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California Supreme Court Survey -- A Review of Decisions: April 1989-June1989

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California Supreme Court Survey
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The California Supreme Court Survey is a synopsis of decisions by the Supreme Court of California. The survey's purpose is to supply the reader with information and a basic understanding of the issues addressed by the court, as well as to provide a starting point for research of the topical areas involved. Toward this end, each summary discusses one recent case before the court, while analyzing it according to the importance of the holding and the extent to which the court expands or modifies existing law. The survey treats death penalty decisions cumulatively every six months in a single article devoted to the recurrent issues within each case. Attorney discipline decisions are omitted from the survey.

I. CONSTITUTIONAL LAW

Adult entertainment zoning ordinances should be applied only to movie theaters at which sexually explicit films "constitute a substantial portion of the films shown." Under no circumstances can a single showing of an adult film make a theater subject to enforcement: **People v. Superior Court (Lucero).**

I. INTRODUCTION

In *People v. Superior Court (Lucero)*,[1] the California Supreme Court considered whether a Long Beach movie theater was an "adult entertainment business" as defined in the city's "Anti-Skid Row" zoning ordinance.[2] The owners of the movie theater were charged with numerous misdemeanor counts under the ordinance, but they demurred on the grounds that each of the complaints alleged only a single showing of an adult film, and as such, the theater was not an "adult entertainment theater."[3]

The court of appeal agreed that a theater could not be deemed an "adult entertainment theater" based on a "single-use" standard as contended by the People.[4] The supreme court affirmed, but disagreed with the appellate court's holding that a "preponderance" of the movies shown by a theater must be sexually explicit before such an ordinance can be applied. Instead, the supreme court enunciated

1. 49 Cal. 3d 14, 774 P.2d 769, 259 Cal. Rptr. 740 (1989). Chief Justice Lucas wrote the majority opinion in which Justices Panelli, Eagleson, and Kaufman concurred. Justices Mosk and Kennard wrote separate opinions, each concurring and dissenting.

2. *Id.* at 18, 774 P.2d at 770, 259 Cal. Rptr. at 741. The ordinance prohibited adult entertainment businesses from locating within 500 feet of any residential zone, within 1,000 feet of any other adult entertainment business, or within 1,000 feet of any school, park, playground, public building, church, religious organization, or establishment likely to be used by minors. LONG BEACH, CA., MUN. CODE ch. 21.51. The ordinance is reprinted in full in the appendix to the case. *Lucero*, 49 Cal. 3d at 38, 774 P.2d at 777-79, 259 Cal. Rptr. at 748-50.

3. *Lucero*, 49 Cal. 3d at 19, 774 P.2d at 771, 259 Cal. Rptr. at 742. After the municipal court overruled the demurrers, the superior court granted a peremptory writ of mandate with leave to amend. The People declined to amend and instead sought a writ of mandate from the court of appeal compelling the superior court to vacate its judgment. *Id.*

4. *Id.* at 20, 774 P.2d at 771-72, 259 Cal. Rptr. at 742-43. The court of appeal relied on Pringle v. City of Covina, 115 Cal. App. 3d 151, 171 Cal. Rptr. 251 (1981), which held that a "preponderance" or "more often than not" standard should be applied in determining whether a movie theater will be regulated under an adult entertainment zoning statute. *Id.* at 162, 171 Cal. Rptr. at 257. The supreme court disapproved *Pringle* to the extent that it conflicts with the standard established in this case. *Lucero*, 49 Cal. 3d at 28, 774 P.2d at 777, 259 Cal. Rptr. at 748. It also disapproved two other appellate court decisions that interpreted *Pringle* as establishing a preponderance standard. *Id.* at 28 n.10, 774 P.2d at 777 n.10, 259 Cal. Rptr. at 748 n.10 (citing Strand Property Corp. v. Municipal Court, 148 Cal. App. 3d 882, 200 Cal. Rptr. 47 (1983); Kuhns v. Board of Supervisors, 128 Cal. App. 3d 369, 181 Cal. Rptr. 1 (1982)).

the proper standard: whether X-rated movies[5] "constitute a substantial portion of the films shown or account for a substantial part of the revenues."[6] The court additionally noted that while the preponderance standard is "not constitutionally compelled," a municipality is free to specify that higher standard in its ordinance.[7]

II. TREATMENT OF THE CASE

Municipal zoning ordinances restricting adult entertainment theaters were upheld by the United States Supreme Court in *Young v. American Mini Theaters, Inc.*[8] The Long Beach law was modeled after the two Detroit ordinances examined in *Young*.[9] The California Supreme Court in this case, relying on *Young* and its progeny,[10] concluded that the city's substantial governmental interest in regulating

5. LONG BEACH, CA., MUN. CODE ch. 21.51, § 21.51.020(A). The ordinance defined an adult motion picture theater as one that shows material "depicting, describing or relating to specified sexual activities or specified anatomical areas." *Id.* Definitions of "specified sexual activities," and "specified anatomical areas" are contained in the ordinance. *Id.* § 21.51.020(B), (C).

6. *Lucero*, 49 Cal. 3d at 19, 774 P.2d at 770-71, 259 Cal. Rptr. at 741-42. The shorthand term used by the court for referring to this standard is "regular and substantial course of conduct." *Id.* at 19, 774 P.2d at 771, 259 Cal. Rptr. at 742. Thus, it is unconstitutional to apply an adult entertainment zoning ordinance to a theater for a "single showing" of an X-rated movie. *Id.* at 28, 774 P.2d at 777, 259 Cal. Rptr. at 748.

7. *Id.* at 19, 774 P.2d at 770, 259 Cal. Rptr. at 741.

8. 427 U.S. 50, *reh'g denied*, 429 U.S. 873 (1976). The ordinances were upheld as permissible licensing regulations or locational restrictions. *Id.* at 62-63; *see* 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 319 (9th ed. 1988). *See generally* 50 AM. JUR. 2D *Lewdness, Indecency, and Obscenity* § 26 (1970 & Supp. 1989); 66 CAL. JUR. 3D *Zoning and Other Land Controls*, §§ 76-77 (1981 & Supp. 1989); Day, *The Incidental Regulation of Free Speech*, 42 U. MIAMI L. REV. 491 (1988); Comment, *Zoning and the First Amendment: A Municipality's Power to Control Adult Use Establishments*, 55 UMKC L. REV. 263 (1987); Note, *Zoning and the First Amendment Rights of Adult Entertainment*, 22 VAL. U.L. REV. 695 (1988); Recent Development, *Trends in First Amendment Protection of Commercial Speech*, 41 VAND. L. REV. 173 (1988).

9. *Lucero*, 49 Cal. 3d at 18, 774 P.2d at 770, 259 Cal. Rptr. at 741. In Walnut Properties v. City Council of the City of Long Beach, 100 Cal. App. 2d 1018, 161 Cal. Rptr. 411 (1980), the court of appeal upheld the constitutionality of the Long Beach ordinance based upon the holding in *Young*. *See Lucero*, 49 Cal. 3d at 22, 774 P.2d at 773, 259 Cal. Rptr. at 744.

10. *See* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). *Renton* emphasized that municipalities have a "substantial governmental interest" in regulating the "secondary effects" of adult entertainment. *Id.* at 50-52. However, the government may not use this rationale as a pretext for limiting protected expression on the basis of content. Thus, "reasonable alternative avenues of communication" must be available. *Id.* at 53-54. In the instant case, the California Supreme Court viewed both *Young* and *Renton* as requiring "that an ordinance be content-neutral and narrowly tailored to minimize only the adverse secondary effects related to adult entertainment establishments." *Lucero*, 49 Cal. 3d at 27, 774 P.2d at 776, 259 Cal. Rptr. at 747.

adult theaters would not be served by applying a single-use standard.[11] Instead, the court viewed "substantiality" in the number of the films shown or revenue received as the constitutional minimum, rejecting the single-use standard as too restrictive on the one hand, and the "preponderance" requirement[12] as too relaxed on the other.[13]

Justice Mosk concurred that the single-use standard was unconstitutional, but dissented on the basis that the majority was effectively legislating the standard imposed.[14] Because earlier cases had not established a rigid standard, he characterized the majority's creation of a new standard as unnecessary.[15] Justice Kennard also agreed that the single-use standard was unconstitutional,[16] and she emphasized that the City of Long Beach, rather than the court, should determine its new standards.[17] Furthermore, both Justices Mosk and Kennard criticized the majority's "regular and substantial course of conduct" standard as being vague.[18]

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11. *Lucero*, 49 Cal. 3d at 27-28, 774 P.2d at 776-77, 259 Cal. Rptr. at 747-48.

12. *See supra* note 4.

13. *Lucero*, 49 Cal. 3d at 26, 774 P.2d at 776, 259 Cal. Rptr. at 746 (citing Tollis, Inc. v. San Bernardino County, 827 F.2d 1329, 1332-33 (9th Cir. 1987) (a single-use standard is not narrowly tailored to further the substantial governmental interest of limiting the secondary effects of adult entertainment)). Under the supreme court's reasoning, a lower standard is implicitly compelled because the deleterious effects of adult entertainment outlets arise even if 49%, as opposed to 51%, of a theater's fare is sexually explicit. *Id.* at 26 n.8, 774 P.2d at 776 n.8, 259 Cal. Rptr. at 747 n.8.

14. *Id.* at 28-34, 774 P.2d at 779-82, 259 Cal. Rptr. at 752-53 (Mosk, J., concurring and dissenting). Justice Mosk cited Christy v. City of Ann Arbor, 824 F.2d 489 (6th Cir. 1987), *cert. denied*, 484 U.S. 1059 (1988), for the proposition that municipalities must state the findings on which their ordinances are based. He then argued that the supreme court had violated this rule by creating a new standard in the absence of findings or a record from the court below. *Lucero*, 49 Cal. 3d at 31-32, 774 P.2d at 781, 259 Cal. Rptr. at 752 (Mosk, J., concurring and dissenting).

15. *Lucero*, 49 Cal. 3d at 32-33, 774 P.2d at 781-82, 259 Cal. Rptr. at 752-53 (Mosk, J., concurring and dissenting). Earlier cases recognized the right of a municipality to adopt a standard other than the preponderance test. *Id.* (Mosk, J., concurring and dissenting) (citing Strand Property Corp. v. Municipal Court, 148 Cal. App. 3d 882, 200 Cal. Rptr. 47 (1983); Kuhns v. Board of Supervisors, 128 Cal. App. 3d 369, 181 Cal. Rptr. 1 (1982)). However, the majority merely held that in the absence of clear legislative intent, the preponderance standard is not constitutionally compelled. The majority acknowledged that municipalities may explicitly adopt the preponderance standard or some other formula if they so choose. *Id.* at 19, 774 P.2d at 770, 259 Cal. Rptr. at 741; *see supra* note 7 and accompanying text.

16. *Lucero*, 49 Cal. 3d at 35, 774 P.2d at 783, 259 Cal. Rptr. at 754 (Kennard, J., concurring and dissenting).

17. *Id.* at 35-37, 774 P.2d at 783-85, 259 Cal. Rptr. at 754-56 (Kennard, J., concurring and dissenting). Justice Kennard emphasized that the City of Long Beach was free to specify a standard other than "preponderance," but that it had failed to do so. She noted that the city's attorney specifically stated that the city was interested only in legitimizing the single-use standard. *Id.* at 35, 774 P.2d at 783-84, 259 Cal. Rptr. at 754-55 (Kennard., J., concurring and dissenting).

18. *Id.* at 33, 774 P.2d at 782, 259 Cal. Rptr. at 753 (Mosk, J., concurring and dissenting); *id.* at 36-37, 774 P.2d at 784, 259 Cal. Rptr. at 755 (Kennard, J., concurring and dissenting).

III. CONCLUSION

The City of Long Beach undoubtedly sought the single-use standard to simplify and expedite its enforcement actions. Under that test, a newly-opened adult theater could be cited for violating the "Anti-Skid Row" ordinance immediately after showing its first X-rated film. Because *Lucero* constitutionally abrogates the single-use standard, the city must now document that the showing of adult films is a "regular and substantial course of conduct." This standard is less clear cut than the "preponderance" standard, yet a municipality likely will have little difficulty meeting this burden in most cases because theaters that show sexually explicit films tend to do so exclusively.

In the event that a theater can reasonably argue its adult fare is a "less than substantial" part of its business, the municipality may have a chance to prove the X-rated showings fall within the *Lucero* standard. For example, a theater that shows X-rated films only at midnight every Friday and Saturday night and more conventional movies at all other times probably could not be classified as an adult theater under the preponderance test. However, a municipality might be able to argue that these weekend showings fall within *Lucero's* "regular and substantial course of conduct" standard by focusing on their regularity or profitability. Furthermore, a municipality that fears the new standard is vague or unworkable is not prevented from adopting the preponderance standard[19] or from employing another test that is narrowly tailored to restrict the negative impact of adult entertainment.[20]

PAUL J. MCCUE

II. CONTRACT LAW

Breach of a contract warranty is a violation of sections 7107 and 7113 of the Business and Professions Code and may subject a licensed contractor to discipline: **Viking Pools, Inc. v. Maloney.**

In *Viking Pools, Inc. v. Maloney*,[1] the California Supreme Court

19. *See supra* note 7 and accompanying text.
20. *See supra* note 10.
1. 48 Cal. 3d 602, 770 P.2d 732, 257 Cal. Rptr. 320 (1989), Justice Broussard wrote the unanimous decision of the court, with Arleigh M. Woods, Presiding Justice, Court of Appeal, Second Appellate District, Division Four, sitting by designation.

announced that contractual obligations, not mere physical completion of a construction project or operation, will define the scope of potential discipline under the Contractor's State License Law.[2] The court interpreted the statutory phrase "construction project or operation," which is referenced in both sections 7107[3] and 7113[4] of the Business and Professions Code, to include an express written warranty, thereby subjecting Viking Pools to possible discipline[5] for its failure to honor a contractual warranty.[6]

The court set forth three reasons for its broad construction of the statutory phrase: (1) the policy behind the statutory design makes it reasonable to shelter the public from dishonest or incompetent contractors;[7] (2) court of appeal cases examining the phrase have found

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2. CAL. BUS. & PROF. CODE §§ 7000-7161 (Deering 1984).

3. *Id.* § 7107. The section provides: "Abandonment without legal excuse of any *construction project or operation* engaged in or undertaken by the licensee as a contractor constitutes a cause for disciplinary action." *Id.* (emphasis added).

4. *Id.* § 7113. The section states: "Failure in a material respect on the part of a licensee to complete any *construction project or operation for the price stated in the contract* for such construction project or operation or in any modification of such contract constitutes a cause for disciplinary action." *Id.* (emphasis added).

5. *See id.* § 7095. Section 7095 delineates possible disciplinary measures:

> The decision may:
>
> (a) Provide for the immediate complete suspension by the licensee of all operations as a contractor during the period fixed by the decision.
>
> (b) Permit the licensee to complete any or all contracts shown by competent evidence taken at the hearing to be then uncompleted.
>
> (c) Impose upon the licensee compliance with such specific conditions as may be just in connection with his operations as a contractor disclosed at the hearing and may further provide that until such conditions are complied with no application for restoration of the suspended or revoked license shall be accepted by the registrar.

Id.

6. Viking Pools, Inc. v. Maloney, 48 Cal. 3d 602, 604, 770 P.2d 732, 733, 257 Cal. Rptr. 320, 321 (1989). The warranty stated in pertinent part: "Provided VIKING has installed the pool, VIKING warrants to repair or replace defective material or installation thereof for a period of 10 years from the date hereof . . . ." *Id.* Viking Pools breached this written contract by refusing to repair a defective swimming pool it had supplied and installed. Viking argued that its failure to honor the warranty fell outside the scope of sections 7107 and 7113 because it had completed the installation of the swimming pool. *Id.* at 605-06, 770 P.2d at 733-34, 257 Cal. Rptr. at 321-22. The court concluded, however, that the breach of warranty was an abandonment under section 7107 and a material failure under section 7113, thereby subjecting Viking Pools to possible disciplinary action. *Id.* at 609, 770 P.2d at 736, 257 Cal. Rptr. at 324; *see supra* notes 2-4. *See generally* 11 CAL. JUR. 3D *Building and Construction Contracts* § 28 (1974) (discussing abandonment and other grounds for disciplining a contractor).

7. *Viking Pools*, 48 Cal. 3d at 607-08, 770 P.2d at 734-35, 257 Cal. Rptr. at 322. The court of appeal viewed the statute as penal and therefore gave it a narrow interpretation. The supreme court held that it was error to adopt such a narrow view because the statute's aim is to protect the public, not to punish contractors. *Id.* A statute that is enacted not to punish, but to serve another legitimate purpose, is nonpenal in nature. *See id.* at 607 n.4, 770 P.2d at 735 n.4, 257 Cal. Rptr. at 323 n.4 (explaining that the statute's nonpenal nature allows a broader interpretation than the one applied by the court of appeal).

its scope to be determined by the contract;[8] and (3) evidence of the legislature's intent to interpret the phrase broadly exists, as illustrated by the 1980 amendment to section 7091 which extended the time to file an accusation in cases involving an alleged breach of an express written warranty.[9]

By defining the phrase "construction project or operation" under the terms of the contract, the court furthered a policy of protecting consumers as well as the business of contracting.[10] This statutory interpretation appears reasonable since the discipline imposed by the Contractors' State License Law is nonpenal.[11]

BARRY J. REAGAN

III. CRIMINAL PROCEDURE

A. *A defendant opposing joinder of offenses under section 954 of the Penal Code has the burden of clearly demonstrating potential prejudice, even if the evidence for the different offenses would not be cross-admissible in separate trials:* **Frank v. Superior Court.**

In *Frank v. Superior Court*,[1] the California Supreme Court rein-

8. The court utilized two cases in its analysis: Bailey-Sperber, Inc. v. Pensanti, 64 Cal. App. 3d 725, 134 Cal. Rptr. 740 (1977), and Mickelson Concrete Co. v. Contractors' State License Bd., 95 Cal. App. 3d 631, 157 Cal. Rptr. 96 (1979). In *Bailey-Sperber*, the court held that a complaint alleging nonperformance of contractual obligations because the subcontractor had died was sufficient to assert a cause of action under sections 7107 and 7113. *Bailey-Sperber*, 64 Cal. App. 3d at 729, 134 Cal. Rptr. at 742. In *Mickelson Concrete*, the contractor failed to remedy adequately a concrete slab he had poured. The court found a violation of section 7113 because the contractor had failed to materially complete the project. *Mickelson Concrete*, 95 Cal. App. 3d at 635, 157 Cal. Rptr. at 98. Based upon these two cases, the supreme court stated that the lower courts understood the contract as defining the scope of "construction project or operation." *Viking Pools*, 48 Cal. 3d at 608, 770 P.2d at 735, 257 Cal. Rptr. at 323.

9. *See* CAL. BUS. & PROF. CODE § 7091 (Deering 1984). Section 7091 grants three years to file an accusation against a contractor. The 1980 amendment regards accusations concerning a breach of an express written warranty differently. In addition to the normal three years, the statutory period is extended for the duration of the particular warranty at issue. Thus, the court surmised that "the [l]egislature believed that it had already included a breach of an express, written warranty as a ground for discipline of contractors in sections 7107 and 7113." *Viking Pools*, 48 Cal. 3d at 609, 770 P.2d at 736, 257 Cal. Rptr. at 324.

10. *Viking Pools*, 48 Cal. 3d at 608, 770 P.2d at 735, 257 Cal. Rptr. at 323.

11. *See supra* note 7. *But see* 51 AM. JUR. 2D *Licenses and Permits* § 58 (1970) (discussion of cases regarding disciplinary statutes as penal and applying a narrow interpretation thereto).

1. 48 Cal. 3d 632, 770 P.2d 1119, 257 Cal. Rptr. 550 (1989). Dr. Kenneth Frank was charged with two rapes occurring approximately four months apart. In unrelated inci-

forced a line of cases giving trial courts broad power to join separate offenses[2] which meet the statutory requirements of section 954 of the Penal Code.[3] The court declared that a defendant moving to sever counts must carry the burden of demonstrating potential prejudice,[4] and further emphasized that cross-admissibility of evidence is only one of several factors for consideration.[5] Because the defendant failed to meet this burden, the court found no abuse of discretion in the trial court's denial of the severance motion.[6]

In *Frank*, the supreme court acknowledged a "statutory preference"[7] for joinder of offenses under section 954 which could be overcome only by a "clear showing of potential prejudice" by the defendant.[8] While the requirements of such a showing cannot be precisely defined, the court restated the guidelines it first applied in

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dents, each victim claimed she was drugged and raped by the defendant. The defendant, however, stated that each woman voluntarily engaged in sex with him. At trial, the defendant moved for separate proceedings on the two counts, arguing that the evidence of the offenses was not cross-admissible and, therefore, a joint trial would be prejudicial. The motion was denied. After a series of petitions, writs, and reviews, the California Supreme Court agreed to hear the case.

2. Joint trial of separate counts involving different victims or offenses is not uncommon. *See, e.g.*, People v. Bean, 46 Cal. 3d 919, 760 P.2d 996, 251 Cal. Rptr. 467 (1988) (two murders); People v. Keenan, 46 Cal. 3d 478, 758 P.2d 1081, 250 Cal. Rptr. 550 (1988), *cert. denied*, 109 S. Ct. 1656 (1989) (codefendants charged with murder); People v. Odle, 45 Cal. 3d 386, 754 P.2d 184, 247 Cal. Rptr. 137, *cert. denied*, 109 S. Ct. 275 (1988) (two murders); People v. Ruiz, 44 Cal. 3d 589, 749 P.2d 854, 244 Cal. Rptr. 200, *cert. denied*, 109 S. Ct. 186 (1988) (two murders); People v. Balderas, 41 Cal. 3d 144, 711 P.2d 480, 222 Cal. Rptr. 184 (1985) (kidnapping, robberies, forcible sex crimes, and murder involving several victims); Williams v. Superior Court, 36 Cal. 3d 441, 683 P.2d 699, 204 Cal. Rptr. 700 (1984) (multiple murders and attempted murders). *See generally California Supreme Court Survey—February 1988-April 1988*, 16 PEPPERDINE L. REV. 117, 150 (1988) (discussing *Ruiz*); *California Supreme Court Survey—December 1985-February 1986*, 13 PEPPERDINE L. REV. 1101, 1127 (1986) (discussing *Balderas*).

3. CAL. PENAL CODE § 954 (West Supp. 1989). This section allows joinder of counts under various conditions, including charged offenses of the same class. It also gives the trial court discretion to order joined counts to be separated "in the interests of justice." *Id. See generally* 41 AM. JUR. 2D *Indictments & Informations* § 221 (1968 & Supp. 1989); 21 CAL. JUR. 3D *Criminal Law* § 2883 (rev. ed. 1985 & Supp. 1989); 4 B. WITKIN & N. EPSTEIN, CALIFORNIA CRIMINAL LAW § 2087 (2d ed. 1989); Van Dam, *Criminal Procedure in a Nutshell: Part II Criminal Defense Motions*, 12 W. ST. L. REV. 647, 758 (1985); Annotation, *Consolidated Trial Upon Several Indictments or Information Against Same Accused, Over His Objection*, 59 A.L.R. 2D 841 (Later Case Service 1984 & Supp. 1989).

4. *Frank*, 48 Cal. 3d at 636, 770 P.2d at 1120-21, 257 Cal. Rptr. at 551-52. This burden was similarly assigned in several earlier cases. *See, e.g., Ruiz*, 44 Cal. 3d at 605, 749 P.2d at 860-61, 244 Cal. Rptr. at 206; *Balderas*, 41 Cal. 3d at 171, 222 Cal. Rptr. at 196, 711 P.2d at 492; *Williams*, 36 Cal. 3d at 452, 683 P.2d at 706, 204 Cal. Rptr. at 707.

5. *Frank*, 48 Cal. 3d at 641, 770 P.2d at 1124, 257 Cal. Rptr. at 555.

6. *Id.* Justice Panelli authored the majority opinion joined by all except Justice Broussard, who wrote separately in dissent. Justice Kaufman also wrote a separate concurrence in response to the dissent.

7. *Id.* at 640, 770 P.2d at 1123, 257 Cal. Rptr. at 554.

8. *Id.* at 638, 770 P.2d at 1122, 257 Cal. Rptr. at 553; *see also Williams*, 36 Cal. 3d at 447, 683 P.2d at 702, 204 Cal. Rptr. at 703.

Williams v. Superior Court:[9] (1) whether the evidence of the offenses would be cross-admissible in separate trials; (2) whether one of the offenses would be highly inflammatory to the jury; (3) whether a relatively weak case has been linked to a strong one, or to other weak cases, causing the evidence of one to "spill over" onto the others; and (4) whether any of the offenses are capital crimes.[10] These factors then must be balanced against the benefits of financial and judicial economy which accompany joinder.[11] The court stressed that cross-admissibility is not dispositive; all four *Williams* factors must be considered. The court also criticized the defendant's reliance on *People v. Smallwood*,[12] which suggested the prejudice burden remains on the prosecution in the absence of cross-admissibility.[13] Although the prosecution does carry that burden if seeking to introduce evidence of *uncharged* crimes,[14] the defendant has the burden of showing prejudice throughout a motion to sever *charged* offenses.[15]

The supreme court never decided the cross-admissibility of the evidence in *Frank*.[16] Based on the court's application of the balancing

9. 36 Cal. 3d 441, 452, 683 P.2d 699, 706, 204 Cal. Rptr. 700, 707 (1984).

10. *Frank*, 48 Cal. 3d at 639, 770 P.2d at 1122, 257 Cal. Rptr. at 553; *see also* People v. Balderas, 41 Cal. 3d 144, 173, 197-98, 711 P.2d 480, 494, 222 Cal. Rptr. 184, 198 (1985).

11. *Frank*, 48 Cal. 3d at 639, 770 P.2d at 1122-23, 257 Cal. Rptr. at 553-54; *see also* People v. Bean, 46 Cal. 3d 919, 939-40, 760 P.2d 996, 1108, 251 Cal. Rptr. 467, 479 (1988) (joinder eliminates redundant trials and hastens final judgments); People v. Matson, 13 Cal. 3d 35, 41, 528 P.2d 752, 756, 117 Cal. Rptr. 664, 668 (1974) (joinder conserves economic resources and minimizes "harassment" of charged parties).

12. 42 Cal. 3d 415, 722 P.2d 197, 228 Cal. Rptr. 913 (1986). *See generally California Supreme Court Survey—June 1986-August 1986*, 14 PEPPERDINE L. REV. 453, 492 (1987) (discussing *Smallwood*).

13. *Frank*, 48 Cal. 3d at 636, 770 P.2d at 1120, 257 Cal. Rptr. at 551; *see also Bean*, 46 Cal. 3d at 939 n.8, 760 P.2d at 1108 n.8, 251 Cal. Rptr. at 479 n.8 (describing *Smallwood* as "misleading").

14. *Frank*, 48 Cal. 3d at 639-40, 770 P.2d at 1123, 257 Cal. Rptr. at 554. The court agreed that the prosecution properly carries the prejudice burden for evidence of uncharged crimes because such evidence is usually not admissible. *See* People v. Anderson, 43 Cal. 3d 1104, 1136, 742 P.2d 1306, 1324, 240 Cal. Rptr. 585, 603 (1987) (generally excluding evidence of uncharged crimes); People v. Thompson, 27 Cal. 3d 303, 317, 611 P.2d 883, 889-90, 165 Cal. Rptr. 289, 295-96 (1980) (discussing the dangers of admitting evidence of uncharged crimes at trial).

15. *Frank*, 48 Cal. 3d at 639-40, 770 P.2d at 1123, 257 Cal. Rptr. at 554; *see also* cases cited *supra* note 4.

16. However, cross-admissibility was addressed in Justice Broussard's dissent and Justice Kaufman's concurrence. The dissent argued that evidence of other sex crimes is prejudicial and should be excluded under People v. Tassell, 36 Cal. 3d 77, 679 P.2d 1, 201 Cal. Rptr. 567 (1984), despite the majority's assertion that *Tassell* was inapposite because it dealt with evidence of uncharged crimes rather than the severance of joined counts. Justice Broussard also gave great weight to the cross-admissibility factor of the

test, the defendant failed to show potential prejudice even assuming the evidence was not cross-admissible, and the case was remanded for consolidated trial of the charges.[17]

Because the court upheld joinder without any consideration of cross-admissibility, that factor may now be a secondary element of the *Williams* guidelines. This adjustment of the balancing test perhaps reflects the court's concern about congested criminal court calendars. In a cost-benefit analysis weighing defendants' rights against the expense of multiple trials, the court apparently has tipped the scales in favor of judicial economy unless a clear danger of prejudice can be shown. This places an additional burden on judges and defense lawyers to avoid jury confusion about evidence in multiple offense cases which previously would have been severed. In light of the court's strong language requiring an affirmative demonstration of potential prejudice, it is possible that the three other *Williams* guidelines also will be reevaluated to allow for more joint trials.

ROBERT J. MILLS

B. *Presentence custody credits against a prison sentence may be granted if the presentence custody was exclusively attributable to the conduct for which the petitioner ultimately was convicted:* In re Joyner.

In the case of *In re Joyner*,[1] the California Supreme Court resolved a conflict between the courts of appeal regarding credits for

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Williams test. He concluded that joinder would be prejudicial and, consequently, that the trial should be severed. *Frank*, 48 Cal. 3d at 643, 770 P.2d at 1125, 257 Cal. Rptr. at 556 (Broussard, J., dissenting).

In response, Justice Kaufman's concurrence vigorously asserted that the evidence would be cross-admissible because it addressed the issue of the defendant's intent. *Id.* at 641-43, 770 P.2d at 1124-25, 257 Cal. Rptr. at 555-56 (Kaufman, J., concurring) (citing *Thompson*, 27 Cal. 3d at 314-15, 611 P.2d at 888, 165 Cal. Rptr. at 294; People v. Mayberry, 15 Cal. 3d 143, 155-56, 542 P.2d 1337, 1345-46, 125 Cal. Rptr. 745, 753-54 (1975)). *See generally* Annotation, *Admissibility, in Rape Case, of Evidence that Accused Raped or Attempted to Rape Person Other than Prosecutrix*, 2 A.L.R. 4TH 330, 343 (1980 & Supp. 1988).

17. *Frank*, 48 Cal. 3d at 641, 770 P.2d at 1124, 257 Cal. Rptr. at 555.

1. 48 Cal. 3d 487, 769 P.2d 967, 256 Cal. Rptr. 785 (1989). Authorities for the State of California issued arrest warrants in January of 1983 charging the petitioner with grand theft and robbery. Several months later, the petitioner was arrested in Florida for two offenses unrelated to the California crimes. Upon request by the California police, the Florida authorities placed a hold on the petitioner to prevent his release pending the resolution of the California offenses. The petitioner failed to post bond and was held in custody by Florida police until the date of his trial. Approximately six months after his arrest, the petitioner was convicted of the Florida offenses and sentenced to three years in a state prison. The three-year prison term was reduced by the number of days representing his presentence custody. The petitioner was then extradited to California, where he was convicted of the California offenses and sentenced to a four-year prison term to run concurrently with the three-year Florida prison term. The trial court denied the presentence custody credit requested by the petitioner. The

presentence custody by affording definition to section 2900.5(b) of the Penal Code.[2] The court held that the petitioner was not entitled to presentence custody credits against a sentence in California when his period of time in custody prior to his California convictions had already been credited to a Florida sentence for unrelated offenses, and the petitioner had failed to establish that he "would have been at liberty during the period [of custody] were it not for a restraint relating to the proceedings resulting in the later [California] sentence."[3]

Section 2900.5(a) of the Penal Code[4] provides that a defendant's sentence may be reduced by the number of days in which the defendant was held in police custody prior to commencement of his sentence.[5] However, section 2900.5(b)[6] further stipulates that credit

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court of appeal affirmed, and although the supreme court denied a petition for review, this matter came before the court by an original petition for writ of habeas corpus. *Id.*

2. *See infra* notes 4-6 and accompanying text.

3. *Joyner*, 48 Cal. 3d at 489, 769 P.2d at 967, 256 Cal. Rptr. at 785. Justice Kaufman authored the opinion of the court, in which Chief Justice Lucas and Justices Mosk, Panelli, and Eagleson concurred. Justice Broussard dissented separately, joined by Justice Arguelles..

4. Section 2900.5(a) provides, in relevant part:

> In all felony and misdemeanor convictions, either by plea or by verdict, when the defendant has been in custody, including but not limited to any time spent in a jail . . . prison . . . or similar residential institution, all days of custody of the defendant . . . shall be credited upon his term of imprisonment . . . .

CAL. PENAL CODE § 2900.5(a) (West 1982). *See generally* 49 CAL. JUR. 3D *Penal and Correctional Institutions* § 147 (1979 & Supp. 1989); 24B C.J.S. *Criminal Law* § 1995 (1962 & Supp. 1988); *California Supreme Court Survey—A Review of Decisions: December 1982-March 1983*, 11 PEPPERDINE L. REV. 187, 237-38 (1983); Comment, *Presentence Custody Time Credit Under California Penal Code Section 2900.5*, 3 PEPPERDINE L. REV. 157 (1975); Annotation, *Defendant's Right to Credit for Time Spent in Halfway House, Rehabilitation Center, or Similar Restrictive Environment as a Condition of Pretrial Release*, 29 A.L.R. 4TH 240 (1984); Annotation, *When is Federal Prisoner Entitled, Under 18 USCS § 3568, to Credit for Time Spent in State Custody "In Connection With" Offense or Acts for Which Federal Sentence Was Imposed*, 47 A.L.R. FED. 755 (1980 & Supp. 1989); Annotation, *Right of Defendant Sentenced After Revocation of Probation to Credit for Jail Time Served as Condition of Probation*, 99 A.L.R. 3D 781 (1980 & Supp. 1988).

5. The purpose of accrediting a defendant's sentence for presentence custody is twofold. The first is to eradicate disparate treatment between an indigent defendant and a wealthy defendant where the former defendant may be unable to post bond and thus would serve a longer confinement than the latter. *See In re* Rojas, 23 Cal. 3d 152, 156, 588 P.2d 789, 791, 151 Cal. Rptr. 649, 651 (1979). The second purpose is to equalize the amount of time served in custody by two defendants who have committed the same crime. *See* People v. Riolo, 33 Cal. 3d 223, 228, 655 P.2d 723, 726, 188 Cal. Rptr. 371, 374 (1983).

6. Section 2900.5(b) states:

> For the purposes of this section, credit shall be given only where the custody to be credited is *attributable to proceedings* related to the same conduct for which the defendant has been convicted. Credit shall be given only once for a

against a sentence is to be granted only when the custody was attributable to the proceedings in which the defendant ultimately was convicted. The court interpreted this subsection to mean that, if a defendant is to be granted credit against his sentence, the presentence custody must be *exclusively* attributable to the conduct for which the defendant was convicted.[7] Because the petitioner's custody in Florida related to both Florida and California offenses, the California sentence could not be reduced by the number of days he was held in police custody.[8]

In denying presentence credits against a sentence unless exclusively attributable to the conduct for which a defendant ultimately was convicted, the court indicated that it is not willing to reward those defendants who commit multiple offenses by awarding multiple presentence custody credits against imposed sentences. The court simply supports a growing trend[9] to maximize the amount of prison time actually served by criminal offenders.

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single period of custody attributable to multiple offenses for which a consecutive sentence is imposed.

CAL. PENAL CODE § 2900.5(b) (West 1982) (emphasis added).

7. In reaching the conclusion that the presentence custody must be exclusively attributable to the proceedings in which the defendant is ultimately convicted, the court noted that a defendant cannot be granted presentence custody if that defendant is already serving a prison term for another offense. If a defendant is currently incarcerated because of a separate offense, the pending charges have not affected his liberty. *See Rojas*, 23 Cal. 3d at 155-56, 588 P.2d at 791-92, 151 Cal. Rptr. at 651-52. The court then observed that presentence custody credits had already been applied against the petitioner's Florida sentence. Thus, the period of time in which the petitioner was held in custody by the Florida police was, in effect, a period in which the petitioner was serving a prison term for another offense. *Joyner*, 48 Cal. 3d at 492, 769 P.2d at 969, 256 Cal. Rptr. at 787.

8. Justice Broussard, in dissent, argued that the majority's rule would not only discriminate against indigents, but also prove difficult to administer. Further, he believed that the statute and developmental case law allow a defendant facing unrelated charges to receive pretrial custody credit on each charge until the defendant begins to serve a term on one of them. *Joyner*, 48 Cal. 3d at 496, 769 P.2d at 972, 256 Cal. Rptr. at 790 (Broussard, J., dissenting).

9. *See* United States v. Brown, 753 F.2d 455 (5th Cir. 1985); United States v. Blankenship, 733 F.2d 433 (6th Cir. 1984); State v. Horrisberger, 133 Ariz. 569, 653 P.2d 26 (1982); State v. Willis, 376 N.W.2d 427 (Minn. 1985); Peterson v. New York State Dep't of Correctional Serv., 100 A.D.2d 73, 473 N.Y.S.2d 473 (1984).

IV. DEATH PENALTY LAW — SURVEY III

*This survey provides an analysis of the California Supreme Court's automatic review of cases imposing the death penalty. Rather than a case-by-case approach, this section focuses on the key issues under review by the court and identifies trends and shifts in the court's rationale.**

I. INTRODUCTION

Between January and June of 1989, the California Supreme Court decided twenty-one death penalty cases.[1] During this period the Lucas Court continued its policy of distinguishing harmless error from prejudicial error, and reversing only upon a finding of actual prejudice.[2] With this approach, the court reversed the death penalty in six cases, and vacated with the possibility of reinstatement in another.[3]

One particularly noteworthy event is the court's implementation of

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* This survey is the third in a continuing series of semi-annual surveys of California death penalty law. For the two previous efforts, see *California Supreme Court Survey—Death Penalty Law*, 16 PEPPERDINE L. REV. 451-85, 1165-1209 (1989).

1. This survey covers the 21 death penalty cases decided between January 5, 1989, and June 26, 1989. The following cases, listed alphabetically by defendant, form the basis for this survey: People v. Allison, 48 Cal. 3d 879, 771 P.2d 1294, 258 Cal. Rptr. 208 (1989); People v. Bittaker, 48 Cal. 3d 1046, 774 P.2d 659, 259 Cal. Rptr. 630 (1989); People v. Bloom, 48 Cal. 3d 1194, 774 P.2d 698, 259 Cal. Rptr. 669 (1989); People v. Bonillas, 48 Cal. 3d 757, 771 P.2d 844, 257 Cal. Rptr. 895, *cert. denied*, 110 S. Ct. 288 (1989); People v. Bonin, 47 Cal. 3d 808, 765 P.2d 460, 254 Cal. Rptr. 298 (1989); People v. Boyer, 48 Cal. 3d 247, 768 P.2d 610, 256 Cal. Rptr. 96, *cert. denied*, 110 S. Ct. 497 (1989); People v. Burton, 48 Cal. 3d 843, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989); People v. Coleman, 48 Cal. 3d 112, 768 P.2d 32, 255 Cal. Rptr. 813 (1989); People v. Edelbacher, 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1989); People v. Farmer, 47 Cal. 3d 888, 765 P.2d 940, 254 Cal. Rptr. 508, *cert. denied*, 109 S. Ct. 3158 (1989); People v. Garrison, 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 257 (1989); People v. Hamilton, 48 Cal. 3d 1142, 774 P.2d 730, 259 Cal. Rptr. 701 (1989); People v. Harris, 47 Cal. 3d 1047, 767 P.2d 619, 255 Cal. Rptr. 352 (1989); People v. Johnson, 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989); People v. Morales, 48 Cal. 3d 527, 770 P.2d 244, 257 Cal. Rptr. 64, *cert.denied*, 110 S. Ct. 520 (1989); People v. Murtishaw, 48 Cal. 3d 1001, 773 P.2d 172, 258 Cal. Rptr. 821 (1989); People v. Robertson 48 Cal. 3d 18, 767 P.2d 1109, 255 Cal. Rptr. 631, *cert. denied*, 110 S. Ct. 216 (1985); People v. Sheldon, 48 Cal. 3d 935, 771 P.2d 1330, 258 Cal. Rptr. 242 (1989); *In re* Sixto, 48 Cal. 3d 1247, 774 P.2d 164, 259 Cal. Rptr. 491 (1989); People v. Williams, 48 Cal. 3d 1112, 774 P.2d 146, 259 Cal. Rptr. 473 (1989); People v. Wright, 48 Cal. 3d 168, 768 P.2d 72, 255 Cal. Rptr. 853 (1989). For ease of reference, subsequent histories are hereinafter omitted, and citation references will include only the name of each defendant.

2. *See California Supreme Court Survey—Death Penalty Law*, 16 PEPPERDINE L. REV. 451 (1989) [hereinafter *Death Penalty Law I*].

3. The death penalty was reversed in the cases of *Bonillas, Edelbacher, Farmer, Garrison, Harris,* and *Wright*, and vacated with the possibility of reinstatement in *Sheldon*. For citations and subsequent history treatment, see *supra* note 1.

new policies regarding the procedure and timeliness of habeas corpus appeals. In addition to an accelerated time frame for habeas petitions, the court has reserved the right to deny the writ if it fails to meet the new standards and no good cause for the failure can be shown.[4]

This survey seeks not only to examine those issues which resulted in reversal, but also to highlight further developments in areas of identified trial errors such as *Ramos* error, *Boyd* error, *Davenport* error, and *Brown* error.[5] This survey also includes a discussion of the developments in habeas corpus appeals at both the state and federal levels.

II. NEW CALIFORNIA SUPREME COURT DEATH PENALTY POLICIES

In an effort to reduce the procedural delays associated with death penalty appeals[6], the California Supreme Court recently adopted a new set of policies designed to expedite the process.[7] Although the policies include standards for compensating attorneys representing death row inmates in habeas proceedings, the most controversial part of the new guidelines is the section dealing with the timeliness standards for habeas corpus petitions.[8]

Under standard 1-1, appellate counsel is required to investigate and file petitions for a writ of habeas corpus "without substantial delay."[9] What constitutes "without substantial delay" is defined more specifically within the standards, which explain that a brief will be presumed timely if it is filed within sixty days after the appellant's reply brief on the direct appeal is due.[10] However, certain provisions allow the appeal to be filed even later, provided counsel can show that the petition was filed within a "reasonable time" after discovery of the legal and factual basis of the claim.[11] If the petitioner is unable to

4. *See infra* notes 8-22 and accompanying text.

5. *See infra* notes 118-70 and accompanying text.

6. "Roughly 280 men sit on San Quentin's death row awaiting decisions from the courts on their appeals." *New Death Case Rules Criticized*, United Press Int'l, June 7, 1989 (Cal. distribution).

7. *Supreme Court Policies Regarding Cases Arising From Judgements of Death*, 48 Cal. 3d 1045a (1989) [hereinafter *Supreme Court Policies*].

8. *See* Steiner, *Beware New Standards for Death Penalty Appeals*, L.A. Daily J., Oct. 6, 1989, at 7, col. 1; *High Court Acts to Speed Its Review of Capital Cases*, L.A. Times, June 7, 1989, at 3, col. 1 (home ed.); *New Death Case Rules Criticized*, *supra* note 6.

9. *Supreme Court Policies*, 48 Cal. 3d at 1045a (1989).

10. Standard 1-1.1 states that "[a] petition for a writ of habeas corpus will be presumed to be filed without substantial delay if it is filed within 60 days after the final due date for the filing of appellant's reply brief on the direct appeal." *Id.* at 1045b.

11. Standard 1-1.2 defines the "absence of substantial delay" in filing the writ as "a reasonable time after petitioner or counsel became aware of information indicating a factual basis for the claim *and* became aware, or should have become aware, of the legal basis for the claim." *Id.* (emphasis in original).

meet these requirements or to articulate a good cause for the appeal's tardiness,[12] the court may deny the petition for habeas corpus as untimely.[13] Thus, the apparent harshness of the timeliness standard is balanced by the broad discretion reserved by the court. The combined effect of accepting an untimely appeal based upon a showing of good cause, and providing that an untimely petition *may* (not will) be denied, allows the court substantial flexibility to grant a deserving petition.

In a related effort to decrease delays, the court made clear that withdrawal of the counsel of record will be allowed only if replacement counsel is "ready and willing" to assume the post-appeal responsibilities of the case.[14] While this action may dissuade some attorneys from representing defendants in death penalty cases, it should result in an acceleration of the appellate process.

In response to similar criticisms of delay and abuse in federal death penalty procedures, a panel chaired by former Supreme Court Justice Lewis Powell[15] recently published a review of habeas corpus procedures.[16] Because of the parallel appellate system for writs of habeas corpus, a state's ability to carry out a death sentence depends directly upon federal habeas procedures.[17] Normally, even when the entire state appellate process has been exhausted, a separate series of appeals is available in the federal system, which often takes several years to process.[18] This situation is aggravated further by a flood of

12. Standard 1-2 also will excuse a delay beyond the normal 60-day filing period provided that the "petitioner may establish good cause by showing particular circumstances sufficient to justify substantial delay." *Id.*

13. *Id.* (Standard 1-3).

14. *Id.* at 1045a.

15. The Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, led by former Supreme Court Justice Lewis F. Powell, Jr., was comprised of the following senior federal judges: Charles Clark, Chief Judge of the U.S. Court of Appeals for the Fifth Circuit; Paul H. Roney, Chief Judge of the U.S. Court of Appeals for the Eleventh Circuit; William T. Hodges, Chief Judge of the U.S. District Court for the Middle District of Florida; and Barefoot Sanders, District Judge of the U.S. District Court for the Northern District of Texas. Chief Justice William H. Rehnquist asked the committee members to review the 1867 Habeas Corpus Act and to present their findings to the Judicial Conference of the United States. *Panel Seeks New Limits on Death Row Appeals*, MANHATTAN LAW., Oct. 3-9, 1989, at 15 [hereinafter *Panel Seeks New Limits*].

16. Nationally, about 2,200 inmates inhabit death row. Since 1976, less than 200 inmates have been put to death, resulting in an average delay of eight years from sentencing to execution. Savage, *Panel Would End Death Row Inmates' Multiple Appeals*, L.A. Times, Sept. 22, 1989, at 15, col. 1.

17. The committee, after examining cases from Alabama, Florida, Georgia, Mississippi, and Texas, found that 80 percent of the time expended in habeas proceedings occurs at the federal level. *See Panel Seeks New Limits*, *supra* note 15, at 15.

18. In California, a defendant's death sentence is reviewed on automatic appeal to

last minute appeals, accompanied by requests for a stay, as the execution date approaches.[19]

The panel has recommended that a petitioner be limited to one detailed review within six months after the conclusion of all state appeals.[20] Furthermore, to ensure that all pertinent issues are adequately addressed, the panel also recommended that state participants in the accelerated review be required to provide assistance of counsel free of charge.[21] As of this writing, the Senate Judiciary Committee has the findings of the panel under consideration for possible legislative action.[22]

III. GUILT PHASE ISSUES

Although a broad spectrum of issues[23] was raised in the guilt phase section of the cases surveyed,[24] only three resulted in reversal.[25]

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the state supreme court, and may receive further review in the United States Supreme Court. CAL. CONST. art. VI, § 4; CAL. PENAL CODE § 1239(b) (West Supp. 1989). The decision also may be collaterally attacked in the California state court system through state collateral proceedings. Once the defendant has exhausted all state remedies, the defendant is entitled to seek relief through federal habeas corpus proceedings, even if the issues presented have already been decided at the state level. *See* 39 AM. JUR. 2D *Habeas Corpus* § 28 (1968). After the state and federal collateral proceedings have been decided, the litigation often is extended even further since the defendant is entitled to three petitions for certiorari to the United States Supreme Court. *See Panel Seeks New Limits*, *supra* note 15, at 15.

19. The committee examined the substance of the cumulative appeals and stays of executions and found most of them "meritless," as they were filed simply to stall the judicial process. *See Panel Seeks New Limits*, *supra* note 15, at 15. Significantly, the California Supreme Court's new policies provide that "[t]he court will consider a motion for a stay of execution only if such a motion is made in connection with a petition for a writ of habeas corpus filed in this court, or to permit certiorari review by the United States Supreme Court." *Supreme Court Policies*, 48 Cal. 3d at 1045a.

20. *Panel Seeks New Limits*, *supra* note 15, at 15. More specifically, the six-month filing period would not start until counsel had been appointed to represent the defendant. Moreover, the period would be tolled if any properly initiated state proceeding was still pending. The report also recommended an automatic stay of execution until either the completion of habeas proceedings or the expiration of the filing period. A final provision provided for an extension to the filing period upon a showing of "good cause." *Id.*

21. *Id.*

22. On September 21, 1989, the Judicial Conference of the United States decided to delay consideration of Justice Powell's report until March, 1990. In the meantime, Chief Justice Rehnquist forwarded the report to the Senate Judiciary Committee, activating an accelerated congressional consideration schedule. The Chief Justice defended his unilateral action on the basis that his statutory authority to trigger congressional consideration was not dependent on any ratification by the Judicial Conference as a whole. N.Y. Times, Oct. 13, 1989, § A, at 21, col. 1.

23. The overwhelming majority of issues raised in the guilt phase failed because either there was no error, or if there was an error, the court found it to be harmless. For a discussion of the court's policy on harmless error, see *Death Penalty Law I*, *supra* note 2, at 451-52.

24. *See supra* note 1.

25. *Boyer*, 48 Cal. 3d 247, 768 P.2d 610, 256 Cal. Rptr. 96 (1989) (illegal detention and *Miranda* violation); *Sixto*, 48 Cal. 3d 1247, 774 P.2d 164, 259 Cal. Rptr. 491 (1989)

These reversals were the result of fundamental errors in well-settled areas of the law.[26] In the overwhelming majority of cases, the supreme court upheld the finding of guilt even when reversible error was found in the separate penalty phase of the case.[27] Thus, the court has continued either finding no error in the proceedings of the lower courts or, in the event error is found, deeming it nonprejudicial or harmless.[28]

In *People v. Boyer*,[29] the jury fixed the sentence at death after finding the defendant guilty of two counts of first-degree murder and two counts of robbery.[30] Boyer was charged with the robbery and murder of an elderly couple. The charge was supported by his own incriminating statement made to the police. The timing and characterization of this statement constituted an error which led to one of the few reversals of a guilt-phase conviction. Writing for the majority,[31] Justice Eagleson found that even if the defendant was not in formal custody, a reasonable person in the defendant's position could have concluded that he was not free to leave.[32] He further explained that the defendant's admission of guilt was the direct result of unduly coercive interrogation by the police[33] and thus a violation of the defendant's *Miranda* rights.[34] The dissent characterized the defendant's state-

(ineffective assistance of counsel); *Williams*, 48 Cal. 3d 1112, 774 P.2d 146, 259 Cal. Rptr. 473 (1989) (improper venue).

26. *See supra* note 25.

27. Aside from *Boyer*, *Sixto*, and *Williams*, *see supra* note 25, the remainder of the cases surveyed affirmed the conviction of guilt. However, even when guilt was affirmed, the death penalty was reversed in six cases, and vacated with the possibility of reinstatement in another. *See supra* note 3.

28. *See supra* note 23.

29. 48 Cal. 3d 247, 768 P.2d 610, 256 Cal. Rptr. 96 (1989).

30. *Id.* at 255-56, 768 P.2d at 612, 256 Cal. Rptr. at 98.

31. Justice Eagleson authored the opinion of the majority, which included Chief Justice Lucas and Justices Mosk, Broussard, and Arguelles. Justice Panelli dissented in an opinion joined by Justice Kaufman.

32. *Boyer*, 48 Cal. 3d at 268, 768 P.2d at 620, 256 Cal. Rptr. at 106. Police officers in street clothes "accosted" the defendant at his home and took him down to the police station for further questions. He subsequently was questioned in a small room by two officers, who first read the defendant his *Miranda* rights, and then proceeded to interrogate him for over an hour. *Id.* Justice Eagleson characterized this as one of "the relatively rare but distressing cases in which the outcome is determined by the constable's blunders." *Id.* at 256, 768 P.2d at 612, 256 Cal. Rptr. at 98.

33. *Id.* at 267, 768 P.2d at 619, 256 Cal. Rptr. at 105; *see* Rhode Island v. Innis, 446 U.S. 291 (1980) (*Miranda* violation may occur if it can be established that the police should have known that their actions were reasonably likely to evoke an incriminating reaction from the defendant).

34. *Id.* at 270, 768 P.2d at 621, 256 Cal. Rptr. at 107. Two members of the court were inclined to show greater deference to the fact-finding ability of the trial court. In his dissent, Justice Panelli stated that "reasonable inferences deduced from the facts

ment, "I did it," as a spontaneous outburst, and not as the result of interrogation, thereby placing it beyond the scope of *Miranda*.[35]

The supreme court also found reversible error in the denial of a defendant's timely motion for a change in venue. In *People v. Williams*,[36] a black defendant accused of the rape, robbery, kidnapping, and murder of a young white girl was denied a change of venue.[37] In reaching its conclusion that a "reasonable likelihood [existed] that . . . a fair and impartial trial" could not be had without a change in venue,[38] the court examined several factors. First, the court noted the relatively small population of the county and the overwhelming majority of whites in its racial composition.[39] Second, the court weighed the relative status of the victim, whose family had some prominence within the community, against the status of the defendant, a geographical and racial outsider, and found that this relative status was indeed prejudicial.[40] Third, the court considered the nature and gravity of the offense in light of the heightened role of emotions in a capital case.[41] Finally, the court noted that, due to pretrial publicity, two-thirds of the jurors in the case were acquainted with media versions of the facts even before the trial had begun.[42]

Although most of the surveyed cases raised the issue of ineffective assistance of counsel,[43] it was successful in only one case.[44] The de-

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as found by the trial court are necessarily supported by substantial evidence, and a reviewing court is *without power* to substitute its deductions for those of the trial court." *Id.* at 281, 768 P.2d at 629, 256 Cal. Rptr. at 115 (Panelli, J., dissenting) (emphasis added).

35. *Id.* at 283, 768 P.2d at 630, 256 Cal. Rptr. at 116 (Panelli, J., dissenting). Justice Panelli expressed concern that "the subjective standard used by the majority portends a severe limitation, if not elimination, of the voluntary, noncustodial police station interview." *Id.* at 281, 768 P.2d at 629, 256 Cal. Rptr. at 115 (Panelli, J., dissenting).

36. 48 Cal. 3d 1112, 774 P.2d 146, 259 Cal. Rptr. 473 (1989). Justice Kaufman authored the opinion of the court, which was joined by Chief Justice Lucas and Justices Mosk, Broussard, Panelli, and Kennard. Justice Eagleson concurred and dissented separately.

37. *Id.* at 1117, 774 P.2d at 147, 259 Cal. Rptr. at 474.

38. *Id.* at 1132, 774 P.2d at 157, 259 Cal. Rptr. at 484. Although the court remanded with directions to transfer the case, Justice Eagleson would simply have reversed the conviction and remanded with instructions for the trial court to reevaluate the proper venue at present, as the inflammatory situation had long since subsided. *Id.* at 1140-41, 774 P.2d at 163-64, 259 Cal. Rptr. at 490-91 (Eagleson, J., concurring and dissenting).

39. *Id.* at 1126, 774 P.2d at 153, 259 Cal. Rptr. at 480.

40. *Id.* at 1129-31, 774 P.2d at 156-57, 259 Cal. Rptr. at 483-84.

41. *Id.* at 1131, 774 P.2d at 157, 259 Cal. Rptr. at 484. Justice Kaufman observed that "[w]here the jury in its discretion is responsible for determining whether a defendant *lives or dies*, the need for juror impartiality is obviously most acute." *Id.* (emphasis in the original).

42. *Id.* at 1128, 774 P.2d at 155, 259 Cal. Rptr. at 482.

43. Defendants raised the issue of ineffective assistance of counsel in the following cases: *Allison, Bittaker, Bloom, Bonillas, Bonin, Burton, Edelbacher, Garrison, Johnson, Sixto, Sheldon, Williams,* and *Wright.* For citations and subsequent history treatment, see *supra* note 1. For further discussion of ineffective assistance of counsel in

fendant in *In re Sixto*[45] claimed to have been under the influence of alcohol and phencyclidine (PCP) when he sodomized and strangled a young boy. The original counsel representing Sixto failed to have the defendant's blood tested for alcohol, and did not request further blood tests for traces of PCP after the government's test was declared negative.[46] Moreover, when Sixto's first counsel withdrew, he failed to inform the replacement counsel that PCP might still provide a viable defense of diminished capacity and unconsciousness. This failure resulted in a poor tactical decision by replacement counsel.[47] Therefore, the court concluded that the trial counsel's actions were unreasonable and prejudicial,[48] and the conviction was vacated and remanded.[49]

IV. SPECIAL CIRCUMSTANCE ISSUES

In California, the death penalty may not be imposed for first-degree murder unless one of the special circumstances enumerated by statute is charged and found to be true.[50] Although several of the cases surveyed contained errors in the finding of a special circumstance, none required reversal of the death penalty.[51]

One of the more common special circumstance errors is the so-

California death penalty cases, see *California Supreme Court Survey—Death Penalty Law*, 16 PEPPERDINE L. REV. 1165, 1191-96 (1989) [hereinafter *Death Penalty Law II*].

44. *Sixto*, 48 Cal. 3d 1247, 774 P.2d 164, 259 Cal. Rptr. 491 (1989). The opinion specified several elements of ineffective assistance of counsel to be considered under Article I, section 16, of the California Constitution. *Id.* at 1257, 774 P.2d at 169, 259 Cal. Rptr. at 496. On appeal, the petitioner bears the burden of proof that counsel failed to properly investigate a particular defense, and that as a consequence of this error the defendant was inadequately represented. *Id.* (citing People v. Williams, 44 Cal. 3d 883, 936, 751 P.2d 395, 430-31, 245 Cal. Rptr. 336, 371-72 (1988)). Furthermore, the petitioner must show that counsel "knew or should have known" that a more detailed investigation was required. *Id.* Lastly, the petitioner must demonstrate that counsel's actions were not the result of a tactical decision "which a reasonably competent, experienced criminal defense attorney would make." *Id.* (citing People v. Frierson, 25 Cal. 3d 142, 158, 599 P.2d 587, 595, 158 Cal. Rptr. 281, 289 (1979)).

45. 48 Cal. 3d 1247, 774 P.2d 164, 259 Cal. Rptr. 491 (1989). Justice Panelli authored the opinion of a unanimous court, which granted habeas corpus relief.

46. *Id.* at 1258-59, 774 P.2d at 170, 259 Cal. Rptr. at 497.

47. *Id.* at 1261, 774 P.2d at 171, 259 Cal. Rptr. at 498.

48. *Id.* at 1264-65, 774 P.2d at 174, 259 Cal. Rptr. at 501.

49. *Id.* at 1265, 774 P.2d at 174-75, 259 Cal. Rptr. at 501-02.

50. CAL. PENAL CODE § 190.2(a) (West 1988); *see* 2 B. WITKIN, CALIFORNIA CRIMES § 1026C (Supp. 1985).

51. In order to affirm the death penalty, only one special circumstance must be upheld on appeal. *See generally* 3 B. WITKIN, CALIFORNIA CRIMINAL LAW § 1566 (1989). For a general discussion of the bifurcated procedure of a death penalty trial, see *Death Penalty Law I*, *supra* note 2, at 457-59.

called "multiple" multiple-murder finding. Section 190.2(a)(3) of the California Penal Code provides that if a defendant is convicted of more than one first- or second-degree murder in the same proceeding, the special circumstance requirement is satisfied.[52] The "multiple" multiple-murder error is produced when more than one multiple-murder special circumstance is alleged.[53] Essentially, it does not matter how many victims have been murdered; as long as there are two or more, only one charge of multiple murder is proper.[54] The current trend of the court is to treat such an error as harmless or nonprejudicial because the jury, as a result of the trial, is fully aware of the murders on which to base its sentence.[55]

Five of the cases surveyed presented the same issue on appeal: whether intent to kill is an essential element of the jury instructions in a felony-murder special circumstance.[56] These appeals were grounded on the holding in *Carlos v. Superior Court*,[57] which required intent to kill as an element of the felony-murder special circumstance, regardless of whether the defendant did the actual killing.[58] In *People v. Garrison*,[59] the court reiterated its earlier finding that intent to kill is not an element of the felony-murder special circumstance.[60] However, when the defendant is merely an aider or abettor, "intent to kill must be proved before the trier of fact can find the special circumstance to be true."[61] Since the jury in *Garrison* could have reached its verdict by viewing the defendant as an ac-

52. CAL. PENAL CODE § 190.2(a)(3) (West 1988) ("The defendant has in this proceeding been convicted of more than one offense of murder in the first or second degree.").

53. Justice Broussard, writing as a member of the Bird Court in 1984, commented that "alleging two special circumstances for a double murder improperly inflates the risk that the jury will arbitrarily impose the death penalty . . . ." People v. Harris, 36 Cal. 3d 36, 67, 679 P.2d 433, 452, 201 Cal. Rptr. 782, 801, *cert. denied*, 469 U.S. 965 (1984). However, the overwhelming majority of recent decisions has described the error as harmless or nonprejudicial. *See, e.g., Bloom* (two of three multiple-murder special circumstances vacated); *Bonin* (nine of ten multiple murder special circumstances vacated); *Garrison* (one of two multiple murder special circumstances vacated); *Hamilton* (one of two multiple murder special circumstances vacated). For citations and subsequent history treatment, see *supra* note 1.

54. People v. Hamilton, 46 Cal. 3d 123, 144, 756 P.2d 1348, 1359, 249 Cal. Rptr. 320, 330 (1988).

55. *See supra* note 54.

56. *See Bonillas, Burton, Harris, Garrison,* and *Johnson*. For citations and subsequent history treatment, see *supra* note 1.

57. 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983).

58. *Id.* at 153-54, 672 P.2d at 877, 197 Cal. Rptr. at 95.

59. 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 257 (1989).

60. *Id.* at 789, 765 P.2d at 442, 254 Cal. Rptr. at 280. The court cited People v. Anderson, 43 Cal. 3d 1104, 1147, 742 P.2d 1306, 1331, 240 Cal. Rptr. 585, 611 (1987), which stated "we overrule *Carlos* and hold as follows: intent to kill is not an element of the felony-murder special circumstance; but when the defendant is an aider and abettor rather than the actual killer, intent must be proved." Garrison, 47 Cal. 3d at 789, 765 P.2d at 442, 254 Cal. Rptr. at 280.

61. *Garrison*, 47 Cal. 3d at 789, 765 P.2d at 442, 254 Cal. Rptr. at 280.

complice, the trial court's failure to instruct on intent to kill was indeed an instructional error.[62] However, the court found that the requisite intent was necessarily included in the jury's verdict of guilt regarding the witness-killing special circumstance.[63]

V. PENALTY PHASE ISSUES

A. Differences Between the 1977 and the 1978 Death Penalty Laws

In *People v. Murtishaw*,[64] the court further clarified its position on the differences between the 1977 death penalty statute and the 1978 modifications resulting from the Briggs death penalty initiative.[65] The court concluded that while it is improper to use 1978 sentencing instructions in cases subject to the 1977 statute, it does not automatically constitute reversible error.[66]

Although Murtishaw killed three college students in 1978, he was subject to the 1977 statute because the 1978 initiative had not yet become law.[67] Consequently, the supreme court found that the trial court had erred by giving sentencing instructions based on the 1978 version of the law instead of its predecessor.[68] Nevertheless, the court determined that since the error was not prejudicial, no cause existed for reversal.[69]

In 1977, after mandatory death penalty laws had been declared un-

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62. *Id.*

63. *Id.* at 790, 765 P.2d at 442-43, 254 Cal. Rptr. at 280-81.

64. 48 Cal. 3d 1001, 773 P.2d 172, 258 Cal. Rptr. 821 (1989).

65. Former section 190.3 read, in relevant part, "after having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and *shall determine* whether the penalty shall be death or life imprisonment without the possibility of parole." Act of Aug. 11, 1977, ch. 316, § 7, 1977 Cal. Stat. 1257 (emphasis added). The 1978 version expands the above italicized portion to read:

> [T]he trier of fact . . . shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in a state prison for a term of life without the possibility of parole.

CAL. PENAL CODE § 190.3 (West 1988); *see also Death Penalty Law I*, *supra* note 2, at 462-66.

66. *Murtishaw*, 48 Cal. 3d at 1025, 773 P.2d at 186, 258 Cal. Rptr. at 835.

67. *Id.* The murders were committed in April 1978, which was prior to the November 8, 1978, effective date of the Briggs Initiative.

68. *Id.*

69. *Id.*

constitutional,[70] the California legislature enacted a modified death penalty statute. The 1977 version of section 190.3 of the Penal Code instructed the trier of fact to "take into account and be guided by the aggravating and mitigating circumstances . . . and [to]' determine whether the penalty shall be death or life imprisonment without parole."[71] The court in *Murtishaw* observed that under the 1978 version of section 190.3, the trier of fact shall impose the death penalty if it finds that the aggravating circumstances *outweigh* the mitigating circumstances.[72] Murtishaw claimed that under the 1978 version, a juror was prevented from finding that the death penalty was unwarranted as long as the aggravating circumstances outweighed those in mitigation.[73] However, because of the court's contrary holding in *Brown I*,[74] this argument was rejected.[75]

In *Brown I*, the court explained that the statute simply requires the jury to consider and individually weigh all the circumstances in order to determine whether the circumstances in aggravation outweigh those in mitigation.[76] In fact, if the court had interpreted the 1978 version of the statute to restrict the trier of fact's discretion to consider *all* of the circumstances of the case, as well as to ascribe whatever relative weight the jurors believed appropriate to these considerations, it would have violated the United States Constitution.[77]

Trial courts now are required to inform the jury of both the bounds of its discretion and its responsibility to consider the totality of the circumstances in reaching a decision.[78] Courts generally sat-

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70. *See* Furman v. Georgia, 408 U.S. 238 (1972). For a detailed synopsis of *Furman*, see 2 B. WITKIN, CALIFORNIA CRIMES § 947D-L (Supp. 1985).

71. Act of Aug. 11, 1977, ch. 316, § 7, 1977 Cal. Stat. 1256, 1260; *see supra* note 66.

72. *Murtishaw*, 48 Cal. 3d at 1025, 773 P.2d at 186, 258 Cal. Rptr. at 835.

73. *Id.* at 1026, 773 P.2d at 186-87, 258 Cal. Rptr. at 835-36. A scholar of linguistics observed that the use of the word "shall" in the 1978 version confused the jury about its duty. "Therefore, to be sure of conveying the law correctly, the instructions should contain not only *may* but also an addendum along these lines: 'Where the aggravation outweighs mitigation, you are permitted to impose the death penalty—*but are not required to do so.*'" Lakoff, *Life or Death Confusion in the Law*, L.A. Times, Jan. 3, 1986, Part II, at 5, col. 3 (emphasis in original).

74. People v. Brown, 40 Cal. 3d 512, 709 P.2d 440, 220 Cal. Rptr. 637 (1985), *rev'd on other grounds*, 479 U.S. 538 (1987).

75. *Murtishaw*, 48 Cal. 3d at 1027, 773 P.2d at 187, 258 Cal. Rptr. at 836.

76. *Brown*, 40 Cal. 3d at 538-44, 709 P.2d at 453-59, 220 Cal. Rptr. at 650-56. For a more detailed discussion of *Brown* in the context of the Briggs Initiative, see G. UELMEN, CALIFORNIA DEATH PENALTY LAWS AND THE CALIFORNIA SUPREME COURT: A TEN YEAR PERSPECTIVE 55-59 (1986).

77. *See, e.g.*, Sumner v. Shuman, 107 S. Ct. 2716 (1987) (statutes which impose mandatory death penalty for a specific category of defendants violate the eighth and fourteenth amendments); Woodson v. North Carolina, 428 U.S. 280 (1976) (statutory constructions which have the effect of making the death penalty mandatory for a category of crimes violate the eighth and fourteenth amendments).

78. *Murtishaw*, 48 Cal. 3d at 1028, 773 P.2d at 188, 258 Cal. Rptr. at 837.

isfy this requirement by giving the current, modified version of CALJIC Instruction 8.84.1.[79] However, for those cases decided under the 1978 Briggs Initiative and prior to *Brown I* in 1985, the court will continue to scrutinize each appeal on a case-by-case basis to ensure that the defendant's rights were not abridged by the error.[80]

B. Automatic Motion for Modification of the Verdict

Whenever a jury returns a verdict imposing the death penalty, the trial court must, of its own accord, consider a motion to modify the verdict.[81] This rule actually has two aspects: the underlying authority of the court to modify the verdict in a criminal case,[82] and the requirement that the trial court address the issue sua sponte.[83]

Previously, in *People v. Williams*,[84] the supreme court analyzed section 1385 of the California Penal Code,[85] which provides the trial court with the authority to dismiss an action on its own motion if it is in the interests of justice and the legislature has not evidenced a contrary intent.[86] The court in *Williams* concluded that the statute also

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79. "Both the People and the Defendant have a right to expect that you will consider all of the evidence . . . ." CALJIC No. 8.84.1 (West Supp. 1989).

80. *Murtishaw*, 48 Cal. 3d at 1028, 773 P.2d at 188-89, 258 Cal. Rptr. at 837-38; *see also* G. UELMEN, *supra* note 76, at 56.

81. *See* 22 CAL. JUR. 3D *Criminal Law* § 3347 (1985); *Death Penalty Law II*, *supra* note 43, at 1196-98.

82. Section 1385(a) states in part, "[t]he judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed." CAL. PENAL CODE § 1385(a) (West Supp. 1989).

83. Section 190.4(e) states in part:

> In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant *shall be deemed to have made an application for modification* of such verdict or finding pursuant to Subdivision 7 of Section 11. In ruling on the application, the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge *shall state on the record* the reasons for his findings.

Id. § 190.4(a) (West 1988) (emphasis added).

84. 30 Cal. 3d 470, 637 P.2d 1029, 179 Cal. Rptr. 443 (1981).

85. Although the statute itself speaks in terms of dismissing an "action," *see supra* note 82, the language has been interpreted to allow the rejection of a portion of the verdict, namely the finding of a particular special circumstance. *Williams*, 30 Cal. 3d at 489, 637 P.2d at 1039-40, 179 Cal. Rptr. at 453-54. Use of the word "shall" in section 190.4(e) cannot be construed to indicate a legislative intent to deny the courts their use of discretion under § 1385(a). *Id.*; *see supra* note 83.

86. CAL. PENAL CODE § 1385 (West Supp. 1989).

gives the trial court the authority to dismiss a special circumstance finding even if it modifies the verdict from life without parole to life with the possibility of parole.[87]

Section 190.4(e) of the California Penal Code requires a judge to consider automatically a motion to modify in a death penalty case.[88] The judge must conduct a separate review to determine whether the death penalty is appropriate and then state the reasons for his or her findings on the record.[89] In *People v. Bonillas*,[90] the trial judge's failure to properly consider the automatic motion to modify caused the court to vacate the death sentence and remand the case for further consideration.[91]

In *Bonillas*, the supreme court believed the trial judge erred in failing to conduct a separate and independent review[92] of whether the aggravating circumstances outweighed the mitigating circumstances.[93] Rather, the judge simply found that the jury had not misapplied the law in determining that the aggravating circumstances

87. *Williams*, 30 Cal. 3d at 490, 637 P.2d at 1040, 179 Cal. Rptr. at 454. The court did not directly decide that section 1385 allowed modification of a special circumstance after the jury returns a death sentence. *Id.* at 490 n.11, 637 P.2d at 1040 n.11, 179 Cal. Rptr. at 454 n.11.

88. *See supra* note 83.

89. Section 190.4(e) of the California Penal Code further provides, in part, that "[t]he judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes." CAL. PENAL CODE § 190.4(e) (West 1988).

90. 48 Cal. 3d 757, 771 P.2d 844, 257 Cal. Rptr. 895 (1989).

91. *Id.* at 802, 771 P.2d at 870-71, 257 Cal. Rptr. at 921-22. The supreme court specified that the original trial judge should consider the case on remand if at all possible; otherwise, another judge of the same court could hear the motion. *Id.* at 801 n.14, 771 P.2d at 870 n.14, 257 Cal. Rptr. at 921 n.14.

92. The idea that section 190.4(e) requires a separate and independent review is the result of an interesting evolution. In People v. Frierson, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979), the California Supreme Court observed that Gregg v. Georgia, 428 U.S. 153 (1976), required some sort of review in capital punishment cases to guard against imposing sentences "capriciously or in a freakish manner." *Frierson*, 25 Cal. 3d at 178, 599 P.2d at 608, 158 Cal. Rptr. at 302 (quoting *Gregg*, 428 U.S. at 195). The court noted that an independent review by the trial judge was an important part of this process. *Id.* at 179, 599 P.2d at 608, 158 Cal. Rptr. at 302. Next, in People v. Rodriguez, 42 Cal. 3d 730, 726 P.2d 113, 230 Cal. Rptr. 667 (1986), the court examined the reference to "Subdivision 7 of Section 11" in the automatic motion for modification provision of section 190.4(e). *See supra* note 84. Section 11 provides no support for the statute because its topics are unrelated to the substance of § 190.4(e), and it does not have a subdivision 7. As a result, the court determined that the statute referred to section 1181, subdivision 7, concerning modification of verdicts. *Rodriguez*, 42 Cal. 3d at 792 n.25, 726 P.2d at 154 n.25, 230 Cal. Rptr. at 708 n.25.

In a related interpretation of construction, the *Rodriguez* court found that even though the word "independent" was omitted in the 1978 version of section 190.4(e), which had been included in the former 1977 version, the section must be construed to require independent review to comply with constitutional mandates. *Id.* at 794, 726 P.2d at 155, 230 Cal. Rptr. at 709; *see also* People v. Thompson, 45 Cal. 3d 86, 140, 753 P.2d 37, 71, 246 Cal. Rptr. 245, 279, *cert. denied*, 109 S. Ct. 404 (1988) (trial judge must conduct independent review).

93. *Bonillas*, 48 Cal. 3d at 801, 771 P.2d at 870, 257 Cal. Rptr. at 921.

outweighed those in mitigation.[94] The trial judge stated, "*I don't think I have any right in that situation to reverse the verdict of the jury*, and I'm not going to do so at this time."[95] But, as Justice Kaufman indicated, the trial judge was mistaken about his authority under the law.[96] The obligation imposed upon the trial judge under section 190.4(e) extends beyond a basic finding that the jury's verdict is supported by the evidence.[97] Instead, the judge must independently reweigh the evidence; then if a conflict exists between the judge's findings and those of the jury, the judge has a duty to modify the verdict.[98] Since the trial judge might have modified the jury's verdict had he been aware of his authority, the case was remanded for further consideration.[99]

The supreme court also noted the trial judge's failure in *Bonillas* to specifically state his reasons for denying the automatic motion to modify.[100] Such findings are required by statute[101] because they guarantee the defendant proper consideration of the automatic motion to modify and allow the reviewing court an opportunity to supervise the process on appeal.[102] The court found that generalized statements, even when coupled with obvious familiarity with the evidence, do not fulfill the statutory requirements.[103]

The decision in *People v. Hamilton*[104] demonstrates the usefulness of this requirement. After examining the trial judge's detailed findings, the supreme court was able to determine that the trial judge had erroneously considered the lack of extenuating evidence to be an aggravating factor and had failed to consider other mitigating evidence.[105] Nevertheless, because the trial court had considered each

94. *Id.* at 800-01, 771 P.2d at 870, 257 Cal. Rptr. at 921.

95. *Id.* at 801, 771 P.2d at 870, 257 Cal. Rptr. at 921 (emphasis in original).

96. *Id.*

97. *See supra* note 83.

98. *Bonillas*, 48 Cal. 3d at 801, 771 P.2d at 870, 257 Cal. Rptr. at 921. The trial court has both the power and the *obligation* to modify the verdict when its own findings disagree with the jury's. *Id.*

99. *Id.* The trial court was specifically instructed to reconsider the judgment of death and to properly apply its own findings in accordance with section 190.4(e), although it retained the authority to reinstate the death penalty if appropriate. *Id.* at 801, 771 P.2d at 870-71, 257 Cal. Rptr. at 921-22.

100. *Id.*

101. *See supra* note 89 and accompanying text.

102. *Bonillas*, 48 Cal. 3d at 801, 771 P.2d at 870, 257 Cal. Rptr. at 921.

103. *Id.*

104. 48 Cal. 3d 1142, 774 P.2d 730, 259 Cal. Rptr. 701 (1989).

105. *Id.* at 1186, 774 P.2d at 757, 259 Cal. Rptr. at 728.

of the factors mandated by the statute[106] and had placed them on the record, the supreme court found the analytical errors harmless.[107]

However, in *People v. Allison*,[108] the trial judge entered nothing more than a conclusory finding regarding his consideration of the motion to modify.[109] Although the prosecutor requested that the judge indicate for the record that the aggravating circumstances outweighed those in mitigation, the judge failed to state the reasons for his conclusions.[110] Under such circumstances, the supreme court typically vacates the judgment of death and remands for further consideration.[111] However, in *Allison*, this avenue was foreclosed because the original trial judge had died in the interim.[112] Rather than remanding the case to another trial judge, the supreme court opted to analyze the situation for prejudicial error.

The court noted, on the one hand, that the murder had occurred in the course of a robbery, thereby satisfying the special circumstance requirement and creating an aggravating factor.[113] On the other hand, none of the statutory mitigating factors were present except for the defendant's youth and his general character evidence.[114] Con-

106. *Id.*

107. *Id.* at 1187, 774 P.2d at 757, 259 Cal. Rptr. at 728.

108. 48 Cal. 3d 879, 771 P.2d 1294, 258 Cal. Rptr. 208 (1989).

109. *Id.* at 909-10, 771 P.2d at 1316-17, 258 Cal. Rptr. at 228-29. Another one of the cases surveyed, People v. Sheldon, 48 Cal. 3d 935, 771 P.2d 1330, 258 Cal. Rptr. 242 (1989), was similarly remanded because the judge failed to state his reasons for denying the automatic motion to modify. The court explained that the original judge should rehear the motion personally, state his reasons for the record, and either reinstate the death penalty or modify the sentence to life without parole. *Id.* at 963, 771 P.2d at 1346, 258 Cal. Rptr. at 258.

110. *Allison*, 48 Cal. 3d at 910, 771 P.2d at 1316, 258 Cal. Rptr. at 228.

111. The supreme court could have remanded the case even though the original judge was dead. *See* CAL. PENAL CODE § 1053 (West 1985). Essentially, section 1053 provides a replacement judge with the same authority as an original judge replaced due to illness or death. *Id.*

112. The court recently decided a case presenting the same issue. In People v. Heishman, 45 Cal. 3d 147, 753 P.2d 629, 246 Cal. Rptr. 673 (1988), the trial court judge died prior to the supreme court's decision. In *Heishman*, the court underscored its discretion to remand by stating, "Unfortunately, the trial judge is no longer alive. If he were, we would remand for a new hearing on the verdict-modification application *simply out of an abundance of caution* . . . ." *Allison*, 48 Cal. 3d at 910, 771 P.2d at 1316, 258 Cal. Rptr. at 228 (quoting *Heishman*, 45 Cal. 3d at 200, 753 P.2d at 665, 246 Cal. Rptr. at 709) (emphasis added). The court cited both the conservation of judicial resources and the elimination of delay as primary reasons for returning the case to a judge already familiar with it. *Id.*

113. *Allison*, 48 Cal. 3d at 912, 771 P.2d at 1317, 258 Cal. Rptr. at 230.

114. Factors (d) through (j) of section 190.3 of the California Penal Code are elements to be considered in mitigation. Factor (i) refers to the age of the defendant when the crime was committed. CAL. PENAL CODE § 190.3(i) (West 1988). Because the defendant in *Allison* was 25 years old at the time he robbed and murdered his victim, age was a minor consideration. *Allison*, 48 Cal. 3d at 912, 771 P.2d at 1317, 258 Cal. Rptr. at 230. The court also considered general evidence introduced at trial in compliance with section 190.3(k). *See* CAL. PENAL CODE § 190.3(k) (West 1988). With regard to factor (k), defense counsel offered evidence, which the supreme court discounted,

sequently, the court held that there was no prejudice to the defendant since the aggravating circumstances clearly outweighed those in mitigation.[115]

C. Ramos Error

Even though the Briggs instruction was declared unconstitutional in 1984,[116] the court is still facing the issue on appeal because of the delays associated with death penalty cases.[117] Of the cases surveyed, two were reversed due to *Ramos* error.[118]

In *People v. Garrison*,[119] the court reiterated its holding in *Ramos* that introduction of the Briggs instruction, without additional instructions to cure the error, is a violation of the guarantee of fundamental fairness required under the state constitution.[120] Because the jury had received an unadorned Briggs instruction, the court reversed Garrison's death sentence.[121]

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that the defendant was a good son and the product of a broken home. *Allison*, 48 Cal. 3d at 912, 771 P.2d at 1318, 258 Cal. Rptr. at 230. For a general discussion of "factor (k)," see *Death Penalty Law I*, *supra* note 2, at 459-62; *Death Penalty Law II*, *supra* note 43, at 1174-76.

115. *Allison*, 48 Cal. 3d at 912, 771 P.2d at 1318, 258 Cal. Rptr. at 230.

116. The 1978 Briggs Initiative directed the trier of fact to consider the possibility of parole or commutation by the governor when deciding whether or not to impose the death penalty. In People v. Ramos, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982), *rev'd sub nom.* California v. Ramos, 463 U.S. 992 (1983), the California Supreme Court found that the Briggs instruction was misleading and that it could bias the trier of fact toward imposing a judgment of death. *Id.* at 600-01, 639 P.2d at 936, 180 Cal. Rptr. at 294. The court also found that the Briggs instruction violated the fifth, eighth, and fourteenth amendments of the United States Constitution. *Id.* The United States Supreme Court subsequently reversed, finding no constitutional violation, and remanded the case for further consideration. *Ramos*, 463 U.S. at 1014. On remand, the California Supreme Court once again held the Briggs instruction unconstitutional, but this time it based its findings on the due process clause of the California Constitution. People v. Ramos, 37 Cal. 3d 136, 143, 689 P.2d 430, 432, 207 Cal. Rptr. 800, 802 (1984); *see* G. UELMEN, *supra* note 76, at 53-54; *Death Penalty Law I*, *supra* note 2, at 466-68; *Death Penalty Law II*, *supra* note 43, at 1167-71.

117. The text of the Briggs instruction reads as follows:

> You are instructed that under the state Constitution, a governor is empowered to grant a reprieve, pardon or commutation after sentence following conviction of a crime. Under this power a governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

CALJIC No. 8.84.2 (West 1979).

118. *Garrison*, 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 257 (1989); *Harris*, 47 Cal. 3d 1047, 767 P.2d 619, 255 Cal. Rptr. 252 (1989).

119. 47 Cal. 3d 746, 765 P.2d 419, 254 Cal. Rptr. 257 (1989).

120. *Id.* at 794, 765 P.2d at 445, 254 Cal. Rptr. at 284 (quoting *Ramos*, 37 Cal. 3d at 153, 689 P.2d at 439-40, 207 Cal. Rptr. at 809-10).

121. *Id.* at 795, 765 P.2d at 446, 254 Cal. Rptr. at 285.

In a similar situation, the state argued that the defendant was not prejudiced by the Briggs instruction because of defense counsel's remarks indicating that commutation was highly unlikely.[122] During the trial, the defense had characterized the hope of commutation as a "cruel hoax," and had argued further that if the defendant received a sentence of life without parole, he would "never walk the streets again."[123] Nevertheless, the supreme court deemed the instruction reversible error.[124] The court noted that the Briggs instruction forced defense counsel to emphasize the instruction in his arguments in order to overcome it, which served only to focus the jury's attention on the instruction, rather than to minimize its effect.[125]

However, in *People v. Bonillas*,[126] the court found no *Ramos* error because the trial judge, in response to an inquiry by the jury, refused to allow the jurors to consider parole or commutation in their deliberations.[127] The defendant argued that the trial court had erred in light of *Ramos*, which suggests that a judge respond to such an inquiry by explaining that commutation applies to both death and life without parole.[128] Furthermore, the defendant claimed the judge erred in failing to specifically state that life without parole means that the defendant may not be paroled at a later date.[129] The court held that the suggestions in *Ramos* were not mandatory and that the trial court's actions were fundamentally correct because the jury never was actually exposed to the Briggs instruction.[130]

The court also declined to find *Ramos* error in *People v. Bittaker*,[131] even though the prosecutor had stated that the defendant could not be rehabilitated.[132] In the original trial, the prosecutor remarked that the defendant "would never be rehabilitated. He would just go out and do the same thing again."[133] On appeal, the defendant argued that such a statement implied that the defendant might later be released despite a sentence of life without parole.[134] The court held that without a more specific reference to parole or commutation, the defendant could not have suffered any prejudice.[135]

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122. *Harris*, 47 Cal. 3d at 1101, 767 P.2d at 654, 255 Cal. Rptr. at 387.
123. *Id.*
124. *Id.* at 1102, 767 P.2d at 654-55, 255 Cal. Rptr. at 387-88.
125. *Id.*
126. 48 Cal. 3d 757, 771 P.2d 844, 257 Cal. Rptr. 895 (1989).
127. *Id.* at 797-98, 771 P.2d at 868, 257 Cal. Rptr. at 919.
128. *Id.* at 798, 771 P.2d at 868, 257 Cal. Rptr. at 919.
129. *Id.*
130. *Id.*
131. 48 Cal. 3d 1046, 774 P.2d 659, 259 Cal. Rptr. 630 (1989).
132. *Id.* at 1110 n.35, 774 P.2d at 697 n.35, 259 Cal. Rptr. at 668 n.35.
133. *Id.*
134. *Id.*
135. *Id.*

D. Boyd Error

In *Lockett v. Ohio*,[136] the United States Supreme Court held that jurors must be allowed to consider any part of the defendant's character or record which constitutes a mitigating factor.[137] At the time, it was argued that the scope of mitigating considerations in the 1978 death penalty law was too narrow to comply with the holding in *Lockett*.[138] In 1983, the California Supreme Court responded to the challenges of the constitutionality of the 1978 death penalty statute,[139] and held that the jury should be instructed to consider all factors in mitigation based on a more liberal reading of factor (k).[140] In other words, factor (k) was interpreted to encompass the broader range of mitigating concerns mandated by the United States Supreme Court.

This broad interpretation does not extend to aggravating circumstances. Only those aggravating circumstances specifically enumerated in the statute may be considered by the jury.[141] *Boyd* error[142] occurs when the trier of fact considers circumstances in aggravation which extend beyond those factors specifically listed in the statutory scheme.[143]

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136. 438 U.S. 586 (1978).

137. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court stated:

> [W]e conclude that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 110 (quoting *Lockett*, 438 U.S. at 604) (emphasis in original). For a discussion of *Lockett* and *Eddings*, see Note, Thompson v. Oklahoma: *Debating the Constitutionality of Juvenile Executions*, 16 PEPPERDINE L. REV. 737, 740-41 (1989).

138. *See* People v. Boyd, 38 Cal. 3d 762, 775, 700 P.2d 782, 791, 215 Cal. Rptr. 1, 10 (1985).

139. *Id.*

140. *Id.*; *see* notes 200-13 and accompanying text for an explanation and discussion of "factor k."

141. *Id.* In *Robertson*, 48 Cal. 3d 18, 767 P.2d 1109, 255 Cal. Rptr. 631 (1989), the court distinguished *Boyd* error under the 1977 statute from the interpretation allowed under the 1978 version. The trier of fact under the 1977 statute was allowed to consider " 'any matter relevant to . . . the defendant's character, background, history, mental condition and physical condition.' " *Id.* at 51, 767 P.2d at 1127, 255 Cal. Rptr. at 649 (quoting People v. Murtishaw, 29 Cal. 3d 733, 777, 631 P.2d 446, 472, 175 Cal. Rptr. 738, 764 (1981)). Consequently, the court found that the trial court's consideration of the defendant's violation of his probation status and therapy participation was proper since it was authorized by the former statute. In contrast, the current statute limits the consideration to those factors specifically enumerated in section 190.3 of the California Penal Code.

142. *See Boyd*, 38 Cal. 3d at 762, 700 P.2d at 782, 215 Cal. Rptr. at 1.

143. *Id.* at 775, 700 P.2d at 791-92, 215 Cal. Rptr. at 10-11.

In *People v. Wright*,[144] the court reversed the judgment of death and remanded the case for a new penalty phase trial due to prejudicial *Boyd* error.[145] During the original trial, the prosecution presented nine different witnesses who testified about threats the defendant had made and his general misconduct while incarcerated. Most notably, the defendant purportedly admitted to a correctional counselor that he liked to do "freaky things" to women.[146] The prosecutor drew particular attention to this remark in his closing argument when he stated, "I'm sure everybody would agree that raping a 76-year-old woman as she lay dying on the floor in a pool of blood is pretty freaky."[147] Although the state sought to characterize the damaging testimony as harmless error, the court found it clearly prejudicial.[148] Moreover, the court found the witnesses' testimony to be outside the scope of the statutory aggravating factors, thus creating *Boyd* error.[149]

In an important distinction, the court explained that *Boyd* error is based on statutory interpretation.[150] The majority recognized that while it might be reasonable—and constitutional—to allow the jury to consider an inmate's past performance in prison, any change in the law must be left to the legislature, not the judiciary.[151]

The dissent, however, argued that the testimony in question was properly admissible under the language of factor (b) of section 190.3 of the California Penal Code.[152] Factor (b) specifically addresses "[t]he presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence."[153] The dissent concluded that the bulk of the testimony plainly fell within the statutory scheme, and that the court had "never held that *Boyd* . . . error *alone* could constitute reversible error."[154]

The prosecution's graphic remarks in *People v. Bittaker*[155] also raised the issue of *Boyd* error. In discussing the victim's murder, the prosecutor stated: "And then her body is thrown over so that the coyotes and the maggots and the beetles can finish her off so that nobody will find her . . . not even a body for her parents to give a de-

144. 48 Cal. 3d 168, 768 P.2d 72, 255 Cal. Rptr. 853 (1989).
145. *Id.* at 220, 768 P.2d at 104, 255 Cal. Rptr. at 885.
146. *Id.* at 214, 768 P.2d at 100-01, 255 Cal. Rptr. at 881-82.
147. *Id.* at 217, 768 P.2d at 102, 255 Cal. Rptr. at 883.
148. *Id.* at 215-19, 768 P.2d at 101-04, 255 Cal. Rptr. at 882-85.
149. *Id.* at 215, 768 P.2d at 101, 255 Cal. Rptr. at 882.
150. *Id.* at 215 n.21, 768 P.2d at 101 n.21, 255 Cal. Rptr. at 882 n.21.
151. *Id.*
152. *Id.* at 221, 768 P.2d at 106, 255 Cal. Rptr. at 887 (Eagleson, J., dissenting).
153. CAL. PENAL CODE § 190.3(b) (West 1988).
154. *Wright*, 48 Cal. 3d at 222, 768 P.2d at 106, 255 Cal. Rptr. at 887 (Eagleson, J., dissenting).
155. 48 Cal. 3d 1046, 774 P.2d 659, 259 Cal. Rptr. 630 (1989).

cent burial."[156] On appeal, the defendant argued that the prosecutor exceeded the bounds of the statutory aggravating factors mandated by *Boyd*.[157] The court, however, found the prosecutor's remarks properly admissible under factor (a) of section 190.3,[158] which allows disclosure of the circumstances of the crime.[159] The court particularly observed that "the manner in which a murderer disposes of the victim's body" is relevant under factor (a).[160] Furthermore, the prosecutor is permitted to make an emotional appeal as long as the remarks are confined to relevant matters.[161]

Likewise, in *People v. Burton*,[162] the court declined to find that the admission of a prior violent juvenile adjudication during the original trial constituted *Boyd* error. The defense argued that a juvenile adjudication cannot be considered a felony conviction under factor (c)[163] because section 203 of the California Welfare and Institutions Code[164] prohibits the treatment of a juvenile proceeding as a crime.[165] The defense also claimed that it was improper to characterize the defendant's juvenile transgressions as violent criminal activity within the meaning of factor (b).[166]

The court agreed that a juvenile adjudication is not a felony, and thus factor (c) did not apply.[167] However, the court was unpersuaded with respect to factor (b).[168] In determining that a prior juvenile adjudication involving violence should be allowed under factor (b), the court observed that "[i]t is not the adjudication, but the conduct it-

156. *Id.* at 1110 n.35, 774 P.2d at 697 n.35, 259 Cal. Rptr. at 668 n.35.

157. *Id.*; *see* CAL. PENAL CODE § 190.3 (West 1988).

158. Section 190.3(a) allows consideration of "[t]he *circumstances of the crime* of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." CAL. PENAL CODE § 190.3(a) (West 1988) (emphasis added).

159. *Bittaker*, 48 Cal. 3d at 1110 n.35, 774 P.2d at 697 n.35, 259 Cal. Rptr. at 668 n.35.

160. *Id.*

161. *Id.*; *see also* People v. Haskett, 30 Cal. 3d 841, 864, 640 P.2d 776, 790, 180 Cal. Rptr. 640, 654 (1982).

162. 48 Cal. 3d 843, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989).

163. Section 190.3(c) allows consideration of "[t]he presence or absence of any prior felony conviction." CAL. PENAL CODE § 190.3(c) (West 1985).

164. Section 203 of the Welfare and Institutions Code provides that "[a]n order adjudging a minor to be a ward of the juvenile court shall not be deemed a conviction of a crime for any purpose . . . ." CAL. WELF. & INST. CODE § 203 (West 1984).

165. *Burton*, 48 Cal. 3d at 861, 771 P.2d at 1281, 258 Cal. Rptr. at 195.

166. *Id.*; *see supra* note 153 and accompanying text.

167. *Burton*, 48 Cal. 3d at 861, 771 P.2d at 1281, 258 Cal. Rptr. at 195.

168. *Id.* at 862, 771 P.2d at 1282, 258 Cal. Rptr. at 196.

self, which is relevant."[169] As a result, the court found the restrictions imposed by section 203 of the Welfare and Institutions Code inapplicable to the admissibility of violent juvenile misconduct under factor (b).[170]

E. Davenport Error

Simply stated, *Davenport* error occurs whenever the absence of a mitigating factor is argued as an aggravating factor.[171] For example, if the defense is unable to prove that the defendant was under duress at the time the murder was committed, the prosecution may not argue this lack of mitigation as a factor in aggravation.

In *People v. Allison*,[172] the prosecutor clearly committed *Davenport* error when he argued that the absence of evidence under six of the eleven statutory mitigating factors should be considered aggravating factors.[173] In *Allison*, the prosecutor cited the *absence of* emotional or mental disturbance, victim participation or consent, duress, and an inability to understand wrongfulness of the crime as factors in aggravation.[174] Since these factors may be argued only in mitigation, the prosecutor's argument clearly was erroneous.[175] Despite this improper argument, the court did not reverse the defendant's death sentence.[176] In addition to finding the error harmless, the court cited two reasons in support of its holding: (1) because the defendant failed to object to the prosecutorial misconduct in the lower court, his objection was barred on appeal; and (2) the *Davenport* ruling, which occurred two years after the defendant's trial, has not been applied retroactively.[177]

In *People v. Robertson*,[178] the defendant claimed that *Davenport*

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169. *Id.* (quoting People v. Lucky, 45 Cal. 3d 259, 295-96 n.24, 753 P.2d 1052, 1075 n.24, 247 Cal. Rptr. 1, 24 n.24 (1988)).

170. *Id.*

171. *See* People v. Davenport, 41 Cal. 3d 247, 289-90, 710 P.2d 861, 888, 221 Cal. Rptr. 794, 821 (1985). *See generally Death Penalty Law I*, *supra* note 2, at 471-73; *Death Penalty Law II*, *supra* note 43, at 1190.

172. 48 Cal. 3d 879, 771 P.2d 1294, 258 Cal. Rptr. 208 (1989).

173. *Id.* at 902, 771 P.2d at 1311, 258 Cal. Rptr. at 225.

174. *Id.*; *see* CAL. PENAL CODE § 190.3(d), (e), (g), (h) (West 1988).

175. *Allison*, 48 Cal. 3d at 902, 771 P.2d at 1311, 258 Cal. Rptr. at 225; *see also Hamilton*, 48 Cal. 3d 1142, 1184, 774 P.2d 730, 755, 259 Cal. Rptr. 701, 726 (1989) (absence of factors (d), (e), (f), (g), (h), and (j) may not be cited in aggravation).

176. *Allison*, 48 Cal. 3d at 902, 771 P.2d at 1311, 258 Cal. Rptr. at 224.

177. *Id.* The court also made two consistent related rulings during the survey period. In *Edelbacher*, 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1989), the court held that in a "pre-*Davenport*" case, failure to object based upon *Davenport* error did not bar the court from review, because counsel might have been unaware of the possible objection. *Id.* at 1035 n.16, 766 P.2d at 33 n.16, 254 Cal. Rptr. at 618 n.16. However, the court held that failure to object after *Davenport* constitutes a waiver of the issue. *Johnson*, 47 Cal. 3d 1194, 1247, 767 P.2d 1047, 1075, 255 Cal. Rptr. 569, 597 (1989).

178. 48 Cal. 3d 18, 767 P.2d 1109, 255 Cal. Rptr. 631 (1989).

error occurred when the trial court stated, just prior to a discussion of aggravating factors, that the defense had failed to establish two factors in mitigation.[179] Finding no grounds to support a claim of *Davenport* error, the court reasoned that merely observing the failure to prove a mitigating factor is substantially different from representing the absence of a mitigating consideration as an aggravating factor.[180]

The supreme court also rejected the assertion of *Davenport* error in *People v. Burton*.[181] The alleged error occurred when the prosecution argued that the defendant's status as an accomplice should be considered an aggravating factor. Although this argument is impermissible under factor (j), it may be proper under different circumstances.[182] The court reasoned that since the mistake occurred only once and the jury could have properly received the same information under factor (a), there was "no reasonable possibility the jury was misled."[183]

F. Brown Error

Brown error originally developed from the court's concern that the language in section 190.3 of the Penal Code might mislead the jury about its responsibilities in the "weighing process" when considering whether aggravation outweighs mitigation.[184] The former jury instruction informed jurors that if aggravating factors outweighed mitigating factors, then they "shall impose a sentence of death."[185] A literal reading of the statute might mislead the jury into simply counting up relevant factors, which would eliminate the breadth of

179. *Id.* at 50, 767 P.2d at 1126-27, 255 Cal. Rptr. at 648-49.

180. *Id.*

181. 48 Cal. 3d 843, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989).

182. *Id.* at 865, 771 P.2d at 1284, 255 Cal. Rptr. at 198. Factor (j) focuses on "[w]hether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor." CAL. PENAL CODE § 190.3(j) (West 1988). Although arguing that the defendant was *not* an accomplice is improper, it could be tempered in an argument concerning "[t]he circumstances of the crime of which the defendant was convicted . . . ." *Id.* § 190.3(a) (West 1988).

183. *Burton*, 48 Cal. 3d at 865, 771 P.2d at 1284, 255 Cal. Rptr. at 198; *see supra* note 182.

184. *See* People v. Brown, 40 Cal. 3d 512, 538-44, 709 P.2d 440, 453-59, 220 Cal. Rptr. 637, 650-56 (1985), *rev'd on other grounds sub nom.* California v. Brown, 479 U.S. 538 (1987).

185. CALJIC No. 8.84.2 (West 1979). After *Brown*, the following clarifying language was added to the instruction to eliminate any confusion: "You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider." CALJIC No. 8.88 (West 1988).

its discretion in deciding whether or not the death penalty is appropriate. To properly evaluate factors in aggravation, versus those in mitigation, the jurors must be aware that they are free to attach to the factors whatever value they see fit under the circumstances and in light of their own personal experiences as members of the community.[186]

Although six of the twenty-one cases surveyed claimed *Brown* error on appeal,[187] it constituted reversible error in only *People v. Edelbacher*.[188] Because the trial in *Edelbacher* took place before *Brown* had been decided, the jury was instructed with the unmodified language of section 190.3 of the Penal Code.[189] The supreme court observed that the trial judge had declined to provide the clarifying instruction suggested by the defense, which would have informed the jury of its discretion to assign to each factor whatever weight it deemed appropriate.[190] The court also noted that the prosecutor's arguments had erroneously implied that the death penalty should be imposed if the defendant's bad qualities overshadowed his good qualities. Instead, the prosecutor should have counseled the jury to impose the death penalty only if the defendant's bad qualities were so extreme that death was more appropriate than life without parole.[191] Because the jury possibly could have been misled, the court found reversible error.[192]

In *People v. Burton*,[193] the defendant raised *Brown* error in the prosecutor's closing arguments and the trial court's instructions. Specifically, both the prosecutor and the trial judge had told the jurors that they *must* return a verdict of death if they concluded that the aggravating circumstances outweighed those in mitigation.[194] On appeal, the defendant argued that the prosecution's emphasis on the mandatory wording of the statute might have misled the jurors into believing they were acting "merely as factfinder, not as conscience of the community."[195] The defendant also argued that the prosecutor further confused the jurors by stating that they must follow the law "whether [they] like it or not."[196]

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186. For further discussion and background information, see generally *Death Penalty Law I*, *supra* note 2, at 462-66; *Death Penalty Law II*, *supra* note 43, at 1171-74.

187. The following cases claimed *Brown* error: *Allison*, *Bonillas*, *Bonin*, *Burton*, *Edelbacher*, and *Murtishaw*. *See supra* note 1 for citations and subsequent history treatment.

188. 47 Cal. 3d 983, 766 P.2d 1, 254 Cal. Rptr. 586 (1989).

189. *Id.* at 1036, 766 P.2d at 33, 254 Cal. Rptr. at 619.

190. *Id.*

191. *Id.* at 1038, 766 P.2d at 35, 254 Cal. Rptr. at 620.

192. *Id.* at 1040-41, 766 P.2d at 37, 254 Cal. Rptr. at 622.

193. 48 Cal. 3d 843, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989).

194. *Id.* at 870, 771 P.2d at 1288, 258 Cal. Rptr. at 201.

195. *Id.* at 871, 771 P.2d at 1289, 258 Cal. Rptr. at 202.

196. *Id.*

In response, the supreme court first concluded that it is not erroneous per se to reiterate to the jury the language used in the instruction, but that the entire record must be reviewed to determine if the remarks were prejudicial.[197] The court then concluded that any confusion which may have occurred was alleviated through other arguments or jury instructions.[198] The court explained that when the jurors were instructed to follow the law, they were simply being told to put aside any pre-existing biases against the death penalty.[199]

G. Factor (k)

When considering evidence in mitigation, section 190.3(k) of the Penal Code instructs the jury to assess "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."[200] In *People v. Easley*,[201] the California Supreme Court held that because this section limited the trier of fact to circumstances of the crime and did not consider other mitigating circumstances generally associated with the defendant, it was unconstitutional under *Eddings v. Oklahoma*[202] and *Lockett v. Ohio*.[203] In response to *Easley*, courts now instruct the jury to consider both the defendant's background and character in mitigation.[204]

None of the cases in the survey upheld an assertion of error due to factor (k), even though almost half of them claimed such error on appeal.[205] For example, although the trial court in *People v. Johnson*[206] did not specifically use the modified instruction based on *Easley*, the instruction it did give was even more favorable to the defendant.[207] The language of CALJIC 8.84.1 restricts the analysis to "any other aspect of [the] defendant's character or record,"[208] but the lower court in *Johnson* expanded the instruction to include "any other cir-

197. *Id.* at 870, 771 P.2d at 1288, 258 Cal. Rptr. at 201.
198. *Id.* at 873, 771 P.2d at 1290, 258 Cal. Rptr. at 204.
199. *Id.* at 871, 771 P.2d at 1289, 258 Cal. Rptr. at 202.
200. CAL. PENAL CODE § 190.3(k) (West 1988). *See generally Death Penalty Law I*, *supra* note 2, at 459-62; *Death Penalty Law II*, *supra* note 43, at 1174-76.
201. 34 Cal. 3d 858, 671 P.2d 813, 196 Cal. Rptr. 309 (1983).
202. 455 U.S. 104, 110-16 (1982); *see supra* notes 136-37 and accompanying text.
203. 438 U.S. 586, 604 (1978); *see supra* notes 136-37 and accompanying text.
204. *See* CALJIC No. 8.84.1 (West Supp. 1987).
205. The following cases claimed error due to factor (k) on appeal: *Allison, Bloom, Bonin, Burton, Coleman, Hamilton, Johnson, Morales,* and *Murtishaw*. *See supra* note 1 for citations and subsequent history treatment.
206. 47 Cal. 3d 1194, 767 P.2d 1047, 255 Cal. Rptr. 569 (1989).
207. *Id.* at 1248, 767 P.2d at 1075, 255 Cal. Rptr. at 597.
208. CALJIC No. 8.84.1 (West Supp. 1987).

cumstances relating to the case or to a defendant as reasons for not imposing a death sentence."[209] Because the instruction necessarily encompassed CALJIC 8.84.1, no prejudicial error could occur.[210]

The court also rejected the contention that factor (k) and factor (l), which concern instructions to consider character and background evidence not necessarily associated with the crime,[211] must be read in "conjunction" with one another. In *People v. Burton*,[212] the judge sent a separate clarifying instruction to the jury in response to its request for an interpretation of factor (k), but he did not reiterate his earlier instructions including factor (l). The defense argued that this sequence of events placed an inordinate emphasis on the language in factor (k) without the additional clarification mandated by *Easley*, but the court rejected the argument, finding that the trial court had no duty beyond directly responding to the jury's question.[213]

VI. CONCLUSION

During the first six months of 1989, the California Supreme Court continued its trend during the "post-Bird" era of carefully analyzing the errors claimed on appeal and reversing the penalty only when an error results in *actual* prejudice. Implicit in this trend is the realistic understanding that while a multitude of errors will always occur in the dynamic environment of the courtroom, few have any real effect on the outcome.[214]

Of the twenty-one cases surveyed, eighty-six percent affirmed the conviction of guilt.[215] This supports the long-term trend of the Lucas Court, which has upheld the first-degree murder conviction in ninety-five percent of the death penalty appeals over the last two years.[216] However, even when guilt was affirmed, the death penalty was reversed in twenty-nine percent of the cases,[217] matching the two-year trend exactly.[218] Of course, the record of the Lucas Court stands in sharp contrast to the Bird Court, which affirmed the conviction of guilt in only sixty-six percent of the cases, and reversed the death penalty in eighty-seven percent of its cases.[219]

During the past two years, the Lucas Court has attempted to re-

209. *Johnson*, 47 Cal. 3d at 1248, 767 P.2d at 1075, 255 Cal. Rptr. at 597.
210. *Id.*
211. CAL. PENAL CODE § 190.3(l) (West 1988).
212. 48 Cal. 3d 843, 771 P.2d 1270, 258 Cal. Rptr. 184 (1989).
213. *Id.* at 866, 771 P.2d at 1285, 258 Cal. Rptr. at 199.
214. For a discussion of the court's perspective on "harmless error," see *Death Penalty Law I*, *supra* note 2, at 451-52.
215. *See supra* note 27.
216. Uelmen, *Mainstream Justice*, CAL. LAW., July 1989, at 40.
217. *See supra* note 27.
218. Uelmen, *supra* note 216, at 39.
219. *Id.*

duce the burgeoning backlog of death penalty appeals by devoting almost forty percent of its published opinions to this one subject alone.[220] Nevertheless, even though the court managed to decide seventy-three death penalty cases during its second year, seventy-three new cases have since replaced those, leaving a pending backlog of approximately 171 cases.[221]

Although changes in the habeas corpus procedure are a step in the right direction,[222] greater efforts at dramatic reform by both the legislature and the judiciary must be made to prevent an intolerable breakdown of the criminal justice system while the courts struggle with an overload of capital punishment cases. Anything less is a severe and unnecessary compromise between the demands of the state in executing its judgments without undue delay, and the rights of the death row inmate to a meticulous and careful appeal.

JAMES DUFF MCGINLEY

V. INSURANCE LAW

The Proposition 103 insurance initiative is facially constitutional in principal part: Insurance Code sections 1861.01(b), which temporarily denied rate increases to all insurers not facing insolvency, and 1861.10(c), which named a private corporation to protect policyholders' interests, were declared unconstitutional but severable from the remainder of the initiative: **Calfarm Insurance Company v. Deukmejian.**

I. INTRODUCTION

In *Calfarm Insurance Company v. Deukmejian*,[1] the California Supreme Court assumed original jurisdiction to hear a petition for writ of mandate seeking to have the Proposition 103 insurance rate reduction and control initiative declared facially unconstitutional. The court found two provisions of the initiative to be invalid. First, section 1861.01(b) of the Insurance Code,[2] which for one year would have allowed rate increases only to insurers facing insolvency, denied

220. *Id.* at 38.
221. *Id.*
222. *See supra* notes 6-22 and accompanying text.
1. 48 Cal. 3d 805, 771 P.2d 1247, 258 Cal. Rptr. 161 (1989). Justice Broussard wrote the opinion of the unanimous court.
2. CAL. INS. CODE § 1861.01(b) (West Supp. 1989).

constitutional due process by permitting the imposition of confiscatory rates on financially healthy insurers.[3] Second, section 1861.10(c) of the Insurance Code,[4] which identified a private consumer advocacy corporation to represent the interests of policyholders, violated the state constitution's prohibition[5] against initiatives naming a private corporation to have any power or duty.[6] Both of these provisions were held to be severable from the remainder of the initiative.[7] The court did not decide the constitutionality of section 12202.1 of the Revenue and Taxation Code,[8] which provides for increased tax rates on insurers, because no additional taxes had been collected.[9] However, the court indicated that this section would be severable if subsequently found to be enforced unconstitutionally.[10] The court determined that the remaining sections of the initiative were facially constitutional.[11] Finally, the court held all valid provisions of Proposition 103 to be generally related to the goal of insurance cost regulation, thus satisfying[12] California's single-subject initiative requirement.[13]

II. BACKGROUND OF THE CASE

Pursuant to the California initiative process,[14] Proposition 103 appeared on the General Election ballot in November 1988.[15] The initiative declared that "[e]normous increases in the cost of insurance ha[d] made it both unaffordable and unavailable to millions of Californians."[16] Proposition 103 promised to "protect consumers from arbitrary insurance rates and practices, to encourage a competi-

3. *Calfarm*, 48 Cal. 3d at 815, 771 P.2d at 1251, 258 Cal. Rptr. at 165.
4. CAL. INS. CODE § 1861.10(c) (West Supp. 1989).
5. CAL. CONST. art. II, § 12.
6. *Calfarm*, 48 Cal. 3d at 815, 771 P.2d at 1251, 258 Cal. Rptr. at 165.
7. *Id.*
8. CAL. REV. & TAX. CODE § 12202.1 (West Supp. 1989).
9. *Calfarm*, 48 Cal. 3d at 815, 771 P.2d at 1251-52, 258 Cal. Rptr. at 165-66.
10. *Id.* at 815, 771 P.2d at 1252, 258 Cal. Rptr. at 166.
11. *Id.* at 842, 771 P.2d at 1270, 258 Cal. Rptr. at 184.
12. *Id.* at 816, 771 P.2d at 1252, 258 Cal. Rptr. at 166.
13. CAL. CONST. art. II, § 8(d).
14. *See id.*; *see also* 38 CAL. JUR. 3D *Initiative and Referendum* §§ 1-34 (1977 & Supp. 1989); 7 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 120-125 (9th ed. 1989). *See generally* Comment, *New Limits on the California Initiative: An Analysis and Critique*, 19 LOY. L.A.L. REV. 1045 (1986).
15. *Calfarm*, 48 Cal. 3d at 812, 771 P.2d at 1249, 258 Cal. Rptr. at 163; CAL. GEN. ELECTION BALLOT PAMPHLET (Nov. 8, 1988). The ballot included five different initiatives related to the insurance industry: Proposition 100, 101, 103, 104 and 106. *A California Journal Analysis: November 1988 Ballot Propositions*, 19 CAL. J., Oct. 1988, at 13-16. This spate of initiatives was prompted by a common perception that insurance rates in California were unfair; one poll found that 94% of voters felt their rates were too high. *Id.* at 13. California constitutes 15 percent of the national insurance market, and its automobile insurance premiums alone total $12 billion annually. *Id.*
16. *Calfarm*, 48 Cal. 3d at 812-13, 771 P.2d at 1249-50, 258 Cal. Rptr. at 163-64.

tive insurance marketplace, to provide for an acceptable Insurance Commissioner, and to ensure that insurance is fair, available, and affordable for all Californians."[17]

The initiative proposed that insurers reduce premiums on new or renewed policies to at least twenty percent less than rates in effect on November 8, 1987.[18] Proposition 103 also prohibited rate increases for one year after its approval, unless an insurer could demonstrate that it was "substantially threatened with insolvency."[19] Any increase after November 8, 1989, would require the approval of the insurance commissioner, following public notice and a hearing if requested by a consumer.[20] In addition, a "Good Driver Discount" would be mandated for all qualified drivers.[21]

Insurers would lose their exemption from California civil rights, antitrust, and unfair business practice statutes.[22] Car insurance policies could be cancelled or not renewed only in specific circumstances.[23] However, insurers would retain the right to stop doing business in the state.[24] The state's insurance commissioner would change from an appointed to an elected official.[25] The proposition also provided for an "independent, non-profit corporation" to protect consumers' interests, and required insurers to give notice of this corporation to their customers.[26] This organization would be formed by the insurance commissioner, with a board to be elected from its public membership.[27]

To maintain state tax revenues, the gross premium tax rate

17. Prop. 103 § 2 (1988). The initiative covers all risk and operations insurance, excluding life, title, some kinds of marine, disability, workers' compensation, mortgage, county mutual fire, and reinsurance. *Calfarm*, 48 Cal. 3d at 812 n.1, 771 P.2d at 1249 n.1, 258 Cal. Rptr. at 163 n.1.

18. *Calfarm*, 48 Cal. 3d at 813, 771 P.2d at 1250, 258 Cal. Rptr. at 164.

19. *Id.* (quoting CAL. INS. CODE § 1861.01(b) (West Supp. 1989)).

20. *Id.* at 813, 824, 771 P.2d at 1250, 1257-58, 258 Cal. Rptr. at 164, 171-72. Future rates would be determined primarily by the insured's driving record, miles driven annually, and years of driving experience. *Id.* at 813 n.4, 771 P.2d at 1250 n.4, 258 Cal. Rptr. at 164 n.4. Additional criteria would be developed subsequently by the commissioner. *Id.*

21. *Id.* "Good drivers" would receive an additional 20% reduction in rates. *Id.*

22. *Id.*

23. *Id.*; *see infra* note 68 and accompanying text.

24. *Calfarm*, 48 Cal. 3d at 831, 771 P.2d at 1262-63, 258 Cal. Rptr. at 176-77. If this caused a substantial reduction in the availability of insurance, the commissioner could create a "joint underwriting authority" to prevent a market shortage. *Id.* at 831, 771 P.2d at 1262, 258 Cal. Rptr. at 176.

25. CAL. INS. CODE § 12900(a) (West Supp. 1989).

26. *Calfarm*, 48 Cal. 3d at 831, 771 P.2d at 1263, 258 Cal. Rptr. at 177.

27. *Id.*

charged to insurers would be adjusted to compensate for any reduction in premiums collected.[28] The initiative would also repeal existing statutes that banned discounts or rebates on premiums, and prohibited banks from engaging in the insurance business.[29] Finally, Proposition 103 stated that it should be liberally construed, and that any invalid provisions would be severable and would "not affect other provisions or applications of the act which can be given effect."[30]

On November 8, 1988, Proposition 103 was approved by the voters.[31] Several insurance companies immediately filed an original petition for writ of mandate with the state supreme court, seeking to have the initiative declared unconstitutional on its face.[32] On November 10, 1988, the court temporarily stayed the entire initiative.[33] One month later, on December 7, the supreme court assumed original jurisdiction while partially vacating its previous stay.[34] In the ensuing litigation, the initiative was attacked on six grounds: (1) the rate reductions were "arbitrary, discriminatory, and confiscatory," and thus contradicted both federal and state due process requirements; (2) the restrictions on cancellation and nonrenewal of policies violated insurers' existing contract rights; (3) the formation of a consumer advocacy corporation violated California's constitutional prohibition against naming a private corporation to perform any function; (4) the gross premium tax rate could not be changed by an initiative or, alternatively, such changes required approval by two-thirds of the voters, and the initiative impermissibly delegated legislative power to the commissioner; (5) the initiative addressed more than one topic, and therefore was invalid because it violated the state constitution's "single-subject" rule; and (6) the invalid provisions of Proposition 103 could not be severed, and thus rendered the entire act invalid.[35]

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28. *Id.* at 813, 771 P.2d at 1250, 258 Cal. Rptr. at 164.

29. Prop. 103 § 7.

30. *Id.* § 8.

31. Dresslar & Carrizosa, *Insurers Launch Attack on Proposition 103*, L.A. Daily J., Nov. 10, 1988, at 1, col. 6. The initiative passed with 51.1% of the votes cast. *Id.*

32. *Calfarm*, 48 Cal. 3d at 812, 771 P.2d at 1249, 258 Cal. Rptr. at 163. The petitioners included seven insurance companies and the Association of California Insurance Companies. *Id.* California's Governor, Attorney General, Insurance Commissioner, and Board of Equalization were named as respondents. *Id.* Supporters, including the Access to Justice Foundation, appeared with the respondents as real parties in interest. *Id.*

33. *Id.* at 814, 771 P.2d at 1250, 258 Cal. Rptr. at 164.

34. *Id.* The stay remained in effect for provisions covering the rate rollback, the insolvency requirement for relief, and the consumer advocacy corporation. *Id.*

35. *Id.* at 814, 771 P.2d at 1250-51, 258 Cal. Rptr. at 164-65.

III. THE COURT'S OPINION

A. The Insolvency Requirement for First-Year Rate Relief Was Unconstitutional But Severable

Section 1861.01 of the Insurance Code mandated a minimum twenty percent rollback in rates from those in effect on November 8, 1987.[36] It further provided that for one year after November 8, 1988, no insurance rate could be increased unless the insurance commissioner determined the insurer was "substantially threatened with insolvency."[37] The petitioners argued that this section was a denial of their due process rights under the constitutions of the United States and California.[38] Their claim had three elements: (1) the initial rollback was "arbitrary, discriminatory and confiscatory"; (2) no effective administrative mechanism existed for gaining timely relief from confiscatory rates; and (3) the insolvency requirement did not allow appropriate relief from confiscatory rates during the year following the initiative's approval.[39]

Initially, the court held insurance rate regulation to be a valid exercise of state police powers.[40] Such controls are constitutional if "reasonably calculated" to reduce the public's cost while allowing "a just and reasonable return" for the industry being regulated.[41] In addressing the rate rollback, the court stated that the petitioners' burden was to prove that the law was "so restrictive as to facially preclude any possibility of a just and reasonable return."[42] In other words, the constitutionality of price controls will be determined by

36. CAL. INS. CODE § 1861.01(a) (West Supp. 1989).

37. *Id.* § 1861.01(b).

38. *See* U.S. CONST. art. XIV, § 1; CAL. CONST. art. I, § 7. Due process considerations have long been used to assure reasonable rates of return for regulated businesses. *See, e.g.*, Chicago, M. & St. P.R. v. Minnesota, 134 U.S. 418, 458 (1890) (Minnesota statute barring judicial review of unreasonable state-determined railroad rates declared unconstitutional; unreasonable rates violate due process guarantees).

39. *Calfarm*, 48 Cal. 3d at 814, 771 P.2d at 1250, 258 Cal. Rptr. at 164.

40. *Id.* at 816, 771 P.2d at 1252, 258 Cal. Rptr. at 166; *see also* 16 AM. JUR. 2D *Constitutional Law* § 437 (1979 & Supp. 1989); 13 CAL. JUR. 3D *Constitutional Law* §§ 141-154 (1989); 39 CAL. JUR. 3D *Insurance Companies* § 10 (1977 & Supp. 1989); 8 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* §§ 87-88 (9th ed. 1989). *See generally* 16A C.J.S. *Constitutional Law* §§ 283, 432-443 (1984 & Supp. 1989).

41. *Calfarm*, 48 Cal. 3d at 816, 771 P.2d at 1252, 258 Cal. Rptr. at 166 (quoting Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 165, 550 P.2d 1001, 1027, 130 Cal. Rptr. 465, 491 (1976)); *see* Pennell v. City of San Jose, 485 U.S. 1, 11-14 (1988); Nebbia v. New York, 291 U.S. 502, 539 (1934).

42. *Calfarm*, 48 Cal. 3d at 816, 771 P.2d at 1152, 258 Cal. Rptr. at 166 (quoting Hutton Park Gardens v. Town Council, 68 N.J. 543, 571, 350 A.2d 1, 16 (1975)).

their *results* rather than their language unless a nonconfiscatory application of the statute is impossible.

This focus on results requires an examination, not of the rates set by the initiative, but of its provisions for insurer relief if those rates are confiscatory. With the exception of the first-year insolvency requirement,[43] the court found adequate relief for potential insurer claimants in section 1861.05 of the Insurance Code,[44] which prohibits any rate "which is excessive, *inadequate*, [or] unfairly discriminatory."[45] The court interpreted this section to require rates that would allow insurers a fair rate of return.[46] Because a rate cannot be both fair and confiscatory,[47] and because the initiative requires relief from confiscatory rates, the initial rollback was not facially unconstitutional.[48]

The petitioners then argued that the mechanism for obtaining relief was inadequate, and would require them to endure confiscatory rates pending the commissioner's determination of appropriate rates.[49] The insurers asserted that the review process would be unmanageably cumbersome, and therefore could not achieve the initiative's goal of reduced insurance rates.[50] However, the court found nothing on Proposition 103's face that would prevent efficient processing of insurers' rate applications.[51] Other than the initiative's notice and public hearing requirements, the insurance commissioner has "broad discretion to adopt rules and regulations as necessary to promote the public welfare."[52] The commissioner can delegate hearings,[53] consolidate cases, and take any reasonable measures to administer the law effectively.[54] "It 'is to be presumed that the [administrative agency] will exercise its power in conformity with the

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43. *See infra* notes 59-62 and accompanying text.

44. CAL. INS. CODE § 1861.05(a) (West Supp. 1989).

45. *Calfarm*, 48 Cal. 3d at 817, 771 P.2d at 1253, 258 Cal. Rptr. at 167 (emphasis added) (quoting CAL. INS. CODE § 1861.05(a) (West Supp. 1989)). The same section also directs the commissioner to "consider whether the rate mathematically reflects the insurance company's investment income," although it gives no guidelines for determining how much income is proper. *Id.* at 822, 771 P.2d at 1256, 258 Cal. Rptr. at 170 (quoting CAL. INS. CODE § 1861.05(a) (West Supp. 1989)).

46. *Id.* at 822-23, 771 P.2d at 1256-57, 258 Cal. Rptr. at 170-71.

47. *Id.* at 816 n.5, 771 P.2d at 1252 n.5, 258 Cal. Rptr. at 166 n.5; *see also* FPC v. Texaco, Inc., 417 U.S. 380, 392 (1974) (noting that "fair and reasonable" and "confiscatory" are opposites; a rate is either one or the other).

48. *Calfarm*, 48 Cal. 3d at 825-26, 771 P.2d at 1259, 258 Cal. Rptr. at 173.

49. *Id.* at 823, 771 P.2d at 1257, 258 Cal. Rptr. at 171.

50. *Id.* (quoting Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 173, 550 P.2d 1001, 1033, 130 Cal. Rptr. 465, 497 (1976) (unworkable rent control ordinance with burdensome requirements declared invalid)).

51. *Id.* at 824, 771 P.2d at 1257-58, 258 Cal. Rptr. at 171-72.

52. *Id.* (citing Credit Ins. Gen. Agents Ass'n v. Payne, 16 Cal. 3d 651, 656, 547 P.2d 993, 996, 128 Cal. Rptr. 881, 884 (1976)).

53. CAL. INS. CODE § 1861.08 (West Supp. 1989).

54. *Calfarm*, 48 Cal. 3d at 824, 771 P.2d at 1258, 258 Cal. Rptr. at 172.

requirements of the Constitution; and if it does act unfairly, the fault lies with the [agency] and not the statute.' "[55] Therefore, because the adequacy of the rate relief process will depend upon the performance of the agency rather than the language of the initiative, the court found that this section of the proposition was valid on its face.[56]

Furthermore, the court inferred from the language of Proposition 103 that the commissioner has the power to authorize interim rates for insurers during the administrative review process.[57] If the commissioner's final rate is less than the interim amount charged by insurers, the insurers will have to refund the excess, plus interest, to their customers.[58] When the court combined this interim rate scheme with the fair rate of return and administrative review provisions, the entire rate rollback section, with the exception of the first-year insolvency clause, was held to be facially constitutional.[59]

The court's determination that section 1861.05 of the Insurance Code requires a fair rate of return for insurers could not be reconciled with a section that limited first-year adjustments.[60] Section 1861.01(b) of the Insurance Code allowed relief from rate rollbacks between November 8, 1988, and November 8, 1989, only for insurers "substantially threatened with insolvency."[61] Accordingly, financially sound insurers could have been subject to confiscatory rates during that period. Because this would have denied their due process rights, the court declared the insolvency restriction on first year relief from unfair rates to be unconstitutional.[62]

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55. *Id.* (alteration in original) (citation omitted) (quoting Fisher v. City of Berkeley, 37 Cal. 3d 644, 684, 693 P.2d 261, 293, 209 Cal. Rptr. 682, 714 (1984)).

56. *Id.* at 825-26, 771 P.2d at 1259, 258 Cal. Rptr. at 173.

57. *Id.* at 824-25, 771 P.2d at 1258, 258 Cal. Rptr. at 172. The court analogized this to the Public Utilities Commission's well-recognized implied power to authorize interim rates. *See, e.g.*, Dyke Water Co. v. Public Utils. Comm'n, 56 Cal. 2d 105, 110, 363 P.2d 326, 328, 14 Cal. Rptr. 310, 312, *cert. denied*, 368 U.S. 939 (1961).

58. *Calfarm*, 48 Cal. 3d at 825, 771 P.2d at 1258, 258 Cal. Rptr. at 172.

59. *Id.* at 825-26, 771 P.2d at 1259, 258 Cal. Rptr. at 173.

60. *Id.* at 817-18, 771 P.2d at 1253, 258 Cal. Rptr. at 167.

61. *Id.* at 818, 771 P.2d at 1253, 258 Cal. Rptr. at 167 (quoting CAL. INS. CODE § 1861.01(b) (West Supp. 1989)).

62. *Id.* at 821, 771 P.2d at 1255-56, 258 Cal. Rptr. at 169-70. The court rejected the respondent's arguments that, under the circumstances, the insurers could be forced to operate at a loss for one year. First, the respondents noted that price freezes are not uncommon when administrative procedures are being developed. *Id.* at 819, 771 P.2d at 1254, 258 Cal. Rptr. at 168; *see, e.g.*, Trans Alaska Pipeline Rate Cases, 436 U.S. 631 (1978); United States v. Students Challenging Regulatory Agency Procedures (SCRAP), 412 U.S. 669 (1973). However, the court distinguished those cases allowing price freezes from the present case, because the rates frozen in these cases had been originally set by the businesses themselves, thus creating a presumption of fairness.

The petitioners insisted that this element of the initiative was not severable and, therefore, its unconstitutionality should invalidate the entire proposition.[63] The court stated first that a severability clause of the type in Proposition 103,[64] while not conclusive, "normally calls for sustaining the valid part of the enactment."[65] It then tested the invalid clause for grammatical, functional, and volitional separability and concluded that it was properly severable from the rest of the initiative.[66]

In sum, the rate rollback provision allowed a fair rate of return for all insurers, contained a facially valid process for gaining approval of fair rates, and gave the commissioner the power to authorize interim rates pending final administrative determinations. The insolvency restriction on first year rate relief was unconstitutional but severable, leaving the balance of the section valid.

B. The Restrictions on Cancellation and Nonrenewal Apply to All Policies in Effect When the Initiative Became Law

Section 1861.03(c) of the Insurance Code[67] permits insurers to can-

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Calfarm, 48 Cal. 3d at 819-20, 771 P.2d at 1254-55, 258 Cal. Rptr. at 168-69. In *Calfarm*, because the prices to be frozen would have been substantially less than existing rates, they were more likely to be unfair. *Id.* at 820, 771 P.2d at 1155, 258 Cal. Rptr. at 169.

The respondents' second claim was that high insurance rates had created an emergency that justified a temporary rate freeze. *Id.* The court recognized that such measures are occasionally appropriate, particularly during wartime. *Id.*; *see, e.g.*, Bowles v. Willingham, 321 U.S. 503 (1944) (World War II rent control); Block v. Hirsh, 256 U.S. 135 (1921) (post-World War I rent control); Whitney v. Heckler, 780 F.2d 963 (11th Cir.), *cert. denied*, 479 U.S. 813 (1986) (Medicare rate freeze under Deficit Reduction Act of 1984). However, the court distinguished these acute temporary emergencies from the protracted insurance rate problem by observing that, unlike the wartime cases, insurance rates do not create an expectation that everyone will sacrifice to overcome the emergency. *Calfarm*, 48 Cal. 3d at 820-21, 771 P.2d at 1155, 258 Cal. Rptr. at 169.

63. *Calfarm*, 48 Cal. 3d at 814, 771 P.2d at 1251, 258 Cal. Rptr. at 165.

64. Prop. 103 § 8(c) provides:

> If any provision of this act or the application thereof to any person or circumstances is held invalid, that invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Id.

65. *Calfarm*, 48 Cal. 3d at 821, 771 P.2d at 1256, 258 Cal. Rptr. at 170 (quoting Santa Barbara School Dist. v. Superior Court, 13 Cal. 3d 315, 331, 530 P.2d 605, 618, 118 Cal. Rptr. 637, 650 (1975)); *see* Metromedia, Inc. v. City of San Diego, 32 Cal. 3d 180, 190, 649 P.2d 902, 908, 185 Cal. Rptr. 260, 266 (1982); *see also* 58 CAL. JUR. 3D *Statutes* §§ 14-15 (1980).

66. *Calfarm*, 48 Cal. 3d at 822, 771 P.2d at 1256, 258 Cal. Rptr. at 170. The court noted that the insolvency provision was grammatically severable because, as a separate subsection, it could be removed without affecting the remainder of the initiative; it was functionally severable as an exception to the fair return rule because its deletion would simply allow the general rule to apply; and it was volitionally severable because the court felt voters would have supported the initiative had it not contained the clause. *Id.*

67. CAL. INS. CODE § 1861.03(c) (West Supp. 1989).

cel or refuse to renew automobile policies only in the event of " 'nonpayment of premiums . . . fraud or material misrepresentation . . . [or] a substantial increase in the hazard insured against.' "[68] The respondents and petitioners both agreed that this section applies to policies extant when the initiative was approved.[69] Although the petitioners did not question the section's prospective effect on new policies, they did challenge the retrospective application as an unconstitutional impairment of existing contract rights.[70]

The court agreed that the restrictions applied to existing policies.[71] Otherwise, insurers might defeat the initiative's purpose through widespread cancellations or nonrenewals.[72] While acknowledging that the law affected existing contract rights, the court emphasized that the state's police power to protect its citizens sometimes justifies interference with such rights.[73] Furthermore, the highly regulated insurance industry was "on notice" that its rates might be legislated.[74] Here, the "relatively low degree" of interference with insurers' contract disputes was outweighed by the high public interest in lower insurance rates and by a desire to avoid mass policy cancellations and nonrenewals resulting from passage of the initiative.[75] After noting that insurers retain the right to withdraw from doing business in California, the court validated the retrospective application of the cancellation and nonrenewal section.[76]

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68. *Calfarm*, 48 Cal. 3d at 826, 771 P.2d at 1259, 258 Cal. Rptr. at 173 (quoting CAL. INS. CODE § 1861.03(c) (West Supp. 1989)).

69. *Id.*

70. *Id.*; *see* U.S. CONST. art. II, § 10; CAL. CONST. art. I, § 9; *see also* 39 CAL. JUR. 3D *Insurance Contracts and Coverage* § 6 (1977 & Supp. 1989). *See generally* 16A C.J.S. *Constitutional Law* §§ 283, 356, 362 (1984 & Supp. 1989).

71. *Calfarm*, 48 Cal. 3d at 827, 771 P.2d at 1260, 258 Cal. Rptr. at 174.

72. *Id.*

73. *Id.* at 828-30, 771 P.2d at 1260-62, 258 Cal. Rptr. at 174-76; *see also* Exxon Corp. v. Eagerton, 462 U.S. 176 (1983) (state law banning oil and gas price increases negated clauses in existing contracts that permitted such increases); Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400 (1983) (state law controlling gas prices barred price increases allowed by existing contracts); Hinckley v. Bechtel Corp., 41 Cal. App. 3d 206, 215, 116 Cal. Rptr. 33, 39 (1974) (noting that "the police power of the state to regulate insurance business cannot be contracted away . . . [a state may exercise this power] notwithstanding interference with existing contracts").

74. *Calfarm*, 48 Cal. 3d at 829-30, 771 P.2d at 1261-62, 258 Cal. Rptr. at 175-76 (quoting American Mfrs. Mut. Ins. Co. v. Commissioner of Ins., 374 Mass. 181, 194, 372 N.E.2d 520, 528 (1978)).

75. *Id.* at 831, 771 P.2d at 1262-63, 258 Cal. Rptr. at 176-77.

76. *Id.* at 831, 771 P.2d at 1263, 258 Cal. Rptr. at 177.

C. *The Formation of a Private Consumer Advocacy Corporation Was Unconstitutional But Severable*

Section 1861.10(c) of the Insurance Code directed the establishment of a nonprofit corporation to protect the interests of insurance consumers.[77] In attacking this section, the petitioners cited article II, section 12, of the California Constitution: " 'no statute . . . [or] initiative, that names . . . or identifies any private corporation to perform any function . . . may be submitted to the electors or have any effect.' "[78] The respondents argued that the constitutional restriction should: (1) apply only to *existing* rather than future corporations; (2) exempt nonprofit public benefit corporations, such as the proposed consumer advocacy organization; and (3) apply only if the corporation's function is equivalent to that of a public office.[79]

The court explained that article II's purpose is to avoid giving "special privilege[s]" to an initiative's sponsor.[80] Moreover, the court stated that if future corporations were allowed to be named, they could improperly benefit in the same way as existing corporations.[81] Even nonprofit status fails to provide an exemption from article II. In fact, in 1964, the legislature rejected an amendment that would have excluded nonprofit corporations from the restriction.[82] The court also refused to find that the initiative created a public corporation; although established by the insurance commissioner, the organization would be a private corporation operated by consumers elected from its membership.[83] Finally, the court rejected the argument that article II applied only to functions of the type performed by public offices.[84] Not only does article II contain no such restrictions, but the court concluded that the corporation would have performed a quasi-public function by representing all insurance consumers at the commissioner's hearings.[85] Therefore, because section 1861.10(c) named a private corporation to perform such a function, the supreme court declared it unconstitutional.[86]

The petitioners claimed that, based on the constitution's language, the consumer advocacy section of the initiative was not severable and

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77. CAL. INS. CODE § 1861.10(c) (West Supp. 1989).

78. *Calfarm*, 48 Cal. 3d at 832, 771 P.2d at 1263, 258 Cal. Rptr. at 177 (quoting CAL. CONST. art. II, § 12); *see also* 38 CAL. JUR. 3D *Initiative and Referendum* § 2 (1977 & Supp. 1989).

79. *Calfarm*, 48 Cal. 3d at 832-35, 771 P.2d at 1263-65, 258 Cal. Rptr. at 177-79.

80. *Id.* at 833, 771 P.2d at 1264, 258 Cal. Rptr. at 178.

81. *Id.*

82. *Id.* at 833-34, 771 P.2d at 1264, 258 Cal. Rptr. at 178.

83. *Id.* at 834, 771 P.2d at 1264-65, 258 Cal. Rptr. at 178-79.

84. *Id.* at 834-35, 771 P.2d at 1265, 258 Cal. Rptr. at 179.

85. *Id.* at 835, 771 P.2d at 1265, 258 Cal. Rptr. at 179.

86. *Id.*

the entire proposition should have been invalidated.[87] Section 12 of Article II states that "no statute proposed to the electors . . . by initiative . . . [shall] have any effect" if it names a private corporation to perform a function or duty.[88] The petitioners argued that the words "no statute" encompassed the entire initiative and precluded severance.[89] The court disagreed with this reading of the constitution. It pointed out that initiatives often include more than one statute, as demonstrated by Proposition 103 itself. Because the constitution specifies "no statute" rather than "no initiative," the court held that an invalid statute can be severed from an otherwise valid initiative.[90] The court then applied the three-prong separability test[91] and found the private corporation provision of the initiative severable.[92]

D. The Validity of Premium Tax Rate Adjustments Could Not Be Determined

Section 12202.1 of the Revenue and Taxation Code authorizes the Board of Equalization to adjust the rate of premium taxes paid by insurers.[93] This provision is intended to compensate for any reduction in premiums collected by insurers, thereby maintaining state tax revenues.[94] The petitioners insisted that the rate adjustment was invalid because the state constitution either barred tax change by initiative, or required a two-thirds vote by the electorate to enact such a

87. *Id.*

88. *Id.* (quoting CAL. CONST. art. II, § 12).

89. *Id.* The petitioners analogized this to the California Constitution's "single-subject" rule, which forbids severance of invalid statutes. CAL. CONST. art. II, § 8. This rule is intended to prevent initiatives from addressing more than one issue. *Calfarm*, 48 Cal. 3d at 835, 771 P.2d at 1265, 258 Cal. Rptr. at 179. However, the single-subject rule states that an *initiative measure* that violates the rule is invalid; section 12 specifies that an improper *statute* is invalid. *Id.* at 835, 771 P.2d at 1265-66, 258 Cal. Rptr. at 179-80. By examining the purpose of the two constitutional sections, the court was able to distinguish them. *Id.* Section 8 prevents two otherwise valid statutes from addressing different subjects in the same initiative; because a court would not know which statute to sever, the entire initiative must be invalidated. *Id.* at 836, 771 P.2d at 1266, 258 Cal. Rptr. at 180. On the other hand, section 12 seeks to prevent the assignment of duties to private corporations, thus allowing the court to excise the invalid statute and leave the balance of the initiative intact. *Id.*

90. *Calfarm*, 48 Cal. 3d at 836, 771 P.2d at 1266, 258 Cal. Rptr. at 180.

91. *See supra* notes 64-66 and accompanying text.

92. *Calfarm*, 48 Cal. 3d at 836, 771 P.2d at 1266, 258 Cal. Rptr. at 180.

93. CAL. REV. & TAX. CODE § 12202.1 (West Supp. 1989). This tax is imposed by the state constitution. CAL. CONST. art. XIII, § 28; *see* 71 AM. JUR. 2D *State and Local Taxation* §§ 428-434 (1973 & Supp. 1989); 9 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 293 (9th ed. 1989).

94. *Calfarm*, 48 Cal. 3d at 837, 771 P.2d at 1266-67, 258 Cal. Rptr. at 180-81.

change.[95] They further claimed this provision improperly delegated legislative power to the Board of Equalization.[96]

However, the court elected not to rule on the petitioners' contentions, pointing out that article XIII, section 32, of the state constitution[97] prohibits review of tax measures before any payments have been made.[98] The court asserted that a prepayment review in this case would have been difficult because the adjustment had not yet been made, and might never be made pursuant to the initiative.[99] As a result, the court declined to decide the validity of the tax provision.

Although the court did not settle the tax issue, it did resolve the potential question of severance. Based on the three-prong test for severability,[100] the provision was declared to be severable if subsequently found to be invalid.[101]

E. Proposition 103 Did Not Violate the Single-Subject Rule

The California Constitution requires initiatives to embrace only a single subject; any initiative addressing " 'more than one subject may not be submitted to the electors or have any effect.' "[102] It was argued that provisions that repealed laws barring customer rebates and the sale of insurance by banks were not related to the goal of reducing insurance costs, and thus violated the single-subject rule.[103] Had this argument succeeded, the entire initiative would have been invalidated.

The court rejected this theory, finding all the elements of the initiative to be "reasonably germane" to the goal of reducing insurance costs.[104] It was not necessary for the court to determine whether all the provisions would actually achieve their intended purposes; because they arguably advanced the initiative's goals, the single-subject

95. *Id.* at 837, 771 P.2d at 1267, 258 Cal. Rptr. at 181; *see* CAL. CONST. art. XIII, § 28; CAL. CONST. art XIII A, § 3.

96. *Calfarm*, 48 Cal. 3d at 837, 771 P.2d at 1267, 258 Cal. Rptr. at 181.

97. "No legal or equitable process shall issue in any proceeding in any court against this State or any officer thereof to prevent or enjoin the collection of any tax. After payment of a tax claimed to be illegal, an action may be maintained to recover the tax paid . . . ." CAL. CONST. art. XIII, § 32.

98. *Calfarm*, 48 Cal. 3d at 839-40, 771 P.2d at 1268, 258 Cal. Rptr. at 182.

99. *See supra* notes 64-66 and accompanying text.

100. *See id.*

101. *Calfarm*, 48 Cal. 3d at 840-41, 771 P.2d at 1269-70, 258 Cal. Rptr. at 183-84.

102. *Id.* at 841, 771 P.2d at 1270, 258 Cal. Rptr. at 184 (quoting CAL. CONST. art. II, § 8); *see also* 42 AM. JUR. 2D *Initiative and Referendum* §§ 1-20 (1969 & Supp. 1989); 38 CAL. JUR. 3D *Initiative and Referendum* § 19 (1977 & Supp. 1989).

103. *Calfarm*, 48 Cal. 3d at 841-42, 771 P.2d at 1270, 258 Cal. Rptr. at 184. The Association of California Life Insurance Companies, an intervenor in the action, predicted that the repeal of these laws would actually cause an increase in rates, thus contradicting the initiative's stated goal of cost control. *Id.* at 841, 771 P.2d at 1270, 258 Cal. Rptr. at 184.

104. *Id.* at 841-42, 771 P.2d at 1270, 258 Cal. Rptr. at 184.

rule was satisfied.[105]

In summary, the court determined that two provisions of the initiative were unconstitutional but severable. The court also concluded that the insolvency prerequisite of section 1861.01(b) of the Insurance Code for first year rate relief violated both federal and state due process rights. The court found that section 1861.10(c) violated the state constitution's restriction against initiatives naming a private corporation to perform any function. The validity of section 12202.1 of the Revenue and Taxation Code was not decided, but the court held that it would be severable if subsequently declared invalid. Accordingly, a writ of mandate was issued to prohibit enforcement of the insolvency and consumer advocacy corporation sections. Finally, the supreme court declared that all other provisions of Proposition 103 were facially constitutional.[106]

IV. IMPACT

In finding that Proposition 103's language implied a fair rate of return for insurers, the court clearly altered the initiative in order to save it. However, it is unclear whether a widespread reduction in insurance rates will follow.

The post-*Calfarm* initiative places an enormous burden on the insurance commissioner, who must define the "fair rate of return" for each of the state's insurers. Before reaching this question, the commissioner will have to develop accurate means for measuring insurers' costs, as well as proper standards for setting individual consumers' premiums. Nearly one year after the initiative's adoption, the commissioner had yet to announce any standards to define a "fair rate of return" or to conduct any public hearings to consider applications for rate increases.[107] The rollbacks mandated by Proposition 103 were nowhere to be seen.

In the meantime, many insurers have raised premiums substantially,[108] while flooding the commissioner's office with requests for rate relief in the event that rollbacks or restrictions are eventually

105. *Id.* at 842, 771 P.2d at 1270, 258 Cal. Rptr. at 184.

106. *Id.*

107. *See* Dresslar, *Lead Plaintiff Seeks Stay in Prop. 103 Effective Date*, L.A. Daily J., Oct. 2, 1989, at 4, col. 2 [hereinafter Dresslar, *Lead Plaintiff Seeks Stay*]; Dresslar, *Gillespie Trumpets Insurance Companies' Message*, L.A. Daily J., Aug. 4, 1989, at 3, col. 2.

108. During the period when *Calfarm* was being decided by the court, many insurers boosted rates by 24 to 46 percent. Dresslar, *103 Advocates Ask Court to Freeze Insurance Hikes*, L.A. Daily J., Apr. 21, 1989, at 3, col. 2.

imposed.[109] Petition drives and litigation continue,[110] with no evidence of progress toward a resolution of the problems spawning the initiative.[111]

It is unlikely that Proposition 103 will ever be enforced in the manner anticipated by the voters in 1988. Simply trying to define the court's "fair rate of return" standard could generate enough litigation to postpone rate cuts indefinitely. The initiative's most substantial effect may be as a signal to the legislature. The same voters who placed five insurance initiatives on the 1988 ballot and adopted Proposition 103 are now paying higher insurance rates. Legislators who face these frustrated voters may be inspired to enact statutes that will both reduce premiums and survive attacks by insurers.[112]

V. CONCLUSION

The California Supreme Court's flexible interpretation of Proposition 103 saved it from constitutional invalidity. However, the probability of endless litigation makes it doubtful that the initiative will lead to widespread reductions in insurance rates. If the current insurance crisis is to be resolved, it most likely will be through carefully drafted legislation. The voters have spoken; it remains to be seen whether the legislature will respond.

ROBERT J. MILLS

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109. By July 1989, the commissioner's office had received approximately 4000 applications for rate relief. Bush, *Gillespie Urged to Cut Insurance Rates Immediately*, L.A. Daily J., July 28, 1989, at 3, col. 2.

110. *Id.*; Dresslar, *Lead Plaintiff Seeks Stay*, *supra* note 107. For example, at the same time that the Proposition 103 sponsors were suing Insurance Commissioner Roxani Gillespie for failing to implement the initiative, the Calfarm Insurance Company was asking a court to stay the November 1989 effective date for some of the rate control provisions. *Id.*

111. Depending on who is being asked, the causes of high insurance rates may include: greedy insurers, or equally greedy plaintiffs' lawyers; a lack of insurance regulation, or a need for tort reform; and other factors including fraud, auto theft, and the absence of no-fault insurance. *See* Kushman, *The Insurance-Reform Stampede*, 19 CAL. J., Oct. 1988, at 417; Schubert, *While Roxani Gillespie Is Placed on the Horns of a Dilemma*, L.A. Daily J., May 31, 1989, at 6, col. 3.

112. Much of the foreseeable Proposition 103 litigation will be the result of its vagueness, particularly regarding the commissioner's duties and the court-created "fair rate of return" standard. The legislature's resources would allow extensive fact finding *before* a bill became law; this should result in more effective and less vulnerable insurance rate controls.

VI. TORT LAW

A. *In a defamation action, no statutory or common law privilege extends beyond the constitutional requirements protecting the media in reporting on matters of "public interest"; therefore, a private figure need prove only negligence on behalf of a media defendant to prevail in a libel or slander action:* **Brown v. Kelly Broadcasting Co.**

I. INTRODUCTION

Brown v. Kelly Broadcasting Co.[1] arose from a consumer affairs report by KCRA-TV in Sacramento, a television station owned by Kelly Broadcasting Company. In the report, the television station accused the plaintiff's contracting company of performing shoddy home repair work. According to the broadcast, Brown had refused to comment to the television station.[2] After the report aired, Brown denied the truth of the report and made a written demand for a retraction. When the station refused, Brown brought an action alleging slander per se, negligence, and malice.

The trial court granted the defendant's motion for summary judgment, finding that the defendant's broadcast fell under a conditional privilege found in the California Civil Code.[3] The court of appeal reversed,[4] although it agreed that the conditional privilege applied to the defendant. The court of appeal found, however, that there was a triable issue of material fact on whether there was malice[5] on the

1. 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989). Justice Eagleson authored the opinion of a unanimous court. The Honorable Campbell M. Lucas, Presiding Justice, Court of Appeal, Second Appellate District, Division Five, sat by designation.

2. *Id.* at 719-20, 771 P.2d at 409-10, 257 Cal. Rptr. at 711-12. In a second broadcast, a contractor who had been criticized in the first broadcast along with Brown appeared to defend his work. Again, the reporter stated that Brown had turned down a request to defend herself. However, Brown filed a declaration in opposition to a motion for summary judgment stating that KCRA had not contacted her, that the report was false, and that KCRA had been told by the Contractor's State License Board that the allegations were false. *Id.*

3. CAL. CIV. CODE § 47(3) (West 1982). Section 47(3) provides, in pertinent part, that a publication or broadcast is privileged if made without malice and "to a person interested therein, (1) by one who is also interested . . . ." [hereinafter the "common-interest . . . ." privilege]. *Id.*; *see infra* note 20.

4. *See* Brown v. Kelly Broadcasting Co., 198 Cal. App. 3d 1106, 244 Cal. Rptr. 531 (1988), *aff'd*, 48 Cal. 3d 711, 771 P.2d 406, 257 Cal. Rptr. 708 (1989).

5. In this context, malice is defined as "a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person." *Brown*, 48 Cal. 3d at 723, 771 P.2d at 411, 257 Cal. Rptr. at 713 (quoting Agarwal v. Johnson, 25 Cal. 3d

part of the defendant that would overcome the privilege.[6] The supreme court accepted review only on the issue of whether the news media is accorded a broad "public interest" privilege.[7]

II. BACKGROUND

The holding in this case is based largely on California statutory law, although federal constitutional concerns are implicated. Section 47(3) of the California Civil Code, upon which both courts below relied, does not create a broad-based privilege to report on matters of public interest.[8] However, both state law and the common law regarding defamation have been shaped and, in many instances, superseded by United States Supreme Court decisions during the last twenty-five years.[9] The defendant, along with members of the national media writing as amici curiae,[10] urged the court to find a pub-

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932, 944, 603 P.2d 58, 66, 160 Cal. Rptr. 141, 148 (1979)). This is referred to as "common law malice." *Id.*

6. The supreme court set out to clarify what it considered to be incorrect terminology in a number of cases dealing with privileges. The court stated that there is no such thing as a "privileged defamation" or a "privilege to defame." *Id.* at 723 n.7, 771 P.2d at 412 n.7, 257 Cal. Rptr. at 714 n.7. A defamation is defined in sections 45 and 46 of the Civil Code as an "unprivileged" publication or communication, the former being libel (written) and the latter being slander (oral). *See* CAL. CIV. CODE §§ 45-46 (West 1982). The court believed it incorrect to state that the privilege can be overcome by a showing of malice. *Brown*, 48 Cal. 3d at 723 n.7, 771 P.2d at 412 n.7, 257 Cal. Rptr. at 714 n.7. Instead, the privilege never arises if malice exists. *Id.* Finally, the privilege itself is not conditional. *Id.* Rather, the occasion giving rise to publication, such as a judicial proceeding, is conditionally privileged; that is, certain occasions and the absence of malice give rise to a privilege that is a "complete defense." *Id. See generally* 50 AM. JUR. 2D *Libel and Slander* §§ 195-199 (2d ed. 1970 & Supp. 1989); 6 CAL. JUR. 3D *Assault and Other Willful Torts* § 206 (3d ed. 1988); L. ELDREDGE, THE LAW OF DEFAMATION § 83, at 448-50 (1978); 2 F. HARPER, F. JAMES & O. GRAY, THE LAW OF TORTS §§ 5.26-.27 (2d ed. 1986 & Supp. 1989); RESTATEMENT (SECOND) OF TORTS §§ 600, 603 (1977); 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 519 (9th ed. 1988); Comment, *"Actual Malice" and the Standard of Proof in Defamation Cases in California: A Proposal for a Single Constitutional Standard*, 16 SW. U.L. REV. 577, 591 (1986). For the common law perspective, see J. TOWNSHEND, A TREATISE ON THE CHARGES CALLED SLANDER AND LIBEL AND ON THE REMEDY BY CIVIL ACTION FOR THOSE WRONGS, TOGETHER WITH A CHAPTER ON MALICIOUS PROSECUTION 296 (4th ed. 1890).

7. *Brown*, 48 Cal. 3d at 720, 771 P.2d at 410, 257 Cal. Rptr. at 712.

8. *Id.* at 729, 771 P.2d at 416, 257 Cal. Rptr. at 718.

9. *See* New York Times v. Sullivan, 376 U.S. 254 (1964). A public official must prove that a defamatory statement was made with actual malice, meaning "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 280. The U.S. Supreme Court later held "reckless disregard" to require evidence that the "defendant in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). For purposes of this article, the malice standard set out in *Sullivan* will be referred to as "constitutional" malice; it is a creation of constitutional interpretation rather than common law. *See generally* Lewis, New York Times v. Sullivan *Reconsidered: Time to Return to "The Central Meaning of the First Amendment,"* 83 COLUM. L. REV. 603 (1983).

10. Amici curiae in the case included The Times Mirror Company; National Broadcasting Company, Inc.; Hearst Corporation; CBS, Inc.; Gannett Co., Inc.; and Capital Cities/ABC, Inc.

lic-interest privilege in section 47(3) based on the policies expressed in these United States Supreme Court cases.[11] The issue and holding in *Brown* are best understood in light of those Supreme Court decisions, particularly *Gertz v. Robert Welch, Inc.*[12]

Gertz rejected the notion that a private plaintiff[13] must show that the defendant acted with constitutional malice, as required of public officials by *New York Times v. Sullivan.*[14] Instead, the Supreme Court held that each state could determine the standard of liability for the defamation of a private individual, as long as liability was not imposed without fault.[15] By permitting states to choose the standard of liability for private figures, *Gertz* destroyed the media's argument that the United States Supreme Court's holdings support the creation of a "public-interest" privilege.[16]

Prior to *Brown*, it was unclear in California whether constitutional malice or the lesser standard of negligence was required to impose liability for the defamation of a private figure.[17] With this holding, California has joined the majority of states[18] in requiring only a

11. *Brown*, 48 Cal. 3d at 721, 771 P.2d at 410, 257 Cal. Rptr. at 712.

12. 418 U.S. 323 (1974). *See generally* R. LABUNSKI, LIBEL AND THE FIRST AMENDMENT (1987); Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349 (1975); Note, *The* Gertz *Case: Unbalancing Media Rights and Reputational Interests*, 2 W. ST. U.L. REV. 227.

13. There was no contention in this case that the plaintiff was a public figure. *Brown*, 48 Cal. 3d at 722 n.4, 771 P.2d at 411 n.4, 257 Cal. Rptr. at 713 n.4. Even if the court had found a statutory public-interest privilege in California, the mere fact that the plaintiff was paid from funds borrowed by homeowners from a public agency—the Sacramento Housing and Redevelopment Agency—would be "too remote" to deem her a public figure. *Id.* at 738 n.24, 771 P.2d at 422 n.24, 257 Cal. Rptr. at 724 n.24.

14. 376 U.S. 254 (1964). In Curtis Publishing v. Butts, 388 U.S. 130 (1967), the United States Supreme Court held "public figures" to the standard established by *Sullivan* for plaintiffs who were public officials. *See* Christie, *Underlying Contradictions in the Supreme Court's Classification of Defamation*, 1981 DUKE L.J. 811 (criticizing the public-private figure distinction created by *Gertz*).

15. *Gertz*, 418 U.S. at 347. Liability without fault, or strict liability, was the standard prior to *Sullivan*. *Brown*, 48 Cal. 3d at 721, 771 P.2d at 410, 257 Cal. Rptr. at 712 (citing L. ELDREDGE, *supra* note 6, at 252-54); *see* 5 B. WITKIN, *supra* note 6, §§ 543-544.

16. *Brown*, 48 Cal. 3d at 723, 771 P.2d at 411, 257 Cal. Rptr. at 713.

17. *See, e.g.*, Rancho La Costa, Inc. v. Superior Court, 106 Cal. App. 3d 646, 105 Cal. Rptr. 347 (1980); *see also* Comment, *As Time Goes By:* Gertz v. Robert Welch, Inc. *and Its Effect on California Defamation Law*, 6 PAC. L.J. 565, 589 (1975); Comment, *The Nonmedia Figure and Strict Liability in California*, 18 U.S.F. L. REV. 253 (1984) (uncertainty created by *Gertz* allows some states, including California, to revert to strict liability in the case of a nonmedia defendant and a private figure).

18. Since *Gertz*, 33 states have adopted the lower standard of negligence for private figures, six have applied a negligence standard without comment, and two federal courts, as well as Puerto Rico and the Virgin Islands, have interpreted local law to im-

showing of negligence.[19]

III. THE COURT'S DECISION

A. *Legislative History*

The legislative history of section 47(3) suggests that it was intended to be a codification of the common law privilege of "common interest,"[20] rather than a broad public-interest privilege for media defendants.[21] The statute apparently was based on the New York codification of the common law privilege, which did not envision a public-interest privilege for the media.[22] The court stated that if the legislature had intended to broaden the privilege to create a public-interest privilege, then it would have explicitly done so.[23] Also, the supreme court noted that the common law did not grant any greater privileges to the press than it granted to ordinary citizens.[24]

B. *Previous Interpretive Decisions*

Previous decisions by the California Supreme Court did not construe section 47(3) as creating a public-interest privilege for the defamation of a *private* citizen.[25] Prior case law applied the common interest privilege, or the fair comment[26] defense,[27] to public figures

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pose a negligence standard. *Brown*, 48 Cal. 3d at 741, 771 P.2d at 424-25, 257 Cal. Rptr. at 726-27; *see also infra* notes 41-44 and accompanying text.

19. *Brown*, 48 Cal. 3d at 740, 771 P.2d at 424, 257 Cal. Rptr. at 726.

20. One commentator noted:

> A conditionally privileged occasion arises "if the communication [is] of such a nature that it could be fairly said that those who made it had an interest in making such a communication, and those to whom it was made had a corresponding interest in having it made to them. When those two things co-exist the occasion is a privileged one."

L. ELDREDGE, *supra* note 6, § 87 (quoting Hunt v. Great N. Ry., 2 Q.B. 189, 191 (1891)); *see also* 6 CAL. JUR. 3D *Assault and Other Willful Torts* §§ 220-222 (1988); F. HARPER, *supra* note 6, § 5.26; 5 B. WITKIN, *supra* note 6, §§ 523-529.

21. *Brown*, 48 Cal. 3d at 727, 771 P.2d at 414, 257 Cal. Rptr. at 716.

22. *Id.* at 728, 771 P.2d at 415, 257 Cal. Rptr. at 717.

23. *Id.* at 729, 771 P.2d at 416, 257 Cal. Rptr. at 718. The court noted that Wilson v. Fitch, 41 Cal. 363 (1872), decided one year before the enactment of section 47(3), specifically rejected the application of the privilege merely because the communication applied to a subject of public interest. *Brown*, 48 Cal. 3d at 729, 771 P.2d at 416, 257 Cal. Rptr. at 718. Legislators would have been aware of that decision and would have corrected it had that been their intent. *Id.* at 730, 771 P.2d at 416, 257 Cal. Rptr. at 718.

24. *Brown*, 48 Cal. 3d at 729, 771 P.2d at 416, 257 Cal. Rptr. at 718.

25. *Id.*

26. To clarify the use of terms describing privileges, the supreme court noted that the common-interest privilege and the right of fair comment were two separate defenses under the common law. *Id.* at 732 n.18, 771 P.2d at 418 n.18, 257 Cal. Rptr. at 720 n.18. However, only the common interest privilege was codified in section 47(3). *Id.* The fair-comment defense continues to be a viable defense in defamation actions under the common law. *Id.* (citing Institute of Athletic Motivation v. University of Ill., 114 Cal. App. 3d 1, 8 n.4, 170 Cal. Rptr. 411, 415 n.4 (1980)); *see also* Dairy Stores, Inc. v. Sentinel Pub. Co., 104 N.J. 125, 516 A.2d 220 (1986) (extending fair comment privilege

or public officials, but not to matters of supposed "public interest" involving private citizens.[28] "Interest" in the phrase "common interest" refers to private or pecuniary matters and not merely to topics of general public interest.[29] The court in *Brown* distinguished the type of consumer affairs report at issue from the situation in which the privilege arose because of a true common interest.[30]

Decisions by courts of appeal generally have followed the supreme court's narrow view of the common-interest privilege,[31] but several cases have mistakenly construed that view as creating a broader privilege than that which applies to matters of "public interest" and private persons.[32] The most recent appellate case to interpret correctly the breadth of the statutory privilege was *Rancho La Costa, Inc. v. Superior Court*.[33] Prior to the decision in *Brown*, the conflicting opinions at the appellate level created confusion regarding the scope

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in New Jersey to false statements of fact on matters of public interest). *See generally* J. TOWNSHEND, *supra* note 6, at 462, 590-91; 5 B. WITKIN, *supra* note 6, §§ 547-553.

27. The court believed it preferable to refer to the fair comment defense as a "right rather than a privilege." *Brown*, 48 Cal. 3d at 732 n.18, 771 P.2d at 418 n.18, 257 Cal. Rptr. at 720 n.18.

28. *Id.* at 729-35, 771 P.2d at 416-20, 257 Cal. Rptr. at 718-22; *see, e.g.*, Maidman v. Jewish Publications, Inc., 54 Cal. 2d 643, 355 P.2d 265, 7 Cal. Rptr. 617 (1960) (an "individual of renown" in Jewish community); Stevens v. Storke, 191 Cal. 329, 216 P. 371 (1923) (road builder not a public figure); Snively v. Record Pub. Co., 185 Cal. 565, 198 P. 1 (1921) (Los Angeles police chief is a public figure); Newby v. Times-Mirror Co., 173 Cal. 387, 160 P. 233 (1916) (political activity of well-known lawyer not a matter of public interest); Gilman v. McClatchy, 111 Cal. 606 (1896) (private citizen accused of raping household servant); Edwards v. Pub. Soc., 99 Cal. 431, 34 P. 128 (1893) (employee or agent of a utility deemed to be a private figure).

29. *Brown*, 48 Cal. 3d at 727, 771 P.2d at 414, 257 Cal. Rptr. at 716 (citing Rancho La Costa, Inc. v. Superior Court, 106 Cal. App. 3d 646, 664-65, 165 Cal. Rptr. 347, 358-59 (1980)).

30. *Brown*, 48 Cal. 3d at 733-34, 771 P.2d at 418-19, 257 Cal. Rptr. at 720-21 (citing Emde v. San Joaquin County Cent. Labor Council, 23 Cal. 2d 146, 143 P.2d 20 (1943) (common interest between labor union that published newsletter and its members); Schreidell v. Shoter, 500 So. 2d 228 (Fla. App. 1986) (privilege applied in action by rabbi against member of board of directors of synagogue for statements made to other directors); Fisher v. Illinois Office Supply Co., 130 Ill. App. 3d 996, 474 N.E.2d 1263 (1984) (statements made in grievance and arbitration hearings); Bainhauer v. Manoukian, 215 N.J. Super. 9, 520 A.2d 1154 (1987) (allegations among hospital physicians about alleged deficiencies of a colleague)).

31. *Brown*, 48 Cal. 3d at 735, 771 P.2d at 420, 257 Cal. Rptr. at 722.

32. *Id.* at 735-38, 771 P.2d at 420-22, 257 Cal. Rptr. at 722-24. To the extent *Brown* is inconsistent by holding or dicta, the court disapproved Rollenhagen v. City of Orange, 116 Cal. App. 3d 414, 172 Cal. Rptr. 49 (1981) (no privilege in reporting on fraudulent automobile repair scam); Williams v. The Daily Review, Inc., 236 Cal. App. 2d 405, 46 Cal. Rptr. 135 (1965) (engineer awarded city road paving contract); Glenn v. Gibson, 75 Cal. App. 2d 649, 171 P.2d 118 (1946) (owner of motel allegedly used by military men to engage in illicit sex).

33. 106 Cal. App. 3d 646, 105 Cal. Rptr. 347 (1980) (privilege does not arise in re-

of privileges in California.[34]

C. *Policy Considerations*

Because the court premised its holding on the legislative intent behind section 47(3),[35] policy considerations were not as important as if the issue had been purely one of common law.[36] Nonetheless, the many arguments raised by the defendants and the amici curiae prompted the supreme court to weigh the competing policies raised by this case.[37]

1. The Legislature's Role and Media Self-determination

The supreme court believed that the proposed expansion of section 47(3) to include a public-interest privilege was so broad as to be more appropriate for state legislative action.[38] The privilege would be all-encompassing because it would permit media defendants to claim that all of their communications were of public interest and therefore privileged.[39] This defense would be plausible in nearly every case because the function of the media is to publish or broadcast matters of public interest.[40]

2. Majority Viewpoint in the United States

As stated above, California joined the majority of jurisdictions in requiring that private figure plaintiffs need prove only negligence in defamation actions.[41] Only three states have applied the constitutional malice standard to private-figure defamation suits,[42] and New

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porting on alleged organized crime figures merely because of public interest in the subject).

34. *See* Cate, *Defining California Civil Code Section 47(3): The Resurgence of Self-Governance*, 39 STAN. L. REV. 1201 (1987) (showing privilege has been extended beyond statutory intent, but urging California legislature or supreme court to adopt it); Comment, *Fair Comment in California: An Unwelcome Guest*, 57 S. CAL. L. REV. 173 (1983) (discussing conflict between *Rollenhagen* and previous decisions, then criticizing expansion of privilege in that case).

35. *See supra* notes 20-24 and accompanying text.

36. *Brown*, 48 Cal. 3d at 739, 771 P.2d at 423, 257 Cal. Rptr. at 725.

37. *Id.*

38. *Id.* at 739-40, 771 P.2d at 423, 257 Cal. Rptr. at 725 (citing Cahill v. Hawaiian Paradise Park Corp., 56 Haw. 522, 543 P.2d 1356 (1975)).

39. *Id.* at 739, 771 P.2d at 423, 257 Cal. Rptr. at 725.

40. The court explicitly noted that "the result implicitly sought by the media in this case is a rule that in effect would be, 'If it is published, it is privileged.' " *Id.*

41. *See supra* notes 18-19; *see also* Collins & Drushal, *The Reaction of the State Courts to* Gertz v. Robert Welch, Inc., 28 CASE W. RES. 306 (1978) (burden of proof is equally as important as the standard of liability); Recent Development, *State Court Reactions to* Gertz v. Robert Welch, Inc.: *Inconsistent Results and Reasoning*, 29 VAND. L. REV. 1431 (1976) (media may be held to the standard of liability in each of the states in which they broadcast or have circulation).

42. These are Colorado, Indiana, and New Jersey. *Brown*, 48 Cal. 3d at 741 n.30, 771 P.2d at 425 n.30, 257 Cal. Rptr. at 727 n.30.

York has adopted an intermediate position between constitutional malice and negligence.[43] The supreme court cited this trend among the states as support for its position.[44]

3. The Importance of Reputation

While constitutional protections are required to prevent libel suits from having a "chilling effect" on the free flow of news, the court believed that the importance of the individual's personal reputation is an equally compelling interest.[45] Changes in technology and business have created an expansive media audience. Because it would be impractical for an individual defamed by the mass media to contact personally those who have heard a defamation, an individual's ability to redress injury to reputation through a defamation action is needed more today than during the eighteenth century.[46] The court emphasized that private individuals, as opposed to either the media or those who voluntarily enter the glare of public debate,[47] are the beneficiaries of the rule set forth in this case.[48]

The supreme court also pointed out the possible anomaly that could result in placing a greater burden on the private—rather than the public—figure plaintiff if section 47(3) were construed as suggested.[49] If the public-interest privilege being urged upon the court

43. *Id.*; *see* F. HARPER, *supra* note 6, § 5.0, at 14.

44. *Brown*, 48 Cal. 3d at 742, 771 P.2d at 425, 257 Cal. Rptr. at 727.

45. *Id.* at 742-44, 771 P.2d at 425-26, 257 Cal. Rptr. at 727-28. The supreme court relied on *Gertz* for the basic proposition that an individual's reputation is deserving of significant legal protections. *Id.* "[T]he individual's right to the protection of his own good name 'reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.' " *Id.* at 744, 771 P.2d at 426, 257 Cal. Rptr. at 728 (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 341 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92 (1966))).

46. "[T]echnology has immeasurably increased the power of the press to do both good and evil." *Brown*, 48 Cal. 3d at 743-44, 771 P.2d at 426, 257 Cal. Rptr. at 728 (citing Rosenbloom v. Metromedia, 403 U.S. 29, 60 (1971)).

47. *Id.* at 744, 771 P.2d at 426, 257 Cal. Rptr. at 728 (citing *Gertz*, 418 U.S. at 344). It is argued that, because public officials have greater access to the media than do private individuals, the public official can presumably use his media exposure to counteract falsehoods directed against him. *Id.*

48. *Id.* *See generally* Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal*, 18 U.S.F. L. REV. 1, 22-28 (1983) (rejecting an absolute privilege for any matter of public concern regardless of the involvement of a private figure). *But see* Del Russo, *Freedom of the Press and Defamation: Attacking the Bastion of* New York Times Co. v. Sullivan, 25 ST. LOUIS U.L.J. 501 (1981) (rejecting greater protections for private figures and urging a single standard of liability focusing on public concern).

49. *Brown*, 48 Cal. 3d at 745, 771 P.2d at 427, 257 Cal. Rptr. at 729. The supreme court commented that it would be an "extremely rare case in which a journalist had

were adopted, then a private plaintiff would be forced to show *common law* malice[50] to prevent the privilege from being invoked. A public figure in the same scenario would be required to show only *constitutional* malice,[51] which he may have a better chance of proving than common law "hatred or ill will."[52]

4. Constitutional Protections for the Media

The supreme court rejected any argument that the California Constitution provides greater free speech protection than the United States Constitution.[53] The court further noted that it would be unwise to expand a common law privilege at a time when the United States Supreme Court has articulated a "panoply of constitutional protections"[54] for the media.[55] The common law privileges such as fair comment and common interest originally developed to give the media some degree of protection from the prevailing strict liability standard for false publications; however, a special need for these privileges no longer exists given the media rights granted by the Supreme Court,[56] and any state action in this area would unnecessarily complicate the law of defamation.[57] As discussed below, the supreme court did not foresee that its decision would have a chilling effect on news operations, given the wide-ranging constitutional protections already favoring the media defendant.

In addition to the requirement in *Sullivan* that public figures prove constitutional malice,[58] the United States Supreme Court in *Gertz* created three significant safeguards for the media: (1) a private plaintiff must prove at least negligence;[59] (2) if the speech involves a matter of public concern, a private plaintiff also must show constitutional malice to recover presumed or punitive damages;[60] and (3) con-

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actual hatred of a person on whom the journalist was reporting." *Id.* at 745 n.32, 771 P.2d at 427 n.32, 257 Cal. Rptr. at 729 n.32.

50. *See supra* note 5.

51. *See supra* note 9.

52. *See supra* notes 5, 49 and accompanying text.

53. *Brown*, 48 Cal. 3d at 746, 771 P.2d at 428, 257 Cal. Rptr. at 730. Every person must be "responsible for the abuse" of the right of free speech. CAL. CONST. art. I, § 2(a). This, the court noted, indicates that the individual's right to reputation is "worthy of constitutional protection." *Brown*, 48 Cal. 3d at 746, 771 P.2d at 428, 257 Cal. Rptr. at 730.

54. *See supra* note 9.

55. *Brown*, 48 Cal. 3d at 746-47, 771 P.2d at 428, 257 Cal. Rptr. at 730.

56. *Id.* (citing W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS § 113, at 808 (5th ed. 1984)).

57. *Brown*, 48 Cal. 3d at 747-48, 771 P.2d at 428-29, 257 Cal. Rptr. at 730-31 (citing Rouch v. Enquirer & News of Battle Creek, 427 Mich. 157, 199-201, 398 N.W.2d 245, 264 (1986)).

58. *See supra* note 9.

59. Gertz v. Robert Welch, Inc., 418 U.S. 323, 347-48 (1974).

60. *Id.* at 348-50.

stitutional malice in this context must be shown by "clear and convincing" evidence.[61] Furthermore, a private plaintiff often will have the burden of proving falsity against a media defendant regarding matters of public concern.[62]

The supreme court also noted that the additional protections granted the press in reporting on public figures likely have been the cause of costly and rarely successful libel suits.[63] Finally, the court added that media outlets are increasingly controlled by large and profitable corporations, which lends credence to the belief that they should compensate victims of their defamatory publications.[64]

IV. IMPACT

In addressing policy considerations, the supreme court dismissed the argument that its refusal to find a public-interest privilege will have a chilling effect on news reporting.[65] The court first cited a lack of evidence regarding self-censorship by the press in states where negligence rather than constitutional malice is the standard of liability.[66] The court added that little impact on news reporting will occur because journalists strive for accuracy under their code of professional ethics.[67] In a similar vein, the court questioned whether working journalists and their editors actually contemplate privileges and standards of liability in their rush to report the news.[68] However, there is substantial evidence of self-censorship by media outlets based on the fear of libel suits and large damage awards.[69]

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61. *Id.* at 342.

62. Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 777 (1986). If the publication is about a private figure and is also a matter of public concern, then the plaintiff has the burden of proving its falsity. *Id.*

63. *Brown*, 48 Cal. 3d at 750-51, 771 P.2d at 431, 257 Cal. Rptr. at 733.

64. *Id.* at 755-56, 771 P.2d at 434-35, 257 Cal. Rptr. at 736-37.

65. *Id.* at 748, 771 P.2d at 429-30, 257 Cal. Rptr. at 731-32.

66. *Id.* at 749, 771 P.2d at 430, 257 Cal. Rptr. at 732. The court noted that defendants and amici curiae "have not identified a single instance in which they have declined to report the news for fear that section 47(3) is not as broad as they would like." *Id.*

67. *Id.* at 748-50, 771 P.2d at 429-30, 257 Cal. Rptr. 731-32.

68. *Id.*

69. *See* Renas, Hartmann & Walker, *An Empirical Analysis of the Chilling Effect*, in THE COST OF LIBEL: ECONOMIC AND POLICY IMPLICATIONS 41-68 (1989); Note, *Libel and Self-Censorship*, 53 TEX. L. REV. 422 (1975) (self-censorship perpetuated by cost of defending libel claims).

V. CONCLUSION

This case sorts through the confusion that had arisen in California over defamation laws concerning private figures. In future cases, private figure plaintiffs must prove only negligence by media defendants, rather than the higher burden of constitutional malice, even if the topic of the communication was a matter of putative "public interest." The decision places California among the majority of states on this issue.

The court's most compelling argument in rejecting the creation of a statutory "public-interest" privilege is that it would make practically all publications and broadcasts privileged because the media is, by its very nature, responsive to the public's interest.[70] However, whether the decision will have a "chilling effect" on aggressive news reporting in California remains to be seen.[71] The measure of any media "chilling" will be difficult—if not impossible—to calculate because the concept refers to media reports that will *not* occur following this decision. However, this decision most directly examined statutory and common law privileges, even though matters of constitutional law were implicated. The court sided with the private individual held up to public scrutiny by the investigative media. Should the burden prove too great on either the media or the public it serves, the legislature likely will respond to their needs.

PAUL J. MCCUE

B. *When a psychotherapist molests a minor child during the course of individual counseling of mother and child for intra-family problems, the mother has a claim for negligent infliction of emotional distress due to the psychotherapist's breach of the duty of care to the mother and child as patients:* Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.

In *Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.*,[1] the court decided whether a mother who consults a psychotherapist to

70. *See supra* notes 38-40 and accompanying text.

71. *See supra* notes 65-69 and accompanying text.

1. 48 Cal. 3d 583, 770 P.2d 278, 257 Cal. Rptr. 98 (1989). Two mothers obtained counseling for their minor children to resolve family problems. The psychologist also began treatment of the mothers. Upon discovering that the psychotherapist had sexually abused the children, the mothers filed suit for negligent infliction of emotional distress. The trial court sustained the defendant's demurrer, and the court of appeal affirmed, holding that the mothers failed to state a claim under either the "bystander witness" theory, *see infra* note 2, or the "direct victim" theory, *see infra* note 3. Although the suit originally alleged a similar cause of action against the clinic and its owner and director, the court addressed no issues of vicarious liability. *See id.* at 588 n.3, 770 P.2d at 280 n.3, 257 Cal. Rptr. at 100 n.3.

treat both herself and her minor child can state a claim for negligent infliction of emotional distress when the psychotherapist sexually molests her child. Without expressly stating if the "bystander witness"[2] or "direct victim" theories[3] applied, the supreme court upheld the mother's independent claim for negligent infliction of emotional distress because the molestation was a breach of the duty of care[4] owed by the psychotherapist to both the mother and the child as patients.[5]

A cause of action based on negligent infliction of emotional distress cannot rest solely on the foreseeability of the emotional distress.[6] The emotional distress must result from the breach of a duty owed to the plaintiff.[7] As the counseling in this case involved intra-family emotional problems, the therapist was treating both the mother and the child as a single unit, although counseling each separately, to improve the parent-child relationship. Thus, the therapist knew, or

2. *See* Dillon v. Legg, 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1962) (mother could recover for the emotional distress resulting from witnessing the death of her child). *See also* 46 CAL. JUR. 3D *Negligence* § 76 (1978 & Supp. 1989) (witnessing injury to third person); Diamond, Dillon v. Legg *Revisited: Toward a Unified Theory of Compensating Bystanders and Relatives for Intangible Injuries*, 35 HASTINGS L.J. 477 (1984); Annotation, *Right to Recover Damages in Negligence for Fear of Injury to Another, or Shock or Mental Anguish at Witnessing Such Injury*, 29 A.L.R. 3D 1316 (1970). The court recently reconsidered *Dillon* and its progeny. *See* Thing v. LaChusa, 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 864 (1989) (discussed in this survey, *infra*).

3. *See* Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (husband was direct victim of misdiagnosis of wife as having a sexually transmitted disease, and, as a direct victim, had a cause of action for emotional distress). *See also* Comment, *The Increasingly Disparate Standards of Recovery for Negligently Inflicted Emotional Injuries*, 52 U. CIN. L. REV. 1017 (1983); Comment, *Negligent Infliction of Emotional Distress: New Horizons After* Molien v. Kaiser Foundation Hospitals, 13 PAC. L.J. 179 (1981); Annotation, *Necessity of Physical Injury to Support Cause of Action for Loss of Consortium*, 16 A.L.R. 4TH 518 (1982).

4. *See generally* 36 CAL. JUR. 3D *Healing Arts and Institutions* §§ 162-163 (1977 & Supp. 1989).

5. *See Marlene F.*, 48 Cal. 3d at 591, 770 P.2d at 282-83, 257 Cal. Rptr. at 102-03. Even though Justice Arguelles authored the majority opinion, he wrote separately to stress that these facts would support liability for the intentional infliction of emotional distress. *Id.* at 592-99, 770 P.2d at 283-88, 257 Cal. Rptr. at 103-08 (Arguelles, J., concurring). Justice Eagleson, concurring in the judgment, argued that the court's analogy to the "direct victim" theory, *see supra* note 3, had no relevance, but believed that the mothers had a cause of action based upon professional malpractice. *Marlene F.*, 48 Cal. 3d at 599-601, 770 P.2d 288-89, 257 Cal Rptr. 108-09 (Eagleson, J., concurring).

6. The elements of this tort involve duty, breach, causation and damages, although foreseeabilty helps to define the duty owed. *See Marlene F.*, 48 Cal. 3d at 589-90, 770 P.2d at 281-82, 257 Cal. Rptr. at 101-02.

7. *See id.* at 590, 770 P.2d at 282, 257 Cal Rptr. at 102. *See generally* 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* §§ 838-857 (9th ed. 1988) (negligence causing emotional stress).

should have known, that the sexual molestation of the minor child would directly cause emotional distress to the mother and damage the parent-child relationship. The therapist's conduct, therefore, was directed against both the mother and child, as they both were patients of the therapist.[8]

The court accepted the plaintiff's cause of action without applying the facts to prior theories of recovery for negligent infliction of emotional distress.[9] This step was not particularly bold as the psychotherapist was aware of the identity of his patients and the reasons they sought counseling. Although the plaintiff conceivably could have alleged an action for professional malpractice,[10] the court appeared to limit its holding to the facts of the case, and thus did not greatly increase the scope of negligent infliction of emotional distress.

MARK A. CLAYTON

C. *The holding in Foley v. Interactive Data Corporation that a party may receive only contract damages for breach of the implied covenant of good faith and fair dealing in employment contracts shall be applied retroactively:* **Newman v. Emerson Radio Corporation.**

The issue before the California Supreme Court in *Newman v. Emerson Radio Corporation*[1] was whether its decision last year in *Foley v. Interactive Data Corporation*[2] should be applied retroac-

8. *See Marlene F.*, 48 Cal. 3d at 590-91, 770 P.2d at 282, 257 Cal. Rptr. at 102. *See also* Richard H. v. Larry D., 198 Cal. App. 3d 591, 596, 243 Cal. Rptr. 807, 809-10 (1988) (husband had cause of action for negligent infliction of emotional distress based upon marital therapist's sexual relations with wife).

9. *Marlene F.*, 48 Cal. 3d at 592, 770 P.2d at 283, 257 Cal. Rptr. at 103. *See generally* Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772 (1985).

10. *See supra* note 5.

1. 48 Cal. 3d 973, 772 P.2d 1059, 258 Cal. Rptr. 592 (1989). Chief Justice Lucas delivered the majority opinion in which Justices Panelli, Eagleson, and Arguelles concurred. Justice Broussard wrote a separate dissenting opinion, in which Justices Mosk and Kaufman concurred.

2. 47 Cal. 3d 654, 765 P.2d 373, 254 Cal. Rptr. 211 (1988). In *Foley*, an employee was terminated after he informed his former supervisor that he had heard his present supervisor was under investigation for embezzlement. *Id.* at 664, 765 P.2d at 375-76, 254 Cal. Rptr. at 213-14. The court recognized that a tort remedy is available if an employee is dismissed in violation of public policy. *Id.* at 670, 765 P.2d at 380, 254 Cal. Rptr. at 218. The court held that the statute of frauds will not bar a contract recovery if the employee can prove an implied-in-fact contract to discharge only for good cause. *Id.* at 675, 765 P.2d at 383, 254 Cal. Rptr. at 221. The unsuccessful final claim alleged a breach of the implied covenant of good faith and fair dealing sounding in tort. *Id.* at 682-83, 700, 765 P.2d at 389, 401, 254 Cal. Rptr. at 227, 239-40; *see California Supreme Court Survey—November 1988-January 1989*, 16 PEPPERDINE L. REV. 1143, 1227 (1989) (discussing *Foley*).

tively. *Foley* overruled a series of court of appeals decisions[3] by declaring that only contract and not tort damages are available for breach of the implied covenant of good faith and fair dealing in an employment contract.[4] Through *Newman*, the court gave *Foley* full retroactive effect.[5]

The majority noted at the outset that whether or not *Foley* represented a new rule of law was not important in its retroactivity analysis because California courts customarily give such decisions retroactive effect.[6] Utilizing three factors,[7] the court determined that *Foley* did not fall within the narrow group of exceptions[8] to that gen-

3. *See, e.g.*, Koehrer v. Superior Court, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986); Gray v. Superior Court, 181 Cal. App. 3d 813, 226 Cal. Rptr. 570 (1986); Khanna v. Microdata Corp., 170 Cal. App. 3d 250, 215 Cal. Rptr. 860 (1985); Rulon-Miller v. International Business Machs. Corp., 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984); Shapiro v. Wells Fargo Realty Advisors, 152 Cal. App. 3d 467, 199 Cal. Rptr. 613 (1984); Crosier v. United Parcel Serv., Inc., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983); Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980).

4. *Foley*, 47 Cal. 3d at 700, 765 P.2d at 401, 254 Cal. Rptr. at 239-40. *See generally* Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

5. *Newman*, 48 Cal. 3d at 993, 772 P.2d at 1072, 258 Cal. Rptr. at 605. In *Newman*, the employee brought three claims against his former employer, who had fired him without cause: breach of an oral contract to terminate only for good cause, termination in violation of public policy, and tortious breach of the implied covenant of good faith and fair dealing. *Id.* at 976-77, 772 P.2d at 1060-61, 258 Cal. Rptr. at 593-94. The court reversed the court of appeals' dismissal of the first claim, reiterating that the statute of frauds does not bar recovery for breach of an oral contract. The court affirmed the lower court's decision to allow the employee to allege sufficiently a violation of public policy. It also affirmed the dismissal of the tort claim based on a breach of the implied covenant of good faith and fair dealing, but it allowed the employee to amend his complaint to allege a breach entitling him to contract damages. *Id.* at 993, 772 P.2d at 1072-73, 258 Cal. Rptr. at 605-06.

6. *See, e.g.*, Peterson v. Superior Court, 31 Cal. 3d 147, 156, 642 P.2d 1305, 1306-07, 181 Cal. Rptr. 784, 785-86 (1982); Safeway Stores Inc. v. Nest-Kart, 21 Cal. 3d 322, 333, 579 P.2d 441, 446-47, 146 Cal. Rptr. 550, 555-56 (1978); Mark v. Pacific Gas & Elec. Co., 7 Cal. 3d 170, 177-78, 496 P.2d 1276, 1280, 101 Cal. Rptr. 908, 912 (1972); Neel v. Magana, Olney, Levy, Cathcart & Gelfand, 6 Cal. 3d 176, 193, 491 P.2d 421, 432, 98 Cal. Rptr. 837, 848 (1971); Corning Hosp. Dist. v. Superior Court, 57 Cal. 2d 488, 491, 494, 370 P.2d 325, 327, 329, 20 Cal. Rptr. 621, 623, 625 (1962); Cummings v. Morez, 42 Cal. App. 3d 66, 71, 116 Cal. Rptr. 586, 589 (1974); Archibald v. Braverman, 275 Cal. App. 2d 253, 254, 79 Cal. Rptr. 723, 724 (1969).

7. The three factors examined were (1) the purpose to be served by the new rule, (2) the extent of reliance upon the old rule, and (3) the effect of retroactive application on the administration of justice. *Newman*, 48 Cal. 3d at 986, 772 P.2d at 1067, 258 Cal. Rptr. at 600; *see Peterson*, 31 Cal. 3d at 152-53, 642 P.2d at 1307, 181 Cal. Rptr. at 786.

8. For a list of cases having limited retroactivity, see 9 B. WITKIN, CALIFORNIA PROCEDURE § 815 (3d ed. 1985). The court impliedly distinguished Moradi-Shalal v. Fireman's Fund Ins. Cos., 46 Cal. 3d 287, 758 P.2d 58, 250 Cal. Rptr. 116 (1988), which allowed prospective application of a new ruling by acknowledging that, in contrast to *Foley*, *Moradi-Shalal* eliminated a claim, not a remedy, and overruled a prior decision

eral rule.[9] First, the court noted that limiting a breach of the implied covenant award to contract damages would serve two important purposes: it would better reflect the parties' expectations and provide more predictability to employment contract actions.[10] Second, the court observed that fruitless reliance upon the prior tort remedy would not leave a party without a claim or deprive an employee of a vested right.[11] Finally, because few, if any, retrials would be required, the court found that retroactivity would further the "administration of justice."[12]

In cases pending on January 30, 1989, the date *Foley* became final, a party may seek only contract damages for breach of the implied covenant of good faith and fair dealing in employment contracts. Despite the far-reaching impact of *Foley*, the court was unwilling to depart from the sound and generally accepted rule of full retroactive application absent a showing of extraordinary hardship.[13]

BARRY J. REAGAN

D. *To recover as a bystander under a theory of emotional distress, the plaintiff must suffer severe emotional distress as a result of actual presence and awareness at an event causing injury to a victim closely related to the plaintiff:* **Thing v. La Chusa.**

I. INTRODUCTION

The California Supreme Court has decisively transformed the negligent infliction of emotional distress guidelines set forth in *Dillon v.*

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of the supreme court rather than a lower court. *Newman*, 48 Cal. 3d at 982-83, 772 P.2d at 1064-65, 258 Cal. Rptr. at 597-98.

9. For discussions of the general rule of full retroactive application, see 16 CAL. JUR. 3D *Courts* § 172 (1983 & Supp. 1989); 9 B. WITKIN, CALIFORNIA PROCEDURE § 812 (3d ed. 1985 & Supp. 1988).

10. *Newman*, 48 Cal. 3d at 988-89, 772 P.2d at 1069, 258 Cal. Rptr. at 602. *See generally* Gould, *Stemming the Wrongful Discharge Tide: A Case for Arbitration*, 13 EMPLOYEE REL. L.J. 404, 405-07 (1987); Note, *"Contort": Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance, Commercial Contracts—Its Existence and Desirability*, 60 NOTRE DAME L. REV. 510, 526 n.94 (1985).

11. *Newman*, 48 Cal. 3d at 989-91, 772 P.2d at 1069-71, 258 Cal. Rptr. at 602-04. The court also noted that any firm reliance on the prior rule would not be justified because (1) *Foley* overruled lower court decisions, not its own; (2) the remedies available for breach of the implied covenant were unsettled; and (3) the litigants had notice that the court was going to review Cleary v. American Airlines, Inc., 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980). *Newman*, 48 Cal. 3d at 986-87, 772 P.2d at 1067-68, 258 Cal. Rptr. at 600-01.

12. *Newman*, 48 Cal. 3d at 991-92, 772 P.2d at 1071-72, 258 Cal. Rptr. at 604-05.

13. Justice Broussard, in his dissenting opinion, concentrated his attack on the majority's perceived failure to distinguish *Moradi-Shalal*, *see supra* note 8, and the majority's analysis of the reliance factor, *see supra* note 11. He felt that the reliance on the prior tort claim justified prospective application. *Newman*, 48 Cal. 3d at 994-99, 772 P.2d at 1073-77, 258 Cal. Rptr. at 606-10 (Broussard, J., dissenting).

Legg[1] into doctrinal barriers.[2] After twenty years of broad interpretation of the circumstances under which a bystander may recover for the emotional distress suffered when a close relative is injured in an accident,[3] the court has reversed the trend in the recent decision of *Thing v. La Chusa*.[4]

Writing for the majority, Justice Eagleson made clear that policy considerations dictated that some limitations be placed on the trend toward unlimited liability.[5] The court denied the plaintiff recovery because she arrived at the accident scene after an automobile-pedestrian collision had left her son bleeding and unconscious.[6] Consequently, she failed to satisfy the requirement that a plaintiff must be "present at the scene of the injury-producing event at the time it occurs . . . ."[7] The court clearly realized the effect of its holding in *Thing* on earlier cases with broader interpretations: "To the extent they are inconsistent with this conclusion, . . . [they] are disapproved."[8]

II. HISTORICAL BACKGROUND

Each step in the development of the law involving the negligent infliction of emotional distress must be understood in light of two competing interests. On one hand rests the societal need to provide a civilized forum for the aggrieved to seek redress.[9] On the other hand lies an intuitive mistrust of emotional injuries because of the difficulties in proving genuine harm.[10] As a result of these competing interests, the law more closely resembles a compromise than a guidepost of stellar clarity.[11]

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1. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).

2. Pearson, *Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules*, 34 U. FLA. L. REV. 477, 492 (1982).

3. *See Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *Nazaroff v. Superior Court*, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978).

4. 48 Cal. 3d 644, 771 P.2d 814, 257 Cal. Rptr. 865 (1989); *see* Carrisoza, *Justices Limit Lawsuits for Mental Distress*, L.A. Daily J., Apr. 28, 1989, at 10, col. 1.

5. *Thing*, 48 Cal. 3d at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880. Justice Eagleson's opinion for the court was joined by Chief Justice Lucas and Justices Panelli and Arguelles. Justice Kaufman concurred in a separate opinion. Justices Mosk and Broussard each dissented separately.

6. *Id.* at 647, 771 P.2d at 815, 257 Cal. Rptr. at 866.

7. *Id.* at 668, 771 P.2d at 829, 257 Cal. Rptr. at 880.

8. *Id.* at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881.

9. Pearson, *supra* note 2, at 486.

10. Note, *Limiting Liability for the Negligent Infliction of Emotional Distress: The "Bystander Recovery" Cases*, 54 S. CAL. L. REV. 847 (1981).

11. Pearson, *supra* note 2, at 483.

A. *The Impact Rule*

Originally, the law sought to guarantee the authenticity of emotional harm by limiting recovery to those plaintiffs who actually suffered some sort of physical impact as well.[12] Obviously, the more grave the physical injury, the more certain a court could be that the emotional harm was real, not feigned.[13] However, the so-called "impact rule" was unreasonably harsh, or subject to absurd manipulation. In cases in which severe emotional distress was suffered but no physical contact was made, recovery was denied. As a consequence, some courts construed even the slightest bump or touch as physical contact, even though it caused no harm in and of itself.[14] In recognition of the artificial nature of the impact rule, the contact requirement was dropped, and the zone of danger rule was adopted in an effort to limit liability.[15]

B. *The Zone of Danger Rule*

The court in *Amaya v. Home Ice, Fuel & Supply Co.*[16] discarded the requirement that a bystander suffer some sort of physical impact in order to recover for emotional distress. Rather, the court extended recovery to a plaintiff who encountered emotional distress, out of fear for his own safety, while within the zone of danger created by the defendant's negligence.[17] The *Restatement* also adopted the zone of danger rule, but it allowed recovery even if the plaintiff's distress was the result of "[s]hock or fright at harm or peril to a member of his immediate family occurring in his presence."[18] Nevertheless, both variations of the rule would deny recovery to a plaintiff who experienced severe emotional distress but who, because of the peculiar circumstances of a given situation, was not exposed to any danger himself.[19]

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12. *See* Dillon v. Legg, 68 Cal. 2d 728, 738, 441 P.2d 912, 919, 69 Cal. Rptr. 72, 79 (1968).

13. Note, *supra* note 10, at 849.

14. *Id.* at 848; *see* W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 54, at 363 (5th ed. 1984); Pearson, *supra* note 2, at 488.

15. Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963).

16. *Id.*

17. *Id.* at 332, 379 P.2d at 536, 29 Cal. Rptr. at 56. The "zone of danger" is defined as the area in which the bystander himself is also exposed to physical harm by the defendant's negligence. This is contrasted with the area outside the zone of danger where the plaintiff enjoys relative freedom from physical harm, but may still be able to observe the harm caused to the victim. Note, *supra* note 10, at 849.

18. RESTATEMENT (SECOND) OF TORTS § 436 (1965).

19. A more complete criticism of the zone of danger rule is provided in Dziokonski v. Babineau, 375 Mass. 555, 380 N.E.2d 1295 (1978). The court's basic problem with the rule was its failure to provide relief to all whose injuries were reasonably foreseeable. Further, suffering emotional distress from a position of relative safety may be just as

C. Dillon v. Legg

The facts in *Dillon* provided a situation in which the proper application of the zone of danger rule would have led to an anomalous result. In *Dillon*, a young girl was struck by an automobile while her mother and sister watched helplessly. The victim's sister was close enough to the accident to be considered within the zone of danger. The mother, however, was standing on the sidewalk when the accident occurred, and although she witnessed the mishap, she was clearly out of the zone of danger.[20]

In an effort to develop a more just result, while balancing the need to avoid unlimited liability, the California Supreme Court fashioned a set of guidelines which limited foreseeability in bystander cases. The *Dillon* decision established the following factors to be considered in determining foreseeability:

> (1) Whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it. (2) Whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence. (3) Whether plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship.[21]

These factors offered a mechanism to extend recovery to bystanders outside the zone of danger, thereby allowing both the mother and the sister to be compensated in the *Dillon* case.

Since the *Dillon* decision was handed down in 1968, other courts have expanded the definition of foreseeability to include plaintiffs who were not even present at the scene when the accident occurred.[22] At least one court sought to allow recovery for an absent plaintiff by labeling him a "direct victim," not a "bystander," while

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profound as that suffered from within the zone of danger. *Id.* at 562, 380 N.E.2d at 1300.

20. Dillon v. Legg, 68 Cal. 2d 728, 737-38, 441 P.2d 912, 918-19, 69 Cal. Rptr. 72, 78-79 (1968).

21. *Id.* at 740-41, 441 P.2d at 920, 69 Cal. Rptr. at 80.

22. *See* Ochoa v. Superior Court, 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985) (mother whose son suffered and died over a period of several days from misdiagnosis prevailed even though the event was not sudden, and the negligent cause was not readily apparent); Nazaroff v. Superior Court, 80 Cal. App. 3d 553, 145 Cal. Rptr. 657 (1978) (mother allowed recovery when child drowned, even though mother did not arrive until after rescue efforts were well under way); Campbell v. Animal Quarantine Station, 63 Haw. 557, 632 P.2d 1066 (1981) (negligent infliction of emotional distress bystander recovery allowed for distress suffered by family for loss of pet, even though family was not present when injury was suffered, and no human suffered physical injury).

distinguishing the plaintiff in *Dillon* as a mere "percipient witness."[23]

III. STATEMENT OF THE CASE

On the evening of December 8, 1980, the plaintiff, Maria Thing, was in her kitchen when her daughter burst into the room screaming: "They hit Johnny."[24] Immediately, the plaintiff dashed to the scene, only to find her young son lying on the ground unconscious. His left arm was bleeding due to injuries sustained in a pedestrian-automobile accident.[25] Although the plaintiff was located near the scene, she neither heard nor saw the impact when the defendant struck her son. The plaintiff alleged that upon her arrival at the scene, she thought her son was dead and, as a result, suffered shock and severe emotional distress.[26]

The trial court granted the defendant's motion for summary judgment because the plaintiff failed to meet the contemporaneous perception element suggested in *Dillon*.[27] However, despite prior decisions to the contrary, the court of appeal held that a contemporaneous perception of the "immediate consequences" was sufficient to uphold the plaintiff's cause of action.[28] The court of appeal cited *Ochoa v. Superior Court*[29] as authority for its proposition that the factors in *Dillon* were guidelines rather than strict requirements. This interpretation enabled the court to conclude that none of the *Dillon* factors was, by itself, essential to recovery.[30]

The California Supreme Court granted review to examine the court of appeal's reading of *Ochoa* as authority for its holding, and to delineate the circumstances under which a bystander may properly recover for negligent infliction of emotional distress.[31]

IV. THE COURT'S DECISION

A. *The Majority Opinion*

The majority identified one issue specific to the facts of the case,

23. In Molien v. Kaiser Found. Hosps., 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980), the wife, who was misdiagnosed as having syphilis, was instructed to tell her husband to be examined as well. The court viewed the husband as a direct victim. His involvement was compelled by the doctor's negligence, and as a result he transcended the role of a mere bystander. *Id.* at 922-23, 616 P.2d at 816, 167 Cal. Rptr. at 834.

24. Carrizosa, *supra* note 4, at 10.

25. *Id.*

26. Thing v. La Chusa, 48 Cal. 3d 644, 647-48, 771 P.2d 814, 815, 257 Cal. Rptr. 865, 866 (1989).

27. *Id.*

28. *Id.* at 648, 771 P.2d at 815, 257 Cal. Rptr. at 867.

29. 39 Cal. 3d 159, 703 P.2d 1, 216 Cal. Rptr. 661 (1985).

30. *Thing*, 48 Cal. 3d at 648, 771 P.2d at 816, 257 Cal. Rptr. at 867-68.

31. *Id.* at 648, 771 P.2d at 816, 257 Cal. Rptr. at 867.

and further realized a broader opportunity to resolve judicial confusion regarding the tort of negligent infliction of emotional distress. The narrower issue presented by *Thing* asked whether a closely related plaintiff, absent from the scene of an accident at the moment it occurs, may recover for the emotional distress suffered upon arrival at the scene shortly thereafter.[32] This allowed an examination of the more significant question: whether the "guidelines" presented in *Dillon* properly define the parameters of negligent infliction of emotional distress in California.[33]

The California Supreme Court discussed several policy goals impacting its decision. First, emotional distress is a type of harm which is properly compensable under the law.[34] Second, liability for negligent infliction of emotional distress ought to maintain a "reasonable relationship to the culpability of the negligent defendant."[35] Third, liability ought to have reasonable limits in order to provide a more predictable risk for insurance purposes.[36]

In an effort to reconcile these needs, the majority found the factors in *Dillon*, if employed as strict requirements, would effectively contain liability while providing compensation to deserving plaintiffs.[37] As a consequence of this determination, the plaintiff in *Thing* was denied recovery because she was not present at the scene when the accident occurred.[38]

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32. *Id.* at 646-47, 771 P.2d at 815, 257 Cal. Rptr. at 866.

33. *Id.*; *see supra* note 21 and accompanying text.

34. *Thing*, 48 Cal. 3d at 650, 771 P.2d at 817, 257 Cal. Rptr. at 868. Regarding *intentional* infliction of emotional distress, the court noted that the common law has recognized a "[r]ight to be free from socially unacceptable conduct that seriously affects another's peace of mind." *Id.* at 648, 771 P.2d at 816, 257 Cal. Rptr. at 867. The majority recited a definition of emotional distress in intentional torts as "[f]right, nervousness, grief, anxiety, worry, mortification, shock, humiliation and indignity, as well as physical pain." *Id.* at 648-49, 771 P.2d at 816, 257 Cal. Rptr. at 867 (quoting Deevy v. Tassi, 21 Cal. 2d 109, 130 P.2d 389 (1942)). The majority further observed the common law's willingness to quantify damages, even in the absence of physical manifestations, based on a review of the relevant circumstances by the trier of fact. *Id.* at 650, 771 P.2d at 817, 257 Cal. Rptr. at 868 (citing Slate Rubbish Ass'n v. Siliznoff, 38 Cal. 2d 330, 338, 240 P.2d 282, 286 (1952)). This approach allows the court to compensate equally a comparatively strong plaintiff, and one who is less emotionally stable. *Id.*

35. *Id.* at 687, 771 P.2d at 829, 257 Cal. Rptr. at 880.

36. *Id.* at 665, 771 P.2d at 827, 257 Cal. Rptr. at 878.

37. *Id.* at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81.

38. *Id.* at 669, 771 P.2d at 830, 257 Cal. Rptr. at 881.

1. Liability Limitations in Negligent Infliction of Emotional Distress

In analyzing the limits on liability associated with both the impact and the zone of danger rules, the majority concluded that traditional concepts of foreseeability and duty operated as limiting factors.[39] First, those who did not suffer an impact, or who were beyond the zone of danger, could not recover because they were owed no duty of care. Even if the emotional distress was foreseeable, the defendant had no duty to refrain from generating a risk.[40]

Second, the court explained the simple understanding that shock or fright without any associated physical injuries was not reasonably foreseeable.[41] Consequently, recovery in negligence actions was denied based on the lack of foreseeability.

Third, the majority found several of the policy considerations for limiting liability in *Amaya* still appropriate today.[42] The court recognized the difficulty in distinguishing fraudulent claims from genuine causes of action, as well as the problems with quantifying the injury created by the emotional distress.[43] Another consideration involves the difficulty in finding a logical place to limit liability, although the court held that economic and moral considerations demand that liability be limited within reasonable confines.[44] A final consideration involves judicial consistency with established tort law. While the intentional tortfeasor is generally held to answer for all consequences of his actions, liability in negligence generally follows only what is reasonably foreseeable.[45]

The majority observed that the limiting factors in *Dillon* had been referred to as "guidelines," which enabled courts to either expand or

39. *Id.* at 652, 771 P.2d at 818, 257 Cal. Rptr. at 868. For a more detailed discussion of foreseeability as a limitation on liability, see Pearson, *supra* note 2, at 490-501.

40. *Thing*, 48 Cal. 3d at 652, 771 P.2d at 818, 257 Cal. Rptr. at 869; Pearson, *supra* note 2, at 489.

41. *Thing*, 48 Cal. 3d at 652, 771 P.2d at 818, 257 Cal. Rptr. at 869; *see* W. KEETON, *supra* note 14, at 361.

42. *Thing*, 48 Cal. 3d at 652, 771 P.2d at 818, 257 Cal. Rptr. at 869 (citing Amaya v. Home Ice, Fuel & Supply Co., 59 Cal. 2d 295, 379 P.2d 513, 29 Cal. Rptr. 33 (1963)); *see* W. KEETON, *supra* note 14, at 360-61.

43. Courts have recognized that emotional distress may be easily feigned, in spite of expert testimony to the contrary. Mental health professionals still may be fooled on occasion because emotional distress does not always produce outward manifestations. *See* RESTATEMENT (SECOND) OF TORTS § 436A comment b (1965).

44. *Thing*, 48 Cal. 3d at 652, 771 P.2d at 818, 257 Cal. Rptr. at 869 (citing *Amaya*, 59 Cal. 2d at 295, 379 P.2d at 513, 29 Cal. Rptr. at 33). Generally, tort law has looked to the concept of foreseeability to define the boundaries of the defendant's liability in a negligence action. One notable exception is the "thin skull" rule, whereby the defendant is also responsible for unforeseeable consequences. However, this liability only goes as far as the actual physical injury sustained. Pearson, *supra* note 2, at 477 n.3.

45. *Thing*, 48 Cal. 3d at 652, 771 P.2d at 818-19, 257 Cal. Rptr. at 869-70.

ignore them altogether.[46] The majority also noted that the original *Dillon* decision intended these factors to be applied on an ad hoc or case-by-case basis.[47] As a result, decisions at the appellate level were inconsistent and unpredictable. The majority expressed a strong concern that courts in the wake of *Dillon* had given too little attention to the impact of ever expanding liability.[48]

2. Clarification

The court observed that adoption of a pure foreseeability rule in negligent infliction of emotional distress cases would essentially create the intolerable situation of unlimited liability.[49] Therefore, the court concluded that a "bright line" was essential to meet realistic insurance concerns and to control the cost of administration.[50]

The majority flatly acknowledged that any bright line in negligent

46. *Id.* at 654, 771 P.2d at 820, 257 Cal. Rptr. at 870. Apparently, the court did not wholly disagree with *Dillon* but, instead, envisioned a stricter interpretation of a basically sound premise.

47. *Id.* at 655, 771 P.2d at 820, 257 Cal. Rptr. at 871. Relegating the decision of what constitutes negligent infliction of emotional distress in a bystander cause of action to a case-by-case basis does little more than delay deciding exactly where to draw the line. In the meantime, the lower courts are expected to make those decisions without guidance from the California Supreme Court. The majority pointed out that "the *Dillon* court was satisfied that trial and appellate courts would be able to determine the extent of a duty because the court would know it when it saw it." *Id.* at 655, 771 P.2d at 821, 257 Cal. Rptr. at 872 (citing Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)).

48. *Thing*, 48 Cal. 3d at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880.

49. *Id.* at 663, 771 P.2d at 826, 257 Cal. Rptr. at 877. The majority commented that "there are clear judicial days on which a court can foresee forever and thus determine liability but none on which foresight alone provides a socially and judicially acceptable limit on recovery of damages for that injury." *Id.* at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881.

The majority also examined two proposals in an effort to eliminate the arbitrary nature of bystander recovery. *Id.* at 662-63, 771 P.2d at 825-26, 257 Cal. Rptr. at 876-77. The first proposal, a return to the impact rule, was found to be no less arbitrary than the current state of the law. It still is vulnerable to the original problems of inconsequential impacts providing an excuse to allow recovery, and harsh results for a deserving plaintiff suffering in the absence of any impact. The second proposal suggested that recovery be allowed exclusively for economic loss. This, too, was rejected as no less arbitrary than the current law, with the additional disadvantage that it would extend recovery to all foreseeable plaintiffs, not just to those who are closely related. *Id.* at 663, 771 P.2d at 826, 257 Cal. Rptr. at 877. It is unclear, however, just what would be included as an "economic loss." The *Thing* court suggested that economic loss is merely out-of-pocket damages. It appears that the proposal would entail allowing the plaintiff to recover the costs associated with psychiatric counselling and lost income. Most likely, any losses claimed strictly as emotional suffering would be disallowed. *Id.*

50. *Id.* at 664, 771 P.2d at 827, 257 Cal. Rptr. at 878 (citing Elden v. Sheldon, 46 Cal. 3d 267, 277, 758 P.2d 582, 588, 250 Cal. Rptr. 254, 260 (1988)).

infliction of emotional distress must be somewhat arbitrary, but cited several justifications for its holding.[51] First, since money does not really undo the damage suffered, the fact that some deserving plaintiffs will go uncompensated is considered less critical.[52] Second, given the difficulty in assessing the value of the harm, a bright line would allow only the most deserving plaintiffs to recover.[53] Third, society as a whole must bear the costs of increased litigation and insurance expenses if a broader group of potential plaintiffs is entitled to compensation.[54] Finally, the court pointed out that the vast majority of emotional distress goes uncompensated because it is a normal part of life, and is not caused by the fault of another.[55]

Based on these justifications, the majority found that the best solution was to construct a law which offers relief only to those who suffer the most.[56] The majority concluded its examination by holding that the facts in *Dillon* are to be treated as threshold requirements for recovery under negligent infliction of emotional distress.[57] The majority also held that to the extent any prior case suggested a broader interpretation of the law, it was overruled.[58]

B. The Concurring Opinion

In his concurrence, Justice Kaufman struck at the very heart of negligent infliction of emotional distress by suggesting that freedom therefrom should not be a legally protected interest. He criticized as too rigid the majority's treatment of the *Dillon* factors as threshold requirements, thus creating the obvious result of disparate treatment

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51. *Id.* at 666, 771 P.2d at 828, 257 Cal. Rptr. at 879.

52. *Id.* at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880. This argument raises the question: if money does not undo the damage, why are monetary damages awarded to the plaintiff under any circumstances? This line of reasoning supports the concept of limiting damages exclusively to economic loss. *See supra* note 49.

53. While assessing the value of the harm in an emotional distress suit may be difficult, courts generally have been more willing to try when the cause is intentional rather than negligent. *See supra* note 34. While the additional culpability enters into the calculation, the focus, in either case, is on the resultant damage.

54. Clearly, the impact the holding in this case would have on liability insurance was a key consideration. At least three insurance associations were represented as amici curiae. Carrizosa, *supra* note 4, at 10.

55. *Thing*, 48 Cal. 3d at 666-67, 771 P.2d at 828-29, 257 Cal. Rptr. at 879-80.

56. The court stated recovery would be available:

> if . . . and only if, said plaintiff: (1) is closely related to the injury victim; (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim; and (3) as a result suffers serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.

Id. at 667-68, 771 P.2d at 829-30, 257 Cal. Rptr. at 880-81 (footnotes omitted).

57. *Id.*

58. *Id.* at 668, 771 P.2d at 830, 257 Cal. Rptr. at 881.

among equally deserving plaintiffs.[59] Yet Justice Kaufman also found fault with the dissent's recommendation to retain *Dillon* in its original, more flexible form,[60] recognizing this as a course which already has led to substantial confusion and inconsistency in the lower courts.[61]

Justice Kaufman further criticized the majority's holding because its arbitrary nature resembled institutionalized caprice. He stated that this kind of decision operates to discredit the judiciary and undermines the respect for the law that justice commands.[62] Moreover, he believed that negligent infliction of emotional distress was too universal an experience for the law to become involved with, and he recommended that "bystander liability should not be retained."[63] Based on these criticisms, and despite stare decisis, Justice Kaufman would have denied recovery for the plaintiff in *Thing* merely because she harbored no fear for her own safety.[64]

C. *The Dissenting Opinions*

In his dissent, Justice Broussard exhibited an unswerving faith in the natural limits on liability created by the application of foreseeability.[65] He argued that foreseeability alone should determine liability in order to preserve the original flexibility of *Dillon*, thereby avoiding unjust and arbitrary results.[66] In addition, Justice Broussard also proposed that courts look to several additional considerations, apart from the three guideposts of *Dillon*, to aid them in

59. *Id.* at 670, 771 P.2d at 831, 257 Cal. Rptr. at 882 (Kaufman, J., concurring). For a hypothetical example of such disparate treatment, see *infra* note 79 and accompanying text.

60. *Thing*, 48 Cal. 3d at 689, 771 P.2d at 844, 257 Cal. Rptr. at 895 (Kaufman, J., concurring).

61. Justice Kaufman suggested that the zone of danger rule became arbitrary once the requirement that the plaintiff fear for his own safety was dropped and replaced by the requirement that the plaintiff must at least suffer fear for the safety of another. *Id.* at 671, 771 P.2d at 832, 257 Cal. Rptr. at 883 (Kaufman, J., concurring). He further noted that a majority of jurisdictions have rejected the *Dillon* rule precisely because there is no logical place to draw the line on liability. *Id.* at 672-73, 771 P.2d at 833, 257 Cal. Rptr. at 884 (Kaufman, J., concurring). Justice Kaufman also observed that whether the *Dillon* guidelines are applied in a rigid or flexible manner, they always will reach a point at which they become arbitrary. *Id.* (Kaufman, J., concurring).

62. *Id.* at 675, 771 P.2d at 835, 257 Cal. Rptr. at 886 (Kaufman, J., concurring).

63. *Id.* (Kaufman, J., concurring).

64. *Id.* at 676, 771 P.2d at 836, 257 Cal. Rptr. at 887 (Kaufman, J., concurring).

65. *Id.* at 682, 771 P.2d at 839, 257 Cal. Rptr. at 890 (Broussard, J., dissenting). Because Justice Mosk's dissent was written to amplify Justice Broussard's dissent, Justice Broussard's arguments are presented first.

66. *Id.* (Broussard, J., dissenting).

determining foreseeability.[67] In particular, they should first concentrate on the relationship between the defendant's conduct and the risk of injury. As the nexus between the two becomes more tenuous, the likelihood of finding any liability also should decrease. Another consideration is the effect of liability on the defendant and the community as a whole. Modernly, this is closely related to Justice Broussard's final consideration: the cost and availability of insurance.[68] The burden borne by the defendant and the community is tied to insurance: before the accident by resources dedicated to premiums, and afterward by policy limits which may not cover the entire amount owed. Justice Broussard concluded that recovery should be allowed because the plaintiff did perceive the immediate consequences of the accident, and according to the development of case law since *Dillon*, her experience qualified as a contemporaneous perception.[69]

Justice Mosk generally agreed with Justice Broussard that *Dillon* provided the proper balance by limiting liability while allowing sufficient flexibility; however, Justice Mosk took issue with the majority's analysis of several fundamental cases.[70] In the majority's treatment of *Krouse v. Graham*,[71] there was no mention of the fact that the plaintiff, who did not actually see the impact, nevertheless had a contemporaneous sensory perception of the accident because he heard it.[72] Justice Mosk was quick to point out that "sensory" means any one of the senses, including hearing.[73] He was also unable to find any broad extension of foreseeability in *Molien v. Kaiser Foundation Hospitals*.[74] The husband in *Molien* submitted to a physcial examination because his wife had been misdiagnosed as having syphilis. Jus-

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67. Justice Broussard's dissent put forth these additional factors for consideration:

> the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Id. at 686, 771 P.2d at 842, 257 Cal. Rptr. at 893 (Broussard, J., dissenting) (quoting Rowland v. Christian, 69 Cal. 2d 108, 112-13, 443 P.2d 561, 564, 70 Cal. Rptr. 97, 100 (1968)).

68. One of the arguments presented to the court was the direct correlation between insurance costs and a more liberal interpretation of *Dillon*. Carrizosa, *supra* note 4, at 10; *see supra* note 54 and accompanying text.

69. *Thing*, 48 Cal. 3d at 688-89, 771 P.2d at 844, 257 Cal. Rptr. at 895 (Broussard, J., dissenting).

70. *Id.* at 677, 771 P.2d at 836, 257 Cal. Rptr. at 887 (Mosk, J., dissenting).

71. 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977).

72. *See id.* at 76, 562 P.2d at 1031, 137 Cal. Rptr. at 872.

73. *Thing*, 48 Cal. 3d at 677, 771 P.2d at 836, 257 Cal. Rptr. at 887 (Mosk, J., dissenting).

74. 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980); *see supra* note 23.

tice Mosk maintained that the husband was not merely a bystander, but was actually an injured victim.[75] Justice Mosk concluded that the courts should simply look to the definition of emotional distress provided by the *Restatement* in order to distinguish between compensatory and noncompensatory claims.[76]

VII. IMPACT OF THE COURT'S DECISION

The holding in *Thing* will "dramatically cut back on emotional distress claims" by significantly narrowing the number of eligible plaintiffs.[77] Implicit in the court's restrictive interpretation of the factors in *Dillon* is the suggestion that a more technical reading of these elements will be required of the lower courts.

The decision implies that the court will deny recovery to even the closest of friends because they fail to meet the "closely related" requirement.[78] Moreover, the type of emotional distress which the court would find compensable is likely limited to shock, fright, and anxiety. Although the court does mention humiliation and indignity as compensable in intentional torts, one could infer that these emotions are beyond the scope of the court's determination.[79] It also can

75. *Thing*, 48 Cal. 3d at 678-79, 771 P.2d at 837, 257 Cal. Rptr. at 887 (Mosk, J., dissenting). Justice Mosk criticized the majority by re-emphasizing that the holding in *Ochoa* was consistent with the factors in *Dillon*. *Id.* at 680, 771 P.2d at 838, 257 Cal. Rptr. at 889 (Mosk, J., dissenting). He believed the majority's focus was not on the holding, but rather, the dictum. *Id.* (Mosk, J., dissenting). It was the dictum in *Ochoa* which suggested that the *Dillon* factors were merely guidelines, and thus not required in a foreseeability analysis. *See id.* at 660, 771 P.2d at 824, 257 Cal. Rptr. at 875.

76. *Id.* at 681, 771 P.2d at 839, 257 Cal. Rptr. at 890 (Mosk, J., dissenting). "The law intervenes only when the distress is so severe that no reasonable man could be expected to endure it." RESTATEMENT (SECOND) OF TORTS § 46 comment j (1965).

77. Carrisoza, *supra* note 4, at 10. It is important to note the emphatic language of the court in creating these requirements: "We conclude, therefore, that a plaintiff may recover damages for emotional distress caused by observing the negligently inflicted injury of a third person if, *but only if*, said plaintiff meets the three *Dillon* elements." *Thing*, 48 Cal. 3d at 667, 771 P.2d at 829, 257 Cal. Rptr. at 880 (emphasis added).

78. The majority commented that if liability is extended to include those who are not closely related, then it threatens to become "unlimited." *Thing*, 48 Cal. 3d at 666-67, 771 P.2d at 828-29, 257 Cal. Rptr. at 880-81. Hence, it can be fairly inferred that the court has little interest in broadening the definition of what it means to be "closely related."

79. The majority opinion exhibits a tension in trying to define a rule of law that would allow recovery only for the most severe circumstances. The majority firmly would disallow recovery to a deserving plaintiff who may have come upon an accident just moments after its occurrence (even though the plaintiff is distraught with shock and anxiety). *See supra* notes 39-41 and accompanying text. Thus, it is difficult to imagine that recovery would be allowed for the "lesser" emotional harm of indignity or humiliation.

be fairly assumed that "injury" (in the first and second elements) refers exclusively to physical injury, given the context of the opinion.[80]

The most significant impact of the holding in *Thing* is its propensity to produce an anomalous result. An obvious illustration involves two parents sitting on the porch watching their child at play in the front yard. At the moment the child is hit by an automobile, the father is watching and the mother is reading and listening to music through a set of headphones. A proper application of the court's holding would allow recovery to the child's father, while denying recovery to the mother, even though she was aware of the accident literally seconds after its occurrence.[81]

One question not squarely addressed by the opinion is exactly what constitutes an injury-producing event. The court seems to suggest that the type of accident which would lead to the negligent infliction of emotional distress would be sudden in nature because, under such circumstances, most people are likely to experience shock or fright.[82] A more difficult situation arises when the injury-producing event lasts several minutes, or even hours. In the case of a drowning victim, it may be difficult to ascertain whether the victim is alive or dead. It would be incongruous to allow recovery to the bystander who found a victim who had been floating dead in a swimming pool for several hours, and then deny recovery to the plaintiff in *Thing* who arrived on the scene within moments to find her son unconscious and bleeding.

Notwithstanding some of the drawbacks this decision may have for

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80. The first two elements from the holding in *Thing* require that the plaintiff: "(1) is closely related to the injury victim; [and] (2) is present at the scene of the injury producing event at the time it occurs and is then aware that it is causing injury to the victim . . . ." *Thing*, 48 Cal. 3d at 667-68, 771 P.2d at 829, 257 Cal. Rptr. at 880-81. Justice Mosk criticized the majority for its failure to recognize that *Molien* could still constitute the requisite physical injury. *Id.* at 681, 771 P.2d at 838, 257 Cal. Rptr. at 889 (Mosk, J., dissenting); *see Molien v. Kaiser Found. Hosps.*, 27 Cal. 3d 916, 616 P.2d 813, 167 Cal. Rptr. 831 (1980) (wife misdiagnosed as having syphilis, and both she and her husband underwent a physical examination as a result).

81. The concurrence would solve this problem by reinstituting the zone of danger rule, thereby allowing neither parent to recover, because both were outside the zone at the time of impact. *See supra* notes 59-64 and accompanying text. On the other hand, each dissent would allow both parents to recover—the father because he witnessed the injuries, and the mother because she saw the immediate consequences of the accident. *See supra* notes 65-76 and accompanying text.

82. *See Jansen v. Children's Hosp. Medical Center*, 31 Cal. App. 3d 22, 106 Cal. Rptr. 883 (1973) (recovery denied where plaintiffs watched daughter die a slow death as a result of a misdiagnosis). The court in *Jansen* explained that what was contemplated by *Dillon* was a sudden event, lasting for a short duration. If the physical injury occurs over a longer period, there is time to adapt and adjust emotionally, which decreases the shock. *But see* Ochoa v. Superior Court, 39 Cal. 3d 159, 167, 703 P.2d 1, 7, 216 Cal. Rptr. 661, 667 (1985) ("Our review of other cases allowing a cause of action for emotional duties under *Dillon* leads us to the conclusion that the 'sudden occurrence' requirement is an unwarranted restriction on the *Dillon* guidelines.").

an individual plaintiff, *Thing* may hold some real and tangible benefits. "The insurance industry is a conduit, not a cornucopia," which translates extensions in liability into increased premiums in order to spread the risk.[83] If the court had extended recovery to those who arrived after the injury had occurred, it would have increased the number of possible plaintiffs, thereby increasing the risk exposure that must be reflected in higher premiums.[84] It also would have spawned the question: how much later may a plaintiff arrive, and still be entitled to recover? While many close relatives may not reach the accident scene before the victim is transported, there are few who do not suffer emotional distress upon arrival at the hospital.

A second future benefit provided by *Thing* is a contemplated frontal assault on fraud. A plaintiff who has observed a close relative receive injuries is unlikely to escape emotional injury. Because most juries will not have to divine whether a claim is genuine, the number of fraudulent claims erroneously compensated should decrease. More importantly, because *Thing* restricts those plaintiffs who may bring a cause of action, claims which ultimately would not survive judicial scrutiny will not be initiated simply for their settlement value. Either way, the costs associated with fraud in negligent infliction of emotional distress cases will be decreased. As a consequence of *Thing*, the courts may see a shift toward recovery of intangible loss as a part of a wrongful death action when the victim's injuries result in death.[85]

VIII. CONCLUSION

Some may see *Thing* as an attempt by the California Supreme Court to "jury-proof" bystander recovery in negligent infliction of emotional distress cases. Using the *Dillon* factors as threshold requirements ensures that only the most severe circumstance is considered for relief. In essence, the court has developed a formula which almost always ensures a deserving plaintiff by stipulating that the plaintiff be near the accident scene, actually witness it as it occurs, and be closely related to the injured victim. This judicial certainty,

83. Carrisoza, *supra* note 4, at 10.

84. *See supra* note 68 and accompanying text.

85. While loss of companionship is compensable in a wrongful death action, grief generally is not. Note, *supra* note 10, at 869. To the extent the law provides some redundancy in this area, relief still may be available for an aggrieved party who arrives after the fact. *See id.* at 847 (citing Manie v. Natson Oldsmobile-Cadillac Co., 378 Mich. 650, 655, 148 N.W.2d 779, 781-82 (1967)).

however, also carries with it an expensive blow to the compensation of victims, because the same elements that limit liability also are sure to screen some of the most deserving plaintiffs because they fail to meet the technical requirements of the law.

JAMES DUFF MCGINLEY

VII. WORKERS' COMPENSATION

In the absence of extreme or outrageous conduct, the exclusive remedy against the independent claims administrator of a self-insured employer for the delay or refusal to pay compensation benefits is a claim through the Workers' Compensation Appeals Board: **Marsh & McLennan, Inc. v. Superior Court.**

In *Marsh & McLennan, Inc. v. Superior Court*,[1] the California Supreme Court held that when an independent claims administrator or adjustor of a self-insured employer unreasonably delays or refuses to pay compensation benefits, the exclusive remedy for the employee or the dependents of the employee must be sought through the Workers' Compensation Appeals Board (WCAB) pursuant to sections 3602,[2] 5300[3] and 5814[4] of the Labor Code. In so holding, the court overruled the court of appeal's decision in *Dill v. Claims Administration Services, Inc.*[5] However, the court noted that even though the employee's dependent could not maintain a common law cause of action for the recovery of compensation, a claims administrator may be liable under *Unruh v. Truck Insurance Exchange*[6] if the administra-

1. 49 Cal. 3d 1, 774 P.2d 762, 259 Cal. Rptr. 733 (1989). The widow of an employee whose death was covered by workers' compensation benefits filed suit in superior court against the self-insured employer's independent claims administrator. The complaint alleged fraud, intentional infliction of emotional distress, breach of fiduciary duty, and violation of the Insurance Code. The superior court sustained Marsh & McLennan's demurrer to the complaint as to the Insurance Code violation. The court of appeal denied the subsequent petition for writ of mandate by Marsh & McLennan. Justice Panelli wrote the opinion of the court in which Chief Justice Lucas and Justices Broussard, Eagleson, Kaufman, and Kennard concurred. Justice Mosk wrote a separate dissenting opinion.

2. Section 3602 states that the sole remedy of an employee or the employee's dependents is the recovery of compensation. CAL. LAB. CODE § 3602 (West Supp. 1989).

3. Section 5300 gives the WCAB exclusive jurisdiction for claims relating to the recovery of compensation and the enforcement of those claims. *Id.* § 5300 (West 1971).

4. Section 5814 states that if the WCAB finds a delay or refusal to pay the compensation to be unreasonable, the full amount of the recovery will be increased ten percent. *Id.* § 5814.

5. 178 Cal. App. 3d 1184, 224 Cal. Rptr. 273 (1986). In *Dill*, the court held that a claims administrator was neither an employer nor an insurer and thus was "a person 'other than an employer' against whom [the plaintiff] is allowed to maintain an action in the superior court." *Id.* at 1189, 224 Cal. Rptr. at 276; *see* CAL. INS. CODE §§ 3850, 3852; *Marsh & McLennan*, 49 Cal. 3d at 7-9, 774 P.2d at 765-66, 259 Cal. Rptr. at 736-37.

6. 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

tor's actions are so extreme and outrageous as to effectively remove them from the role of a claims administrator.[7]

In *Marsh & McLennan*, the court's decision that the WCAB is the appropriate forum for deciding issues of delay or cessation of benefits was based on several reasons. First, the legislature has stated that the sole and exclusive remedy against an employer by an injured employee is the recovery of workers' compensation benefits.[8] The legislature also has given exclusive jurisdiction to the WCAB for disputes regarding those benefits.[9] Lastly, the legislature allows an employee to bring suit outside of the WCAB only against any person other than the employer or its insurer.[10] The only exception to this rule comes from *Unruh*, which allows a private cause of action against any entity (*i.e.*, employer, insurer, or claims administrator) that commits tortious acts independent of its role as a provider of workers' compensation benefits.[11] The court concluded that the current system for the resolution of disputes between an employee and employer was designed to be more efficient than the regular judicial process.[12]

The court overruled *Dill* because the court of appeals incorrectly focused on the status of the defendant (*i.e.*, employer, insurer, or claims administrator) instead of focusing on the nature of the defendant's actions (*i.e.*, delay or refusal to pay benefits or tortious conduct independent of duty to pay benefits).[13] Even though an independent

7. *Marsh & McLennan*, 49 Cal. 3d at 11, 774 P.2d at 767, 259 Cal. Rptr. at 738. For further discussion regarding the exclusive remedy of the employee's under Workers' Compensation and the exceptions to the exclusive remedy, see 81 AM. JUR. 2D *Workmen's Compensation* §§ 50-51 (1976); 65 CAL. JUR. 3D *Work Injury Compensation* §§ 22-28 (1981).

8. *Marsh & McLennan*, 49 Cal. 3d at 5, 774 P.2d at 763, 259 Cal. Rptr. at 734; *see* CAL. LAB. CODE § 3602.

9. *Marsh & McLennan*, 49 Cal. 3d at 5, 774 P.2d at 763, 259 Cal. Rptr. at 734; *see* CAL. LAB. CODE § 5300.

10. *Marsh & McLennan*, 49 Cal. 3d at 6, 774 P.2d at 764, 259 Cal. Rptr. at 735; *see* CAL. LAB. CODE §§ 3850(b), 3852.

11. Unruh v. Truck Ins. Exch., 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972).

12. *Marsh & McLennan*, 49 Cal. 3d at 6, 774 P.2d at 763, 259 Cal. Rptr. at 734. "The exclusive remedy provisions of the system are designed to provide 'a quick, simple and readily accessible method of claiming and receiving compensation.' " *Id.* (quoting Everfield v. State Comp. Ins. Fund, 115 Cal. App. 3d 15, 20, 171 Cal. Rptr. 164, 166 (1981)); *see also* 2 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Workmen's Compensation* § 1 (8th ed. 1973).

13. *Marsh & McLennan*, 49 Cal. 3d at 7-10, 774 P.2d at 765-67, 259 Cal. Rptr. at 736-38. The court specifically noted:

> [T]he [Workers' Compensation] Act covers all disputes over the payment of compensation to injured employees, regardless of what type of entity refused or delayed those payments. . . . Only when the entity commits tortious acts

claims administrator is literally not an employer or an insurer, it is usually hired to be responsible for the worker compensation related tasks.[14] Thus, the refusal or delay in payments of benefits by the administrator is deemed to be within the exclusive jurisdiction of the WCAB.[15]

Unless the employee or dependent of the employee has been injured in a way unrelated to the delay or refusal of a claims administrator or adjustor to pay benefits, the exclusive remedy is the recovery of workers' compensation benefits and not a private cause of action under *Unruh*. Additionally, in the absence of an *Unruh* cause of action, the exclusive jurisdiction of the action is with the WCAB.

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independent of its role as a provider of workers' compensation benefits may an employee maintain a private cause of action under *Unruh*.

Id. at 10, 774 P.2d at 767, 259 Cal. Rptr. at 738 (citations omitted); *see also* Phillips v. Crawford, 202 Cal. App. 3d 383, 387-88, 248 Cal. Rptr. 371, 373-74 (1988) (Workers' Compensation Act covers all disputes over the payment of compensation benefits regardless of what entity delayed or refused payments); Mottola v. R.L. Kautz & Co., 199 Cal. App. 3d 98, 109, 244 Cal. Rptr. 737, 743 (1988) (court sustained claims adjuster's demurrer based on exclusive remedy provision of Workers' Compensation Act); Santiago v. Employee Benefits Services, 168 Cal. App. 3d 898, 904, 214 Cal. Rptr. 679, 683 (1985) (failure to pay workers' compensation benefits is within exclusive jurisdiction of WCAB and not actionable under Unruh); Denning v. Esis, 139 Cal. App. 3d 946, 948, 189 Cal. Rptr. 118, 119 (1983) (jurisdiction of claim for failure to provide workers' compensation benefits against independent claims administrator is with WCAB); Fremont Indemnity v. Superior Court, 133 Cal. App. 3d 879, 882, 184 Cal. Rptr. 184, 186 (1982) (actions in superior court for bad faith, emotional distress, and violation of Insurance Code disallowed because they were based on delayed and altered compensation benefits); *Everfield*, 115 Cal. App. 3d at 19, 171 Cal. Rptr. at 166 (reasons for delay, intentional or negligent, excusable or not, can be questioned by the board and discipline may be imposed).

14. *Marsh & McLennan*, 49 Cal. 3d at 8, 774 P.2d at 766, 259 Cal. Rptr. at 736.

15. *Id.* at 10, 774 P.2d at 767, 259 Cal. Rptr. at 738. The dissent argued that the causes of action should be allowed because the claims administrator was an independent contractor and thus an entity other than an employer or insurer. *Id.* at 11, 774 P.2d at 768, 259 Cal. Rptr. at 739 (Mosk, J., dissenting).