already been determined to give rise to a duty of care, was accompanied by the right of control and supervision. It was this element of control, the *Sprecher* court observed, that "[had] been expressly relied upon by some courts in imposing a duty of reasonable care with regard to a natural condition of the land."[15]

The court noted another flaw in the common law principle. When a possessor of land had no part in the creation of an artificial condition upon his land, he or she was generally not liable for

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two parties. It would follow then, under common law principles, that a natural condition on the land would shield the landowner under nonfeasance. Since neighbors are in no special relationship, the landowner would not be liable for harm caused to his neighbor by a natural condition on the landowner's property. *Id.*

10. *See* note 6 *supra*.

11. 30 Cal. 3d at 365, 636 P.2d at 1128, 178 Cal. Rptr. at 786. The court noted that the RESTATEMENT (SECOND) OF TORTS § 363 (1963-64) has declared that landowners can be held liable for harm caused by natural conditions on their land. This was a change from the Restatement First of Torts which did not recognize any liability for natural conditions. *Id.* The court also recognized that some courts have refrained from using an "urban" versus "rural" distinction to determine landowner liability. "The [Oregon Supreme Court] held, that, in most cases, the location of the land becomes but one of many factors to be considered . . . in evaluating the reasonableness of the defendant's conduct." *Id.* at 366, 636 P.2d at 1129, 178 Cal. Rptr. at 787.

12. *Id.* at 366, 636 P.2d at 1129, 178 Cal. Rptr. at 787.

13. *Id.*

14. *Id.* The court found four cases which held that a landowner was liable for harm caused to others from natural conditions upon the land. *See* note 12 *supra*.

15. 30 Cal. 3d at 368, 636 P.2d at 1131, 178 Cal. Rptr. at 788. *See* Husovsky v. United States, 590 F.2d 481 (D.C. Cir. 1978) (element of control crucial in determining landowner liability for natural condition on the land).

any harm caused thereby.[16] However, the court noted cases which stated that, because the landowner had possession, and thereby, control of the land, the landowner should be liable for any harm caused, even though the artificial condition was placed upon his land by previous owner.[17] The court found this supported the conclusion that control of land is the primary factor in finding liability of a landowner.[18] It should not matter whether a potentially harmful condition on the land is preexisting, artificial or natural, or placed there by the possessor; control instead is the deciding factor. Thus, finding a "lack of congruence between the old common law rule of nonliability and the relevant factors[19] which should determine when a duty exists," the court rejected the artificial versus natural distinction.[20] In the future,[21] when determining a landowner's liability, California courts must make a decision based on the reasonableness, under all circumstances, of that person's management of the land.[22]

The California Supreme Court in *Sprecher* has taken a big step in erasing the common law distinction of natural or artificial causes of harm. By doing this, the court has extended a uniform reasonableness standard of conduct to the actual owner and controller of the land, a party that previously had no liability in this area.

XIII. WORKERS' COMPENSATION LAW

A. *Insurer has burden of proof in third party tortfeasor reimbursement actions:* Breese v. Price

Originally, when a worker had the misfortune of sustaining an injury in the course of employment, the common law posed an almost insurmountable barrier to recovery for the employee's physical loss. Confronted with the harsh defenses known as the "Holy Trinity"[1] and with the general difficulty of maintaining an ardu-

16. 30 Cal. 3d at 369, 636 P.2d at 1132, 178 Cal. Rptr. at 789.
17. *Id.* at 370, 636 P.2d at 1133, 178 Cal. Rptr. at 789-90.
18. *See* note 6 *supra*.
19. *See* note 8 *supra*.
20. 30 Cal. 3d at 371, 636 P.2d at 1132, 178 Cal. Rptr. at 789-90.
21. *Id.* at 373, 636 P.2d at 1136, 178 Cal. Rptr. at 791-92. This case was reversed and remanded because the trial court issued summary judgement for the "owners of the landslide" based upon the common law rule. *See* note 1 *supra*.
22. *See* note 8 *supra*.

1. In pre-compensation years, the employee faced the three defenses of negligence of fellow servants, contributory negligence, and, assumption of risk. They were "sarcastically referred to as the 'Holy Trinity.'" Grillo, *Fifty Years of Workers' Compensation—An Historical Review*, 38 CONN. B. J. 239, 240 (1964).

ous and lengthy legal battle,[2] injuries sustained in the course of employment were the workers' burden to bear.

Eventually, these extreme policies, which originated in English common law,[3] were superceded by modern workers' compensation statutes.[4] Beginning with New York in 1910 and ending with Hawaii in 1963, over the course of 53 years, all of the states adopted workers' compensation laws.[5] At last, the employee was to be compensated for work related injuries.

However, workers' compensation laws are far from perfect in protecting the rights and liabilities of all those involved in claims arising from injuries to employees. Workers' compensation laws, providing a needed remedy for the employee, have impacted on other areas of tort law and on other parties in litigation. One such area of controversy involves the ability of a workers' compensation insurance carrier to be reimbursed by the defendant in a third party personal injury suit for the amount the insurance carrier paid out to the injured employee.

The California Supreme Court dealt with this issue in *Breese v. Price*.[6] Holding that the modern workers' compensation statutes must be applied according to legislative intent, the court limited the defendant tortfeasor's obligation to reimburse a workers' compensation insurance carrier. The court established a condition precedent to reimbursement: there must be a finding of negligence on the part of the tortfeasor, and that negligence must be the proximate cause of the employee's injuries. In addition, the defendant's tort liability must be equal to or greater than the amount the insurance carrier paid out as compensation before the insurance carrier is entitled to full reimbursement from the de-

2. Difficulties in proof and the delay in obtaining relief were two factors working against an employee trying to recover compensation for work-related injuries. *Id.* at 239-40. In addition, statistics have shown that between 70 and 94 percent of those employees who did try to recover, received nothing for their effort. E. BLAIR, A REFERENCE GUIDE TO WORKERS COMPENSATION LAW (1974) [hereinafter cited as E. BLAIR].

3. Employees were believed to have contracted to assume the risks of the workplace, whether it be due to machinery in poor condition or a fellow servant who was negligent in doing his or her duty. Grillo, *supra* note 1, at 240-41.

4. The California Workmen's Compensation and Insurance provisions of the CAL. LAB. CODE, § 3201 (West 1971), are representative examples of modern worker's compensation statutes.

5. *See* BLAIR *supra* note 2, at 1-1.

6. 29 Cal. 3d 923, 633 P.2d 224, 176 Cal. Rptr. 791 (1981) (Richardson, J., dissenting and concurring; Mosk and Newman, J.J., concurring, in an opinion by the court). *Id.*

fendant tortfeasor.[7]

The first occurence in what would prove to be a long chain of events was begun when Rikki Price rear-ended Robert Breese on January 17, 1974. This chain of events would culminate ultimately with a decision by the California Supreme Court. Breese, an employee of Hughes Aircraft Company (Hughes), was on company business when the accident occurred. Following the accident, Breese filed suit against Price for personal injury damages, as well as filing a claim for workers' compensation benefits.[8]

The Workers' Compensation Appeals Board (WCAB) referee found that Breese did not need medical treatment, nor was he permanently disabled as a result of the accident. The Workers' Compensation award was fixed at $25. Subsequent to this hearing, Breese and Argonaut Insurance Company, the insurer of Hughes, reached a separate settlement in which Breese was awarded $10,885 in satisfaction of his claim.[9] Argonaut intervened in the pending lawsuit against Price, asking reimbursement of the $10,885 paid as settlement.[10] Price conceded responsibility for the accident but contended that the settlement between Argonaut and Breese was unreasonable because it was not based upon the findings of the referee, nor on the medical testimony.[11] Both the trial court and the appeals court[12] disagreed with this argument and entered judgment for Argonaut in the amount of $10,885.

Two opposing lines of cases have developed on the issue of whether a workers' compensation insurer is entitled to automatic reimbursement from a third party defendant, after having paid on a claim of an injured employee. *Board of Administration v. Ames*[13] and *State Compensation Insurance Fund v. Williams*[14]

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7. *Id.* at 926, 633 P.2d 227, 176 Cal. Rptr. at 793-94.

8. A complete factual analysis was not in the record as it appeared before the California Supreme Court. However, a factual summary, as well as the main points of the court of appeals' decision, can be found in Argonaut Ins. Co. v. Price, 8 CWCR 173 (Cal. 1980).

9. There was no reason given for the large discrepancy between the referee's award of $25 and the final settlement of $10,885 between Argonaut and Breese. 29 Cal. 3d at 926, 633 P.2d at 227, 176 Cal. Rptr. at 793-94. In fact, the court noted that the "compromise settlement [was] 436 times larger than the miniscule award of the referee who, after having heard the evidence, concluded that no compensable industrial injury resulted and only nominal expenses were incurred." *Id.* at 931, 633 P.2d at 232, 176 Cal. Rptr. at 796.

10. Meanwhile, Breese and Price settled their litigation, leaving only the issue of reimbursement to be litigated between Price and Argonaut. *Id.* at 927, 633 P.2d at 228, 176 Cal. Rptr. at 794.

11. *See* note 8 *supra*.

12. Breese v. Price, 110 Cal. App. 3d 241, 167 Cal. Rptr. 765 (1980).

13. 215 Cal. App. 2d 215, 29 Cal. Rptr. 917 (1963) (while intoxicated, defendant crashed into California Highway Patrol cruiser, causing injuries to the patrolman).

14. 38 Cal. App. 3d 218, 112 Cal. Rptr. 226 (1974) (employee sustained injuries

answered this question affirmatively.

The *Ames* court was faced with a due process challenge. At issue were the procedures under which an insurer was reimbursed for the amount of money paid in satisfaction of a claim by the injured employee, whose accident arose from the negligent acts of a third party tortfeasor. The defendant argued that the issue of damages, proximately caused by the accident, was resolved in a hearing in which only the injured employee and the insurer were participants. Thus, a third party tortfeasor was denied adequate notice and an opportunity for a hearing. The *Ames* court dismissed this challenge by making a distinction between the process of determining damages and the process of finding liability:

> [U]nder the Workmen's Compensation Act, where liability for injury to an employee by a third party tortfeasor is determined . . . the measure of damages for that injury is subject to legislative control and . . . *the amount of damages may be determined in some proceeding other than that which determines the liability of the third party.*[15]

Thus, *Ames* vindicated the procedure of determining at trial, only the question of liability for the accident, as between the insurer and the third party tortfeasor; the damages being previously determined in a hearing between the insurer and the injured employee. This precedent was followed by the *Williams* court, even though it left the defendant tortfeasor relatively open to excessive payment of damages.[16]

In *Williams*, the defendant attacked the constitutionality of California Labor Code section 3854[17] on the grounds that it authorized a taking of property without due process of law.[18] The *Williams* court premised its holding on the fact that the legislature had statutorily created a cause of action for the insurer

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during course of employment due to defendants negligent handling of his automobile).

15. 215 Cal. App. 2d at 225, 29 Cal. Rptr. at 927 (*citing* City of Sacramento v. Central Cal. Traction Co., 78 Cal. App. 215, 248 P.2d 307 (1926) (emphasis added).

16. A defendant tortfeasor is not able to be present at the time when damages for injuries to the employee are being determined. Additionally, decisions following the *Ames* rationale have declared that the compensation actually paid by the insurer is the minimum measure of the insurer's damages which are to be reimbursed by the defendant. 38 Cal. App. 3d at 226, 112 Cal. Rptr. at 228-29.

17. CAL. LAB. CODE § 3854 (West 1980) is also pertinent to the present case. If the action is prosecuted by the employer alone, evidence of any amount which the employer has paid or becomes obligated to pay by reason of the injury or death of the employee, is admissible. Such expenditures or liability shall be considered as proximately resulting from the injury or death in addition to any other items of damage proximately resulting therefrom.

18. 38 Cal. App. 3d at 221-22, 112 Cal. Rptr. at 228.

which was not previously available at common law.[19] This legislative creation, governed by California workmen's compensation laws, was a cause of action in indemnity to recover from the defendant the damage caused to the insured. The court reasoned that the defendant's due process needs were fully satisfied when the defendant and the insurer litigated only the issue of whether the defendant was the proximate cause of the insurer's damages.[20] The constitutionality[21] of California Labor Code section 3854 was verified in *Williams*.

Not all courts followed the *Williams-Ames* approach regarding the problem of reimbursement.[22] In *City of San Diego v. Sanfax*,[23] the supreme court stated that employee and insurer actions against the third party tortfeasor are interchangeable.[24] The remedy set up by these statutes against a third party tortfeasor for an employee and an insurer follows from general tort principles. The court stated that "[r]egardless of who brings an action [the employee or an insurer], it is essentially the same lawsuit."[25] Thus, the findings of the *Sanfax* court were in direct conflict with the *Ames-Williams* approach.[26]

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19. *Id.* at 222, 112 Cal. Rptr. at 230. This "[e]ntirely new cause of action which is vested in the employer [or the insurer] . . ." is a cause of action "[F]or indemnity to recover from the third person tortfeasor the 'damage' which the employer has sustained as a proximate result of the third person's tort." 38 Cal. App. 3d at 222, 112 Cal. Rptr. at 228. The court made a distinction between subrogation and indemnity, declaring that the latter was the more correct definition of the action the insured was entitled to bring. *See* notes 37 & 41-2 *infra* and accompanying text.

20. Of course, this does not deal adequately with the fact that the defendant is not able to contest the medical bills or expenses introduced in evidence at the compensation hearing. Generally, the defendant's ability to question and object to excessive expenses or treatment insures that the injured party will recover only that which is a reasonable expense from injuries proximately caused by the defendant. Rodriguez v. Canadian Indemnity, 6 CWCR 38 (Cal. 1978). The discrepancy in the award given by the referee and the settlement reached by the parties is an example of the inherent unfairness to the defendant in the *Ames* and *Williams* decisions. *See* note 9 *supra*.

21. The *Breese* court later dealt with this same statute and came to the opposite result of the *Williams* court. However, the *Breese* court did not rule § 3854 unconstitutional; the court simply applied a different interpretation in harmony with both legislative intent and greater due process rights for the third party tortfeasor. 29 Cal. 3d at 929, 633 P.2d at 230, 176 Cal. Rptr. at 795.

22. This is not to say that the *Williams-Ames* approach was not persuasive. Even a Workers' Compensation Appeals Board (WCAB) case found this reasoning persuasive. In Rodriguez v. Candian Indemnity, 6 CWCR 38 (Cal. 1978), the WCAB decided that a third party defendant could not intervene in a hearing before the WCAB to introduce evidence to decrease the defendant's liability. Only the insurer and the injured party are privy to such proceedings. *Id.*

23. 19 Cal. 3d 862, 568 P.2d 363, 140 Cal. Rptr. 638 (1977) (statute of limitation entitles employer one year to sue third party for reimbursement).

24. *Id.* at 872, 568 P.2d at 373, 140 Cal. Rptr. at 641.

25. *Id.* at 874, 568 P.2d at 375, 140 Cal. Rptr. at 642.

26. *See* note 19 *supra*.

A court of appeals decision followed the *Sanfax* rationale in *Ventura County Employees' Retirement Association v. Pope*.[27] The *Ventura* court overturned a trial court decision to award full reimbursement to an insurer in a subrogation claim for all damages the insurer had paid to an injured employee.[28] The court held that it was error to determine such an award without reaching a finding on the issues of the defendant's negligence and his tort liability for damages which actually resulted from the actions of the defendant.[29] "A defendant may contest liability in a subrogation action by an employer [insurer] to the same extent as in an action brought by the injured employee."[30] The *Ventura* court recognized that the defendant's inability to litigate the issues of comparative negligence and causality with regard to the employee's injury, constituted an injustice to the defendant.[31] The stage was now set for the *Breese* court to resolve the rights and liabilities of the insurer and the third party tortfeasor in actions for reimbursement.

The *Breese* court began by laying a foundation of traditional tort principles which were already applicable. Most important was the concept of determining a reasonable amount of damages by assessing a plaintiff's losses which were proximately caused by the defendant's negligent conduct.[32] The respondent, Argonaut, argued that tort principles have been modified by the enactment of workers' compensation laws in California, specifically California Labor Code sections 3852[33] and 3854.[34] However, the court stated that "Argonaut claims too much"[35] when it interprets these statutes as suspending the requirements of causation and reasonableness when calculating damages.

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27. 87 Cal. App. 3d 938, 151 Cal. Rptr. 695 (1978) (action in subrogation reversed because trial court did not make a finding regarding defendant's liability for damages proximately caused).

28. *Id.*

29. *Id.* at 943, 151 Cal. Rptr. at 698-99.

30. *Id.*

31. *Id., see also* note 20 *supra*.

32. California has codified this concept at CAL. CIV. CODE § 3333 (West 1971).

33. The pertinent language of this section is as follows: "The claim of the employee for compensation does not affect his claim or right of action for all damages proximately resulting from such injury . . . against any person other than the employer [insurer]. Any employer [insurer] who . . . becomes obligated to pay compensation, may likewise make a claim . . . against such third person." CAL. LAB. CODE § 3852 (West 1971).

34. *See* note 17 *supra*.

35. 29 Cal. 3d at 927, 633 P.2d at 228, 176 Cal. Rptr. at 794.

Relying on the court's reasoning in *Sanfax* that an employee's action, and an insurer's action against a third party tortfeasor are interchangeable, the court declared that the correct interpretation of Labor Code section 3852 would limit the insurer's reimbursement claim to damages actually resulting from a third party tortfeasor's negligent acts.[36] Thus, the insurer would not have any greater claim against the defendant than an injured employee would have.[37]

The court then focused its attention on the interpretation of Labor Code section 3854. Argonaut contended that this section conclusively established that compensation paid by an insurer to an injured party was the final measure of damages proximately caused by the third party tortfeasor. As a result, this amount was automatically recoverable by the insurer from the third party tortfeasor.[38] In deciding that this argument lacked merit, the court relied on traditional tort principles[39] and the fact that workers' compensation statutes are procedural[40] rather than substantive in nature. In further relying on *Sanfax*, the court held that the proper characterization of the insurer's cause of action was that it parallels the common law doctrine of equitable subrogation.[41] In section 3854, the legislature simply codified the right of the insurer to seek reimbursement damages[42] for injuries proxi-

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36. *Id.* at 928, 633 P.2d at 229, 176 Cal. Rptr. at 794-95.

37. *Id.* This concept was wholly contrary to the idea espoused in *Williams* that the legislature had made an entirely new cause of action on behalf of the insurer to obtain reimbursement. *See* note 19 *supra* and accompanying text.

38. 29 Cal. 3d at 927, 633 P.2d at 228, 176 Cal. Rptr. at 794. For the text of CAL. LAB. CODE § 3854, see note 17 *supra*.

39. *See* note 32 *supra* and accompanying text.

40. 29 Cal. 3d at 929, 633 P.2d at 230, 176 Cal. Rptr. at 795. The court relied on Roe v. Workmen's Comp. Appeals Bd., 12 Cal. 3d 884, 528 P.2d 771, 117 Cal. Rptr. 683 (1974) which held that the subrogation statutes were primarily procedural in nature. *Id.* at 889, 528 P.2d at 776, 117 Cal. Rptr. at 686.

The result of interpreting CAL. LAB. CODE § 3854 as substantive law would mean that the defendant's liability is determined without making a connection between the damages and the alleged actions of the defendant. Consequently, there would be a question as to the propriety of the degree of procedural due process accorded the defendant. Indeed, a defendant's liability would be absolute, based on a determination by the Court at a time when he was not available to present evidence to mitigate the damages. 29 Cal. 3d at 929, 633 P.2d at 230, 176 Cal. Rptr. at 795.

Some authorities have criticized the lower court decision in the *Breese* case to be in contravention of the doctrine of collateral estoppel. Only when an issue has been previously litigated between the parties are they estopped from relitigating that issue. In this case the defendant was not a party to the compensation hearing and should therefore be able to litigate the issue of damages with the insurer. Simply because the insured and injured employee litigated the issue of damages does not estop the defendant from doing so at a later time. J. MASTORIS, 1980-1981 SUMMARY OF CALIFORNIA WORKERS COMPENSATION LAW (1981).

41. 29 Cal. 3d 929, 633 P.2d at 230, 176 Cal. Rptr. at 795. *But see* note 19 *supra*.

42. The court found that by enacting § 3854 the legislature had directed:

(1) that the intervening act of an employee's [insurers'] payment to the

mately caused by the defendant. It followed, then, that the traditional tort principle of establishing a reasonable amount of damages proximately caused by the defendant must be proven by the insurer before that party is entitled to any reimbursement for proceeds paid to an injured employee."[43] Furthermore, the *Breese* court affirmed *Ventura*, which held that a defendant can contest the issues of liability and causation regardless of whether the insured or the employee is the adverse party.[44]

In conclusion, the *Breese* court stated that the *Ames* and *Williams* decisions were overruled in so far as they were inconsistent with the following findings:[45] an insurance company must prove that the "defendant's negligence is the proximate cause of an employee's injuries and the amount of tort damages reasonably resulting therefrom."[46] This amount, if equal to or in excess of the amount the insurer has already paid to the employee, will entitle the insurer to "full reimbursement."[47] In addition, the de-

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> employee of compensation shall not be construed as breaking the chain of causation which is essential to a plaintiff's recovery under traditional negligence principles; and (2) that the employer [insurer] is entitled to full reimbursement provided defendants tort liability, in an amount equal to or in excess of the employer's [insurer's] expenditures is otherwise established.

29 Cal. 3d at 929, 633 P.2d at 230, 176 Cal. Rptr. at 795.

43. 29 Cal. 3d at 929, 633 P.2d at 230, 176 Cal. Rptr. at 795. The *Breese* court looked favorably upon a similar lower court decision in Mendenhall v. Curtis, 102 Cal. App. 3d 786, 162 Cal. Rptr. 569 (1980). In *Mendenhall*, the jury found that defendant's acts were not the proximate cause of the employee's injuries, yet the trial court entered judgment for the insurer against the defendant. The court ruled that a defendant would not be liable for reimbursing the insurer for compensation paid if the court found that the defendant's actions were not the cause of the injuries to the employee. Alternatively, an insurer would actually have to prove that the defendant was negligent and that defendant's negligence was the proximate cause of injuries suffered by the employee (thereby causing damage to the insurer because of the compensation paid). *Id.* at 792, 162 Cal. Rptr. at 573.

Thus, in *Breese*, Argonaut would have to prove that Price was negligent. More importantly, Argonaut would have to show that the $10,885 paid in compensation to the employee was for legitimate injuries caused by the defendant's conduct.

44. 87 Cal. App. 3d 938, 151 Cal. Rptr. at 695-96.

45. 29 Cal. 3d at 931, 633 P.2d at 232, 176 Cal. Rptr. at 796-97.

46. *Id.* The court observed that no valid public policy would be served by taking away an insurer's incentive to dispute questionable claims. If an insurer had a guarantee of automatic reimbursement, frivolous claims would not be discovered. In addition, the court noted the $10,885 settlement made pursuant to an agreement between the insurer and the employee was questionable, especially after a referee found that the appropriate award was $25. *Id.* Practically speaking, an insurer would be less apt to settle for such excessive amounts if recovery from the defendant were limited to damages for injuries actually caused by the defendant.

47. *Id.* Although Justice Richardson concurred in the result, he took issue

fendant's ability to present evidence contrary to the finding of damages exists regardless of whether the insurer or the employee is a party.

Pervading the *Breese* court decision is the acknowledgment that the third party tortfeasor was being denied due process in not being allowed to contest the amount awarded in compensation for injuries. The court has alleviated this problem for the defendant by placing the burden of proof upon the insurer.[48] Consequently, an insurer will be forced to make more reasonable settlements in light of the actual finding of injury suffered by the employee.[49] Prior to *Breese*, an insurer was given carte blanche in the area of compensation to an employee, knowing that the third party tortfeasor would be automatically liable for reimbursement.[50]

The *Breese* decision will tend to promote frivolous claims by insured employees because the insurer will no longer be able to obtain full reimbursement unless it can prove that the negligence of the defendant was the proximate cause of the injuries suffered.[51] The *Breese* decision's effect much like the legislature shifted the risks of the workplace from employee to employer, because the decision has lifted the burden of automatic liability from the third party tortfeasor, and has more reasonably placed the burden of proof for reimbursement upon the insurer.

B. *Indigent in workfare program is an employee for workmen's compensation purposes:* County of Los Angeles v. Workers' Compensation Appeals Board

The California Supreme Court recently confirmed that "[t]he evolution of public welfare has been from public 'charity' toward social justice,"[1] in *County of Los Angeles v. Workers' Compensation Appeals Board*.[2] There, the court held that an indigent, participating in a county workfare program, was entitled to workers'

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with the phrase "full" reimbursement. Richardson argued that giving rights of full reimbursement to the insurer "[i]gnores the possibility that there may be other claimants against the tort judgement." *Id.* at 932, 633 P.2d at 233, 176 Cal. Rptr. at 797. However, the majority opinion stated that this case did not decide the issue of the priority of the insurer's claim over other potential claimants in such an action. *Id.* at 926 n.1, 633 P.2d at 227 n.1, 176 Cal. Rptr. at 793 n.1.

48. *See* notes 45-47 *supra* and accompanying text.

49. *See* note 46 *supra*.

50. *See* notes 13-21 *supra* and accompanying text.

51. *See* note 43 *supra*.

1. County of Los Angeles v. Workers' Comp. App. Bd., 30 Cal. 3d 391, 401, 637 P.2d 681, 691, 179 Cal. Rptr. 214, 220 (1981) (quoting Industrial Comm'n v. McWhorter, 129 Ohio St. 40, 42-43, 193 N.E. 620, 622-23 (1934).

2. 30 Cal. 3d at 391, 637 P.2d at 681, 179 Cal. Rptr. at 214. (Bird C.J., writing the opinion for a unanimous court).

compensation benefits.[3]

The County of Los Angeles contested the indigent's claim,[4] arguing that he was not an "employee"[5] for the purpose of the Workers' Compensation Act,[6] or, in the alternative, even if employee status was found, liability did not rest with the County.[7] The court noted that the term "employee" was given a broad definition by both workers' compensation statutes[8] and courts.[9] Thus, the County was not justified in relying on the 47-year-old case of *McBurney v. Industrial Accidents Commission*[10] to support the proposition that, before employee status can be found, a contract of employment was necessary. The supreme court specifically attacked the validity of the *McBurney* decision and its un-

3. *Id.* at 406, 637 P.2d at 685, 179 Cal. Rptr. at 223.

4. The petitioner was an indigent and a workfare participant. Instead of simply receiving a welfare benefit, petitioner earned his monthly benefits by working for the Inglewood Unified School District. However, his wage was paid by the County of Los Angeles. While working, the petitioner injured himself and was unable to continue at his job. Petitioner then filed for workmen's compensation benefits. A workmen's compensation judge, basing his decision on a previous case, held that the petitioner was entitled, as an employee, to receive benefits. The County appealed. 30 Cal. 3d at 394-96, 637 P.2d at 684-86, 179 Cal. Rptr. at 215-16.

5. The term "employee" is defined in CAL. LAB. CODE § 3351 (West 1971) as "every person in the service of an employer under any appointment or contract of hire . . . express or implied, oral or written . . . ." CAL. LAB. CODE § 3357 (West 1971) states that "any person rendering service for another, other than as an independent contractor, or unless expressly excluded herein, is presumed to be an employee."

6. CAL. LAB. CODE § 3201 (West 1971).

7. 30 Cal. 3d at 396, 637 P.2d at 686, 179 Cal. Rptr. at 216. The County contended that the Inglewood Unified School District was the employer and was therefore liable for only workers' compensation benefits the petitioner may be entitled to receive. *Id.*

8. CAL. LAB. CODE § 3202 (West 1971) provides that "this code shall be liberally construed . . . with the purpose of extending . . . benefits for the protection of persons injured in the course of their employment."

9. The supreme court favored the opinion in Laeng v. Workmen's Comp. App. Bd., 6 Cal. 3d 771, 494 P.2d 1, 100 Cal. Rptr. 377 (1972) (job applicant injured while trying out for employment considered employee for compensation purposes). The *Laeng* court established four criteria to determine employee status: (1) whether the worker was performing a service when injured; (2) whether the worker was subject to control by the "employer"; (3) whether a benefit was conferred upon the "employer"; and (4) whether the worker was exposed to the same risks of the job as employees were. 30 Cal. 3d at 397, 637 P.2d at 687, 179 Cal. Rptr. at 217. Thus, an employee was not necessarily defined as one who had a contractual relation with an employer. *See* text accompanying note 10 *infra*.

10. 220 Cal. 124, 30 P.2d 414 (1934) (county deemed to hold no contractual relationship with public welfare recipient and therefore no employee status conferred).

derlying philosophy that an indigent is a ward of the state,[11] and that welfare programs are considered a form of charity.[12]

The court turned instead to the *Laeng v. Workmen's Compensation Appeals Board*[13] decision which listed four criteria as instrumental in determining employee status in accordance with the spirit of workers' compensation laws.[14] The court in the instant found that the indigent petitioner was in the service of the County when he was injured because he was, at that time, performing the task assigned to him by the County. The petitioner was also subject to the control of the County because it determined his wage and work hours. The County, in turn, receive a benefit from the petitioner because he watched over children in a school within the County. Lastly, the petitioner was exposed to the same risks as all other school employees.[15] Thus, the supreme court deemed the petitioner to be an employee for the purposes of receiving workers' compensation benefits.[16]

The County also argued that the interpretation of California Labor Code section 3352, subsection (b), which excluded "[a]ny person performing services in return for aid or sustenance only, received from any religious, charitable or relief organization"[17] from employee status, was an independent ground for refusing the petitioner's claim. Since the legislature had not repealed this statute in light of court rulings holding that the section excluded public welfare recipients, the County argued that there was an implicit legislative approval for this interpretation.[18] The court

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11. 30 Cal. 3d at 397, 637 P.2d at 687, 179 Cal. Rptr. at 217.

12. 30 Cal. 3d at 399, 637 P.2d at 689, 179 Cal. Rptr. at 218. The court conducted a lengthy historical analysis beginning with the original "poor laws," and culminated with the conclusion that "[t]he state recognizes that many of its citizens are indigent, but it still wishes them to be independent" and free from the old notions that the poor are wards of the state. *Id.* at 401, 637 P.2d at 691, 179 Cal. Rptr. at 220. *See also id.* at 399-402, 637 P.2d at 689-92, 179 Cal. Rptr. at 218-20.

13. *See* note 9 *supra*.

14. *Id.*

15. 30 Cal. 3d at 398-99, 637 P.2d at 688-89, 179 Cal. Rptr. at 217-19. *See also* note 9 *supra*.

16. 30 Cal. 3d at 399, 637 P.2d at 689, 179 Cal. Rptr. at 218. Finding that the petitioner had employee status, the supreme court specifically overruled the *McBurney* decision as perpetuating "a paternalistic and even oppressive social policy." *Id.* at 402, 637 P.2d at 692, 179 Cal. Rptr. at 220.

17. In pertinent part, the section reads: " 'Employee' excludes: . . . (b) Any person performing services in return for aid or sustenance only, received from any religious charitable or *relief organization* . . . ." (emphasis added). CAL. LAB. CODE § 3352(b) (West 1971). The County wanted to have itself characterized as a relief organization.

18. 30 Cal. 3d at 403, 637 P.2d at 693, 179 Cal. Rptr. at 221. Specifically the County relied on County of Los Angeles v. Industrial Accident Comm'n., 2 Cal. App. 2d 614, 38 P.2d 828 (1934). However the supreme court found that decision deficient in analysis of the statutory language as well as in not bothering to define the term "relief organization." Since the supreme court had disapproved of the

disagreed with this argument, stating that legislative inaction in this situation was not determinative. The County had not presented evidence to show that the legislature was even aware of this interpretation of the statute.[19] Therefore, the court chose to implement the legislative policy[20] of construing workers' compensation statutes liberally in favor of awarding benefits.[21] Thus, section 3352, subsection (b) did not work to exclude the petitioner from claiming status as an employee.

In addition, the court found that the County, as a "general employer"[22] of the petitioner, was wholely liable for any injuries to the plaintiff. The County's school district, as a "special employer,"[23] was not jointly liable as was customary in these situations, because the petitioner was on the payroll of the County.[24] Although both the County and the school district acted in supervisory capacities, liability rested on the party liable for payment of wages to the petitioner.

In conclusion, the supreme court put to rest the archaic notions of the poor as wards of the state.[25] Accordingly, an indigent, who works for a county government and faces the same risks as regular county employees, can now seek compensation for injuries

philosophy underlying the *McBurney* case, the County's argument was totally without support. *Id.* at 404 & n.13, 637 P.2d at 694 & n.13, 179 Cal. Rptr. at 222 & n.13.

19. *Id.* at 403-04, 637 P.2d at 693-94, 179 Cal. Rptr. at 221. The court stated that "[t]he Legislature's failure to act may indicate many other things than approval of a judicial construction of a statute . . . ." *Id.*

20. *See* text accompanying notes 9-10 *supra*.

21. 30 Cal. 3d at 404, 637 P.2d at 694, 179 Cal. Rptr. at 221-22. The court noted that statutory language did not specifically exclude public entities and that the statute was probably motivated to exclude private charities from liability under the old doctrine of charitable immunity. *Id.* at 404 & n.13, 637 P.2d at 694 & n.13, 179 Cal. Rptr. 222 & n.13.

22. *Id.* at 405, 637 P.2d at 695, 179 Cal. Rptr. at 222. A "general employer" was one who sends an employee to a "special employer" and both had supervisory control over the employee. Usually, the general and special employers are jointly liable. *Id.*

23. *Id.*

24. *Id.* at 406, 637 P.2d at 696, 179 Cal. Rptr. at 223. The court found that joint liability of the general and special employer was alleviated by CAL. INS. CODE § 11663 (West 1980) which provided that the general employer was solely liable and responsible for paying the wages of the employee. The County, not the district, was liable for paying petitioner's benefits. *See* note 4 *supra*.

25. 30 Cal. 3d at 406, 637 P.2d at 696, 179 Cal. Rptr. at 223. The court specifically overruled *McBurney* and all of its progeny. *Id.* at 403, 637 P.2d at 693, 179 Cal. Rptr. at 220-21. *See also* note 16 *supra*.

sustained while performing that job. It is immaterial whether the employee is a participant in public welfare programs.

C. *Workmen's Compensation Remedies and the Dual Capacity Doctrine:* **Bell v. Industrial Vangas, Inc.**

In *Bell v. Industrial Vangas, Inc.*,[1] the California Supreme Court addressed the issue of the dual capacity doctrine in the context of products liability as it relates to workers' compensation insurance.[2]

The dual capacity test has developed over the years through several cases applying its precepts.[3] The doctrine generally recognizes that an individual can act in two or more different capacities either simultaneously or sequentially.[4] This general concept gives rise to two sets of distinct and separate legal obligations. The test resulting from the dual capacity doctrine has been determined to be " 'whether the non-employer aspect of the employer's activity generates a different set of obligations by the employer through the employee.' "[5]

In *Bell*, it was argued that the plaintiff's injuries resulted "from two concurrent causes: the employment relation (for which Vangas is liable under the workers' compensation law) coinciding

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1. 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981).

2. CAL. LAB. CODE § 3600 (West 1982), excluding certain nonrelevant exceptions provides:

> Liability for the compensation provided by this division, in lieu of any other liability whatsoever to any person . . . shall, without regard to negligence, exist against an employer for any injury sustained by his employees arising out of and in the course of the employment . . . in those cases where the following conditions of compensation concur:
>
> . . . .
>
> (b) Where, at the time of injury, the employee is performing service growing out of and incidental to his employment and is acting within the course of his employment.
>
> (c) Where the injury is proximately caused by the employment, either with or without negligence.

Id. CAL. LAB. CODE § 3601 (West Supp. 1982), insofar as relevant here, provides: "(a) Where the conditions of compensation exist, the right to recover such compensation, pursuant to the provisions of this division is . . . the exclusive remedy for injury or death of an employee against the employer or against any other employee of the employer acting within the scope of his employment. . . ."

3. The *Bell* court noted that what has come to be known as the dual capacity doctrine was first recognized and applied in 1952 in the landmark case of Duprey v. Shine, 39 Cal. 2d 781, 249 P.2d 8 (1952). The doctrine has been developed by several later cases decided by the California Supreme Court. The most recent statement concerning the test for dual capacity came in D'Angona v. County of Los Angeles, 27 Cal. 3d 661, 666-67, 613 P.2d 238, 242, 166 Cal. Rptr. 177, 181 (1980), where the court stated that underlying the *Duprey* decision "is the rationale that if any injury arising from the relationship which is distinct from that of employer and employee and invokes a different set of obligations than the employer's duties to its employee, there is no justification for shielding the employer from liability at common law."

4. 30 Cal. 3d at 273 n.4, 637 P.2d at 269 n.4, 179 Cal. Rptr. at 33 n.4.

5. *Id.* at 276, 637 P.2d at 271, 179 Cal. Rptr. at 35.

with a defective product (for which Vangas is liable as a manufacturer [under product liability law]).”[6] The application of the dual capacity doctrine, however, was brought into question by the concurrent claim based on workers' compensation legislation.

The conflict arose because liability under the workers' compensation law is based not upon an act or omission by the employer, but rather upon the existence of an employer-employee relationship and the fact that the injury occurs during the course of such employment.[7] Since this duty arises due to the relationship between the parties and not from an act or omission, the policy reasons behind the Workers' Compensation Act should require that the workers' compensation be the exclusive remedy for the employee.[8]

The *Bell* court, however, noted that if an additional concurrent duty arises (such as would arise under the dual capacity doctrine) from a relationship distinct from that of employer-employee, then the employer should be treated as any third party tortfeasor and should not be immune from a common law action. In upholding the dual capacity doctrine in a workmen's compensation claim, the court recognized that it was going against the great weight of authority found in other states.[9] Relying on policy considerations, the *Bell* court applied the dual capacity doctrine and allowed the plaintiff to have a common law remedy.[10] The court noted that any application to the contrary “would permit a manufacturer to test new products, utilizing his employees, and limit his liability from resulting injuries from a defective product to workmen's compensation remedies.”[11]

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6. *Id.* at 282, 637 P.2d at 275, 179 Cal. Rptr. at 39.
7. *Id.* at 277, 637 P.2d at 271-72, 179 Cal. Rptr. at 35-36.
8. *Id.* at 277, 637 P.2d at 272, 179 Cal. Rptr. at 36.
9. *Id.* at 280, 637 P.2d at 274, 179 Cal. Rptr. at 38.
10. *Id.* at 282, 637 P.2d at 275, 179 Cal. Rptr. at 39.
11. *Id.* at 280, 637 P.2d at 273, 179 Cal. Rptr. at 37. The California Supreme Court believed that the interests of public safety in deterring unsafe products, a powerful force in motivating the establishment of product liability law, could be greatly served by the application of the dual capacity doctrine in this case. Another reason underlying the court's decision was that a manufacturer is in a peculiarly strategic position to promote the safety of [his] products. . . .” 30 Cal. 3d at 279, 637 P.2d at 273, 179 Cal. Rptr. at 37 (quoting James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923 (1957)).