Pepperdine Law Review

Volume 23 | Issue 4 Article 6

5-15-1996

California Supreme Court Survey - A Review of Decisions: April 1995-August 1995

April L. Anstett

California Supreme Court Survey

April 1995 - August 1995

The California Supreme Court Survey provides a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of issues that the supreme court has addressed, as well as to serve as a starting point for researching any of the topical areas. Attorney discipline, judicial misconduct, and death penalty appeal cases have been omitted from the survey.

The survey will review California Supreme Court cases in either and article or summary format. Articles provide an in-depth analysis of selected California Supreme Court cases including the potential impact a case may have on California law. Additionally, articles guide the reader to secondary sources that focus on specific points of law.

Summaries provide a brief outline of the areas of law addressed in selected California Supreme Court cases. Summaries are designed to provide the reader with a basic understanding of the legal implications of a cases in a concise format.

ARTICLES

SUMMARIES

I. CRIMINAL LAW

A. *Criminal defendants have standing to object to a witness' involuntary custodial statements if it is alleged such a violation actually taints that witness' trial testimony; however, criminal defendants have the burden of proving such coercion actually affected the reliability of the testimony received at trial:* **People v. Badgett.**

I. INTRODUCTION

In *People v. Badgett*,[1] the California Supreme Court granted review to delineate the extent to which criminal defendants can suppress the fruits of involuntary pretrial statements of third parties.[2] While the court held

1. 10 Cal. 4th 330, 895 P.2d 877, 41 Cal. Rptr. 2d 635 (1995). Chief Justice Lucas delivered the opinion of the court, with Justices Kennard, Arabian, Baxter, George, and Werdegar joining. *Id.* at 330-66, 895 P.2d at 877-98, 41 Cal. Rptr. 2d at 635-57. Justice Mosk wrote a concurring and dissenting opinion. *Id.* at 366-67, 895 P.2d at 899, 41 Cal. Rptr. 2d at 657-58 (Mosk, J., concurring and dissenting).

2. *Id.* at 342-363, 895 P.2d at 883-96, 41 Cal. Rptr. 2d at 640-55. In February 1989, a human head with a bullet wound washed ashore on a Santa Cruz County beach. People v. Badgett, 34 Cal. App. 4th 903, 907, 30 Cal. Rptr. 2d 152, 154 (Cal. Ct. App. 1994), *vacated*, 10 Cal. 4th 330, 895 P.2d 877, 41 Cal. Rptr. 2d 635 (1995). Days later, two hands and two feet washed ashore and a human torso was discovered down a steep incline near a highway. *Id.* at 907, 30 Cal. Rptr. 2d at 154. Several months later, officials used fingerprints to identify the body as that of Michael Palmer. *Id.* The evening Palmer disappeared, codefendant Chris Badgett told Henrietta Jasik, his 17-year-old live-in girlfriend, he wanted to "off" Palmer, but he was not sure that his brother John "would go along with it." *Badgett*, 10 Cal. 4th at 339, 895 P.2d at 881, 41 Cal. Rptr. 2d at 639. That evening, Chris Badgett told Jasik and two of their roommates that he was going to surprise Palmer with a bus ticket so Palmer could return to Texas to see his wife. *Id.* Upon returning home late that night, Chris Badgett told Jasik that Palmer was on a bus to Texas and would call in three days. *Id.* at 340, 895 P.2d at 881, 41 Cal. Rptr. 2d at 639. A day later, however, Chris Badgett told Jasik that he and his brother had driven Palmer into the mountains, shot and killed him, dismembered his body, and disposed of his remains by throwing them into the ocean. *Id.* After identifying Palmer's body, police questioned the Badgett brothers and Jasik because the three had used falsified documents with the same home address in their applications for drivers' licenses in Santa Clara County. *Id.* at 339, 895 P.2d at 881, 41 Cal. Rptr. 2d at 639. Police detained Jasik at a Santa Cruz County juvenile facility for submitting a false driver's license application. *Id.* at 339-40, 895 P.2d at 881, 41 Cal. Rptr. 2d at 639-40. While there, she described to police officers her conversation with Chris Badgett in which he described killing Palmer. *Id.* at 340, 895 P.2d at 881, 41 Cal. Rptr. 2d at 640. Although Jasik told the

that criminal defendants have standing to suppress the fruits of such evidence when it is alleged that coercion from those violations actually taints a witness' trial testimony,[3] it found, after an extensive examination of the entire trial record, that the defendants did not meet their burden of proving that extrajudicial violations actually interfered with their due process rights to a fair trial.[4]

II. TREATMENT

A. *Majority Opinion*

1. Standing to Exclude Fruits of Coerced Third-party Testimony

In considering whether the defendants had standing to suppress Jasik's testimony following her involuntary statements,[5] the court stated that any basis for the exclusion of evidence must rest upon one of the defendants' personal constitutional rights.[6] The court reaffirmed that criminal defendants do not have standing to object to evidence admitted

---

officers that she and John Badgett had thrown the gun used to kill Palmer off the Golden Gate Bridge, she did not tell them about Chris Badgett's statement before Palmer's death that he intended to kill him. *Id.*

At the brothers' trial, Jasik supplied primary prosecution evidence when she testified under a grant of immunity. *Id.* at 341, 895 P.2d at 882, 41 Cal. Rptr. 2d at 640. Chris Badgett moved to exclude Jasik's testimony on the ground of privileged marital communication. *Id.* The trial court denied this motion on the ground that the two could not establish a common-law marriage under Texas law. *Id.* Both defendants moved to exclude Jasik's trial testimony, asserting that her pretrial statements to police officers were the involuntary product of an illegal arrest. *Id.* The defendants also alleged that Jasik's trial testimony was tainted by a coercive immunity agreement that would require her to testify consistently with her previous involuntary statements. *Id.* The trial court denied their motion for lack of standing but allowed the defense to argue to the jury that her testimony should be discounted because of the immunity agreement. *Id.* at 341-42, 895 P.2d at 882, 41 Cal. Rptr. 2d at 640-41.

The jury convicted Chris and John Badgett of first-degree murder and conspiracy to commit murder, and the court sentenced both to 25 years to life in state prison. *Id.* at 339, 895 P.2d at 880-81, 41 Cal. Rptr. 2d at 639. The court of appeal reversed on grounds that the defendants had standing to object to both Jasik's pretrial statements and her trial testimony and that the trial court's failure to hold a hearing on the motion *in limine* warranted reversal. *Id.* at 342, 350, 895 P.2d at 882, 888, 41 Cal. Rptr. 2d at 641, 646. The court of appeal also held that the marital communications privilege protected Chris Badgett's statements to Jasik. *Id.* at 342, 895 P.2d at 882, 41 Cal. Rptr. 2d at 641.

3. *Badgett*, 10 Cal. 4th at 345, 895 P.2d at 884, 41 Cal. Rptr. 2d at 643. *See generally* 29 AM. JUR. 2D *Evidence* § 633 (1994) (describing the "fruit of the poisonous tree" doctrine).

4. *Id.* at 363, 895 P.2d at 896, 41 Cal. Rptr. 2d at 654-55.

5. *Id.* at 342-45, 895 P.2d at 883-85, 41 Cal. Rptr. 2d at 641-43.

6. *Id.* at 344, 895 P.2d at 884, 41 Cal. Rptr. 2d at 642 (quoting People v. Douglas, 50 Cal. 3d 468, 501, 788 P.2d 640, 656, 268 Cal. Rptr. 126, 142 (1990)).

in violation of another's Fourth,[7] Fifth,[8] or Sixth Amendment[9] rights unless they can show that such evidence violated the defendants' own due process right to a fair trial.[10] Because the defendants alleged in their motion that the witness' coercive immunity agreement could require her to testify consistently with her involuntary pretrial statements, the court held that the defendants had standing to suppress.[11]

---

7. *Id.* at 343, 895 P.2d at 883, 41 Cal. Rptr. 2d at 642; *see* United States v. Payner, 447 U.S. 727, 735 (1980) (contending that an interest in deterring illegal searches does not justify exclusion of tainted evidence to parties not victims of an illegal search); *In re* Lance W., 37 Cal. 3d 873, 896, 694 P.2d 744, 759, 210 Cal. Rptr. 631, 646, (1985) (concluding courts may exclude evidence only as mandated by the federal exclusionary rule), *clarified by* People v. Neer, 177 Cal. App. 3d 991, 223 Cal. Rptr. 555 (Cal. Ct. App. 1986); CAL. CONST. art. I, § 28(d). *See generally* Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907 (1989) (analyzing the Supreme Court rationale for excluding evidence); Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487 (1988) (reviewing the Supreme Court's narrowing of the standing doctrine); 4 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW *Exclusion of Illegally Obtained Evidence* §§ 2276-2278 (1989 & Supp. 1995) (discussing standing for Fourth Amendment violations); 21 CAL. JUR. 3D *Criminal Law* § 3181 (1985 & Supp. 1995) (discussing standing for suppression of illegally obtained evidence).

8. *Badgett*, 10 Cal. 4th at 343, 895 P.2d at 883, 41 Cal. Rptr. 2d at 642; *see Douglas*, 50 Cal. 3d at 501, 788 P.2d at 656, 268 Cal. Rptr. at 142 (finding no standing to suppress statements made by co-conspirator). For inconsistent policy viewpoints on excluding evidence from Fifth Amendment violations, compare Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995) (proposing that coerced confessions are excluded because they are unreliable), with Yale Kamisar, *Response, On the "Fruits" of* Miranda *Violations, Coerced Confessions, and Compelled Testimony*, 93 MICH. L. REV. 929 (1995) (emphasizing offensive police conduct as the primary purpose for excluding involuntary confessions).

9. *Badgett*, 10 Cal. 4th at 343-44, 895 P.2d at 884, 41 Cal. Rptr. 2d at 642; *see* Faretta v. California, 422 U.S. 806, 819-21 (1975) (reasoning the right to counsel is a personal right); People v. Varnum, 66 Cal. 2d 808, 812-13, 427 P.2d 772, 776, 59 Cal. Rptr. 108, 112 (1967) (stating right to counsel cannot be asserted vicariously). *See generally* James J. Tomkovicz, *The* Massiah *Right to Exclusion: Constitutional Premises and Doctrinal Implications*, 67 N.C. L. REV. 751 (1989) (suggesting that few of the Fourth and Fifth Amendment exclusionary rules should apply to the Sixth Amendment).

10. *Badgett*, 10 Cal. 4th at 344, 895 P.2d at 884, 41 Cal. Rptr. 2d at 642-43. *See generally* Scott D. Mroz, Comment, *The Due Process Exclusionary Rule: A Fifth Amendment Approach to the Regulation of Intentional Governmental Misconduct*, 17 U.S.F. L. REV. 277 (1983) (discussing the due process rationales behind the exclusionary rule).

11. *Badgett*, 10 Cal 4th at 345, 895 P.2d at 884, 41 Cal. Rptr. 2d at 643. The court

2. Policy and Burdens of Excluding Coerced Third-party Testimony

The court examined constitutional policy to distinguish between excluding fruits following the violation of a defendant's Fifth Amendment rights and those following the involuntary statements of a witness.[12] The court reasoned that the exclusionary rule exists in the first instance so as to prevent criminal defendants from being compelled to aid the state in their conviction,[13] where the policy of excluding evidence tainted by the involuntary statements of third parties is limited to assuring reliability of the evidence admitted at trial.[14] The court further reasoned that because the danger of compelling defendants to participate in their conviction was absent[15] in the latter situation and, therefore, the state's evidentiary burden would not be lightened,[16] courts must determine, rather than assume, that trial testimony was tainted by ongoing coercion from an earlier violation.[17]

The court also delineated the different evidentiary burdens applicable to defendants' motions to exclude.[18] While the prosecution has the burden of proving that a criminal defendant's confessions comported with the Fifth Amendment,[19] the court stated that when contesting the fruits

---

rejected the state's argument that the defendants moved to suppress Jasik's trial testimony solely because it was the fruit of an earlier coerced statement. *Id.*

12. *Id.* at 346-50, 895 P.2d at 885-88, 41 Cal. Rptr. 2d at 643-46.

13. *Id.* at 346, 895 P.2d at 885-86, 41 Cal. Rptr. 2d at 644; *see* Miranda v. Arizona, 384 U.S. 436, 460 (1966) ("[O]ur accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth.").

14. *Badgett*, 10 Cal. 4th at 347, 895 P.2d at 886, 41 Cal. Rptr. 2d at 644.

15. *Id.*

16. *Id.*

17. *Id.* at 347-48, 895 P.2d at 886, 41 Cal. Rptr. 2d at 644-45. The defendants relied on *In re* J. Clyde K., 192 Cal. App. 3d 710, 237 Cal. Rptr. 550 (1987), which held that "[t]he constitutionally mandated exclusion of a coerced confession and of evidence obtained as a result of that unlawfully obtained confession is equally applicable when the introduction of the same evidence is sought at the trial of another." *Id.* at 718, 237 Cal. Rptr. at 554. The court reasoned that the exclusion of another's coerced confession and its fruits was "essential" to protecting the defendant's due process rights. *Id.*

The supreme court distinguished the two cases, reasoning that rather than attempting to exclude a witness' extrajudicial statement introduced at trial, *Badgett* involved excluding a witness' in-court testimony. *Badgett*, 10 Cal. 4th at 349, 895 P.2d at 887, 41 Cal. Rptr. 2d at 646. Thus, the court ruled that unless criminal defendants can prove exclusion is necessary to prevent the use of unreliable evidence, they should not be able to assert the Fifth Amendment rights of others. *Id.* at 349, 895 P.2d at 888, 41 Cal. Rptr. 2d at 646.

18. *Badgett*, 10 Cal. 4th at 348, 895 P.2d at 886-87, 41 Cal. Rptr. 2d at 645.

19. *Id.* "The burden is on the People to demonstrate the voluntariness of a defendant's admissions or confessions by a preponderance of the evidence. Similarly,

of third-party involuntary statements, defendants have the burden of showing that lingering coercion actually tainted the witness' trial testimony.[20]

3. Determination of Coercion in Henrietta Jasik's Testimony

Because the court of appeal did not determine whether the witness' trial testimony was actually unreliable,[21] the supreme court employed an independent standard of review, examining the entire record to determine whether the defendants' due process rights were actually infringed.[22]

The defendants first contended that because Jasik was detained in violation of Penal Code section 830.1[23] and Welfare and Institutions Code section 626,[24] her extrajudicial statements and in-court testimony

---

it falls to the People to demonstrate, in the case of successive confessions or statements, that the 'taint' of a first, involuntary statement has been attenuated." *Id.* (citations omitted); *see* Lego v. Twomey, 404 U.S. 477, 489 (1971) (stating federal Constitution requires preponderance standard); People v. Markham, 49 Cal. 3d 63, 71, 775 P.2d 1042, 1047, 260 Cal. Rptr. 273, 278 (1989) (finding legislative intent in enacting article 1, section 28(d) of the California Constitution was to curtail the reasonable doubt standard to a preponderance standard); People v. Hogan, 31 Cal. 3d 815, 843, 647 P.2d 93, 109, 183 Cal. Rptr. 817, 833 (1982) (prosecution has burden of rebutting presumption that a subsequent confession is the product of a prior involuntary confession).

20. *Badgett*, 10 Cal. 4th at 348, 895 P.2d at 886-87, 41 Cal. Rptr. 2d at 645.

21. *Id.* at 351, 895 P.2d at 888, 41 Cal. Rptr. at 647.

22. *Id.* at 350, 895 P.2d at 888, 41 Cal. Rptr. 2d at 646. The court recognized that it had not set forth a standard of review with regard to use of coerced testimony of third parties at trial. *Id.* Despite the fact that the trial court refused to hear the motion *in limine* for lack of standing, and because the defendants made an argument to the jury about the witness' testimony, the court determined that the parties had a full opportunity to litigate the issue of witness coercion and the trial court's failure to hold an evidentiary hearing was, therefore, harmless error. *Id.* at 351-52, 895 P.2d at 889, 41 Cal. Rptr. 2d at 647.

23. Penal Code § 830.1 provides, in relevant part, that peace officers have authority "[a]s to any public offense committed or which there is probable cause to believe has been committed *within the political subdivision which employs the peace officer.*" CAL. PENAL CODE § 830.1 (West Supp. 1996) (emphasis added). The defendants contended that because Jasik submitted false documents in order to obtain a driver's license in Santa Clara County, she should not have been arrested by Santa Cruz County peace officers. *Badgett*, 10 Cal. 4th at 340, 895 P.2d at 881-82, 41 Cal. Rptr. 2d at 640.

24. Welfare and Institutions Code § 626 requires a peace officer who takes a juvenile into temporary custody to release the minor to the probation officer of the coun-

were the tainted fruit of an unlawful arrest.[25] The court disagreed, reasoning that such "technical violations" had no coercive impact on either her statements to the police or her in-court testimony.[26] The defendants next alleged that Jasik's statements to police were involuntary because they were made after an offer of leniency, and thus became a "script" for her trial testimony.[27] The court dismissed this argument, noting that it has upheld offers of leniency in return for cooperation with the police, so long as the witness testifies truthfully.[28]

The defendants further contended that unethical conduct by the prosecutor resulted in Jasik's unrepresention by counsel, and that this in turn tainted the testimony she gave at trial.[29] The court disagreed, ruling that there was no requirement that an immunized witness be provided with counsel in order to protect a defendant's right to due process.[30] Finally, the defendants argued that the immunity agreement Jasik signed required her to testify consistently with her prior involuntary statements to the police.[31] Although the court held that such an agreement would violate a defendant's right to due process,[32] the court determined that the actual immunity agreement used at the defendants' trial had no consistency requirement.[33] The court stated that while immunity agreements inherently

---

ty in which the minor was taken into custody. CAL. WELF. & INST. CODE § 626(d) (West Supp. 1996). Jasik was not released to a probation officer; rather, she remained at a Santa Cruz juvenile detention facility before she was released pursuant to an immunity agreement. *Badgett*, 10 Cal. 4th at 340, 895 P.2d at 881-82, 41 Cal. Rptr. 2d at 640.

25. *Badgett*, 10 Cal. 4th at 352-53, 895 P.2d at 889-90, 41 Cal. Rptr. 2d at 648.

26. *Id.* at 353-54, 895 P.2d at 890, 41 Cal. Rptr. 2d at 648-49. The court doubted such minor violations could taint her trial testimony when she had been released to her mother's supervision for three months before trial. *Id.* at 353, 895 P.2d at 890, 41 Cal. Rptr. 2d at 649.

27. *Id.* at 354, 895 P.2d at 890, 41 Cal. Rptr. 2d at 649.

28. *Id.* at 354-55, 895 P.2d at 891, 41 Cal. Rptr. 2d at 649; *see* People v. Daniels, 52 Cal. 3d 815, 802 P.2d 906, 277 Cal. Rptr. 122 (1991) (holding it not improper to confront suspects with offers of leniency in exchange for cooperation with police); People v. Allen, 42 Cal. 3d 1222, 729 P.2d 115, 232 Cal. Rptr. 849 (1986) (granting immunity for prosecution witnesses does not violate defendant's right to a fair trial so long as witness testifies truthfully).

29. *Id.* at 355, 895 P.2d at 891-92, 41 Cal. Rptr. 2d at 650.

30. *Id.* at 357, 895 P.2d at 893, 41 Cal. Rptr. 2d at 651.

31. *Id.*

32. *Id.* at 358, 895 P.2d at 893, 41 Cal. Rptr. 2d at 651; *see* People v. Allen, 42 Cal. 3d 1222, 1251, 729 P.2d 115, 130, 232 Cal. Rptr. 849, 864 (1986) (defendant denied a fair trial if prosecution coerces witnesses to testify in a specific manner). *See generally* Rita W. Gordon, *Right to Immunity for Defense Witnesses*, 20 CONN. L. REV. 153 (1987); 1 WITKIN & EPSTEIN, CALIFORNIA CRIMINAL LAW *Defenses* § 380 (1988 & Supp. 1995) (discussing immunity as a defense); 20 CAL. JUR. 3D *Criminal Law* §§ 2292-2297 (1985 & Supp. 1995) (discussing immunity generally and distinguishing use immunity from transactional immunity).

33. *Badgett*, 10 Cal. 4th at 358, 895 P.2d at 893, 41 Cal. Rptr. 2d at 652. Adding

contain some element of coercion, those requiring only that a witness testify "fully and truthfully" are valid.[34] After dismissing each of the defendants' claims, the court held that the defendants failed to show a violation of their due process rights because they could not prove Jasik's actual trial testimony suffered from any lingering coercion.[35]

B. Justice Mosk's Concurring and Dissenting Opinion

Although Justice Mosk agreed with the majority that a criminal defendant has standing to exclude unreliable fruits of third-party involuntary statements,[36] he found that the trial court committed more than harmless error in not ruling on the merits of the defendants' motion *in limine*.[37] He reasoned that reviewing courts could not determine whether error was harmless beyond a reasonable doubt in the absence of an express or implied ruling on the motion by the trial court.[38] Although Justice Mosk stated the trial court partially cured its error by ruling on the

---

significant confusion to the issue was the fact that Jasik had testified under two different immunity agreements, the first being at her juvenile court detention hearing and the second being at defendants' trial. *Id.* at 358, 895 P.2d at 893, 41 Cal. Rptr. 2d at 651. While the court did find some mention of consistent testimony in the immunity agreement used at her juvenile proceeding, it could not find a similar condition in the immunity agreement used at defendants' trial. *Id.* at 358-59, 895 P.2d at 893-94, 41 Cal. Rptr. 2d at 652. The court emphasized that on her cross-examination, Jasik denied that she had been told to testify in a particular manner or to lie. *Id.* at 361, 895 P.2d at 895, 41 Cal. Rptr. 2d at 653. She also testified that she did not believe that her immunity agreement was conditioned upon her testimony being consistent with her earlier statements to the police. *Id.* In fact, as the court illustrated, Jasik's testimony at trial actually *differed* from her previous statements to the police because she described Chris Badgett's conversation prior to Palmer's disappearance in which he stated that he intended to "off" Palmer. *Id.* at 362, 895 P.2d at 896, 41 Cal. Rptr. 2d at 654.

34. *Id.* at 358, 895 P.2d at 893, 41 Cal. Rptr. 2d at 651-52.

35. *Id.* at 363, 895 P.2d at 896, 41 Cal. Rptr. 2d at 654-55.

36. *Id.* at 366, 895 P.2d at 899, 41 Cal. Rptr. 2d at 657 (Mosk, J., concurring and dissenting).

37. *Id.* (Mosk, J., concurring and dissenting).

38. *Id.* at 367, 895 P.2d at 899, 41 Cal. Rptr. 2d at 657 (Mosk, J., concurring and dissenting).

immunity agreement after the trial,[39] he would have remanded the case to the trial court to determine the merits of the defendants' other three claims.[40]

III. IMPACT AND CONCLUSION

In *People v. Badgett*, the California Supreme Court redefined the extent to which criminal defendants can suppress the fruits of involuntary pretrial statements of third parties.[41] It held that criminal defendants have standing to object to a witness' involuntary custodial statements so long as the defendants allege that such violations actually taint the witness' trial testimony.[42] While the court reaffirmed that defendants cannot ordinarily assert the constitutional rights of others,[43] it held that they do have standing when the fruits of others' constitutional violations would affect the defendants' due process right to a fair trial.[44] With this right comes a burden: criminal defendants must prove that a witness' trial testimony was actually tainted by lingering coercion from an earlier violation.[45] Because appellate courts may employ independent standards of review[46] to motions that were never actually determined on their merits,[47] this burden will indeed be difficult for defendants to bear.

JONATHAN SIMONDS PYATT

39. *Id.* at 367, 895 P.2d at 899, 41 Cal. Rptr. 2d at 657 (Mosk, J., concurring and dissenting).

40. *Id.* at 367, 895 P.2d at 899, 41 Cal. Rptr. 2d at 658 (Mosk, J., concurring and dissenting).

41. *See infra* notes 21-35 and accompanying text.

42. *Id.* at 345, 895 P.2d at 884, 41 Cal. Rptr. 2d at 643.

43. *Id.* at 343-44, 895 P.2d at 883-84, 41 Cal. Rptr. 2d at 642.

44. *Id.* at 344, 895 P.2d at 888, 41 Cal. Rptr. 2d at 642.

45. *Id.* at 347-48, 895 P.2d at 886, 41 Cal. Rptr. 2d at 644-45.

46. *Id.* at 350, 895 P.2d at 888, 41 Cal. Rptr. 2d at 646-47.

47. *Id.* at 367, 895 P.2d at 899, 41 Cal. Rptr. 2d at 657 (Mosk, J., concurring and dissenting).

B. *Police may not base a temporary detention solely upon a person's flight at the sight of police:* **People v. Souza.**

I. INTRODUCTION

In *People v. Souza*,[1] the California Supreme Court determined whether police may base a temporary detention solely upon a person's flight at the sight of police.[2] The court held that police may not temporarily detain a person merely because the person fled upon seeing the officers.[3] The court ruled, however, that police may consider flight as a key factor in determining whether reasonable suspicion exists to detain a person temporarily.[4]

---

1. 9 Cal. 4th 224, 885 P.2d 982, 36 Cal. Rptr. 2d 569 (1994). Justice Kennard wrote the majority opinion in which Chief Justice Lucas and Justices Arabian, Baxter, George, and Werdegar concurred. *Id.* at 227-42, 885 P.2d at 983-93, 36 Cal. Rptr. 2d at 570-80. Justice Mosk wrote a separate concurring opinion. *Id.* at 242-44, 885 P.2d at 993-94, 36 Cal. Rptr. 2d at 580-81.

2. *Id.* at 229, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571. In *Souza*, a police officer was patrolling a high crime neighborhood when he saw the defendant and a woman standing near a car that was parked close to an intersection where the officer recently arrested two people. *Id.* at 228, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571. Although the area was very dark, it appeared to the officer that the defendant was talking to someone in the parked car. *Id.*

Suspecting that the two people were involved in an automobile burglary, the officer pulled up behind the parked car and shined the police car's spotlight into the parked car. *Id.* At that point, two people who were sitting in the front seat ducked, and the defendant ran away. *Id.* "The officer stopped the defendant and conducted a cursory search for weapons," during which a plastic baggie of cocaine fell from the defendant's clothes. *Id.*

At trial, the defendant moved to suppress the bag of cocaine from evidence, claiming that the officer obtained it during an unlawful detention. *Id.* at 227-28, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571. The trial court denied the motion, concluding that the defendant's flight gave the officer reasonable cause for suspicion. *Id.* at 228, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571. Consequently, the defendant pled "guilty to possession of cocaine for sale." *Id.* The court of appeal reversed, finding that the bag of cocaine was the fruit of an illegal detention due to a lack of reasonable suspicion. *Id.* Unlike the trial court, the court of appeal gave little weight to the defendant's flight from the officer as a factor supporting reasonable suspicion. *Id.* at 228-29, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571.

3. *Id.* at 227, 885 P.2d at 983, 36 Cal. Rptr. 2d at 570.

4. *Id.*

II. TREATMENT

A. *Majority Opinion*

The Fourth Amendment of the United States Constitution and Article I, Section 13 of the California Constitution protects individuals from unreasonable seizure.[5] A seizure occurs when police restrain a person's liberty "'by means of physical force or show of authority.'"[6] Thus, a seizure occurs when police temporarily detain a person for investigation.[7]

Under both the United States and California Constitutions, a seizure is unreasonable when it is based on insufficient grounds.[8] To have sufficient grounds for temporary detentions, the police must have a reasonable suspicion that "the person detained may be involved in criminal activity."[9] Police must consider the "totality of the circumstances"—all

---

5. The Fourth Amendment of the United States Constitution provides, in pertinent part, that "[t]he right of the people to be secure in their persons . . . against unreasonable seizures . . . shall not be violated." U.S. CONST. amend IV; *see also* CAL. CONST. art. I, § 13 (West 1995) (granting similar protection). *See generally* 20 CAL. JUR. 3D *Criminal Law* § 2505 (1985 & Supp. 1995) (discussing general constitutional standards that apply to California search and seizure jurisprudence).

6. *Souza*, 9 Cal. 4th at 229, 885 P.2d at 985, 36 Cal. Rptr. 2d at 572 (quoting Terry v. Ohio 392 U.S. 1, 19 n.16 (1968)). *See generally* 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2361 (2d ed. 1989 & Supp. 1995) ("A person is seized whenever an officer accosts him and restrains his freedom to walk away . . . .").

7. *See generally* 20 CAL. JUR. 3D *Criminal Law* § 2540 (1985 & Supp. 1995) ("The Fourth Amendment applies to searches and seizures that involve only a brief detention short of traditional arrest.").

8. *See Terry*, 392 U.S. at 11 ("The heart of the Fourth Amendment . . . is a severe requirement of specific justification for any intrusion upon protected personal security . . . .").

9. *Souza*, 9 Cal. 4th at 231, 885 P.2d at 986, 36 Cal. Rptr. 2d at 573. *See generally* 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2361 (2d ed. 1989 & Supp. 1995) (discussing reasonable suspicion). "There is . . . a right to stop . . . 'where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot . . . . '" *Id.* (alteration in original) (quoting *Terry*, 392 U.S. at 30).

In contrast, police must have probable cause to arrest a person. *See Souza*, 9 Cal. 4th at 230, 885 P.2d at 985, 36 Cal. Rptr. 2d at 572. Probable cause exists when a reasonable person in the shoes of the arresting officer would believe that an individual has committed or is committing an offense. *Id.* The probable cause standard is more demanding than the reasonable suspicion standard. *See generally* 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2366 (2d ed. 1989 & Supp. 1995) (discussing the standards of probable cause and reasonable suspicion); Richard A. Williamson, *The Dimensions of Seizure: The Concepts of "Stop" and "Arrest,"* 43 OHIO ST. L.J. 771 (1982) (discussing Fourth Amendment seizures and distinguishing between stops and arrests). "'[C]ircumstances short of probable cause to make an arrest may still justify an officer's stopping pe-

existing factors—to determine whether reasonable suspicion exists.[10]

In the instant case, the court of appeal found that the officer lacked reasonable suspicion to temporarily detain the defendant.[11] The court of appeal relied on *People v. Aldridge*,[12] which held that "detention involving flight was valid only when flight was an additional factor to confirm other evidence of the defendant's involvement in criminal activity."[13] Accordingly, noting the lack of other evidence implicating the defendant in criminal activity, the court of appeal gave little weight to the defendant's flight from the officer.[14]

The California Supreme Court reversed the court of appeal.[15] According to the supreme court, the court of appeal erroneously relied on *Aldridge*, which involved a pre-Proposition 8 detention.[16] The instant case, the court pointed out, involved a post-Proposition 8 detention.[17]

The court explained that Proposition 8 made the United States Constitution the controlling body of law in California search and seizure jurisprudence.[18] Although state constitutional principles controlled prior to its enactment, Proposition 8 now requires California courts to exclude illegally seized evidence only when the United States Constitution requires such exclusion.[19]

---

destrians or motorists on the streets for questioning.'" 4 B.E. WITKIN & NORMAN L. EPSTEIN, CALIFORNIA CRIMINAL LAW, *Exclusion of Illegally Obtained Evidence* § 2366 (2d ed. 1989 & Supp. 1995) (quoting People v. Mickleson, 59 Cal. 2d 448, 450, 380 P.2d 658, 659, 30 Cal. Rptr. 18, 19 (1963)).

10. *Souza*, 9 Cal. 4th at 230, 885 P.2d at 985, 36 Cal. Rptr. 2d at 572 (citing United States v. Cortez, 449 U.S. 411, 417-18 (1981)).

11. *Id.* at 228, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571.

12. 35 Cal. 3d 473, 674 P.2d 240, 198 Cal. Rptr. 538 (1984).

13. *Souza*, 9 Cal. 4th at 229, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571 (citing *Aldridge*, 35 Cal. 3d at 479, 674 P.2d at 242-43, 198 Cal. Rptr. at 541). "'Under different circumstances . . . flight might imply a consciousness of guilt, and combined with other objective factors could justify an investigative stop.'" *Id.* at 231-32, 885 P.2d at 986, 36 Cal. Rptr. 2d at 573 (emphasis omitted) (quoting *Aldridge*, 35 Cal. 3d at 479, 674 P.2d at 243, 198 Cal. Rptr. at 541).

14. *Id.* at 229, 885 P.2d at 984, 36 Cal. Rptr. 2d at 571.

15. *Id.* at 242, 885 P.2d at 993, 36 Cal. Rptr. 2d at 580.

16. *Id.* at 232, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574. The court pointed out that the detention in *Aldridge* occurred before the enactment of Proposition 8, even though the *Aldridge* court issued its decision after the enactment of Proposition 8. *Id.*

17. *Id.* at 232-33, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574.

18. *Id.*

19. *Id.* (citing *In re* Lance W., 37 Cal. 3d 873, 890, 694 P.2d 744, 755, 210 Cal. Rptr. 631, 642 (1985)). "[S]ection 28(d) was intended to permit exclusion of relevant,

Having determined the applicable body of law, the court next addressed the arguments of the Attorney General.[20] The Attorney General argued that: (1) a person's flight from police should be relevant to determining reasonable suspicion, even though the person may have an innocent explanation for the flight,[21] and (2) a person's flight at the sight of police should, by itself, provide sufficient basis for reasonable suspicion.[22] The court accepted the Attorney General's first argument, but rejected the second.[23]

1. Flight from Police Is Relevant in Determining Reasonable Suspicion

The court stated that there are instances when a person's conduct is consistent with both innocent and criminal behavior.[24] It is the duty of police, according to the court, to investigate such conduct in order to "establish whether the activity is in fact legal or illegal."[25] Since police

---

but unlawfully obtained evidence, only if exclusion is required by the United States Constitution . . . ." *Id.* "Section 28(d)" refers to Article I, Section 28(d) of the California Constitution, which constitutes the Proposition 8 amendment. *See* CAL. CONST. art. I, § 28(d) ("[R]elevant evidence shall not be excluded in any criminal proceeding . . . ."); *Lance W.*, 37 Cal. 3d at 891, 694 P.2d at 755, 210 Cal. Rptr. at 642 ("[S]ection 28(d) was properly adopted through the amendment procedure . . . ."). *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 410 (9th ed. 1988 & Supp. 1995). "Proposition 8 abolished the independent grounds basis for exclusion of evidence, leaving the [F]ederal Constitution as interpreted by controlling federal decisions as the sole basis for exclusion." *Id.* (citation omitted).

20. *Souza*, 9 Cal. 4th at 233-39, 885 P.2d at 987-91, 36 Cal. Rptr. 2d at 574-78.

21. *Id.* at 233, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574. The Attorney General wanted the court "to adopt a 'bright-line' rule" that authorizes police to temporarily detain a person whenever the person flees at the sight of police or police vehicles. *Id.* at 235, 885 P.2d at 988, 36 Cal. Rptr. 2d at 575.

22. *Id.*

23. *Id.* at 233-39, 885 P.2d at 987-91, 36 Cal. Rptr. 2d at 574-78.

24. *Id.* at 233, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574 (citing *In re* Tony C., 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978), *correction notice at* 697 P.2d 311, 212 Cal. Rptr. 570 (1985). The court in *In re* Tony C. noted that "'where events are as consistent with innocent activity as with criminal activity,'" a detention will not be automatically unlawful. *In re* Tony C., 21 Cal. 3d at 893-94, 582 P.2d at 959-60, 148 Cal. Rptr. at 368-69 (overruling as dictum Irwin v. Superior Court, 1 Cal. 3d 423, 427, 462 P.2d 12, 14, 82 Cal. Rptr. 484, 486 (1969)), *superseded by constitutional amendment as stated in In re* Christopher B., 219 Cal. App. 3d 455, 460 n.2, 268 Cal. Rptr. 8, 11 n.2 (1990).

25. *Souza*, 9 Cal. 4th at 233, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574 (quoting *In re* Tony C., 21 Cal. 3d at 894, 582 P.2d at 960, 148 Cal. Rptr. at 369). *See generally* 42 CAL. JUR. 3D *Law Enforcement Officers* § 55 (1978 & Supp. 1995) ("Peace officers generally are charged with the duty of prevention and detection of crime. They are thus required to investigate . . . any suspicious circumstances, such as would indicate to a reasonable man in like position that such a course is necessary in the discharge

cannot effectively investigate a person's conduct without temporarily detaining the person, the court ruled that conduct that is consistent with both innocent and criminal behavior may support a determination of reasonable suspicion.[26]

Accordingly, the court held that a person's flight from police supports a determination of reasonable suspicion.[27] The court reasoned that flight is equally consistent with innocent behavior as it is with criminal behavior because every person is "free to avoid contact with a police officer."[28] Thus, police should be able to temporarily detain the person, in order to investigate and determine whether the person's flight is innocent or criminal.[29]

At the same time, the court ruled that the "manner in which a person avoids police contact" is relevant to determining reasonable suspicion.[30] According to the court, a person's flight at the sight of police is a stronger factor than a person's refusal to answer a police officer's questions.[31] The court reasoned that the former manifests a person's "unwillingness to be observed and possibly identified" and thus, indicates a "consciousness of guilt."[32]

---

of the officer's duty.").

26. *Souza*, 9 Cal. 4th 233, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574. "'The possibility of an innocent explanation does not deprive the officer of the capacity to entertain a reasonable suspicion of criminal conduct.'" *Id.* (quoting *In re* Tony C., 21 Cal. 3d at 894, 582 P.2d at 960, 148 Cal. Rptr. at 369)

27. *Id.* at 235, 885 P.2d at 988, 36 Cal. Rptr. 2d at 575.

28. *Id.* at 234, 885 P.2d at 988, 36 Cal. Rptr. 2d at 575 (citing People v. Bower, 24 Cal. 3d 638, 648, 597 P.2d 115, 121, 156 Cal. Rptr. 856, 862 (1979), *superseded by constitutional amendment as stated in* People v. Lloyd, 4 Cal. App. 4th 724, 733, 6 Cal. Rptr. 2d 105, 109 (1992)). "[A] person approached by police . . . 'need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way.'" *Id.* (quoting Florida v. Royer, 460 U.S. 491, 497-98 (1983)); *see Bower*, 24 Cal. 3d at 648, 597 P.2d at 121, 156 Cal. Rptr. at 862 ("In our society, private individuals are free to conduct their own lives, seeking to mingle with or to avoid whomever they please . . . . Lacking . . . [adequate] basis, an officer may not detain an individual, and the individual . . . is as free to avoid the officer as to avoid any other person."); *see also* Rachel A. Van Cleave, Note, Michigan v. Chesternut *and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L.J. 203, 228 (1988) ("In order to make a citizen's right to ignore officials meaningful, a seizure based solely on a citizen's attempt to avoid an officer should not be permitted.").

29. *Souza*, 9 Cal. 4th at 235, 885 P.2d at 988, 36 Cal. Rptr. 2d at 575.

30. *Id.* at 234-35, 885 P.2d at 988, 36 Cal. Rptr. 2d at 575.

31. *Id.*

32. *Id.*

2. A Person's Flight at the Sight of Police Cannot, by Itself, Provide Sufficient Basis for Reasonable Suspicion

Although the court found that a person's flight at the sight of police supports a finding of reasonable suspicion, the court rejected the Attorney General's argument that flight by itself provides sufficient basis for reasonable suspicion.[33] The court reasoned that the Attorney General's argument contradicts the United States Supreme Court's mandate that police should consider the totality of the circumstances, not just one factor, in determining whether reasonable suspicion exists.[34]

In support of his argument, the Attorney General cited several authorities that allow courts and juries to infer guilt from a person's flight from police.[35] The court pointed out, however, that these authorities address situations where flight is not the only evidence of criminality.[36] Thus, the court stated that it did not support the Attorney General's argument.[37]

---

33. *Id.* at 235, 885 P.2d at 988-89, 36 Cal. Rptr. 2d at 575-76. *See generally* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227 (1994) (arguing against the adoption of categorical rules applicable to all Fourth Amendment situations because such rules "often lead to substantial injustice" and because "their artificiality commonly makes them difficult to apply").

34. *Souza*, 9 Cal. 4th at 235, 885 P.2d at 988-89, 36 Cal. Rptr. 2d at 575-76 (citing United States v. Cortez, 449 U.S. 411, 417 (1981). "[T]he totality of the circumstances—the whole picture—must be taken into account." *Id.* (citing *Cortez*, 449 U.S. at 417).

35. *Id.* at 235, 885 P.2d at 989, 36 Cal. Rptr. 2d at 576. The Attorney General cited four authorities: (1) Section 1127(c) of the California Penal Code, (2) the California Jury Instructions, (3) *Alberty v. United States*, and (4) *Allen v. United States*. *Id.*; *see* CAL. PENAL CODE § 1127(c) (West 1992 & Supp 1995) ("The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed . . . is a fact . . . the jury may consider in deciding his guilt or innocence."); CALIFORNIA JURY INSTRUCTIONS: CRIMINAL (CALJIC) No. 2.52 (5th ed. 1988) (same); Alberty v. United States, 162 U.S. 499, 510 (1896) ("[U]ndoubtedly, the flight of an accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt . . . ."); Allen v. United States, 164 U.S. 492, 499 (1896) ("'[T]he wicked flee when no man pursueth, but the innocent are as bold as a lion.'" (quoting Hickory v. United States, 160 U.S. 408, 422 (1896))); *see also* 20 CAL. JUR. 3D *Criminal Law* § 3159 (1985 & Supp. 1995) ("The flight of the accused after the commission of a crime . . . is a factor tending to connect the accused with the commission of the offense and to show consciousness of guilt.").

36. *Souza*, 9 Cal. 4th at 235-36, 885 P.2d at 989, 36 Cal. Rptr. 2d at 576. Referring to such situations as "flight plus," the court pointed out that these cases involve a defendant who flees "from a crime scene or after being accused of a crime." *Id.*

37. The Attorney General cited seven additional cases from other jurisdictions to support his argument. *Id.* at 236, 885 P.2d at 989, 36 Cal. Rptr. 2d at 576. The court stated that there were "other indicia of criminal activity" aside from the flight in five of the seven cases. *Id.* Further, the court found the other two cases unpersuasive, even though both held that flight by itself provides sufficient basis for reasonable suspicion. *Id.* at 236-37, 885 P.2d at 989-90, 36 Cal. Rptr. 2d at 576-77 (rejecting Platt

In short, the court reaffirmed the totality of the circumstances approach to determining reasonable suspicion.[38] The court stated that police must consider all existing factors, including "[t]ime, locality, lighting conditions, and an area's reputation for criminal activity," when they determine whether reasonable suspicion exists to temporarily detain someone.[39]

Applying these principles to the instant case, the court held that the police officer had reasonable suspicion to temporarily detain the defendant.[40] The court reasoned that the totality of the circumstances, including the defendant's flight, could lead a police officer to reasonably suspect that the defendant was involved in criminal activity.[41] Specifically, the court pointed to the area's reputation for criminal activity,[42] the two people standing near a parked car in total darkness at three in the morning,[43] the two people in the car immediately bending down when the police officer shined the spotlight, and the defendant's flight from the police officer.[44]

---

v. State, 589 N.E.2d 222 (Ind. 1992), and State v. Anderson, 454 N.W.2d 763 (Wis. 1990)).

38. *Id.* at 239, 885 P.2d at 991, 36 Cal. Rptr. 2d at 578. The court noted that the United States Supreme Court recently refused to deviate from its totality of the circumstances approach to seizure cases. *Id.* at 238-39, 885 P.2d at 990-91, 36 Cal. Rptr. 2d at 577-78 (citing United States v. Sokolow, 490 U.S. 1, 7-8 (1989), and Michigan v. Chesternut, 486 U.S. 567, 572 (1988)).

39. *Id.* at 239, 885 P.2d at 991, 36 Cal. Rptr. 2d at 578. The court asserted that there is "no single fact," not even a person's flight from police, that indicates in every instance that a person is involved in criminal activity. *Id.*

40. *Id.* at 240, 885 P.2d at 993, 36 Cal. Rptr. 2d at 579.

41. *Id.* The court stated that the evidence should be viewed from the practical standpoint of a police officer, not from the academic standpoint of scholars. *Id.* at 240, 885 P.2d at 992, 36 Cal. Rptr. 2d at 579 (involving use of footprints to justify detention).

42. *Id.* at 240-41, 885 P.2d at 992, 36 Cal. Rptr. 2d at 579. The court noted that a locale's reputation for unlawful activity is a relevant factor in determining reasonable suspicion. *Id.* (citing People v. Nonnette, 221 Cal. App. 3d 659, 668, 271 Cal. Rptr. 329, 334 (1990)).

43. *Id.* at 241, 885 P.2d at 992-93, 36 Cal. Rptr. 2d at 579-80. "'Three a.m . . . . is both a late and an unusual hour for anyone to be in attendance at an outdoor social gathering . . . .'" *Id.* (quoting People v. Holloway, 176 Cal. App. 3d 150, 155, 221 Cal. Rptr. 394, 396 (1986)). The court also noted that "more than 70 percent of thefts involving motor vehicles take place between 6 p.m. and 6 a.m., and the majority of these occur after midnight." *Id.* at 241, 885 P.2d at 993, 36 Cal. Rptr. 2d at 580 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS-1991 263 (1991)).

44. *Id.* at 241, 885 P.2d at 993, 36 Cal. Rptr. 2d at 580. The court noted that the

B. *Justice Mosk's Concurring Opinion*

Justice Mosk agreed with the majority's disposition of the case but disagreed on one issue.[45] Justice Mosk argued that a person's flight at the sight of police should not, as the majority contended, be more suspicious than a person's refusal to answer a police officer's questions.[46]

Justice Mosk reasoned that a person may avoid the police for innocent reasons, just as the majority pointed out.[47] According to Justice Mosk, the manner in which a person avoids the police is immaterial because a person will likely run, instead of walk, away from "police [who] are known to pursue those who decline to allow themselves to be voluntarily detained."[48]

Similarly, Justice Mosk stated that minorities who have been victims of police harassment might innocently "flee at the first sight of police in order to avoid an encounter that their experience has taught them might be troublesome."[49] Therefore, Justice Mosk asserted that flight at the sight of police is just another factor, no stronger than other factors, that police should consider when determining reasonable suspicion.[50]

Supreme Judicial Court of Massachusetts recently upheld an investigatory stop based on similar facts. *Id.* at 241-42, 885 P.2d at 993, 36 Cal. Rptr. 2d at 580 (citing Commonwealth v. Moses, 557 N.E.2d 14, 16-17 (Mass. 1990)). In *Moses*, a police officer was patrolling a high crime area when he "saw four . . . men standing near an automobile parked next to the sidewalk with its motor running." *Moses*, 557 N.E.2d at 15, 17. The men seemed to be interacting with the three men in the automobile. *Id.* at 17. Upon seeing the police officer, the four men quickly dispersed, and one of the men sitting in the car "immediately ducked under the dashboard." *Id.*

45. *Souza*, 9 Cal. 4th at 242, 885 P.2d at 993, 36 Cal. Rptr. 2d at 580 (Mosk, J., concurring).

46. *Id.* (Mosk, J., concurring).

47. *Id.* at 243, 885 P.2d at 993-94, 36 Cal. Rptr. 2d at 580-81 (Mosk, J., concurring).

48. *Id.* at 243, 885 P.2d at 994, 36 Cal. Rptr. 2d at 581 (Mosk, J., concurring); *see, e.g.*, People v. Aldridge, 35 Cal. 3d 473, 476, 674 P.2d 240, 241, 198 Cal. Rptr. 538, 539 (1984) (involving a police officer who routinely detained every person at the parking lot of a certain liquor store). The *Aldridge* court stated that the defendant "knew what was in store for him if he were to remain," and thus "had every right to avoid such persistent harassment." *Aldridge*, 35 Cal. 3d at 479, 674 P.2d at 243, 198 Cal. Rptr. at 541.

49. *Souza*, 9 Cal. 4th at 243, 885 P.2d at 993-94, 36 Cal. Rptr. 2d at 580-81 (Mosk, J., concurring). Justice Mosk noted that these people wrongly view the police "more as sources of harassment than of protection." *Id.* at 243, 885 P.2d at 994, 36 Cal. Rptr. 2d at 581 (Mosk, J., concurring).

50. *Id.* at 242-44, 885 P.2d at 993-94, 36 Cal. Rptr. 2d at 580-81 (Mosk, J., concurring).

IV. IMPACT & CONCLUSION

Prior to June 1982, the California Constitution was the controlling body of law in California search and seizure cases.[51] To justify a temporary detention under the California Constitution, the California Supreme Court had held that there must be "specific and articulable facts causing [a police officer] to suspect that (1) some activity relating to crime has taken place or is occurring or about to occur, and (2) the person he intends to stop or detain is involved in that activity."[52]

In June 1982, however, the enactment of Proposition 8 made the United States Constitution the controlling body of law in California search and seizure cases.[53] Consequently, United States Supreme Court search and seizure cases also became controlling. Thus, *United States v. Cortez* became the controlling authority in California.[54] In *Cortez*, the United States Supreme Court held that a police officer must consider the totality of the circumstances in determining whether reasonable suspicion exists to justify a temporary detention.[55]

Accordingly, the California Supreme Court in *People v. Souza* applied the totality of the circumstances test and held that a person's flight at the sight of police cannot, by itself, justify a temporary detention.[56] Instead, flight is merely one circumstance that may support a finding of reasonable suspicion.[57]

The California Supreme Court's decision in *Souza* impacts law enforcement practices throughout the state. The decision prohibits police from temporarily detaining a person merely because the person ran away upon seeing the police.[58] Instead, police can constitutionally detain the person

---

51. *See id.* at 232-33, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574.

52. *In re* Tony C., 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978); *see also Aldridge*, 35 Cal. 3d at 478, 674 P.2d at 242, 198 Cal. Rptr. at 540 (applying two-part test of *In re Tony C.*, and holding that the factors of nighttime, a site of frequent drug transactions, and avoidance of police "[w]hether considered separately or together, . . . do not justify [a] . . . detention.").

53. *Souza*, 9 Cal. 4th at 232, 885 P.2d at 987, 36 Cal. Rptr. 2d at 574; *see supra* note 19 and accompanying text.

54. 449 U.S. 411 (1981).

55. *Id.* at 417.

56. *Souza*, 9 Cal. 4th at 227, 885 P.2d at 983, 36 Cal. Rptr. 2d at 570.

57. *Id.*

58. *See id.* at 227, 885 P.2d at 983, 36 Cal. Rptr. 2d at 570.

only when there are other indicators of criminal activity aside from the flight.[59]

The California Supreme Court's decision in *Souza* also impacts the state's criminal courts. In handling temporary detention cases, the courts must determine whether all existing factors, including a person's flight from police, taken together would lead a police officer to reasonably suspect that the person was involved in criminal activity.[60] The courts must find unconstitutional any temporary detentions that are based solely on a person's flight from police.[61]

As a whole, the California Supreme Court's decision in *Souza* strikes a balance between every police officer's duty to investigate potential crime, and every person's right to be free from unreasonable seizures.[62]

ROBERT E. SABIDO

59. *See id.* at 239, 885 P.2d at 991, 36 Cal. Rptr. 2d at 578.

60. *See id.* at 240, 885 P.2d at 992, 36 Cal. Rptr. 2d at 580.

61. *See id.* at 227, 885 P.2d at 983, 36 Cal. Rptr. 2d at 570.

62. *See* Van Cleave, *supra* note 28, at 228 (arguing that the courts would not hamper police efforts to investigate if they required police to have "factors other than flight or avoidance at sight" to temporarily detain a person).

II. INITIATIVE AND REFERENDUM

The voter initiative power is broader than the referendum power and includes the ability to prospectively repeal a tax ordinance: **Rossi v. Brown.**

I. INTRODUCTION

In *Rossi v. Brown*,[1] the California Supreme Court first considered whether the voter initiative power can be used to accomplish an objective which is expressly excluded from the referendum power. In a four to three decision, the court reversed the appellate court's ruling[2] and held that, because neither the San Francisco Charter nor the California Constitution removes tax issues from initiative reach, and because the impacts of the initiative and referendum powers are dissimilar, the initiative power exceeds the referendum power and is a legitimate avenue by which voters may prospectively repeal a tax ordinance.[3]

---

1. 9 Cal. 4th 688, 889 P.2d 557, 38 Cal. Rptr. 2d 363 (1995). Justice Baxter drafted the majority opinion in which Justices Kennard, Arabian and Werdegar concurred. *Id.* at 693-716, 889 P.2d at 559-74, 38 Cal. Rptr. 2d at 365-80. Justice Mosk wrote the dissenting opinion, joined by Chief Justice Lucas and Justice George. *Id.* at 716-37, 889 P.2d at 574-88, 38 Cal. Rptr. 2d at 380-94 (Mosk, J., dissenting).

2. In a unanimous decision, the court of appeal equated the initiative power with the referendum power, which both the California Constitution and the San Francisco City Charter expressly restrict from addressing any tax issue. Rossi v. Brown, 28 Cal. App. 4th 1576, 22 Cal. Rptr. 2d 384 (1993).

3. *Rossi*, 9 Cal. 4th at 693, 889 P.2d at 559, 38 Cal. Rptr. 2d at 365. This appeal arose over the 1982 enactment of an ordinance exempting residential utility consumers from a San Francisco utility tax on water, steam, telephone, electricity and gas. *Id.* The ordinance also contained a provision to reimpose the tax in the future, unless the San Francisco Board of Supervisors again voted to exempt residential users. *Id.* at 693-94, 889 P.2d at 559, 38 Cal. Rptr. 2d at 365. When the Board failed to do so, an initiative to repeal the tax on residential customers found its way to the ballot and was adopted in November of 1987, effectively repealing the residential tax after June of 1988. *Id.* Two taxpayers, Leo Rossi and Guiliano Darbe, sought to compel the collection of the utility tax from residential users. *Id.* at 694, 889 P.2d at 560, 38 Cal. Rptr. 2d at 366. The trial court granted relief and the tax collector appealed. The appellate court affirmed the trial court's ruling and the California Supreme Court granted review. *Id.*

II. TREATMENT

A. *Justice Baxter's Majority Opinion*

1. The Scope of the Initiative and Referendum Powers

After a detailed account of the relevant facts,[4] Justice Baxter examined the characteristics and breadth of the California initiative and referendum powers.[5] He first noted that they are powers reserved by the electorate and must be ardently protected by the courts such that any doubts surrounding these powers must be resolved in favor of their use.[6] He then set forth the basics of the constitutional initiative power,[7] and found nothing that expressly precluded the use of initiatives to repeal taxes.[8] Next, Justice Baxter considered the effect of the city charter of San Francisco, which reserves an expansive initiative power for the electorate.[9] He determined that the plain language of the constitution and the charter initiative provisions supported the majority's contention that the power may be used to repeal the utility tax ordinance.[10]

Next, Justice Baxter assessed the referendum power under the California Constitution and the San Francisco Charter and found express limitations restricting referenda use with respect to taxation issues.[11]

---

4. *See supra* note 3.

5. *Rossi*, 9 Cal. 4th at 695-97, 889 P.2d at 560-62, 38 Cal. Rptr. 2d at 366-68. For a comparison of the referendum and initiative powers, see David B. Magleby, *Let the Voters Decide? An Assessment of the Initiative and Referendum Process*, 66 U. COLO. L. REV. 13 (1995).

6. *Rossi*, 9 Cal. 4th at 695, 889 P.2d at 560, 38 Cal. Rptr. 2d at 366. *See* Stephen H. Sutro, *Interpretation of Initiatives by Reference to Similar Statutes: Canons of Construction Do Not Adequately Measure Voter Intent*, 34 SANTA CLARA L. REV. 945, 946 (1994) ("[C]ourts do their best to 'jealously guard' the public's right to the initiative by interpreting initiatives to be consistent with the public's desires.").

7. *Rossi*, 9 Cal. 4th at 695-96, 889 P.2d at 560-61, 38 Cal. Rptr. 2d at 366-67. *See* CAL. CONST. art. II, § 8 (defining the scope of the initiative power); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 121 (9th ed. 1988 & Supp. 1994) (examining the scope of California's initiative power).

8. *Rossi*, 9 Cal. 4th at 696, 889 P.2d at 561, 38 Cal. Rptr. 2d at 367.

9. *Id.* at 696-97, 889 P.2d at 561-62, 38 Cal. Rptr. 2d at 367-68. Section 9.108(a) reserves this broad power and basically allows for "any ordinance . . . which is within the power conferred upon the board of supervisors to enact, or any legislative act which is within the power conferred upon any other board, commission or officer to adopt, or any amendment to the charter." SAN FRANCISCO CHARTER § 9.108(a).

10. *Rossi*, 9 Cal. 4th at 697, 889 P.2d at 562, 38 Cal. Rptr. 2d at 368. This use of "plain language" to interpret the meaning of the constitutional and charter provisions stems from the principle that "when the language of a statute is clear, 'its plain meaning should be followed.'" *Id.* at 716, 889 P.2d at 674, 38 Cal. Rptr. 2d at 380 (Mosk, J., dissenting) (citations omitted). *See infra* note 32 and accompanying text.

11. *Rossi*, 9 Cal. 4th at 697-99, 889 P.2d at 562, 38 Cal. Rptr. 2d at 368. The constitutional referendum power grants "the power of the electors to approve or reject

However, he determined that the history behind the initiative power suggests that these limitations do not extend to the use of initiatives to decide tax-related issues.[12] In order to clearly establish the divergence between the initiative and referendum powers, Justice Baxter analyzed the impact of each on the political system. A referendum, he explained, generally takes time to process.[13] If taxes and other matters of special urgency were decided by referendum, the county's ability to spend money would be delayed and its ability to provide for its residents impaired.[14] The initiative has no such instantaneous impact.[15] The initiative process is significantly longer than the referendum process;[16] thus,

---

statutes or parts of statutes *except* urgency statues, statutes calling elections, *and statutes providing for tax levies* or appropriations for usual current expenses of the State." CAL. CONST. art II, § 9(a) (emphasis added). *See generally* 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 122 (9th ed. 1988 & Supp. 1994) (explaining the referendum power); 38 CAL. JUR. 3D *Initiative and Referendum* §§ 56-63 (1977 & Supp. 1995) (same); 7 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 123-125 (9th ed. 1988 & Supp. 1994) (exceptions to initiative and referendum powers). The charter also provides that "ordinances levying taxes, . . . shall not be subject to referendum." SAN FRANCISCO CHARTER § 9.108.

12. *Rossi*, 9 Cal. 4th at 699-702, 889 P.2d at 563-65, 38 Cal. Rptr. 2d at 369-71. Justice Baxter determined that the history of the initiative power supports the fact that the power was intended to extend to taxation issues. *Id.* at 699, 889 P.2d at 563, 38 Cal. Rptr. 2d at 369. Since the adoption of the initiative provision by constitutional amendment in 1911, many frustrated attempts have been made to amend it to prevent its application to taxation issues. *Id.* at 699-702, 889 P.2d at 563-65, 38 Cal. Rptr. 2d at 369-71. Justice Baxter also provided an expansive list of cases from 1911 to the present which allowed taxation initiatives. *Id.* at 702 n.8, 889 P.2d at 565 n.8, 38 Cal. Rptr. 2d at 371 n.8. The validity of the use of the initiative power to repeal a tax was most recently confirmed in Carlson v. Cory, 139 Cal. App. 3d 724, 189 Cal. Rptr. 185 (1983). *Rossi*, 9 Cal. 4th at 704, 889 P.2d at 566, 38 Cal. Rptr. 2d at 372. *See generally* K.K. DuVivier, *By Going Wrong all Things Come Right: Using Alternate Initiatives to Improve Citizen Lawmaking*, 63 U. CIN. L. REV. 1185 (outlining the history of the voter initiative).

13. *Rossi*, 9 Cal. 4th at 703, 889 P.2d at 565, 38 Cal. Rptr. 2d at 371. This delay results from the referendum process which often requires suspension, "pending reconsideration and repeal of the ordinance by the board of supervisors or submission of the measure to the voters at a regular or special election." *Id.*

14. *Id. See* Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Election of 1986*, 61 S. CAL. L. REV. 2007, 2030-31 (1988) (explaining California's "urgency statutes").

15. *Rossi*, 9 Cal. 4th at 703-04, 889 P.2d at 566, 38 Cal. Rptr. 2d at 372.

16. *Id.*; *see* 38 CAL. JUR. 3D, *Initiative and Referendum* §§ 45-51 (1994) (describing the stages of the initiative process).

local officials are duly forewarned and the county's budgetary efforts are not upset.[17]

However, Justice Baxter noted that a tax repeal initiative may be an invalid use of the power; the functional equivalent of a referendum eliminating a major revenue source and leaving no available, alternate revenue source.[18] He concluded that the utility tax repeal initiative was a valid use of the initiative power since the initiative did not take immediate effect or siphon an existing revenue source.[19]

2. Mistakenly Applied Authority

Justice Baxter then addressed the court of appeal's conclusion that neither referenda nor initiatives can be used to affect taxation.[20] His opinion was based on two lines of cases, *Myers v. City Council of Pismo Beach*[21] and *Carlson v. Cory*,[22] and their progeny.[23] The *Myers* rule, he explained, has never been confirmed by the California Supreme Court and "was merely dictum" in the *Myers* cases.[24] Further, the *Myers* cases dealt with situations that were not analogous to the instant case;[25] therefore, the *Myers* rule cannot be used as sound authority.[26] Justice Baxter was also unable to regard the *Carlson* cases as applicable authority, "since none [of the cases] involved an initiative repeal of a tax ordinance that is prospective only."[27] Thus, because the appellate court mistakenly relied on improper authority, its decision was incorrect and fur-

---

17. *Rossi*, 9 Cal. 4th at 703-04, 889 P.2d at 566, 38 Cal. Rptr. 2d at 372.

18. *Id.* at 710, 889 P.2d at 570, 38 Cal. Rptr. 2d at 376 (citing Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 550 P.2d 1001, 130 Cal. Rptr. 465 (1976)).

19. *Rossi*, 9 Cal. 4th at 710, 889 P.2d at 570-71, 38 Cal. Rptr. 2d at 376-77.

20. *Id.* at 705, 889 P.2d at 567, 38 Cal. Rptr. 2d at 373.

21. 241 Cal. App. 2d 237, 50 Cal. Rptr. 402 (1966).

22. 139 Cal. App. 3d 724, 189 Cal. Rptr. 185 (1983).

23. *Rossi*, 9 Cal. 4th at 705-11, 809 P.2d at 567-71, Cal. Rptr. 2d at 373-77.

24. *Id.* at 706, 889 P.2d at 567, 38 Cal. Rptr. 2d at 373.

25. *Id.* at 707, 889 P.2d at 568, 38 Cal. Rptr. 2d at 374. The *Myers* decision was "limited to a general law city" where the taxing power was completely vested in the legislature and the initiative power could not exceed the constitutional limits. *Id.* Later decisions extended *Myers* to charter cities but "fail[ed] to acknowledge that the immediate impact on current revenues is absent." *Id.* In Campen v. Greiner, 15 Cal. App. 3d 836, 93 Cal. Rptr. 525 (1971), a case that used *Myers* as support, the court refused to validate an initiative which created an immediate impact on city finances. *Rossi*, 9 Cal. 4th at 707, 889 P.2d at 568, 38 Cal. Rptr. 2d at 374. In Gibbs v. City of Napa, 59 Cal. App. 3d 148, 130 Cal. Rptr. 382 (1976), another case in the *Myers* line, the court disallowed an initiative which "sought to intrude into" an administrative function. *Rossi*, 9 Cal. 4th at 708-09, 889 P.2d at 569, 38 Cal. Rptr. 2d at 375.

26. *Rossi*, 9 Cal. 4th at 709, 889 P.2d at 570, 38 Cal. Rptr. 2d at 376.

27. *Id. see, e.g.*, City of Atascadero v. Daly, 135 Cal. App. 3d 466, 185 Cal. Rptr. 228 (1982); Community Health Ass'n v. Board of Supervisors, 146 Cal. App. 3d 990, 194 Cal. Rptr. 557 (1983).

ther precluded the "obligation to jealously guard the people's reserved right of initiative."[28]

3. Amendment by the Electorate

In the final part of the opinion, Justice Baxter considered the effect of this decision on future tax ordinances. The initiative in question not only repealed the utility tax on residential users, it also specifically granted its amendment power to the electorate.[29] As the California Constitution and the San Francisco Charter both allow for this stipulation,[30] this initiative can only be amended by the voters and future tax initiatives may legitimately incorporate the same condition.[31]

B. Justice Mosk's Dissenting Opinion

1. Legislative Intent Predominates a "Plain Meaning" Interpretation

Justice Mosk began his attack of the majority opinion with a stab at Justice Baxter's use of the plain language rule of interpretation to find that the initiative power can reach taxation issues.[32] While recognizing that the plain meaning of the text is important, he explained that its function is to aid in understanding "the intent of the lawmakers."[33] This supports the well-established principle that the legislative intent behind

---

28. *Rossi*, 9 Cal. 4th at 710-11, 889 P.2d at 571, 38 Cal. Rptr. 2d at 377. *See* Cynthia L. Fountaine, *Lousy Lawmaking: Questioning the Desirability and Constitutionality of Legislating by Initiative*, 61 S. CAL. L. REV. 733, 750 (1988) ("[I]t is extremely difficult to successfully challenge a referendum or initiative that is facially neutral . . . ."); *see also* Sutro, *supra* note 6, at 946. *But see* Elizabeth M. Stein, Note, *The California Constitution and the Counter-Initiative Quagmire*, 21 HASTINGS CONST. L.Q. 143, 162-63 (1993) (courts are increasingly willing to invalidate initiatives).

29. *Rossi*, 9 Cal. 4th at 714-15, 889 P.2d at 573, 38 Cal. Rptr. 2d at 379-80.

30. *Id.* at 714-16, 889 P.2d at 573-74, 38 Cal. Rptr. 2d at 379. "The Legislature . . . may amend or repeal an initiative statute by another statute that becomes effective only when approved by the electors unless the initiative statute permits amendment or repeal without their approval." CAL. CONST. art II, § 10(c).

31. *Rossi*, 9 Cal. 4th at 715, 889 P.2d at 573, 38 Cal. Rptr. 2d at 379. "[T]hrough exercise of the initiative power, the people may bind future legislative bodies other than the people themselves." *Id.* at 715-16, 889 P.2d at 574, 38 Cal. Rptr. 2d at 380 (emphasis omitted).

32. *Id.* at 716-17, 889 P.2d at 574-75, 38 Cal. Rptr. 2d at 380-81 (Mosk, J., dissenting). *See supra* note 11 and accompanying text.

33. *Rossi*, 9 Cal. 4th at 716, 889 P.2d at 574, 38 Cal. Rptr. 2d at 380 (Mosk, J., dissenting).

the provision "prevails over the letter."[34] Thus, the court's main job in interpreting the initiative provisions of the constitution and city charter is to determine the framers' intent.[35]

The dissent also stated that the majority erred in considering only the express limitations restricting the initiative power.[36] Justice Mosk identified several scenarios which create implied exceptions to the initiative power where legislative intent to do so exists.[37] He reasoned that there is nothing prohibiting a reading of the constitutional and charter provisions to contain a similar implied exception for taxation issues.[38]

2. Harmonize, Don't Isolate

Justice Mosk claimed that another factor in the majority's mistaken evaluation of the initiative power was their evaluation of the constitutional and charter provisions completely in isolation, without consideration of other corresponding provisions, particularly the referendum power.[39] Justice Mosk found this analysis to be in direct controversy with the well-settled tenet that statutes are not to be interpreted alone, rather they must be harmonized with "all related provisions if it is reasonably possible to do so without distorting their apparent meaning."[40] The initiative and referendum powers are "inextricably linked" in both the constitution and the city charter and thus, must be interpreted as a unit.[41]

---

34. *Id.* at 717, 889 P.2d at 575, 38 Cal. Rptr. 2d at 381 (Mosk, J., dissenting).

35. *Id.* at 718, 889 P.2d at 575, 38 Cal. Rptr. 2d at 381 (Mosk, J., dissenting). *See* Sutro, *supra* note 6, at 956-57 (analysis of lawmaker intent, as determined by the construction of similar statutes, is the basis for California initiative interpretation).

36. *Rossi*, 9 Cal. 4th at 718-19, 889 P.2d at 576, 38 Cal. Rptr. at 382 (Mosk, J., dissenting).

37. *Id.* (Mosk, J., dissenting). Among these implied exceptions are: (1) forcing the legislature to adopt resolutions, (2) directing of the Legislature's inside procedures, (3) exercising power over "matters of statewide concern . . . delegated to a local legislative body," (4) local legislature's administrative duties, (5) Revising the constitution, or (6) "implementing" a second redistricting in the same decade." *Id.* at 719, 889 P.2d at 576, 38 Cal. Rptr. 2d at 382 (Mosk, J., dissenting).

38. *Id.* (Mosk, J., dissenting).

39. *Id.* at 719-20, 889 P.2d at 576-77, 38 Cal. Rptr. 2d at 382-83 (Mosk, J., dissenting).

40. *Id.* at 720, 889 P.2d at 577, 38 Cal. Rptr. 2d at 383 (Mosk, J., dissenting) (quoting Harbor v. Deukmejian, 43 Cal. 3d 1078, 1093, 742 P.2d 1290, 1298, 240 Cal. Rptr. 569, 577 (1987)).

41. *Id.* at 720, 889 P.2d at 577, 38 Cal. Rptr. 2d at 383 (Mosk, J., dissenting). The provisions were written into both documents in conjunction with one another. *Id.* (Mosk, J., dissenting).

3. Functional Equivalent of a Referendum

Justice Mosk then noted that in both documents, the framers gave great latitude to the initiative power and heavily burdened the referendum power.[42] Although such a construction is generally not problematic, a problem arises when voters use the initiative power to do something that the referendum power restrictions prevent.[43] Thus, they violate another well-chronicled principle by doing "indirectly what the Constitution prohibits doing directly."[44] Here, it was clear to Justice Mosk that the voters had an objective (decrease residential taxes) which could not be accomplished by referendum. Therefore, they used the initiative forum to reach the same ends.[45] As a result, Justice Mosk decided that the initiative was "the functional equivalent of a referendum,"[46] and to condone such a circumvention would undermine "important constitutional limitations."[47]

Justice Mosk then considered the majority's contention that initiatives which prospectively repeal taxes are not functionally equivalent to referenda because they have no immediate impact on municipal fiscal efforts.[48] He found no authority for this position and claimed that it is based on uncertain legal grounds and is not supported by the express language of the San Francisco Charter.[49] Further, Justice Mosk renounced this theory as "clash[ing] with fiscal reality"[50] because large cities like San Francisco must plan certain finances far ahead of their

---

42. *Id.* at 721, 889 P.2d at 578, 38 Cal. Rptr. 2d at 384 (Mosk, J., dissenting).

43. *Id.* at 721-22, 889 P.2d at 578, 38 Cal. Rptr. 2d at 384 (Mosk, J., dissenting).

44. *Id.* at 722, 889 P.2d at 578, 38 Cal. Rptr. 2d at 384 (Mosk, J., dissenting).

Justice Mosk reviewed the history of this doctrine, citing 150 years of federal and state case law supporting it. *Id.* at 722-27, 889 P.2d at 578-81, 38 Cal. Rptr. 2d at 384-87 (Mosk, J., dissenting). *See, e.g.*, Frick v. Pennsylvania, 268 U.S. 473 (1925); Fairbank v. United States, 181 U.S. 283 (1901); Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1866); Legislature v. Deukmejian, 34 Cal. 3d 658, 669 P.2d 17, 194 Cal. Rptr. 781 (1983); Perkins Mfg. Co. v. Jordan, 200 Cal. 667, 254 P. 551 (1927); Wood v. Riley, 192 Cal. 293, 219 P. 966 (1923); Dougherty v. Austin, 94 Cal. 601, 29 P. 1092 (1892).

45. *Rossi*, 9 Cal. 4th at 728-29, 889 P.2d at 582-83, 38 Cal. Rptr. 2d at 388-89 (Mosk, J., dissenting).

46. *Id.* at 729, 889 P.2d at 583, 38 Cal. Rptr. 2d at 389 (Mosk, J., dissenting).

47. *Id.* at 729-30, 889 P.2d at 583, 38 Cal. Rptr. 2d at 389 (Mosk, J., dissenting).

48. *Id.* at 730, 889 P.2d at 583, 38 Cal. Rptr. 2d at 389 (Mosk, J., dissenting). *See supra* notes 11-17 and accompanying text.

49. *Rossi*, 9 Cal. 4th at 730-31, 889 P.2d at 583-84, 38 Cal. Rptr. 2d at 389-90 (Mosk, J., dissenting).

50. *Id.* at 731, 889 P.2d at 584, 38 Cal. Rptr. 2d at 390 (Mosk, J., dissenting).

implementation, thus tax initiatives will likely impair municipal budgetary capabilities.[51]

Next, Justice Mosk criticized the majority's position that a tax repeal initiative "is not an invalid functional equivalent of a referendum" unless it "eliminates a major revenue source" and leaves no other available reserve in the event of a fiscal crisis.[52] He found this exemption lacked authority and observed that it created two major problems.[53] First, it forces the courts to make political decisions in contravention of the separation of powers doctrine, and secondly, it leaves governments with indefinite revenue resources, hindering their fiscal planning capacity.[54] Additionally, Justice Mosk determined that the instant case does not meet this burden. The first prong fails because the city officials considered the repeal a major financial setback.[55] Although the majority never fully addressed the second prong, no current comparable funds exist and voters are not likely to approve another tax in its place.[56]

Finally, Justice Mosk addressed the majority's argument that the history of the initiative power supports its application in this case.[57] He found the argument unpersuasive because their offered authority did not address the same scenario,[58] and he avowed that the use of broad politi-

---

51. *Id.* (Mosk, J., dissenting). Certain "obligations, such as the servicing of bonds and the funding of multi-year employee contracts, ongoing social programs, and major civic repair and construction projects" would fall into this category of long term financing needs. *Id.* (Mosk, J., dissenting).

52. *Id.* at 731-32, 889 P.2d at 584-85, 38 Cal. Rptr. 2d at 390-91 (Mosk, J., dissenting). *See supra* notes 18-19 and accompanying text.

53. *Rossi*, 9 Cal. 4th at 732, 889 P.2d at 585, 38 Cal. Rptr. 2d at 391 (Mosk, J., dissenting).

54. *Id.* at 732-33, 889 P.2d at 585, 38 Cal. Rptr. 2d at 391 (Mosk, J., dissenting). Other questions stem from this exception such as "when is a lost revenue source 'major' . . . [or] . . . 'available?'" *Id.* at 733 n.12, 889 P.2d at 585 n.12, 38 Cal. Rptr. 2d at 391 n.12 (Mosk, J., dissenting).

55. *Id.* at 733-34, 889 P.2d at 585-86, 38 Cal. Rptr. 2d at 391-92 (Mosk, J., dissenting). "The City's controller estimated [the initiative would cost] the City . . . a revenue loss of approximately $10 million each year." *Id.* at 733, 889 P.2d at 585, 38 Cal. Rptr. 2d at 391 (Mosk, J., dissenting). Senator Dianne Feinstein explained: "The 10 million from this tax amounts to 143 police officers or 135 firemen or 200 nurses . . . and over half of the public library's entire budget!" *Id.* at 734, 889 P.2d at 586, 38 Cal. Rptr. 2d at 392 (Mosk, J., dissenting) (quoting Ballot Pamphlet, San Francisco City & County, argument against Prop. R (elec. of Nov. 3, 1987) p. 91).

56. *Id.* at 734, 889 P.2d at 586-87, 38 Cal. Rptr. 2d at 392-93 (Mosk, J., dissenting).

57. *Id.* at 735, 889 P.2d at 587, 38 Cal. Rptr. 2d at 393 (Mosk, J., dissenting); *see supra* note 12 and accompanying text.

58. *Rossi*, 9 Cal. 4th at 736, 889 P.2d at 587, 38 Cal. Rptr. 2d at 393 (Mosk, J., dissenting). Justice Mosk also claimed that the historical evidence offered by the majority has little value in finding legislative intent. *Id.* at 736, 889 P.2d at 588, 38 Cal. Rptr. 2d at 394 (Mosk, J., dissenting) (citing Dyna-Med, Inc. v. Fair Employment & Hous. Comm'n, 43 Cal. 3d 1379, 743 P.2d 1323, 241 Cal. Rptr. 67 (1987)).

cal campaign statements carries no weight in defining legislative intent.[59] Justice Mosk briefly concluded by approving of the court of appeal's reliance on *Myers* and subsequent cases,[60] finding them supported by the maxim "that what the Constitution prohibits directly cannot be done indirectly."[61]

III. IMPACT AND CONCLUSION

The voter initiative power is an important tool in representative democracy.[62] It empowers voters and allows them to change laws independent from the agendas of politicians.[63] Although currently there is no national initiative power,[64] about half of the states have given the power to their electorate.[65] Oregon and California have the highest number of ballot initiatives.[66] The California initiative power originated eighty-five years ago and has since covered an expansive range of topics.[67] It has often been "the starting point for national political trends."[68]

Before the California Supreme Court's decision in *Rossi v. Brown*,[69] the scope of the initiative power in areas where referendum use is prevented had not yet been determined.[70] Both the trial and appellate courts regarded the initiative power as the functional equivalent of the referendum power and thus invalid.[71] However, four Justices disagreed[72] with this characterization and approved the use of an initiative

---

59. *Id.* (Mosk, J., dissenting).

60. *Id.* at 736-37, 889 P.2d at 588, 38 Cal. Rptr. 2d at 394 (Mosk, J., dissenting). *See supra* notes 22-26 and accompanying text.

61. *Id.* at 737, 889 P.2d at 588, 38 Cal. Rptr. 2d at 394 (Mosk, J., dissenting). *See supra* notes 44-47 and accompanying text.

62. *See* Magleby, *supra* note 5, at 13-14; *see also* Stein, *supra* note 28, at 148-49.

63. Stein, *supra* note 28, at 149.

64. Magleby, *supra* note 5, at 42 ("The United States is one of only five democracies which has never held a national referendum . . . .").

65. *Id.* at 14-15. "Only six states west of the Mississippi River do not have some form of initiative . . . while only eight states east of the Mississippi have the process." *Id.* at 15.

66. DuVivier, *supra* note 12, at 1189.

67. Stein, *supra* note 28, at 148. "Subjects ranged from women's suffrage to regulation of railroads and utilities to improved oversight of judicial elections." *Id.*

68. *Id.* at 144 ("[N]ational movements have begun at the California polls.").

69. 9 Cal. 4th 688, 889 P.2d 557, 38 Cal. Rptr. 2d 363 (1995).

70. *Id.* at 705, 889 P.2d at 567, 38 Cal. Rptr. 2d at 373. The California Supreme Court noted that this issue "is a question of first impression in this court." *Id.*

71. *Id.* at 694, 889 P.2d at 560, 38 Cal. Rptr. 2d at 366.

72. *See supra* note 1. The sharp division of the court indicates that future cases

to accomplish objectives unattainable by referendum.[73] They further held that the power to amend the initiative could be legitimately limited to the electorate.[74]

The *Rossi* decision goes against the trend toward limiting electorate control of tax measures[75] by making it possible for voters to do by initiative that which is unconstitutional by referendum.[76] As long as the substance of an initiative is not expressly limited by the language of the state constitution or the city charter, it is valid under the *Rossi* ruling.[77]

The *Rossi* decision will have the greatest impact on the San Francisco public who have dodged ten million dollars in taxes annually. Although this ruling is considered "a victory for the people's power to control taxation,"[78] it will likely force a reduction of vital public services.[79] Perhaps the voters will find a way to compensate for the lost funds, and use their nearly limitless initiative power to implement that plan.

JENNIFER A. POPICK

---

addressing this issue may be decided differently if there is a change in the bench.

73. *Rossi*, 9 Cal. 4th at 714, 889 P.2d at 573, 38 Cal. Rptr. 2d at 379.

74. *Id.* at 715-16, 889 P.2d at 573, 38 Cal. Rptr. 2d at 379.

75. *See* Charles Burress, *State High Court Rulings Strengthen Local Initiatives/ S.F. Case Allows Voters to Repeal Tax*, S.F. CHRON., Mar. 7, 1995, at A13.

76. *See supra* notes 43-47 and accompanying text.

77. *See supra* notes 6-10 and accompanying text.

78. Burress, *supra* note 75 (quoting San Francisco Chief Assistant City Attorney, Dennis Aftergut).

79. *See supra* note 53-54.

III. MORTGAGES

A lender's fraud action against a third party who induced the lender to make loans is not barred by the lender's purchase of the property by full credit bid at a nonjudicial foreclosure sale: **Alliance Mortgage Co. v. Rothwell.**

I. INTRODUCTION

In *Alliance Mortgage Co. v. Rothwell*,[1] the California Supreme Court considered whether a mortgage company's acquisition of security property at a nonjudicial foreclosure sale precluded it from asserting a claim against a third party who fraudulently induced the mortgage company into lending on the property.[2] Resolving a conflict among the lower courts, the supreme court held that the lender's full credit bids did not

1. 10 Cal. 4th 1226, 900 P.2d 601, 44 Cal. Rptr. 2d 352 (1995). Justice Arabian wrote the majority opinion, in which Justices Mosk, Kennard, Baxter, and George concurred. *Id.* at 1226-51, 900 P.2d at 601-17, 44 Cal. Rptr. 2d at 352-68. Justice Werdegar wrote a concurring opinion in which Chief Justice Lucas concurred. *Id.* at 1251-54, 900 P.2d at 617-19, 44 Cal. Rptr. 2d at 368-70 (Werdegar, J., concurring).

2. *Id.* at 1232, 900 P.2d at 603, 44 Cal. Rptr. 2d at 354. The defendants in the present case were Laurie Rothwell, a real estate broker, Pioneer Title Company (which became North American Title Company), and Ticor Title Insurance Company. *Id.* at 1232, 900 P.2d at 603-04, 44 Cal. Rptr. 2d at 354-55. "From 1983 through 1985, [the defendants] devised and implemented an elaborate scheme to fraudulently induce Alliance . . . to lend money for the purchase of nine Bay area residences." *Id.* To induce Alliance to make the loans, the Rothwell group created two sham companies to verify the employment of fictitious borrowers, falsely appraise the properties, and file misleading title reports. *Id.* It was not until after the borrowers defaulted and Alliance acquired title to the properties through the foreclosure sale that Alliance discovered the defendants' fraudulent conduct. *Id.* at 1232-33, 900 P.2d at 604-05, 44 Cal. Rptr. 2d at 355-56.

Alliance then brought an action for damages against the defendants, claiming (among other things) negligent and intentional misrepresentation, breach of contract, and breach of fiduciary duty. *Id.* at 1233, 900 P.2d at 605, 44 Cal. Rptr. 2d at 356. Defendants North American and Ticor moved to strike portions of the complaint, asserting that Alliance's purchase of the property by full credit bid barred the action. *Id.* at 1233-34, 900 P.2d at 605, 44 Cal. Rptr. 2d at 356. The trial court granted the defendants' motions and entered judgment on the pleadings in favor of the defendants. *Id.* at 1234, 900 P.2d at 605, 44 Cal. Rptr. 2d at 356. The court of appeal reversed, holding that the lender's full credit bid did not preclude the fraud claim, since the damages for fraud would not be a recovery for any deficiency on the underlying debt. *Id.*

preclude the action because the lender sought to recover for fraud rather than for impairment of a security interest.[3] The court, therefore, affirmed the court of appeal and remanded the case to the trial court for further proceedings.[4]

II. TREATMENT

A. *Majority Opinion*

Justice Arabian began the majority opinion by reviewing some basic principles of real property loan transactions,[5] and the relationship between foreclosure and antideficiency statutes.[6] The court noted that in a nonjudicial foreclosure sale, the creditor may not seek a deficiency judgment.[7] The court pointed out, however, that a suit for fraud did not involve the type of recovery which the antideficiency statutes preclude.[8]

The court then discussed the "full credit bid rule."[9] When a lender

---

3. *Id.* at 1246, 900 P.2d at 613, 44 Cal. Rptr. 2d at 364-65. The supreme court recognized the lower court's express disagreement with the result reached in Western Fed. Savings & Loan Ass'n v. Sawyer, 10 Cal. App. 4th 1615, 13 Cal. Rptr. 2d 639 (1992) and GN Mortgage Corp. v. Fidelity Nat. Title Ins. Co., 21 Cal. App. 4th 1802, 27 Cal. Rptr. 2d 47 (1994). *Id.* at 1234, 900 P.2d at 605, 44 Cal. Rptr. 2d at 356.

4. *Alliance*, 10 Cal. 4th at 1251, 900 P.2d at 616-17, 44 Cal. Rptr. 2d at 367-68.

5. *Id.* at 1235, 900 P.2d at 605-06, 44 Cal. Rptr. 2d at 356-57. *See generally* 44 CAL. JUR. 3D *Mortgages* §§ 21-32 (1994 & Supp. 1995) (discussing rights and duties of mortgagee and mortgagor); 44 CAL. JUR. 3D *Mortgages* §§ 33-42 (1994 & Supp. 1995) (explaining transfers of mortgaged property).

6. *Alliance*, 10 Cal. 4th at 1236-38, 900 P.2d at 606-08, 44 Cal. Rptr. 2d at 357-59. *See generally* 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* §§ 156-157 (9th ed. 1987 & Supp. 1995) (discussing availability of deficiency after foreclosure sale); Stanley L. Iezman & Russell B. Arnold, *Personal Liability in Commercial Loan Transactions*, 28 BEVERLY HILLS B.A. J. 38 (1994) (evaluating foreclosure actions and deficiency judgments from the lender's point of view).

7. *Alliance*, 10 Cal. 4th at 1236, 900 P.2d at 606-07, 44 Cal. Rptr. 2d at 357-58; *see* CAL. CIV. PROC. CODE §§ 580b, 580d (West Supp. 1995) (disallowing deficiency judgment for purchase money mortgages or foreclosure under power of sale).

8. *Alliance*, 10 Cal. 4th at 1237-38, 900 P.2d at 607-08, 44 Cal. Rptr. 2d at 358-59; *see* 44 CAL. JUR. 3D *Mortgages* § 46 (1994 & Supp. 1995) (effect of fraud on satisfaction of mortgage); *see* CAL. CIV. PROC. CODE § 726 (West Supp. 1995) (allowing fraudulent inducement of loan as exception to the "one action" rule applied to foreclosures). *See generally* Andrew A. Bassak, Comment, *Secured Transaction Guarantors in California: Is it Time to Reevaluate the Validity and Timing of Waivers of Rights?*, 32 SANTA CLARA L. REV. 265 (1992) (examining the effect of antideficiency legislation in sections 580 and 726 of California Civil Procedure Code).

9. *Alliance*, 10 Cal. 4th at 1238-39, 900 P.2d at 608, 44 Cal. Rptr. 2d at 359. The court defined full credit bid as "a bid [by the lender] 'in an amount equal to the unpaid principal and interest of the mortgage debt'" including costs, fees, and expenses. *Id.* at 1238, 900 P.2d at 608, 44 Cal. Rptr. 2d at 359 (quoting Cornelison v. Kornbluth, 15 Cal. 3d 590, 606 n.10, 542 P.2d 981, 992 n.10, 125 Cal. Rptr. 557, 568

makes a successful credit bid for the outstanding balance of the debt, the lender (now as purchaser) cannot later claim that the property was worth less than the bid or pursue other remedies to collect on the underlying debt.[10] The court noted that when applying the full credit bid rule to cases involving fraud and bad faith, courts of appeal have reached different results.[11] Some have held fraud and conversion claims to be barred by the rule, while others allowed fraud claims to go forward despite the lender's full credit bid.[12]

The court then reviewed the elements of a fraud claim and the different possible measures of damages.[13] The court noted that when a victim has been defrauded by a fiduciary, the "benefit of the bargain" measure of damages should apply.[14]

Turning to the instant case, the majority found that because the plaintiff's full credit bid did not bar a fraud claim, judgment on the pleadings was improper.[15] The court based this finding on the fact that, while a lender making a full credit bid assumes the risk that its bid will

---

n.10 (1975)).

10. *Id. See generally* 3 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Security Transactions in Real Property* § 155 (9th ed. 1987 & Supp. 1995) (explaining effect of full credit bid by lienholder at foreclosure sale).

11. *Alliance*, 10 Cal. 4th at 1243, 900 P.2d at 611, 44 Cal. Rptr. 2d at 362.

12. *Id.* at 1243-45, 900 P.2d at 611-13, 44 Cal. Rptr. 2d at 362-64 (discussing the conflict between the court of appeal decision in the instant case with that in Western Fed. Savings & Loan Ass'n v. Sawyer, 10 Cal. App. 4th 1615, 13 Cal. Rptr. 2d 639 (1992) and GN Mortgage Corp. v. Fidelity Nat. Title Ins. Co., 21 Cal. App. 4th 1802, 27 Cal. Rptr. 2d 47 (1994)).

13. *Id.* at 1239-41, 900 P.2d at 608-10, 44 Cal. Rptr. 2d at 359-61. The court reviewed the five elements of a fraud claim: misrepresentation, knowledge of falsity, intent, unjustifiable reliance, and damage. *Id.* The court noted that in the present case only the elements of justifiable reliance and resulting damages were at issue. *Id.*; *see* CAL. CIV. CODE § 1710 (West Supp. 1995) (defining deceit); CAL. CIV. CODE § 3343 (West Supp. 1995) (listing measure of damages for fraud in the purchase or sale of property). *See generally* 5 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 711 (9th ed. 1987 & Supp. 1995) (defining reliance); 37 C.J.S. *Fraud* § 67 (1994) (discussing conditions precedent to a fraud action).

14. *Alliance*, 10 Cal. 4th at 1240-41, 900 P.2d at 609-10, 44 Cal. Rptr. 2d at 360-61. "Benefit of the bargain" damages are defined as those damages which "award . . . the difference in value between what the plaintiff actually received and what he was fraudulently led to believe he would receive." *Id.* at 1240, 900 P.2d at 609, 44 Cal. Rptr. 2d at 360. This measure is broader than the alternative, "out of pocket" damages, which are awarded as "the difference in actual value at the time of the transaction between what the plaintiff gave and what he received." *Id.*

15. *Id.* at 1251, 900 P.2d at 616, 44 Cal. Rptr. 2d at 367.

be sound, an intentional misrepresentation by the defendants as to the property's value was not "within the realm of that risk."[16] The court, therefore, affirmed the lower holding that the defendants could not use Alliance's full credit bid as a defense to their own fraud.[17] The court further noted that "the full credit bid rule was not intended to immunize wrongdoers from the consequences of their fraudulent acts."[18]

In analyzing the reliance requirement, the court held that the full credit bid rule would not apply so long as Alliance's reliance on the misrepresentations made by the defendants was not "manifestly unreasonable."[19] Since this issue required a factual determination,[20] it could not be evaluated in the context of a judgment on the pleadings, and therefore the case was remanded to the trial court for further proceedings.[21]

B. Concurring Opinion

Justice Werdegar agreed that the trial court should not have granted judgment on the pleadings, but disagreed with the majority as to the limitation on damages.[22] Justice Werdegar would have allowed Alliance to recover out-of-pocket damages even if it was not justified in making a full credit bid at the foreclosure sale, because Alliance justifiably relied upon the defendants' fraud when issuing the loans.[23]

---

16. *Id.* at 1246, 900 P.2d at 613-14, 44 Cal. Rptr. 2d at 364-65.

17. *Id.*

18. *Id.* at 1246, 900 P.2d at 614, 44 Cal. Rptr. 2d at 365. The court also rejected the defendant's argument that, according to BFP v. Resolution Trust Corp., 114 S. Ct. 1757 (1994), the court should not question the value of the property established by the lienholder's bid. *Id.* at 1250-51, 900 P.2d at 616, 44 Cal. Rptr. 2d at 367. The court noted that, although *BFP* provided that "reasonably equivalent value" was the price in fact received at a foreclosure sale, a claim of fraud remained an established exception to the finality of a property sale. *Id.* For a thorough review of *BFP* and its effect on foreclosure sales in the bankruptcy setting, see David P. Schwartz, Note, BFP v. Resolution Trust Corporation: *Critiquing the Supreme Court's Method of Determining "Reasonably Equivalent Value" Within the Context of Bankruptcy Foreclosures*, 31 CAL. W. L. REV. 345 (1995).

19. *Alliance*, 10 Cal. 4th at 1247-48, 900 P.2d at 614, 44 Cal. Rptr. 2d at 365.

20. *Id.*

21. *Id.* at 1251, 900 P.2d at 617, 44 Cal. Rptr. 2d at 368.

22. *Id.* at 1251-52, 900 P.2d at 617, 44 Cal. Rptr. 2d at 368 (Werdegar, J., concurring).

23. *Id.* at 1252-53, 900 P.2d at 617-18, 44 Cal. Rptr. 2d at 368-69 (Werdegar, J., concurring). Justice Werdegar looked to the initial transaction as the focal point for justifiable reliance, finding that Alliance had suffered initial damage "when it *loaned* money to unqualified borrowers on inadequate security." *Id.* at 1253 n.1, 900 P.2d at 618 n.1, 44 Cal. Rptr. 2d at 369 n.1 (Werdegar, J., concurring).

III. IMPACT

The present ruling resolves conflicting decisions within the California Courts of Appeal as to whether a lender's full credit bid may preclude a subsequent recovery for fraud.[24] In ruling that the defendants' fraudulent conduct gave rise to a cause of action separate from the impairment of plaintiff's security, the court excepted fraud claims from the one action rule applicable in antideficiency cases.[25]

In so doing, the court has clarified the distinction between the impairment of a security interest (through the overvaluation of property) and fraudulent deception as to the nature of the security property.[26] In ruling that fraud by a lender's agent to induce a loan remained a separate action, the court upheld an important public policy consideration as well: third parties who fraudulently induce lenders to make loans cannot use the lender's full credit bid as a defense.[27]

IV. CONCLUSION

While antideficiency statutes were designed to protect the borrower from multiple actions by the lender, fraud on the part of a third party will remain actionable.[28] Therefore, even though the lender purchases the security property through a full credit bid, the fraudulent misrepre-

---

24. *Id.* at 1245, 900 P.2d at 612-13, 44 Cal. Rptr. 2d at 363-64. The court here agreed with the court of appeal ruling that both *Western Fed.* and *GN Mortgage* were wrongly decided. *Id.* The court of appeal "concluded that '[t]he central error of *Western Federal* . . . and *GN Mortgage* . . . is the failure to appreciate that because the full credit bid rule was conceived only to further the debtor protection purposes of the antideficiency statutes, it has no application in actions against parties not sued as debtors.'" *Id.* at 1245, 900 P.2d at 613, 44 Cal. Rptr. 2d at 364.

25. *Id.* at 1249, 900 P.2d at 615, 44 Cal. Rptr. 2d at 366. *See generally* Michael H. Schill, *Uniformity or Diversity: Residential Real Estate Finance Law in the 1990s and the Implications of Changing Financial Markets*, 64 S. CAL. L. REV. 1261, 1274-77 (1991) (reviewing several states' statutes regarding deficiency judgments and debtor protection provided by "one action" rules).

26. *Alliance*, 10 Cal. 4th at 1249, 900 P.2d at 615, 44 Cal. Rptr. 2d at 366. "[D]efendants did not damage or impair Alliance's security interests rather, they deceived Alliance *at the outset* as to what the security was." *Id.* (emphasis added).

27. *Id.* at 1246, 900 P.2d at 614, 44 Cal. Rptr. 2d at 365.

28. "Alliance's action for fraud against these nonborrower third parties is *not* an attempt to collect its debt, and application of the full credit bid rule in fact *would* protect defendants from the consequences of their allegedly fraudulent acts." *Id.* at 1254, 900 P.2d at 619, 44 Cal. Rptr. 2d at 370 (Werdegar, J., concurring).

sentation used to induce the lender to make a loan gives rise to a separate cause of action for damages.[29]

DEBRA E. BEST

29. For an excellent overview of California foreclosure sale procedures, see Reid Breitman, Note, *Equating California Foreclosure Sales with Ordinary Residential Sales*, 68 S. CAL. L. REV. 947, 978 (1995).

IV. PROBATE

A trustee has standing to appeal a determination that a trust beneficiary's proposed claim would not violate the trust's no contest provision: **Estate of Goulet v. Goulet.**

I. INTRODUCTION

In *Estate of Goulet v. Goulet*,[1] the California Supreme Court considered whether a trustee may appeal a court's determination that a beneficiary's proposed action would not violate the trust's no contest clause.[2] The court weighed a trustee's diverging duties to defend and

1. 10 Cal. 4th 1074, 898 P.2d 425, 43 Cal. Rptr. 2d 111 (1995). Justice Werdegar authored the majority opinion of the court in which Chief Justice Lucas and Justices Arabian, Baxter, and George joined. *Id.* at 1076-86, 898 P.2d at 425-32, 43 Cal. Rptr. 2d at 111-18. Justice Kennard, joined by Justice Mosk, filed a dissenting opinion. *Id.* at 1086-101, 898 P.2d at 432-42, 43 Cal. Rptr. 2d at 118-28 (Kennard, J., dissenting).

2. *Id.* at 1076-77, 898 P.2d at 425, 43 Cal. Rptr. 2d at 111. On August 23, 1992, Donald R. Scott Goulet, who was dying from Acquired Immune Deficiency Syndrome (AIDS), and Esther Montello, his acquaintance of many years, executed a "Premarital Agreement" and were married in Las Vegas, Nevada. *Id.* at 1077, 898 P.2d at 425, 43 Cal. Rptr. 2d at 111-12. They separated the following day. *Id.* at 1077, 898 P.2d at 425, 43 Cal. Rptr. 2d at 111. The premarital agreement stated that the parties maintained separate property interests in assets acquired before and after the marriage. *Id.* at 1077, 898 P.2d at 425, 43 Cal. Rptr. 2d at 112. Other provisions were incorporated by addenda to the premarital agreement, including Goulet's promises to pay Montello $2500 per month until she reached the age of 75, to purchase a home for her worth more than $500,000, to lease a new car for her, to pay for her living expenses until the home was purchased, and to provide health and life insurance for her and her children. *Id.* at 1077, 898 P.2d at 425-26, 43 Cal. Rptr. 2d at 112. Six weeks later in Los Angeles County Superior Court, Goulet claimed he had been of unsound mind and sought an annulment of the marriage that the court granted following Montello's default. *Id.* at 1077, 898 P.2d at 426, 43 Cal. Rptr. 2d at 112.

Goulet's will and declaration of trust were executed prior to the resolution of the annulment proceedings. *Id.* Goulet's will, which included a no contest clause, transferred Goulet's entire estate to the trust, classified all of Goulet's property as separate (as stated in the premarital agreement), and expressly disinherited Montello and her children. *Id.* Goulet's will recited that he had made "adequate provision" for Montello and her children in the trust. *Id.* The trust instrument, which also included a no contest clause, provided Montello $75,000 contingent upon her accepting the validity of the trust and the will. *Id.* at 1078, 898 P.2d at 426, 43 Cal. Rptr. 2d at 112. After the marriage was annulled, Goulet executed a codicil to the will naming his friends, Clint Burke and John Ferry, as co-executors and recited that the marriage had been annulled. *Id.* Goulet also executed an amendment to the declaration of trust that named Burke and Ferry as successor trustees and restated the $75,000 gift

administer the trust according to the trustor's intent against his responsibility to act impartially toward all beneficiaries.[3] Relying on law and policy, the California Supreme Court held that a trustee has a right to appeal a determination that a beneficiary's proposed claim would not violate the trust's no contest provision.[4]

II. TREATMENT

A. *Majority Opinion*

The court began its discussion by reviewing *Smith v. Esslinger*.[5] The court of appeal in *Goulet* relied on *Smith* and held that the trustee was barred from appealing the probate court's order.[6] In determining when a trustee may appeal a court order, the Fourth District Court of Appeal in *Smith* stated that a trustee is aggrieved by a court order that affects the "existence, modification or termination of the trust."[7] However, *Smith* held that a trustee is not aggrieved by a court order that determines the

---

to Goulet's "former spouse." *Id.* On March 28, 1993, Goulet died. *Id.* His estate ultimately had a value of approximately $5,000,000 to $5,500,000. *Id.*

During the probate proceedings, Montello sought a determination from the probate court whether she would violate the no contest clause of the will or trust by filing a creditor's claim against the estate to enforce her purported rights under the premarital agreement. *Id.* at 1078-79, 898 P.2d at 426, 43 Cal. Rptr. 2d at 112; *see also* CAL. PROB. CODE § 21320 (West 1991 & Supp. 1995) (granting a beneficiary of an instrument containing a no contest clause the right to seek with impunity a determination from the court whether a proposed act would violate the no contest provision); Laura J. Fowler, Administration of Estates, 26 PAC. L.J. 272 (1995) (discussing California Probate Code § 21320). The court noted that the 1994 changes to probate code § 21320 did not alter the court's analysis. *Goulet*, 10 Cal. 4th at 1078 n.2, 898 P.2d at 426 n.2, 43 Cal. Rptr. 2d at 112 n.2. Ferry, acting as special administrator of Goulet's estate, opposed the action. *Id.* at 1079, 898 P.2d at 426, 43 Cal. Rptr. 2d at 112-13. The probate court held that Montello's proposed action would not be a contest within the meaning of the no contest clauses of the will or the trust. *Id.* at 1079, 898 P.2d at 426, 43 Cal. Rptr. 2d at 113. Ferry appealed this determination, but the court of appeal concluded that Ferry lacked standing because he was not an aggrieved party. *Id.* at 1079 & n.3, 898 P.2d at 426-27 & n.3, 43 Cal. Rptr. 2d at 113 & n.3; *see* CAL. CIV. PROC. CODE § 902 (West 1980) (granting right of appeal to aggrieved parties); County of Alameda v. Carleson, 5 Cal. 3d 730, 736, 488 P.2d 953, 957, 97 Cal. Rptr. 385, 389 (1971) (defining an aggrieved party as one whose "rights or interests are injuriously affected by the judgment").

3. *Goulet*, 10 Cal. 4th at 1080-81, 898 P.2d at 428, 43 Cal. Rptr. 2d at 114.

4. *Id.* at 1080, 898 P.2d at 427, 43 Cal. Rptr. 2d at 113.

5. 26 Cal. App. 4th 579, 31 Cal. Rptr. 2d 673 (1994).

6. *Goulet*, 10 Cal. 4th at 1079, 898 P.2d at 427, 43 Cal. Rptr. 2d at 113.

7. *Id.* (citing *Smith*, 26 Cal. App. 4th at 583, 31 Cal. Rptr. 2d at 676 (quoting Estate of Bunn, 33 Cal. 2d 897, 899, 206 P.2d 635, 636-37 (1949))). *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 146 (3d ed. 1985) (discussing trustees' ability to appeal).

"conflicting claims of beneficiaries" because of the trustee's duty of impartiality.[8] *Smith* held that a trustee lacks standing to appeal a court order that construes a trust's no contest clause under California Probate Code section 21320 because the court order protects, rather than injures, the trustee.[9]

In overturning *Smith*, the majority in *Goulet* first found support in the policy that requires a trust to be administered according to the trustor's intent.[10] The supreme court reasoned that if a probate court made an erroneous determination under section 21320, often there would not be any beneficiary who possessed both standing and motivation to undertake the expensive and risky appeal.[11] Thus, only the trustee would remain to defend the trustor's intent.[12] Additionally, the majority noted that the trustee's duty to administer the trust according to Goulet's expressed desires was implicated by the potential claim of the "former

---

8. *Goulet*, 10 Cal. 4th at 1079, 898 P.2d at 427, 43 Cal. Rptr. 2d at 113 (citing *Smith*, 26 Cal. App. 4th at 583, 31 Cal. Rptr. 2d at 676); *see* CAL. PROB. CODE § 16003 (West 1991) (stating duty of impartiality). *See generally* 9 B.E. WITKIN, CALIFORNIA PROCEDURE, *Appeal* § 146 (3d ed. 1985 & Supp. 1995) (analyzing cases when trustees may not appeal).

9. *Smith*, 26 Cal. App. 4th at 584-85, 31 Cal. Rptr. 2d at 676; *accord* Krause v. Tullo, 835 S.W.2d 488 (Mo. Ct. App. 1992). *But see* Poag v. Winston, 195 Cal. App. 3d 1161, 241 Cal. Rptr. 330 (1987) (considering a trustee's appeal from a determination that a beneficiary's act did not violate the no contest provision of the trust). *See generally* 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* §§ 530-535 (9th ed. 1990 & Supp. 1995) (discussing no contest clauses); 64 CAL. JUR. 3D *Wills* §§ 443-468 (1994) (analyzing *in terrorem* clauses generally under California law); 60 CAL. JUR. 3D *Trusts* §§ 42, 301 (1994) (examining no contest clauses in trusts); Dana T. Pickard & Janet B. O'Connor, *The Fiduciary's Standard of Care in the Enforcement, Contest, or Compromise of Claims in Favor of or Against the Estate*, 30 REAL PROP. PROB. & TR. J. 1 (1995) (discussing trustee's duties with respect to the trust's disputes).

10. *Goulet*, 10 Cal. 4th at 1080-81, 898 P.2d at 428, 43 Cal. Rptr. 2d at 114; CAL. PROB. CODE § 21304 (West 1991) (calling for strict construction of no contest clauses to determine trustor's intent). *See generally* Catherine Convy, California Supreme Court Survey, 22 PEPP. L. REV. 866 (1995) (discussing judicial construction of the trustor's intent in no contest clause); James L. Robertson, *Myth and Reality—Or, Is it "Perception and Taste"?—in the Reading of Donative Documents*, 61 FORDHAM L. REV. 1045 (1993) (examining interpretation of donor's intent in wills and trusts).

11. *Goulet*, 10 Cal. 4th at 1081, 898 P.2d at 428, 43 Cal. Rptr. 2d at 114. *Smith* and *Goulet* represent two examples where trustees attempted to appeal a § 21320 determination even though the "aggrieved" beneficiaries acquiesced. *Id.* at 1081 & n.5, 898 P.2d at 428 & n.5, 43 Cal. Rptr. 2d at 114 & n.5; *Smith*, 26 Cal. App. 4th at 585, 31 Cal. Rptr. 2d at 676.

12. *Goulet*, 10 Cal. 4th at 1081, 898 P.2d at 428, 43 Cal. Rptr. 2d at 114.

spouse" because her claim might be large enough to force the trustee to modify Goulet's original distributional scheme.[13] The majority reasoned that excluding a trustee from the class of parties aggrieved by section 21320 determinations would increase the likelihood that erroneous probate court determinations would go uncorrected, thereby potentially frustrating the trustor's intent.[14] Although a trustee in his or her representative capacity may subsequently defend creditors' claims against the estate, the issue of whether a beneficiary's proposed act is a contest would be conclusively determined by the section 21320 determination.[15] Therefore, the court enabled trustees to fully defend the trustor's expressed desires by appealing an order construing the trust's no contest provision.[16]

Grappling next with a trustee's competing duties to deal impartially with beneficiaries on the one hand, and to defend the trust corpus against unwarranted diminution on the other, the majority concluded that the "anomalous" rule that allowed a trustee to oppose, but not to appeal, a section 21320 determination was inherently flawed.[17] If a section 21320 determination could decrease the value of the trust fund, then opposing the order clearly falls within the scope of a trustee's duties.[18] The majority reasoned that a trustee is analogous to an administrator of an estate because both have a similar duty to defend the property entrusted to his or her care.[19] An administrator is an aggrieved party when a ruling may diminish the estate confided to his care.[20] Therefore, the court held that a trustee has a right to appeal a section 21320 determination that implicates the trustee's duties to protect the trust.[21]

The majority relied upon legislative intent in finding that a trustee is aggrieved by a court's determination that a beneficiary's act violates or does not violate a trust's no contest clause.[22] The majority explained

---

13. *Id.* at 1082, 898 P.2d at 429, 43 Cal. Rptr. 2d at 115.

14. *Id.*

15. *Id.* at 1081, 898 P.2d at 428, 43 Cal. Rptr. 2d at 114.

16. *Id.* The majority recognized the existence of a similar rule allowing a fiduciary to defend the trustor's intent by appealing a decree determining the relative rights of beneficiaries if some of them are unable to represent themselves. *Id.* at 1085 & n.8, 898 P.2d at 431 & n.8, 43 Cal. Rptr. 2d at 117 & n.8 (citing *Smith*, 26 Cal. App. 4th at 583, 31 Cal. Rptr. 2d at 676 (quoting *In re* Ferrall's Estate, 33 Cal. 2d 202, 205, 200 P.2d 1, 3 (1948))).

17. *Goulet*, 10 Cal. 4th at 1082, 898 P.2d at 429, 43 Cal. Rptr. 2d at 115.

18. *Id.* Montello conceded this point. *Id.*

19. *Id.* at 1082, 898 P.2d at 429, 43 Cal. Rptr. 2d at 115; *see In re* Estate of Heydenfeldt, 117 Cal. 551, 553-54, 49 P. 713, 713-14 (1897).

20. *Goulet*, 10 Cal. 4th at 1082, 898 P.2d at 429, 43 Cal. Rptr. 2d at 115; *Heydenfeldt*, 117 Cal. at 553, 49 P. at 713.

21. *Goulet*, 10 Cal. 4th at 1082-83, 898 P.2d at 429, 43 Cal. Rptr. 2d at 115.

22. *Id.* at 1082, 1085 & n.9, 898 P.2d at 429, 431 & n.9, 43 Cal. Rptr. 2d at 115,

that a trustee's duties are implicated by section 21320 determinations because of the statutory requirement that a trustee be notified of section 21320 applications and because of the provisions allowing a trustee to respond initially to such actions.[23]

The majority expressly refused to hold that a trustee's duty to defend the trust is subsumed by the duty of impartiality when a court order is issued.[24] Addressing again the similarities between an administrator of an estate and a trustee, the court observed that although an administrator of an estate may not appeal a final distribution order, an administrator may nevertheless appeal decrees issued before the final distribution order to defend the trust and carry out the intended plan of distribution.[25] Because a section 21320 determination may occur before the conclusion of probate proceedings, the court reasoned that a trustee's appeal of a section 21320 determination is analogous to an administrator's right to appeal decrees issued before the final distribution order.[26] Therefore, the majority held that a trustee may appeal from section 21320 determinations.[27]

The majority buttressed its holding in *Goulet* by relying on the public policies in California favoring enforcement of no contest clauses[28] and encouraging judicial economy.[29] The policy in favor of enforcing no con-

---

117 & n.9.

23. *Id.* at 1082-83, 1085, 898 P.2d at 429, 431, 43 Cal. Rptr. 2d at 115, 117; *see* CAL. PROB. CODE §§ 1220, 21322 (West 1991) (requiring that notice of § 21320 applications be given to trustee or other fiduciary). The majority openly invited the legislature to enact a contrary rule in the event that the majority misconstrued legislative intent. *Goulet*, 10 Cal. 4th at 1085, 898 P.2d at 431, 43 Cal. Rptr. 2d at 117. By recognizing the right of a trustee to appeal a § 21320 determination, the majority overruled *In re* Estate of Murphy, 145 Cal. 464, 78 P. 960 (1904). The court observed, however, that *Murphy* had been decided prior to the enactment of the statutory scheme from which the majority inferred the legislative intent to involve trustees in § 21320 determinations. *Goulet*, 10 Cal. 4th at 1083 n.6, 898 P.2d at 429 n.6, 43 Cal. Rptr. 2d at 115 n.6.

24. *Goulet*, 10 Cal. 4th at 1083, 898 P.2d at 429-30, 43 Cal. Rptr. 2d at 115-16.

25. *Id.* at 1083-84, 898 P.2d at 430, 43 Cal. Rptr. 2d at 116; Estate of Kessler, 32 Cal. 2d 367, 196 P.2d 559 (1948).

26. *Goulet*, 10 Cal. 4th at 1084, 898 P.2d at 430, 43 Cal. Rptr. 2d at 116.

27. *Id.* at 1084, 898 P.2d at 430, 43 Cal. Rptr. 2d at 116-17.

28. *Id.* at 1084-85, 898 P.2d at 430-31, 43 Cal. Rptr. 2d at 117; Burch v. George, 7 Cal. 4th 246, 866 P.2d 92, 27 Cal. Rptr. 2d 165 (1994); CAL. PROB. CODE § 21303 (West 1991) (upholding the enforceability of no contest clauses). *See generally* 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Wills and Probate* § 532 (9th ed. 1990 & Supp. 1995) (discussing the enforceability of no contest clauses).

29. *Goulet*, 10 Cal. 4th at 1084-85, 898 P.2d at 430-31, 43 Cal. Rptr. 2d at 117.

test clauses flows from the desire to effectuate the trustor's intent.[30] The majority observed that prohibiting a trustee from appealing an erroneous section 21320 determination could undermine the trustor's intent and decrease the effectiveness of the no contest clause.[31] The majority also explained that its holding will ultimately decrease litigation and thereby further judicial economy by deflecting claims likely to flow from an erroneous 21320 determination were the trustee not permitted to appeal.[32]

Finally, the majority emphasized that permitting a trustee to appeal a section 21320 determination would protect fundamental policies, but would not harm the claimants' ability to assert their claims on the merits in the appropriate fora.[33]

B. Justice Kennard's Dissenting Opinion

The dissenting opinion criticized the majority for needlessly disrupting the "well-developed body of law" governing when a fiduciary is aggrieved by a court's ruling.[34] Because a section 21320 proceeding determines whether a proposed act violates a trust's no contest clause and consequently requires the offending beneficiary to forfeit his or her share under the trust, the dissent characterized the section 21320 proceeding as one that merely determines the beneficiaries' relative shares.[35] A trustee is not aggrieved by an order determining the shares of the beneficiaries in the estate under his or her care.[36] A trustee acts as a mere stakeholder under the direction of the court and must remain impartial to the court's disposition of the trust.[37] The dissent opined that giving a trustee the ability to appeal an order under section 21320 forces the trustee to violate the fundamental duty of impartiality.[38] Therefore, the dissent concluded, a trustee can not be aggrieved by a court's determination that

---

30. *Id.* at 1085, 898 P.2d at 431, 43 Cal. Rptr. 2d at 117; *Burch*, 7 Cal. 4th at 254, 866 P.2d at 96, 27 Cal. Rptr. 2d at 168.

31. *Goulet*, 10 Cal. 4th at 1085, 898 P.2d at 431, 43 Cal. Rptr. 2d at 117.

32. *Id.*

33. *Id.* at 1086, 898 P.2d at 432, 43 Cal. Rptr. 2d at 118.

34. *Id.* at 1094, 898 P.2d at 437, 43 Cal. Rptr. 2d at 123 (Kennard, J., dissenting).

35. *Id.* at 1087, 1093, 898 P.2d at 432, 436, 43 Cal. Rptr. 2d at 118, 122 (Kennard, J., dissenting).

36. This fundamental rule, upon which the dissent based its decision, has been established in California for more than a century and is followed by nearly every jurisdiction. *Id.* at 1089-90, 898 P.2d at 434, 43 Cal. Rptr. 2d at 120 (Kennard, J., dissenting) (citations omitted).

37. *Id.* at 1086, 1091-93, 898 P.2d at 432, 435-36, 43 Cal. Rptr. 2d at 118, 121-22 (Kennard, J., dissenting).

38. *Id.* at 1093-94, 898 P.2d at 436-37, 43 Cal. Rptr. 2d at 122-23 (Kennard, J., dissenting).

a beneficiary's proposed act would violate the trust's no contest clause.[39]

In contrast to the majority,[40] the dissent reasoned that the statutes containing the notice requirement[41] and the trustee's duty to follow the trust instrument[42] are not the equivalent of the legislative intent granting the trustee standing to litigate the underlying issue.[43] The purpose of the notice requirement is to keep the fiduciary informed.[44] The dissent explained that the legislature granted standing to appeal only to "aggrieved" parties,[45] and that a trustee's duty of impartiality precludes a finding that a trustee is aggrieved by a court's ruling on whether a beneficiary's contemplated act is a contest.[46]

Even assuming that the notice requirement did give a party standing to appeal, the dissent noted that under the particular facts of *Goulet*, the trustee did not have a right to notice of the section 21320 action and did not oppose the initial action.[47] Even if the same person is named as trustee of a trust and executor of an estate, his or her duties are as distinct as if separate people had been named.[48] The dissent noted that Ferry acted as administrator of Goulet's estate, not as trustee, when he opposed the section 21320 determination in the trial court.[49]

The dissent objected to the majority inferring legislative intent where the legislature had specifically declared that the common law governed the law of trusts and the enforceability of no contest clauses unless mod-

---

39. *Id.* at 1091, 1094, 898 P.2d at 435, 437, 43 Cal. Rptr. 2d at 121, 123 (Kennard, J., dissenting).

40. *See supra* notes 20-21 and accompanying text.

41. CAL. PROB. CODE § 21322 (West 1991).

42. *Id.* § 16000.

43. *Goulet*, 10 Cal. 4th at 1095-97, 898 P.2d at 437-38, 43 Cal. Rptr. 2d at 124-25 (Kennard, J., dissenting).

44. *Id.* at 1096, 898 P.2d at 438, 43 Cal. Rptr. 2d at 124 (Kennard, J., dissenting) (citations omitted).

45. *Id.* at 1095, 898 P.2d at 437, 43 Cal. Rptr. 2d at 123 (Kennard, J., dissenting); CAL. CIV. PROC. CODE § 902 (West 1980).

46. *Goulet*, 10 Cal. 4th at 1096-97, 898 P.2d at 439, 43 Cal. Rptr. 2d at 125 (Kennard, J., dissenting); *see supra* notes 34-37 and accompanying text.

47. *Goulet*, 10 Cal. 4th at 1097, 898 P.2d at 439, 43 Cal. Rptr. 2d at 125 (Kennard, J., dissenting). The dissent questioned whether a trustee even had the right to oppose such actions initially. *Id.* at 1098-100, 898 P.2d at 440-41, 43 Cal. Rptr. 2d at 126-27 (Kennard, J., dissenting).

48. *Id.* at 1097 n.7, 898 P.2d at 439 n.7, 43 Cal. Rptr. 2d at 125 n.7 (Kennard, J., dissenting) (citations omitted).

49. *Id.* at 1097, 898 P.2d at 439, 43 Cal. Rptr. 2d at 125 (Kennard, J., dissenting).

ified by statute.[50] *Murphy*, part of California's common law, held that a fiduciary may not appeal a court order determining whether a beneficiary's action is a contest.[51] Thus, the dissent would not grant a trustee a right that was not conferred by the legislature and is prohibited by the common law of California.[52]

The dissent, in distinguishing orders that require an administrator to make a partial distribution from determinations under section 21320, emphasized that a section 21320 determination does not reach the merits of the underlying claim, but rather merely determines the shares to which a beneficiary is entitled.[53] Orders requiring an administrator to make interim payments, in contrast, could force an unfair preference in favor of the claimants prematurely paid over the claimants who are paid later, especially in cases of insufficient funds.[54] Therefore, the dissent rejected the analogy that because an administrator may appeal an order to make partial distribution or interim payments, a trustee may also appeal a section 21320 determination.[55]

Finally, the dissent rejected as baseless the majority's contention that allowing trustees to appeal determinations under section 21320 will ultimately decrease litigation.[56]

III. IMPACT AND CONCLUSION

Before *Goulet*, a trustee lacked standing to appeal a court's determination that a beneficiary's proposed act would violate the trust's no contest provision.[57] This antiquated rule (according to the majority) was the basis for the holding in *Murphy* nearly a century ago and was followed by *Smith* in 1994.[58] In *Goulet*, the California Supreme Court overturned

---

50. *Id.* at 1101, 898 P.2d at 442, 43 Cal. Rptr. 2d at 128 (Kennard, J., dissenting); CAL. PROB. CODE § 15002 (West 1991) (stating common law governs the law of trusts generally, except as modified by statute); *id.* § 21301 (stating common law governs enforcement of no contest clauses except as modified by statute).

51. *Goulet*, 10 Cal. 4th at 1101, 898 P.2d at 442, 43 Cal. Rptr. 2d at 128 (Kennard, J., dissenting); *In re* Estate of Murphy, 145 Cal. 464, 78 P. 960 (1904); *accord* Smith v. Esslinger, 26 Cal. App. 4th 579, 31 Cal. Rptr. 2d 673 (1994).

52. *Goulet*, 10 Cal. 4th at 1101, 898 P.2d at 442, 43 Cal. Rptr. 2d at 128 (Kennard, J., dissenting).

53. *Id.* at 1097-98, 898 P.2d at 439-40, 43 Cal. Rptr. 2d at 125-26 (Kennard, J., dissenting).

54. *Id.* (Kennard, J., dissenting).

55. *Id.* at 1097, 898 P.2d at 439, 43 Cal. Rptr. 2d at 125 (Kennard, J., dissenting); *see supra* notes 22-25 and accompanying text.

56. *Goulet*, 10 Cal. 4th at 1100-01, 898 P.2d at 441-42, 43 Cal. Rptr. 2d at 127-28 (Kennard, J., dissenting).

57. *See supra* note 6 and accompanying text.

58. *See supra* notes 6, 9.

these decisions and affirmed a trustee has a right to defend the trust by appealing section 21320 determinations.[59] *Goulet* represents the heavy weight given to the policy favoring the trustor's intent.[60] Barring new legislation to the contrary, *Goulet* presents new considerations for both trustees and beneficiaries.

For trustees, this new rule represents another weapon to combat claims that violate the trust's no contest provision and contravene the trustor's expressed intent. Conceivably, under *Goulet* a trustee may also appeal from a determination that a beneficiary's proposed act did violate the no contest clause and thereby contravened the trustor's intent.[61] *Goulet* forces trustees to make another decision while administering the trust. This decision, whether to appeal a section 21320 determination, should be held to the same negligence standard applicable to trustees.

For beneficiaries who, like Montello in the instant case, seek determinations under section 21320 whether their contemplated acts will violate the no contest provisions of a trust, *Goulet* potentially places an additional obstacle in the path of pursuing the contemplated action. A trustee's decision to appeal a section 21320 determination represents an additional delay and financial burden for the beneficiary. A beneficiary will likely be forced to consider the increased risk and cost when contemplating whether to petition the court pursuant to section 21320 to interpret the trust's no contest clause.

KIRK ALAN WALTON

59. *Goulet*, 10 Cal. 4th at 1080-81, 898 P.2d at 428, 43 Cal. Rptr. 2d at 114.
60. *See id.*
61. *See id.*

V. PRODUCTS LIABILITY

During a state of emergency where aerial spraying of malathion is used to eradicate the Mediterranean fruit fly, manufacturers and distributors of malathion are under no private tort duty of care to warn the public after they become aware of deficiencies in the State's warnings to the public: **Macias v. State.**

I. INTRODUCTION

In *Macias v. State*,[1] the California Supreme Court addressed whether, during a state of emergency, manufacturers and distributors of malathion are liable for their failure to warn the public after supplying the government with the insecticide malathion and then discovering that the state's warnings regarding the aerial spraying of the malathion were deficient.[2] Reversing the decision of the court of appeal, the supreme court held that the defendants had no duty to warn the plaintiffs, based upon policy considerations that favor non-interference with the State's ability to quickly and effectively deal with emergency situations.[3]

---

1. 10 Cal. 4th 844, 897 P.2d 530, 42 Cal. Rptr. 2d 592 (1995). In this decision, Justice Arabian delivered the majority opinion, in which Chief Justice Lucas and Justices Kennard, Baxter, George and Werdegar concurred. *Id.* at 846-60, 897 P.2d at 531-40, 42 Cal. Rptr. 2d at 593-602. Justice Mosk wrote a dissenting opinion. *Id.* at 861-65, 897 P.2d at 541-44, 42 Cal. Rptr. 2d at 603-06 (Mosk, J., dissenting).

2. *Id.* at 846-60, 897 P.2d at 531-40, 42 Cal. Rptr. 2d at 593-602. In *Macias*, California declared a state of emergency in order to protect the agricultural industry and agricultural properties from an infestation of the Mediterranean fruit fly, commonly known as the medfly. *Id.* at 847-48, 897 P.2d at 532, 42 Cal. Rptr. 2d at 594. The State purchased malathion, manufactured and distributed by the defendants, and contracted to have the malathion aerially sprayed in the areas of infestation. *Id.* at 848, 897 P.2d at 532, 42 Cal. Rptr. 2d at 594. Based on a declared state of emergency, the State applied for and was given a "special local needs registration" from the Environmental Protection Agency (EPA), which permitted an "off label" use of malathion. *Id.* The special local needs registration required that the State give handouts to the public describing the dates which the spraying would occur, the type of material to be sprayed, as well as the precautions listed on the product label. *Id.* The plaintiffs, Alfonso and Sophia Macias, along with their son Juan, lived in one of the treatment areas. *Id.* at 848, 897 P.2d at 533, 42 Cal. Rptr. 2d at 595. Juan eventually went blind after a large amount of the insecticide fell on his head, face, and other parts of his body. *Id.* at 849, 897 P.2d at 533, 42 Cal. Rptr. 2d at 595. Plaintiffs claimed that the warnings distributed by the State to the public were inadequate because the flyer did not contain the health warnings required by the EPA. *Id.* at 848, 897 P.2d at 533, 42 Cal. Rptr. 2d at 595. Additionally, the plaintiffs claimed that because the defendants manufactured and distributed the product, they were liable in either a strict products liability or a negligence cause of action because they breached a common law duty to warn. *Id.* at 850, 897 P.2d at 534, 42 Cal. Rptr. 2d at 596.

3. *Id.* at 856-60, 897 P.2d at 538-40, 42 Cal. Rptr. 2d at 600-02.

II. TREATMENT

A. Majority Opinion

1. No Private Tort Duty can be Imposed on Defendant Manufacturers and Distributors to Warn the Public During a State Emergency

Justice Arabian, writing for the majority, addressed whether the defendant manufacturers and distributors were required to warn the public of the dangers of malathion in the midst of a state emergency.[4] In beginning his opinion, Justice Arabian first explained the profound significance of a declared state of emergency, recognizing that it requires a state to respond effectively in order to prevent "extreme peril to life, property, and the resources of the state."[5] Defending the actions of the State as pursuant to its authority under the Emergency Services Act,[6] and looking to past cases which have specifically addressed malathion spraying,[7] the court held that in the instant case the State's actions were necessary to preserve the general welfare of California.[8]

---

4. *Id. See generally* RESTATEMENT (SECOND) OF TORTS § 388 (1965) (explaining the liability of a product supplier for negligent failure to warn); Richard D. Chappuis, Jr., *The Flight of the Toxic Tort—Aerial Application of Insecticides and Herbicides: From Drift Liability to Toxic Tort*, 58 J. AIR L. & COM. 411 (1992) (discussing lawsuits being brought as a result of the aerial application of pesticides); Sean A. Murphy, Comment, *Aerial Pest Eradication in Massachusetts and California and the Pesticide Malathion*, 19 B.C. ENVTL. AFF. L. REV. 851 (1992) (describing problems associated with aerial pest eradication); Tybe A. Prett & Jane E.R. Potter, *Risks to Human Health Associated with Exposure to Pesticides at the Time of Application and the Role of the Courts*, 1 VILL. ENVTL. L.J. 355 (1990) (discussing the risks posed by the application of pesticides).

5. *Macias*, 10 Cal. 4th at 853-56, 897 P.2d at 536-38, 42 Cal. Rptr. 2d at 598-600.

6. *See* CAL. GOV'T CODE § 8550 (West 1992 & Supp. 1995) (defining the purpose of the California Emergency Services Act). *See generally* 58 CAL. JUR. 3D *State* §§ 48-51 (1980 & Supp. 1995) (summarizing the authority granted to the government under the California Emergency Services Act); 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 784 (9th ed. 1988) (discussing the nature of a state's police power).

7. *See* Farmers Ins. Exch. v. State, 175 Cal. App. 3d 494, 501, 221 Cal. Rptr. 225, 229 (1985) (justifying malathion spraying based on the potential negative impact the Medfly infestation could have on the economy); Talevich v. Voss, 734 F. Supp. 425, 434 (C.D. Cal. 1990) (upholding the practice of malathion spraying against constitutional claims of deprivation of liberty or property interests).

8. *Macias*, 10 Cal. 4th at 856-57, 897 P.2d at 538, 42 Cal. Rptr. 2d at 600.

The court next turned its attention to the more immediate issue of whether, under a products liability cause of action,[9] the defendants had a private duty to warn the public of the dangers of the emergency malathion spraying when the defendants allegedly knew the State's warnings were inadequate.[10] Attacking the plaintiffs' argument, the court stated that the defendant manufacturers and distributors are under no such duty to warn the public during a state of emergency.[11] The court further reasoned that compelling a private citizen or corporation to interfere with the State's efforts would have a devastating effect on the State' ability to function properly in emergency situations.[12] Basing its arguments largely on policy,[13] the court concluded that necessitating a private tort duty would "second-guess" the legislative policy behind the Emergency Services Act and would be in direct conflict with the State's sovereign authority.[14]

---

9. *See generally* 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1265 (9th ed. 1988 & Supp. 1995) (discussing the duty to warn in products liability); Charles C. Marvel, Annotation, *Strict Products Liability: Liability for Failure to Warn as Dependent on Defendant's Knowledge of Danger*, 33 A.L.R. 4th 368 (1984) (discussing whether defendant's lack of scientific knowledge of danger constitutes a defense in products liability causes of action); Allan E. Korpela, Annotation, *Failure to Warn as Basis of Liability Under Doctrine of Strict Liability in Tort*, 53 A.L.R. 3d 239 (1973 & Supp. 1995) (discussing cases where failure to warn formed the basis of liability under strict liability in tort); M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. VA. L. REV. 221 (1987) (discussing the duty to warn in products liability); Michael A. Pittenger, Note, *Reformulating the Strict Liability Failure to Warn*, 49 WASH. & LEE L. REV. 1509 (1992) (discussing the problems of strict liability under current law).

10. *Macias*, 10 Cal. 4th at 857-59, 897 P.2d at 539-40, 42 Cal. Rptr. 2d at 601-02. *See generally* 72 C.J.S. *Products Liability* § 28 (1975 & Supp. 1995) (detailing the duty of a supplier to adequately warn of possible dangers arising from the use of a product); 63 AM. JUR. 2D *Products Liability* § 772 (1984 & Supp. 1995) (discussing insecticides, pesticides and like products in the context of products liability).

11. *Macias*, 10 Cal. 4th at 857-58, 897 P.2d at 539-40, 42 Cal. Rptr. 2d at 601-02. *See generally* 50 CAL. JUR. *Products Liability* § 16 (1993) (explaining the duty of a manufacturer or distributor to warn); 6 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 1272 (9th ed. 1988 & Supp. 1995) (discussing the manufacturer's scope of liability in products liability cases).

12. *Macias*, 10 Cal. 4th at 857-58, 897 P.2d at 539-40, 42 Cal. Rptr. 2d at 601-02.

13. "When deciding whether to expand a tort duty of care, courts must consider the potential social and economic consequences." *Id.* at 859, 897 P.2d at 540, 42 Cal. Rptr. 2d at 602; *see also* Moore v. Regents of California, 51 Cal. 3d 120, 146, 793 P.2d 479, 495, 271 Cal. Rptr. 146, 162 (1990), *cert. denied*, 499 U.S. 936 (1991) (holding that "[i]n deciding whether to create new tort duties we have in the past considered the impact that expanded liability would have on activities that are important to society").

14. *Macias*, 10 Cal. 4th at 858, 897 P.2d at 539, 42 Cal. Rptr. 2d at 601. *See generally* 46 CAL. JUR. 3D *Negligence* § 9 (1978 & Supp. 1995) (discussing policy considerations in imposing duty).

The court also declared that the imposition of a private tort duty to warn might cause private entities or government entities to fear civil lawsuits and damages to such an extent that they may challenge the State's judgment.[15] The result could mean a halt in the shipment of pesticides, potentially damaging the public interest and resulting in chaos.[16] Based on such rationale, the court held that the imposition of a private duty to warn or otherwise intervene could severely compromise the State's efforts, and place the lives, property and resources of the citizens of California in jeopardy.[17]

2. State's Health Warnings Conformed to Statutory Requirements

The court next addressed the sufficiency of the State's health warnings to the public, and held that no duty to warn could be imposed upon the defendant manufacturers and distributors because the health warnings distributed by the State were sufficient to satisfy the statutory requirements.[18] Furthermore, the court argued, had the defendants given their own warning notices to the public as the plaintiffs advocate, the whole eradication program would likely have been fatally compromised.[19] The public concerns and confusion caused by these additional warnings would have delayed the implementation of a critically important program where "time was of the essence."[20]

3. Preemption Need not be Addressed

Based on its decision that the defendants owed no duty of care to the plaintiffs, the court declined to address the issue of whether plaintiffs'

---

15. *Macias*, 10 Cal. 4th at 858-59, 897 P.2d at 539, 42 Cal. Rptr. 2d at 601.

16. *Id.* at 859, 897 P.2d at 539-40, 42 Cal. Rptr. 2d at 601-02.

17. *Id.* at 860, 897 P.2d at 540, 42 Cal. Rptr. 2d at 602.

18. *Id.* at 857, 897 P.2d at 538, 42 Cal. Rptr. 2d at 600. The health warnings were designed by the Department of Food and Agriculture during the 1989-1990 Medfly eradication program. *Id.* The distributed health warning leaflets contained both English and Spanish language, provided health information, and included telephone numbers to call for additional information. *Id.* Furthermore, health department officials appeared in the news to discuss concerns, and established a telephone "hot line" to answer questions. *Id.* at 857, 897 P.2d at 538-39, 42 Cal. Rptr. 2d at 600-01.

19. *Id.* at 859, 897 P.2d at 540, 42 Cal. Rptr. 2d at 602.

20. *Id. See generally* 58 CAL. JUR. 3D *State* § 49 (1980) (describing how, during a state of emergency, there can be a suspension of provisions of regulatory statutes, orders, rules, or regulations of state agencies).

claim would be preempted by federal law that regulates the labeling of pesticides.[21]

B. Justice Mosk's Dissenting Opinion

In a separate dissenting opinion, Justice Mosk stated that the notice provided by the state did not conform with statutory requirements because it contained an inadequate warning of the health risks associated with malathion.[22] Justice Mosk argued that based upon fundamental notions of products liability, the defendant suppliers of malathion were liable under a common law duty to warn.[23] Furthermore, he found considerable case authority holding that the existence of a government duty to warn does not necessarily displace a manufacturer's common law duty to warn.[24] Based upon such rationale, Justice Mosk would have affirmed the judgment of the court of appeal.[25]

III. IMPACT

Prior to *Macias*, the California Supreme Court had not directly addressed products liability claims arising from the aerial spraying of malathion.[26] On a number of prior occasions, however, the court upheld the policy that the security and welfare needs of society must come before an expanded tort duty of care.[27] *Macias* continues this policy of noninterference with the State's actions during a state of emergency, and furthers the notion that tort and products liability claims come secondary to ensuring that all emergency service functions of the state, local governments, and private agencies will be effectively coordinated to deal with any emergency that may arise.[28] As a result, *Macias* will likely dissuade

---

21. *Macias*, 10 Cal. 4th at 860, 897 P.2d at 540, 42 Cal. Rptr. 2d at 602. *See generally* 13 CAL. JUR. 3D *Constitutional Law* § 95 (1989 & Supp. 1995) (discussing the doctrine of preemption).

22. *Macias*, 10 Cal. 4th at 861, 897 P.2d at 541, 42 Cal. Rptr. 2d at 603 (Mosk, J., dissenting). Justice Mosk argued that the State did not meet its duty, and perhaps omitted the warnings in a "deliberate effort to allay public anxiety and avoid public opposition to aerial spraying of malathion." *Id.* at 862, 897 P.2d at 541, 42 Cal. Rptr. 2d at 603 (Mosk, J., dissenting).

23. *Id.* at 862, 897 P.2d at 542, 42 Cal. Rptr. 2d at 604 (Mosk, J., dissenting).

24. *Id.* at 863, 897 P.2d at 542, 42 Cal. Rptr. 2d at 604 (Mosk, J., dissenting). "No previous case has found that a manufacturer's duty to warn is abrogated simply because a government entity has declared a state of emergency." *Id.* at 863, 897 P.2d at 542, 42 Cal. Rptr. 2d at 604 (Mosk, J., dissenting).

25. *Id.* at 865, 897 P.2d at 544, 42 Cal. Rptr. 2d at 606 (Mosk, J., dissenting).

26. *Id.* at 857, 897 P.2d at 538, 42 Cal. Rptr. 2d at 600.

27. *Id.* at 859-60, 897 P.2d at 540, 42 Cal. Rptr. 2d at 602.

28. *Id.* at 854, 897 P.2d at 536, 42 Cal. Rptr. 2d at 598.

claims against private or government agencies which arise during a declared state of emergency.

IV. CONCLUSION

While it is unfortunate that the plaintiffs were injured by the malathion spraying, it is nonetheless essential that the court limit the liability of state entities and private entities working with the state during a public emergency. Furthermore, it must be noted that the holding in *Macias* is essentially limited in application to emergency situations. Hence, in no way does *Macias* advocate allowing culpable manufacturers and distributors of defective products to escape liability and governmental regulations.

ROGER SHAAR, JR.

VI. WORKERS' COMPENSATION

A person who is convicted of a crime and who elects to perform community service, instead of paying a fine, is an employee covered under the Workers' Compensation Act: **Arriaga v. County of Alameda.**

I. INTRODUCTION

In *Arriaga v. County of Alameda*,[1] the California Supreme Court considered whether a person convicted of a crime who performs community service in lieu of paying a fine is an employee covered by the Workers' Compensation Act.[2] The court held that such a person is an employee for purposes of workers' compensation, and therefore, injuries sustained while performing community service are remedied exclusively under the Workers' Compensation Act.[3]

II. TREATMENT

The court considered whether a person performing court-ordered community service is an employee whose exclusive remedy for injury is under the Workers' Compensation Act (Act).[4] Justice Mosk initially noted

---

1. 9 Cal. 4th 1055, 892 P.2d 150, 40 Cal. Rptr. 2d 116 (1995). Justice Mosk delivered the unanimous opinion of the court, in which Chief Justice Lucas and Justices Kennard, Arabian, Baxter, George, and Werdegar concurred. *Id.* at 1058-68, 892 P.2d at 152-58, 40 Cal. Rptr. 2d at 118-24.

2. *Id.* at 1059, 892 P.2d at 152, 40 Cal. Rptr. 2d at 116; *see* CAL. LAB. CODE §§ 3200-4853 (West 1989 & Supp. 1996) (Workers' Compensation Act).

The Alameda County Sheriff's Department assigned Linda Arriaga to work for the California Department of Transportation (Cal Trans) as part of her sentence in connection with a four year old speeding ticket. *Arriaga*, 9 Cal. 4th at 1059, 892 P.2d at 152, 40 Cal. Rptr. 2d at 118. Cal Trans assigned Arriaga to clean the walls of a ventilation duct where she worked for several hours. *Id.* Cal Trans neither supervised nor warned Arriaga about the toxic fumes from a solvent she was using to clean the walls. *Id.* She worked without ventilation or respiratory equipment and eventually lost consciousness. *Id.* at 1060, 892 P.2d at 152, 40 Cal. Rptr. 2d at 118. Arriaga sustained injuries and filed a complaint alleging negligence against the County of Alameda and the State of California. *Id.* at 1059, 892 P.2d at 152, 40 Cal. Rptr. 2d at 118. The trial court concluded that workers' compensation was Arriaga's exclusive remedy and dismissed the complaint. *Id.* at 1060, 892 P.2d at 152-53, 40 Cal. Rptr. 2d at 119. The court of appeal affirmed and the California Supreme Court granted review. *Id.* at 1060, 892 P.2d at 153, 40 Cal. Rptr. 2d at 119.

3. *Arriaga*, 9 Cal. 4th at 1067, 892 P.2d at 158, 40 Cal. Rptr. 2d at 124.

4. *Id.* at 1059, 892 P.2d at 152, 40 Cal. Rptr. 2d at 118; CAL. LAB. CODE § 3351 (West 1989 & Supp. 1996) (defining "employees" for purposes of the Act). *See generally* Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405 (1988) (discussing the

that the Act applies only in the context of an employment relationship.[5] The court asserted that a contract of hire need not exist to establish the employment relationship and that any person rendering service for another is presumed to be an employee.[6] The court then discussed the purpose of the Act in order to determine the type of employment relationship that triggers its application.[7] The court explained that the Act protects individuals from the special risks of employment and, therefore, the court determined that employment should be broadly defined.[8]

The court next discussed its decisions in two prior cases analogous to the present case.[9] Relying on the prior holdings, the court found that when a city receives a benefit from an individual under its control, and the individual is exposed to the same risks as a regular employee, the individual is an employee for purposes of workers' compensation.[10] Applying this test, the court found Arriaga to be an employee under the Act,[11] the court reasoned that the county and the state benefitted from

---

individuals and the entities affected by the exclusive remedy rule); George H. Singer, *Workers' Compensation: The Assault on the Shield of Immunity*, 70 N.D. L. REV. 905 (1994) (analyzing exemptions to the exclusivity rule).

5. *Arriaga*, 9 Cal. 4th at 1060, 892 P.2d at 153, 40 Cal. Rptr. 2d at 119 (citing County of Los Angeles v. Workers' Compensation Appeals Bd., 30 Cal. 3d 391, 637 P.2d 681, 179 Cal. Rptr. 214 (1981)); *see* CAL. LAB. CODE § 3600 (West 1989 & Supp. 1996) (stating that liability exists for employee injury "arising out of or in the course of the employment").

6. *Arriaga*, 9 Cal. 4th at 1061, 892 P.2d at 153, 40 Cal. Rptr. 2d at 119 (citing Laeng v. Workmen's Compensation Appeals Bd., 6 Cal. 3d 771, 494 P.2d 1, 100 Cal. Rptr. 377) (1972); *see* CAL. LAB. CODE § 3357 (West 1989 & Supp. 1996) ("any person rendering service for another, [except] an independent contractor . . . is presumed to be an employee"). *See generally* 65 CAL. JUR. 3D *Work Injury Compensation* §§ 47-55 (9th ed. 1981 & Supp. 1995) (defining "employee"); 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 161-165 (1987 & Supp. 1995) (discussing who are employees).

7. *Arriaga*, 9 Cal. 4th at 1061, 892 P.2d at 153, 40 Cal. Rptr. 2d at 119.

8. *Id.*

9. *Id.* at 1061-62, 892 P.2d at 154, 40 Cal. Rptr. 2d at 120; County of Los Angeles v. Workers' Compensation Appeals Bd., 30 Cal. 3d 391, 637 P.2d 681, 179 Cal. Rptr. 214 (1981) (holding that a workfare recipient injured during work was an employee covered under the Act); *Laeng*, 6 Cal. 3d 771, 494 P.2d 1, 100 Cal. Rptr. 377 (holding that a job applicant injured during a tryout competition for a city job qualified as an employee).

10. *Arriaga*, 9 Cal. 4th at 1061-62, 892 P.2d at 154, 40 Cal. Rptr. 2d at 120. *See generally* 82 AM. JUR. 2D *Workers' Compensation* §§ 143-145 (1992 & Supp. 1995) (discussing factors determining employee status); 65 CAL. JUR. 3D *Work Injury Compensation* § 36 (1981 & Supp. 1995) (discussing the purported employer's control over the purported employee).

11. *Arriaga*, 9 Cal. 4th at 1062, 892 P.2d at 154, 40 Cal. Rptr. 2d at 120. *See gen-*

her labor, she was subject to their control, and she was subject to the common risks of that employment as were other employees.[12] The court, therefore, found Arriaga to be an employee covered by the Act.[13]

The supreme court then addressed *California State University, Fullerton v. Workers Compensation Appeals Board*,[14] a court of appeal decision that classified an individual in position similar to that as Arriaga as a volunteer, and excluded from protection under the Act.[15] The supreme court premised its disagreement with the lower court's holding on the facts and stated that a person working pursuant to a court order is acting under compulsion.[16] The court also stated that an individual performing community service in lieu of paying a fine is remunerated and is, therefore, not performing a voluntary service.[17] Applying this analysis, the court held that the credit Arriaga received against her fine was sufficient to qualify her as an employee, and therefore, she was not a volunteer.[18]

The court concluded by emphasizing that the Act should be liberally construed to favor the award of workers' compensation over civil litigation.[19] The court explained that in the present case, both Alameda county and the state of California were liable under the Act.[20] Because

---

erally Michelle M. Lasswell, *Workers' Compensation: Determining the Status of a Worker as an Employee or an Independent Contractor*, 43 DRAKE L. REV. 419 (1994) (discussing the general tests for determining the status of a worker).

12. *Arriaga*, 9 Cal. 4th at 1063, 892 P.2d at 154-55, 40 Cal. Rptr. 2d at 120-21.

13. *Id.* at 1063, 892 P.2d at 155, 40 Cal. Rptr. 2d at 121.

14. 16 Cal. App. 4th 1819, 21 Cal. Rptr. 2d 50 (1993), *overruled by*, *Arriaga*, 9 Cal. 4th at 1063-64, 892 P.2d at 155, 40 Cal. Rptr. 2d at 121.

15. *California State Univ., Fullerton*, 16 Cal. App. 4th 1819, 21 Cal. Rptr. 2d 50; CAL. LAB. CODE § 3352(i) (West 1989 & Supp. 1996) (stating that a volunteer not receiving remuneration services is not an employee). *See generally* 65 CAL. JUR. 3D *Work Injury Compensation* § 59 (1981 & Supp. 1995) (discussing volunteer status under the Act).

16. *Arriaga*, 9 Cal. 4th at 1064, 892 P.2d at 155-56, 40 Cal. Rptr. 2d at 121-22.

17. *Id.* The court noted that remuneration, which removes a person from volunteer status under Labor Code § 3352, need not be in monetary form. *Id.* (citing CAL. LAB. CODE § 3352(i) (West 1989 & Supp. 1996)).

18. *Id.* at 1065, 892 P.2d at 156, 40 Cal. Rptr 2d at 122. *See generally* 82 AM. JUR. 2D *Workers' Compensation* § 152 (1992 & Supp. 1995) (discussing nonmonetary compensation); 65 CAL. JUR. 3D *Work Injury Compensation* § 37 (1981 & Supp. 1995) (discussing remuneration as affecting the evaluation of an employment relationship).

19. *Arriaga*, 9 Cal. 4th at 1065, 892 P.2d at 156, 40 Cal. Rptr. 2d at 122. *See generally* 82 AM. JUR. 2D *Workers' Compensation* § 139 (1992 & Supp. 1995) (stating that workers' compensation provisions should be liberally construed).

20. *Arriaga*, 9 Cal. 4th at 1066 n.8, 892 P.2d at 157 n.8, 40 Cal. Rptr. 2d at 123 n.8.

The county was liable for workers' compensation as the general employer and the state was liable as the special employer. *Id.* The county assigned Arriaga to Cal Trans, retaining power over her work program and was, therefore, her general em-

Arriaga performed community service in lieu of paying a fine, she qualified as an employee making the exclusive remedy for her injury recovery under the Act.[21]

III. IMPACT

Prior to *Arriaga*, a court of appeal ruled that a person performing community service instead of paying a fine was not an employee because that person received no consideration to support an employment relationship.[22] *Arriaga* overruled that decision and made it clear that the credit received against a fine is adequate remuneration and thus, establishes an employer-employee relationship.[23] As long as the person performing services is rewarded for those services in a form other than compensation for meals, transportation, lodging, or reimbursement for incidental expenses, there is sufficient remuneration to establish an employment relationship.[24]

The court's decision in *Arriaga* reinforced the requirement that the Act be liberally construed.[25] The court's holding also discourages civil litigation and, undoubtedly, more employee injuries will be remedied exclusively under the Act.[26]

---

ployer. *Id.* at 1063, n.4, 892 P.2d at 154, 155 n.4, 40 Cal. Rptr. 2d at 120, 121 n.4. The state was Arriaga's special employer because it assigned her to particular tasks. *Id. See generally* 2 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workers' Compensation* §§ 150-151 (9th ed. 1987 & Supp. 1995) (discussing general and special employment). If the county assigned a person to work for a private nonprofit organization, that organization would be exempt from liability. *See* CAL. LAB. CODE § 3301(b) (West 1989).

21. *Arriaga*, 9 Cal. 4th at 1059, 892 P.2d at 152, 40 Cal. Rptr. 2d at 118. *See generally* Steven E. Goren, *The Workers' Compensation Exclusive Remedy Rule and its Exceptions*, 71 MICH. B.J. 59 (1992) (discussing various exceptions to the exclusive-remedy provisions).

22. California State Univ., Fullerton v. Workers' Compensation Appeals Bd., 16 Cal. App. 4th 1819, 21 Cal. Rptr. 2d 50 (1993); *Arriaga*, 9 Cal. 4th at 1063-64, 892 P.2d at 155, 40 Cal. Rptr. 2d at 121.

23. *Arriaga*, 9 Cal. 4th at 1064-65, 892 P.2d at 155-56, 40 Cal. Rptr. 2d at 121-22.

24. *Id.* at 1063, 892 P.2d at 155, 40 Cal. Rptr. 2d at 121; *see* CAL. LAB. CODE § 3352(i) (West 1989 & Supp. 1996).

25. *See supra* note 19 and accompanying text.

26. *Arriaga*, 9 Cal. 4th at 1065, 892 P.2d at 156, 40 Cal. Rptr. 2d at 122; *see* CAL. LAB. CODE § 3602 (West 1989 & Supp. 1995). *See generally* Catherine A. Hale, *Workers' Compensation—A Proposal to Protect Injured Workers From Employers' Shield of Immunity*, 20 ST. MARY'S L.J. 933, 951-52 (1989) (proposing to award employees exemplary damages for injuries resulting from employers' gross negligence).

IV. CONCLUSION

In *Arriaga*, the California Supreme Court held that a person convicted of a crime who elects to perform community service in lieu of paying a fine is an employee covered under the Workers' Compensation Act.[27] The court held that such a person was not a volunteer because of the credit received against the court-imposed fine.[28] The county and the state were both liable for Arriaga's injuries to the extent afforded her by the Act.[29]

WENDY M. HUNTER

27. *Arriaga*, 9 Cal. 4th at 1059, 892 P.2d at 150, 40 Cal. Rptr. 2d at 116.
28. *Id.* at 1065, 892 P.2d at 156, 40 Cal. Rptr. 2d at 122.
29. *Id.* at 1062-63, 892 P.2d at 154-55, 40 Cal. Rptr. 2d at 120-21.

SUMMARIES

I. Civil Procedure

An attorney who represents herself in an action to enforce a contract that provides for the recovery of attorney fees may not recover attorney fees for efforts spent in litigating the dispute.

Trope v. Katz, Supreme Court of California, decided October 2, 1995, 11 Cal. 4th 274, 902 P.2d 259, 45 Cal. Rptr. 2d 241.

Facts. In November 1985, Bertram Katz contracted with the law firm of Trope & Trope to represent him in a divorce proceeding. The written contract provided for the recovery of attorney fees incurred in enforcing the contract. Trope withdrew as counsel in February 1989, carrying an account receivable for $163,000. In December 1989, Trope sued Katz for breach of contract to recover the unpaid fees. Katz filed a cross-complaint alleging legal malpractice. Trope represented itself in the suit. The jury awarded Trope $163,000 on its complaint and also found in favor of Katz, awarding him $118,500 in damages. Trope moved for an award of attorney fees as provided in the contract. The trial court denied the motion, holding that because Trope represented itself it was not entitled to recover attorney fees. The court of appeal affirmed.

Holding. The Supreme Court of California unanimously affirmed. Generally, California follows the American rule, which requires each litigant to pay for his or her own defense. California Civil Code section 1717 (a) allows for parties to contract out of the American Rule by providing for the recovery of reasonable attorney's fees incurred to enforce the contract. A litigant, including an attorney, who neither pays for nor becomes liable to pay for legal representation in a suit has not "incurred" any attorney fees, and therefore is not entitled to reimbursement under section 1717 or under the parties' contract. Thus, because Trope & Trope represented itself during the litigation, it incurred no attorney fees. Therefore, the court held Trope could not recover for its time, efforts, or business opportunities lost in defending the suit.

II. Clerks of Court

A transfer of the county clerk's duties as ex officio clerk of the superior court to another official may be made before expiration of the county clerk's elective term.

Anderson v. Superior Court, Supreme Court of California, decided December 11, 1995, 11 Cal. 4th 1152, 907 P. 2d 1312, 48 Cal. Rptr. 2d 766.

Facts. In June of 1994, Susan Anderson was reelected as Fresno County Clerk for a four year term. Despite excellent performance, her duties were set to be transferred to the court executive officer pursuant to a recently passed local rule. Prior to the rule taking effect, Anderson filed an original action with the court of appeal, seeking a writ of mandate staying implementation of the rule until the expiration of her current term. The court of appeal granted the writ on the grounds that transfer of the duties in the middle of the term would infringe on the electorate's right to vote.

Holding. The supreme court began its analysis by examining two prior decisions in which it addressed the "timing question." In the first one, the supreme court had allowed a mid-term transfer of powers. In the second one, the supreme court had disallowed a midterm transfer of powers. The two cases were harmonious, however, because in the first, the powers to be transferred were outside the class of matters that are required to be performed only by an elected official, while in the second, the powers were necessary to the elected office. The court therefore surmised that since the powers of clerk of the superior court need not be performed by an elected official and the appropriate statute does not forbid it, mid-term transfer of these powers was permissible.

In a separate concurring decision, Justice Mosk agreed with the majority that the transfer was permitted by law, but questioned the fairness of such action, considering the fact that the clerk's duties were stripped only three weeks after her re-election, and thus the transfer appeared, at least on its face, as punitive.

In a dissenting decision, Justice Kennard stated that the voters elected the petitioner with the understanding that she would perform a bundle of duties, and that transfer of any of these duties would violate the public's right to vote on this matter and, therefore, could only be accomplished at the end of a term, when the statute expressly allows for such transfer.

III. Criminal Law

A. A single prior conviction for driving under the influence of alcohol and its resulting prison term can be used both to elevate a current drunk driving conviction to a felony and to enhance the sentence without violating the bar against multiple punishment of an act or omission.

People v. Coronado, Supreme Court of California, decided December 21, 1995, 12 Cal. 4th 145, 906 P.2d 1232, 48 Cal. Rptr. 2d 77.

Facts. Defendant was found guilty of driving while under the influence of alcohol. Defendant also had three prior convictions for drunk driving and had served three prior prison terms for felony convictions. One of those prison terms was for felony drunk driving. This prior conviction was used by the superior court to elevate the current offense to a felony and its prison term was used to add a one-year enhancement to defendant's sentence. The court of appeal affirmed the sentence imposed by the superior court, finding that the enhancement was valid.

Holding. The Supreme Court of California affirmed the judgment of the court of appeal. The court held that a single prior conviction for driving under the influence and its resulting prison term can be used to both elevate a new drunk driving conviction to a felony and to justify a one-year enhancement of the sentence. Although the defendant argued that the prior conviction used to elevate the current drunk driving conviction to a felony could not also be used as an enhancement, the court concluded otherwise. The court found that the legislature did not intend to limit the punishment that could be imposed on a habitual drunk driver. The court also found that the dual use of defendant's prior conviction does not violate Penal Code section 654 banning multiple punishment of an act or omission since the enhancement is attributable to defendant's status as a repeat offender and not the underlying criminal conduct which gave rise to the current and prior convictions.

B. **Absent a request by the defendant, trial courts are not required to define the phrase "reckless indifference to human life" to the jury as it used in the felony-murder special circumstance of California Penal Code, section 190.2, because the statutory meaning of the phrase is adequately conveyed by a common understanding of its terms.**

People v. Estrada, Supreme Court of California, decided November 20, 1995, 11 Cal. 4th 568, 904 P.2d 1197, 46 Cal. Rptr. 2d 586.

Facts. Defendant was charged with first degree murder, robbery, and burglary. Two felony-murder special circumstances, each providing for a death sentence or life imprisonment with no possibility of parol, were also alleged against the defendant, because the murder occurred during the commission of both the robbery and burglary. At trial, evidence was introduced showing that while the defendant was not the actual killer, he was an accomplice. Pursuant to California Penal Code, section 190.2, the trial court stated in its jury instructions that a felony-murder special circumstance is applicable to a defendant who is not the actual killer, if the defendant is an accomplice to the underlying felony, and acted with "reckless indifference to human life." The jury found the defendant guilty of first degree murder, robbery, and burglary, and also found that the felony-murder special circumstance allegations applied. Since the trial court never defined "reckless indifference to human life" for the jury, the defendant appealed the court's ruling, arguing that the statutory phrase does not amply convey to the jury the meaning of California Penal Code, section 190.2.

Holding. Affirming the decision of the court of appeal, the supreme court held that the phrase "reckless indifference to human life," as used in California Penal Code, section 190.2, is commonly understood to mean that the defendant was subjectively aware that his participation in the felony involved a grave risk of death. This statutory phrase therefore does not have a technical meaning peculiar to the law, and thus trial courts have no sua sponte duty to further define the statutory phrase for the jury.

The court further held that when the defendant does request that the statutory phrase be clarified for the jury, the trial court should follow the ruling in *Tison v. Arizona*, 481 U.S. 137 (1987), which requires that a "grave" risk of death standard be used to define "reckless indifference to

human life," rather than an "extreme likelihood" of risk to innocent life standard.

Lastly, the court held that the phrase "reckless indifference to human life" comports with due process and is not unconstitutionally vague.

C. Materiality is an element of perjury which must be decided by the jury beyond a reasonable doubt and failure to instruct the jury on the materiality element constitutes a per se reversible error.

People v. Kobrin, Supreme Court of California, decided November 2, 1995, 11 Cal. 4th 416, 903 P.2d 1027, 45 Cal. Rptr. 2d 895.

Facts. After defendant reported receiving numerous threats by doorstep note or telephone and the suspicious starting of two fires outside his apartment, defendant obtained a restraining order against his neighbor, who he swore by affidavit was responsible for the activities, and police began surveillance of defendant's apartment. One evening, while police were carefully observing defendant's apartment, defendant called the police claiming that he had just found another threatening note on his doorstep and had chased the offender from his apartment. This seriously conflicted with what surveillance officers had observed and when the police sergeant confronted defendant with the inconsistencies, he confessed to everything, offering various excuses for his conduct. Defendant was subsequently charged with one count of perjury of the affidavit, six counts of preparing a false record and nine counts of making a false police report.

In his defense, the defendant claimed a mental impairment precluding him from the ability to form the requisite intent, moved to dismiss the perjury count because the falsified elements were not material to the decision to issue the restraining order, and requested that the jury decide the element of materiality. The judge denied both the motion and the request and instructed the jury that, if it found that the defendant had made one or more false statements, those statements were material. The jury returned guilty verdicts on all counts. Defendant appealed based on the failure to submit the materiality question to the jury. Citing a well-established line of case authority finding materiality an issue of law, not fact, the court of appeal upheld the trial court ruling.

Holding. In light of twenty-five years of United States Supreme Court decisions recognizing a criminal defendant's due process right to have every element decided by a jury beyond a reasonable doubt, and finding that materiality is an element of perjury, the California Supreme Court reversed the perjury conviction. The court further noted that the failure to instruct the jury on the materiality element constitutes a per se reversible error because the omission of an element adversely and directly affects the jury's verdict.

IV. Highways and Automobiles

Drivers convicted outside California must attack the constitutionality of those convictions in that jurisdiction rather than through a writ of mandate brought against a California agency that suspended privileges as a result of that conviction.

Larsen v. Department of Motor Vehicles, Supreme Court of California, decided December 26, 1995, 12 Cal. 4th 278, 906 P.2d 1306, 48 Cal. Rptr. 2d 151.

Facts. Orange County resident Charles Larsen was arrested in New York state for driving while intoxicated and for driving on the wrong side of the road. Before Larsen's trial, his defense attorney submitted a guilty plea that had not been signed by Larsen. Later, the attorney submitted an affidavit stating that he advised Larsen of the ramifications of a guilty plea. Larsen was convicted of "driving while ability impaired" and the California Department of Motor Vehicles (DMV) suspended Larsen's license for six months upon receiving notice of the New York conviction.

Larsen filed a petition for a writ of mandate, requesting the superior court to order the DMV to set aside its suspension of Larsen's driving privileges on the ground that he was not advised of his trial rights prior to entering a guilty plea in the New York court. The trial court denied Larsen's request for the writ. The court of appeal reversed, reasoning that California should have provided a forum to contest further punishment from an out-of-state conviction if that conviction may have been unconstitutional.

Holding. Granting review to resolve conflict among the courts of appeal, the supreme court held that Larsen was required to contest his driving conviction in New York rather than by requesting a writ of mandate to set aside the suspension of privileges from a California agency. Larsen

contended that, because the California DMV was imposing a "punishment" as a result of his out-of-state conviction, the state should be required to provide a forum for him to contest the constitutionality of the out-of-state conviction. The court first stated that the revocation of a driver's license was a civil rather than a criminal sanction. While the court conceded that the state could not suspend or revoke a driver's license on the basis of a conviction that was proven to be unconstitutional, it recognized that Larsen had not attacked the constitutionality of his conviction in New York and that nothing prevented him from doing so. Finally, the court concluded that there was nothing unconstitutional about requiring Larsen to attack the constitutionality of a conviction in the jurisdiction in which it was rendered.

V. Initiative

A county's general plans may be amended by initiative of the local electorate.

Devita v. County of Napa, Supreme Court of California, decided March 6, 1995, 9 Cal. 4th 763, 889 P.2d 1019, 38 Cal. Rptr. 2d 699.

Facts. In November 1990, the people of Napa County passed Measure J. This provision amended the county's general plan to preserve agricultural land within the county. The initiative provided that the county's general plan could not be amended without the vote of the people. However, under certain circumstances, the land could be redesignated under various situations without violating the statute. In March 1991, several opponents of the measure filed a complaint in superior court seeking declaratory judgment against the statute as invalid. The complaint alleged that the general plan could not be amended by initiative and that the authority of the county board of supervisors could not be limited by the mandatory voter approval requirements contained in Measure J. The trial court denied plaintiff's relief on the ground that Measure J was a valid use of initiative power. The court of appeal affirmed the trial court's holding. The supreme court granted review to resolve whether a county's general plan can be amended by initiative of the people.

Holding. The supreme court affirmed the decision of the appellate court. The court held that the California statutory provisions governing local planning did not prohibit amending the land use elements of local general plans by initiative. The court reasoned that California Election Code section 9111 specifically recognized the right to amend general plans by initiative. The court asserted that because the statute stated that an initiative's effect on a general plan's internal consistency must be submitted to the board for examination, it would be incorrect to find this type of initiative unlawful.

In addition, the court found that the Measure J's voter approval provisions were constitutional because the provision called for a legislative act by the people. The court noted that legislative acts by the people could also be enacted by local governing bodies, thus the powers of these bodies was not circumscribed and therefore the provisions were constitutional.

VI. Insurance Contracts and Coverage

Former Insurance Code section 11580.2(i) governing uninsured and underinsured motorist claims is inapplicable to underinsured motorist coverage since it directly conflicts with section 11580.2¶(3); therefore an insured need not comply with the conditions precedent in former section 11580.2(i) before filing an underinsured motorist claim.

Quintano v. Mercury Casualty Co., California Supreme Court, decided December 6, 1995, 11 Cal. 4th 1049, 906 P.2d 1057, 48 Cal. Rptr. 2d 1.

Facts. John Quintano (insured) was involved in an auto accident in which he was covered by Mercury Insurance Co. (insurer) for both uninsured and underinsured motorist claims. After entering into a settlement agreement with the tortfeasor, Quintano requested that Mercury pay the difference between his underinsured motorist protection and the limit of the other driver's liability policy. Mercury rejected this request, stating that Quintano had not complied with all conditions precedent to coverage before the statute of limitations had run. The trial court granted Mercury's motion for summary judgment. Quintano appealed, and the court of appeal reversed, finding that former section 11580.2(i) was not applicable to underinsured motorist coverage.

Holding. The supreme court affirmed the court of appeal decision. The court held that since the two subdivisions in question under section 11580.2 were in conflict, the conditions precedent provision of the uninsured and underinsured motorist statute did not apply in a claim for underinsured motorist coverage. The court reasoned that to apply former subdivision (i) to underinsured coverage would often defeat coverage before the condition precedent of former subdivision ¶(3) had occurred, since subdivision ¶(3) required the insured to exhaust the tortfeasor's policy limits in a settlement or judgment as a precondition to underinsured motorist coverage. The court stated that in some cases, it would prove impossible for an insured party to fulfill the conditions of subsection ¶(3) in time to comply with the preconditions of subsection (i), thereby allowing the insurer to refuse coverage. The court asserted that this conflict within the statute could not have been intended by the legislature, and therefore the requirements of section 11580.2(i) did not apply to underinsured motorist claims.

VII. Lewdness, Indecency, and Obscenity

Any type of touching is sufficient to constitute forcible lewd conduct, the touching need not be inherently lewd.

People v. Martinez, Supreme Court of California, decided November 2, 1995, 11 Cal. 4th 434, 903 P. 2d 1037, 45 Cal. Rptr. 2d 905.

Facts. Defendant was tried on two counts of forcible lewd conduct as well as attempted kidnapping and battery. A thirteen year-old girl was walking home one day when the defendant, a stranger, had allegedly wrapped his arms around her waist and attempted to kiss her on the lips. After the girl had broken free, the defendant ran away and later grabbed a different thirteen year-old girl and attempted the same thing, this time grabbing her neck or shoulder as well as her mouth. Defendant released the girl when several of the girl's family approached him. At trial, he was convicted of all charges. The court of appeal reversed the second count of forcible lewd conduct, finding that the touching was not of a sufficiently sexual manner.

Holding. The supreme court rejected the contention that forcible lewd conduct requires touching which is inherently lewd, stating that the statute does not specify that any particular portion of the body needs to be touched. Other crimes that are similar in nature such as sexual battery require a specific type of touching. Because such language was absent from the forcible lewd conduct statute, the supreme court reasoned that the omission was intentional. It did, however, mention that the type of touching is relevant when determining the intent of the defendant, but that any touching is sufficient. Justice Mosk concurred with the majority, only differing slightly in his interpretation of what constitutes a "lewd or lascivious act."

VIII. Parent and Child

Family Code section 7895 requires the court to appoint counsel for appellant parents after a judgment freeing the child from parental custody or control, but not for the respondent parent; however, the court has discretion to appoint counsel for any respondent parent when the termination of parental rights is at stake.

In re Bryce, Supreme Court of California, decided December 26, 1995, 12 Cal. 4th 226, 906 P.2d 1275, 48 Cal. Rptr. 2d 120.

Facts. In a proceeding to determine child custody, the superior court denied the stepfather's petition to have the child declared free from the father's custody and control based on the father's alleged abandonment. The father petitioned the court to have counsel appointed for him after the child's stepfather appealed the decision. The court of appeal denied the father's request for counsel, finding that the statute only provided for appointed counsel for appellants in child custody and control cases.

Holding. The supreme court reversed the court of appeal's decision, holding that while section 7895 does not provide for appointed counsel for respondents in child custody cases, the lower court should have exercised its discretion to decide whether or not to appoint counsel for the father. Looking to the language of the statute as well as its legislative history, the court found that the two prerequisites for appointed appellate counsel were missing in the present case; the parent seeking court-appointed representation must have been the appellant, and the child must have been a dependent of the juvenile court. Since the statute ex-

pressly stated appellants were entitled to appointed counsel, the court determined that the statute impliedly excluded respondents the benefit of appointed counsel when their rights had not been terminated.

However, the supreme court noted that when the presence of counsel may affect the ultimate outcome when determining the termination of parental rights, the lower court should determine whether, in its discretion, appointed counsel was needed. Since the lower court in this case had automatically denied respondent appointed counsel, the supreme court remanded the case, directing the court of appeal to exercise its discretion to determine whether to appoint counsel for the father.

IX. Public Utilities

California Public Utility Code section 453.5 prevents the Public Utilities Commission from assessing a rate refund against a public utility and using the funds for a purpose other than to reimburse ratepayers.

Assembly of the State of California v. Public Utilities Commission, Supreme Court of California, decided December 18, 1996, 12 Cal 4th 87, 48 Cal. Rptr. 2d 54.

Facts. In 1982, the Federal Communications Commission ordered AT&T to reimburse its ratepayers for cellular research expenses. Pursuant to this order, Pacific Bell received $7.9 million, but did not distribute the funds to ratepayers. In 1993, the California Public Utilities Commission decided that the reimbursement was intended to be distributed to ratepayers and ordered Pacific Telesis, Pacific Bell's parent corporation, to place $50 million, $7.9 million at 18% interest, in an account for future distribution. The Commission noted that the intended beneficiaries, ratepayers in the years 1974-1982, could not be identified, so the Commission directed $7.9 million to be distributed to current ratepayers and the rest to be allotted for public school telecommunications infrastructure. On rehearing, the Commission modified the disbursement and ordered $7.9 million plus 3.4% interest to be distributed to current ratepayers and allotted the remainder to public school telecommunications infrastructure. The State Assembly and ratepayers questioned the legality of the Commission's order and petitioned for review.

Holding. The California Supreme Court annulled the Commission's order and held that the Commission could not charge the utility company at one rate of interest and reimburse customers at a differing rate. The court reasoned that section 453.5 of the California Public Utility Code restricted the Commission's discretion with respect to the use of ratepayer refunds. The court stated that section 453.5 prevents the Commission from refunding to ratepayers an amount which is less than what the Commission assessed against a utility company for reimbursement. Therefore, the court held that the California Public Utility Code precluded the Commission from exercising its discretion on the proper use of refunds and remanded the matter to the Commission for further proceedings.

The following students contributed to the above summaries:

WILLIAM ANTHONY BAIRD
DEBRA E. BEST
MARC HANISH
WENDY M. HUNTER
ROLAND T. KELLY
JENNIFER ANNA POPICK
LORI L. PROUDFIT
JONATHAN SIMONDS PYATT
ROGER SHAAR, JR.
KIRK ALAN WALTON