Pepperdine Law Review

Volume 12 | Issue 4 Article 10

5-15-1985

California Supreme Court Survey - A Review of Decisions: December 1984- February 1985

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California Supreme Court Survey
December 1984-February 1985

The California Supreme Court Survey is a brief synopsis of recent decisions by the supreme court. The purpose of the survey is to inform the reader of the issues that have been addressed by the supreme court, as well as to serve as a starting point for researching any of the topical areas. The decisions are analyzed in accordance with the importance of the court's holding and the extent to which the court expands or changes existing law. Attorney discipline and judicial misconduct cases have been omitted from the survey.

I. ADMINISTRATIVE LAW

When reviewing standards adopted by the Air Resources Board, the court need only inquire whether the Board's decision was unsupported or whether it was made outside the scope of authority. Economic cost of compliance need not be taken into consideration; rather, local boards may grant variances to remedy harsh economic consequences: **Western Oil & Gas v. Air Resources Board.**

I. INTRODUCTION

In *Western Oil & Gas Association v. Air Resources Board*,[1] the court assessed the validity of standards established by the Air Resources Board (Board) which set the acceptable levels of sulphates and sulphur dioxide for the state's air basins. The plaintiff's contentions were that the Board did not comply with statutory requirements, fully consider all relevant effects of the adopted standards, and did not afford fair administrative procedure in the adoption process.

II. FACTS

As Health and Safety Code section 39606(b) required,[2] recommendations were received from the health department on the question of what the acceptable levels of sulphur and sulphur dioxide in the state's air basins should be. The health department, on two separate occasions, recommended standards. In 1976, twenty-five micrograms per cubic meter of air during a twenty-four hour period for sulphates was recommended. In 1977, .04 to .10 parts per meter of air during a twenty-four hour period in the presence of excessive levels of oxidants or particulates was recommended as reasonable.[3] In arriving at these recommendations, the health department conceded that the levels recommended were merely approximations of safe levels.[4] Moreover, the report noted that certain sulphates and sulphur diox-

1. 37 Cal. 3d 502, 691 P.2d 606, 208 Cal. Rptr. 850 (1984). Opinion by Grodin, J., with Bird, C.J., and Mosk, Kaus, and Reynoso, JJ., concurring. Separate concurring and dissenting opinion by Broussard, J.

2. The statute provides in pertinent part: "Standards relating to health effects shall be based upon the recommendations of the State Department of Health Services." CAL. HEALTH & SAFETY CODE § 39606(b) (West 1979).

3. The term "excessive level" was to be determined by already existing state standards which went unchallenged in this action.

4. The method of arriving at the recommended requirements was one of performing toxicological studies on healthy persons over a 24-hour day, and then extrapolating long term exposure to determine hazardous level; and then an adjustment was made to protect more sensitive persons. *See* 37 Cal. 3d at 512-13, 691 P.2d at 611-12, 208 Cal. Rptr. at 855-56.

ide are relatively harmless *when other oxidant or particulate pollution is not present*;[5] however, some sulphates are very dangerous to humans, and long term exposure to sulphur dioxide at levels of .10 parts per million averaged over twenty-four hours when photochemical oxidants are present was associated with chronic respiratory conditions.[6] With regard to sulphur dioxide, the report stated that there is "no scientific basis for establishing a particular margin of safety below the level of the .10 standard, and that the margin of safety was a value judgment or policy matter for the Board."[7] However, of critical importance was the statement made in the report that "the present air quality standard of .04 ppm sulphur dioxide for 24 hours average, is reasonable in light of what is known about human health effects and with a margin of safety as determined by the Air Resources Board."[8]

The Board subsequently adopted a standard of twenty-five micrograms per cubic meter of air during a twenty-four hour period (the exact standard recommended by the health department), and a standard for ambient air of .05 ppm of air for a twenty-four hour period in the presence of an excessive level of oxidants or particulates for sulphur dioxide (a standard more favorable to plaintiffs than was previously in force).[9]

For both the sulphate and sulphur dioxide hearings, notice of the hearings was given, and interested parties were invited to attend. Moreover, detailed reports were mailed or made available to interested parties.[10]

The plaintiffs, nine oil companies and two of their trade associations, contended that the standards as adopted by the Board were invalid on the following grounds: first, that the adopted regulations were not based on the recommendations of the health department as statutorily required;[11] second, that the regulations lacked evidentiary support; third, that the economic effects of the regulations were not

5. *Id.* at 515-16, 691 P.2d at 613, 208 Cal. Rptr. at 857 (emphasis added).

6. *Id.* at 513, 691 P.2d at 612, 208 Cal. Rptr. at 856. Of particular note is the fact that more precise scientific data regarding which sulphates are the most hazardous would not be available for 15 months.

7. *Id.* at 515, 691 P.2d at 613, 108 Cal. Rptr. at 857.

8. *Id.* at 515-16, 691 P.2d at 613, 208 Cal. Rptr. at 857.

9. *See supra* text accompanying note 7.

10. 37 Cal. 3d at 525-26, 691 P.2d at 620-21, 208 Cal. Rptr. at 864-65. *See infra* notes 28-32 and accompanying text.

11. *See supra* note 2 and accompanying text.

considered; and fourth, that the plaintiffs were denied fair treatment due to the manner in which the regulations were adopted.

The trial court ruled in favor of the plaintiffs and granted the requested relief of writs of mandate commanding the Board to rescind its resolutions adopting the standards.[12] The Board consequently appealed and the trial court was reversed.

III. MAJORITY OPINION

This case was one of first impression for the court as it was asked to determine the legislature's intent under the Mulford-Carrell Air Resources Act.[13] The act established and directed the Board to adopt standards of ambient air quality "for each air basin in consideration of the public health, safety, and welfare, including, but not limited to, health, illness, irritation to the senses, aesthetic value, interference with visibility, and effects on the economy."[14]

Any and all decisions made by the Board are given only a limited review by the judiciary due to the quasi-legislative nature and the presumed expertise of the Board.[15] The threshold inquiry by a reviewing court encompasses only determinations of whether the Board acted within the scope of its authority and whether the Board acted in an arbitrary, capricious or unsupported manner in adopting a challenged standard.[16]

Because the court uses this standard in reviewing Board decisions, the plaintiffs' arguments, and the rulings of the trial court, were disposed of with relative ease.

The claims that the regulations were not based on the health department recommendations and lacked evidentiary support were leveled at both the sulphate and sulphur dioxide standards. The plaintiffs contended that although the twenty-five microgram standard adopted for sulphates was the exact recommended standard, the health department intended the standard to be applicable only "in the presence of elevated oxidant pollution" and that sulfuric acid, not sulphates, was measured by the health department.[17]

The court rejected this argument, stating that "the health department's recommended standard of 25 micrograms per cubic meter can-

12. Retired Judge Eugene E. Sax heard oral argument and the writs were issued in December, 1980.

13. CAL. HEALTH & SAFETY CODE §§ 39000-39103 (West 1979).

14. CAL. HEALTH & SAFETY CODE § 39660(b) (West 1979).

15. *Id.*

16. Industrial Welfare Comm'n v. Superior Court, 27 Cal. 3d 690, 702, 613 P.2d 579, 584, 166 Cal. Rptr. 331, 336, *cert. denied*, 449 U.S. 1029 (1980). In addition, the reviewing court is not to substitute its own policy judgments for the Board's; and the Board need not prepare findings in support of its decision unless otherwise required by statute to do so. 37 Cal. 3d at 509-10, 691 P.2d at 609, 208 Cal. Rptr. at 853.

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

not be impeached. The health danger from sulphates was clearly established."[18] The court's level of review was clearly indicated by the statement "[t]he trial court's criticisms, at most, reflect the fact that different conclusions can be drawn from the available data. Accordingly, we must accept the health department's determination that a single standard is appropriate for sulfates and that the data warrants a 25-microgram standard."[19]

The plaintiffs also claimed that the Board was overstepping its statutory bounds in adopting the .05 ppm sulphur dioxide standard in that a safety factor influenced the decision.[20] This safety factor was a policy matter for the Board, but the health department considered such a requirement reasonable.[21]

In overruling the trial court and upholding the Board's actions, the court determined that "[t]he Board's duty includes the protection of the health of the citizens of the state (Sec. 39000, 39001), not merely the correction of unhealthy conditions. The Board therefore should not be required to wait until substantial adverse health effects are scientifically verified before adopting appropriate standards."[22] From an evidentiary standpoint, in addition to the health department's comments, doctors and federal agencies urged a safety factor;[23] and the court concluded that there was sufficient evidence to justify the safety factor adopted.

The plaintiffs vigorously opposed the safety factor because the cost of compliance with the .05 ppm standard was estimated at between $38.1 billion and $44.6 billion for the period from 1977 to 2000. Although these estimates were said to be "limited, self-serving and unreliable,"[24] the plaintiffs' point was clear—economic factors on business should be considered in establishing standards. The court did not disagree with the plaintiffs on this issue; certainly economic consequences must be considered. However, when deciding when and how they should be considered the court was ready with an alternative. The legislature intended, said the court, "local and regional authorities, rather than the Board, to consider the economic conse-

18. 37 Cal. 3d at 513, 691 P.2d at 612, 208 Cal. Rptr. at 856.
19. *Id.* at 514, 691 P.2d at 613, 208 Cal. Rptr. at 857.
20. *Id.* at 515-16, 691 P.2d at 613-14, 208 Cal. Rptr. at 857-58. The trial court ruled that the Board did not have authority to impose a safety factor because the legislature did not mention any such power.
21. *Id.* at 516, 691 P.2d at 614, 208 Cal. Rptr. at 858.
22. *Id.*
23. *Id.*
24. *Id.* at 517, 691 P.2d at 614, 208 Cal. Rptr. at 858.

quences of compliance with the air quality standards."[25] The court recognized the formidable task the plaintiffs would have imposed upon the Board and therefore construed section 39606 to focus the Board's attention on pollution and safety rather than economics.[26]

The task of avoiding an unduly harsh economic impact was delegated by the legislature to the local authorities, who had wide discretion in granting variances by "weighing the equities involved and the advantages and disadvantages to the residents of the district and to any lawful business."[27] Thus, the plaintiffs must present their cases to local boards in hopes of acquiring a variance if they have any hopes of avoiding the economic costs of full compliance.

The plaintiffs also alleged that the hearings conducted by the Board were unfair. As the questioned proceeding was an administrative one, no due process violation was presented; rather, a possible violation of the Administrative Procedure Act was at issue.[28] The court overruled the trial court's determination that four working days was an unreasonable amount of time for the plaintiffs to be expected to be prepared for the sulphate hearing. Four days was the amount of time between distribution of the Board's complex report and the hearing. The court stated that "while the report may have been complex, the prospective witnesses would be familiar with such complexities, and the four-day period to study and comment was not unreasonable."[29]

Two procedural issues were raised with regard to the sulphur dioxide hearing. First, the plaintiffs claimed that the Board violated administrative procedure by broadly stating the purpose of the hearing in the notices.[30] In rejecting this claim, the court broadly construed the statutory requirement stating that "the regulation adopted need

25. *Id.* at 517, 691 P.2d at 615, 208 Cal. Rptr. at 859.

26. The phraseology of section 39606, "the objective of ambient air quality standards is to provide a basis for preventing or abating the effects of air pollution, including effects on health, esthetics and economy," was interpreted by the court to mean the economic effects of pollution on the economy rather than the cost of compliance. The court stated that this construction is apparent from the language, as well as the structure and history of the statute, and federal court interpretation of the similar Clear Air Act. *Id.* at 518-19, 691 P.2d at 615-16, 208 Cal. Rptr. at 859-60.

27. *Id.* at 520-21, 691 P.2d at 617, 208 Cal. Rptr. at 861. Although section 39313 requires that the local boards "shall comply with all the standards" of the Board, the majority nevertheless contended that "the Mulford-Carrell Act . . . indicate[s] a continued legislative commitment to the discretionary enforcement powers of local and regional authorities." *Id.* at 521, 691 P.2d at 618, 208 Cal. Rptr. at 862.

28. CAL. HEALTH & SAFETY CODE § 39601 (West 1979); CAL. GOV'T CODE §§ 11340-446 (West 1980 & Supp. 1985).

29. 37 Cal. 3d at 526, 691 P.2d at 620, 208 Cal. Rptr. at 864.

30. This violation was alleged under former Government Code section 11424(c), which required that the notice include either "the express terms or an informative study of the proposed action." The notices stated that the Board would review all relevant evidence, and that the Board would also consider a standard for sulphur dioxide in combination with other air pollution.

not be the same as that proposed as long as it deals with the same subject or issue dealt with by the notice,"[31] a requirement easily fulfilled by the Board. Second, the plaintiffs contended that the Board improperly refused to reopen the hearing after new evidence was submitted.[32] The court, relying on *California Optometric Association v. Lackner*,[33] concluded that "posthearing information may be considered without violating a fair hearing requirement."[34]

IV. CONCURRING/DISSENTING OPINION

Justice Broussard filed a concurring and dissenting opinion in which he agreed that a margin of safety was proper, but that the Board must be required to consider the economic consequences of the adopted standards and not rely on local boards for variances.[35] The rationale behind this portion of the dissent was essentially that the plain language of section 39606 was being limited by the majority. Under a broad construction, argued the dissent, "welfare" should include economic consequences as should "effects on the economy."[36]

In addition, said Justice Broussard, the majority's reliance on variances was not the intent of the statutory scheme.[37] The local board, it was argued, was to merely "promulgate and implement rules and regulations reasonably assuring achievement and maintenance of the state standard," not to make important policy decisions that could ultimately effect the health and safety of local citizens.[38]

V. CONCLUSION

The court has signaled to those wishing to challenge a Board decision in the judicial arena that they must be prepared with evidence of

31. 37 Cal. 3d at 526-27, 691 P.2d at 621, 208 Cal. Rptr. at 865.

32. The new evidence consisted of reports from the Japanese Environmental Protection Agency which were written in Japanese. The plaintiffs contended their inability to reopen the hearing denied them the right of cross-examination. *Id.* at 527, 691 P.2d at 621, 208 Cal. Rptr. at 865.

33. 60 Cal. App. 3d 500, 131 Cal. Rptr. 744 (1976).

34. 37 Cal. 3d at 528-29, 691 P.2d at 622, 208 Cal. Rptr. at 866. *See* Building Code Action v. Energy Resources Conservation and Dev. Comm'n, 102 Cal. App. 3d 577, 162 Cal. Rptr. 734 (1980).

35. *See* 37 Cal. 3d at 530, 691 P.2d at 623, 208 Cal. Rptr. at 867.

36. *Id.* at 529, 691 P.2d at 623, 208 Cal. Rptr. at 867. Justice Broussard contended that "the majority's rule of construction appears inappropriate when we are considering a statute which grants broad quasi-legislative power to adopt standards." *Id.* at 532, 691 P.2d at 625, 208 Cal. Rptr. at 869 (Broussard, J., concurring and dissenting).

37. *See* CAL. HEALTH & SAFETY CODE §§ 40000-02 (West 1979).

38. 37 Cal. 3d at 537, 691 P.2d at 628, 208 Cal. Rptr. at 872.

no less than arbitrary, capricious, and uninformed decisions. The conclusions reached by the majority that the Board may not flatly reject health department recommendations but may consider other factors, even though those other factors need not include economic effect, showed the wide latitude given to the Board. As for notice requirements, since the case went to litigation there have been some changes in statutory requirements;[39] nevertheless, the Board's actions, even providing important reports in Japanese, were deemed acceptable. The dissent argued that in accommodating and giving deference to the Board, the majority erroneously construed legislative intent and statutory requirements.

II. ATTORNEY'S FEES

Attorney's fees are a recoverable element of damages where an insurer breached the implied duty of good faith and fair dealing by tortiously withholding benefits: **Brandt v. Superior Court.**

The supreme court in *Brandt v. Superior Court,* 37 Cal. 3d 813, 696 P.2d 792, 210 Cal. Rptr. 211 (1985), held that attorney's fees are recoverable as damages when expended in compelling payment of tortiously withheld insurance benefits. The case arose when the disabled plaintiff was unreasonably refused benefits by his employer's insurer, Standard Insurance Company, the real party in interest. In addition to damages for breach of contract, breach of implied covenants of good faith and fair dealing, and statutory violations, the plaintiff sought attorney's fees as *damages* proximately caused by the defendant's wrongful breach. This economic loss had to be distinguished from fees incurred in the action itself—"attorney's fees *qua* attorney's fees."

Section 1021 of the Code of Civil Procedure generally requires each individual party to bear its own legal costs. However, the court dismissed the defendant's plea that section 1021 would preclude an award of attorney's fees in this case, even though the fees requested were a result of the same action as the recovery sought.

The court, in settling a conflict among the courts of appeal, *see Austero v. Washington National Insurance Co.,* 132 Cal. App. 3d 408, 182 Cal. Rptr. 919 (1982); *Mustachio v. Ohio Farmers Insurance Co.,* 44 Cal. App. 3d 358, 118 Cal. Rptr. 581 (1975), set down a test to determine when attorney's fees should be awarded in this type of case. Initially, there must be a breach of the implied duty of good faith and fair dealing by the insurer. Furthermore, as a result of this breach,

39. *See* CAL. GOV'T CODE §§ 11346.5, 11346.7 (West 1979).

the plaintiff must retain legal representation in order to collect the insurance benefits due him.

III. CIVIL PROCEDURE

A. *The Fair Employment and Housing Act (FEHA) venue provisions create an exception to the general provisions of the Code of Civil Procedure and will control in cases involving non-FEHA and FEHA claims:* **Brown v. Superior Court.**

In *Brown v. Superior Court,* 37 Cal. 3d 477, 691 P.2d 272, 208 Cal. Rptr. 724 (1984), the supreme court was asked to determine whether the special venue provisions of the California Fair Employment and Housing Act (FEHA), controlled in an action involving both FEHA and non-FEHA claims. It held that the FEHA provisions prevail in such cases when the causes of action all arise out of the same factual allegations.

The petitioners in *Brown* alleged intentional infliction of emotional distress, wrongful discharge, a violation of their civil rights, and a violation of the FEHA based on racial discrimination by their employers, the real parties in interest. The suit was brought in Alameda County where the alleged discrimination took place, but was vacated to Sacramento County upon motion by the employers, respondents on appeal. A conflict thus arose between the special venue provisions of the FEHA and section 395(a) of the Code of Civil Procedure. The Act provides in relevant part that an FEHA action may be brought "in any county in the state in which the unlawful practice is alleged to have been committed." CAL. GOV'T CODE § 12965(b) (West Supp. 1985). Section 395(a) provides in relevant part:

> "[E]xcept as otherwise provided by law . . . the county in which the defendants or some of them reside . . . is the proper county for the trial of the action. If the action is for injury to person or personal property . . . either the county where the injury occurs . . . or the county in which the defendants, or some of them reside . . . shall be a proper county for the trial of the action.

CAL. CIV. PROC. CODE § 395(a) (West Supp. 1985).

In construing the FEHA provisions, the court used the fundamental rule of statutory construction—that is, ascertaining the legislative intent so as to properly effectuate the purpose of the law. The public policy supporting the FEHA recognizes the need to safeguard the rights and opportunities of people to seek and gain employment without discrimination. The express purpose of the Act is "to provide effective remedies which will eliminate such discriminatory practices."

The proper construction of the FEHA must reflect its policy and purpose by affording aggrieved persons the opportunity to bring suit in the most appropriate and convenient forum with respect to their claims. Rather than restrict a plaintiff's choice of venue by applying the provision of the Civil Procedure Code, the court found that strong public policy favored application of FEHA venue provisions, despite the presence of non-FEHA claims.

The conclusion in *Brown* that the FEHA special rules prevail is applicable only when the causes of action alleged in the pleadings arise out of the same set of facts. Thus, in any case involving an FEHA claim, the FEHA venue provisions will determine the propriety of the plaintiff's choice of venue, regardless of any other causes of action, so long as the claims arise out of the same factual allegations.

B. *The granting of a summary judgment in medical malpractice case held to be improper:* Mann v. Cracchiolo.

In *Mann v. Cracchiolo,* 38 Cal. 3d 18, 694 P.2d 1134, 210 Cal. Rptr. 762 (1985), the supreme court had to determine whether a summary judgment was valid where the nonmoving party had filed an untimely opposition to the motion. The court held that the trial court erred in refusing to accept the opposition to the motion for summary judgment.

The action arose when the husband and three sons of a deceased patient brought a medical malpractice and wrongful death suit against the UCLA Medical Center and several of its staff. The decedent initially was an outpatient of the UCLA Medical Center to obtain x-rays in preparation for surgery on her arthritic toe. While undergoing the x-rays she allegedly fell, breaking her neck and ultimately dying from the injury.

The plaintiffs unsuccessfully attempted to remove the trial judge for bias. During an appeal of that decision, the plaintiffs obtained a stay from the court of appeal. The defendants moved for summary judgment while the stay was pending. Soon after the stay was terminated, the hearing on the defendant's motion was held. The plaintiffs' opposition to the motion was not filed three days before the hearing as required by local court rules and so was ignored by the judge. The judge also stated that even if timely filed, the doctor's declaration contained in the opposition was insufficient to raise a triable issue of negligence. Summary judgment was granted in the defendants' favor.

Initially, the court determined that lower courts are free to adopt local court rules limiting the time to file summary judgment pleadings when the legislature is silent on the matter. Although the

supreme court upheld the local rule, it also held that the potential delays from disobedience of the rule were outweighed by the need to hear cases on their merits. Thus, the court held that the trial court had abused its discretion in granting the summary judgment without considering the plaintiff's opposition to the motion.

The court also reversed the lower court's refusal to consider the opinions of a Dr. Fox. His declaration, contained in the plaintiff's opposition, indicated that the UCLA radiologists were negligent in not identifying the decedent's fracture. Along with deciding that the doctor was qualified to testify concerning the standard of care required, the court dismissed the defendants' claim that Fox should be barred because he was not among experts listed in discovery. Finally, the court ruled that, although conclusory at times, the doctor's declaration raised triable issues of fact.

The court refused, however, to extend the reversal of summary judgment to the matter of punitive damages, as no evidence of an intentional conspiracy to conceal the injury of Mrs. Mann was shown. Furthermore, the summary judgment was affirmed as to two doctors who had little contact with the patient.

IV. CRIMINAL LAW

A. *Proof of an intent to kill is an essential element of a felony-murder special circumstance finding:* **People v. Anderson.**

In *People v. Anderson,* 38 Cal. 3d 58, 694 P.2d 1149, 210 Cal. Rptr. 777 (1985), the defendant admitted in his confession to watching a house for several days, and finally breaking in with an intent to steal. Once inside, he began checking each of the rooms. As he entered the victim's bedroom, he saw "a shadow" coming at him and fired one shot, killing the victim. He then ransacked the house, took some money and ate some food. When apprehended red-handed, he stated that he had no intention to shoot anyone and that he fired out of fear and confusion. The defendant was convicted of burglary and murder while engaged in burglary. A special circumstance was found, and the penalty phase of the trial yielded a verdict of death.

The defendant made three claims of error bearing on the guilt phase. Each of these claims was dealt with quickly by the court. First, an exclusion for cause of a venireman who was unalterably opposed to the death penalty was not error. The court had rejected this argument previously in *People v. Fields,* 35 Cal. 3d 329, 673 P.2d 680,

197 Cal. Rptr. 803 (1983), *cert. denied,* 105 S. Ct. 267 (1984). Second, the exclusion for cause of the same venireman did not deny the defendant a neutral jury on the issue of guilt. The court reiterated the fact that such a challenge cannot be sustained "until further research is done which makes it possible to draw reliable conclusions about the non-neutrality of 'California death-qualified' juries in California." Third, the felony-murder rule did not deny due process of law to the defendant because it raised a conclusive presumption of malice.

The court did find error in the instructions on the special circumstance allegation. More specifically, in *Carlos v. Superior Court,* 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), the 1978 death penalty law was construed to require proof of an intent to kill to find a felony-murder special circumstance. No instruction to this effect was given to the jury, thus necessitating reversal. In addition, the court rejected the argument that callous conduct (such as eating in the victim's kitchen after the killing) is conclusive of a specific intent to kill. The question of specific intent is for the jury; therefore, the judgment as to penalty was reversed.

B. *New sentence enhancement statute for "serious felonies" held to apply to second degree burglary, and not to be violative of the double base term statute:* **People v. Jackson.**

I. INTRODUCTION

The passage of Proposition 8's sentence enhancement statute[1] left several ambiguities, which the supreme court recently clarified in *People v. Jackson.*[2] Initially, the court determined that second degree burglary can be a "serious felony" for the statute's purposes, even though entry into a residence, as required by the statute, is not a prerequisite to burglary.[3] Furthermore, the court held that the enhancement statute's five year penalty did not violate a statute which had prohibited imprisonment over twice the base term.[4]

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1. CAL. PENAL CODE § 667 (West Supp. 1985). Section 667(a) provides in part:
> [a]ny person convicted of a serious felony who previously has been convicted of a serious felony in this state or of any offense committed in another jurisdiction which includes all of the elements of any serious felony, shall receive, in addition to the sentence imposed by the court for the present offense, a five year enhancement for each such prior conviction . . . .

Id. § 667(a).

2. 37 Cal. 3d 826, 694 P.2d 736, 210 Cal. Rptr. 623 (1985). The majority opinion was authored by Justice Broussard with Justices Kaus, Reynoso, and Grodin concurring. Chief Justice Bird and Justice Mosk only concurred in the judgment. A separate concurring opinion was filed by Justice Lucas.

3. *Id.* at 831-34, 694 P.2d at 739-41, 210 Cal. Rptr. at 626-28. *See* CAL. PENAL CODE § 460 (West Supp. 1985).

4. 37 Cal. 3d at 837, 694 P.2d at 742-43, 210 Cal. Rptr. at 629-30. *See* CAL. PENAL CODE § 1170.1(g) (West Supp. 1985).

II. FACTUAL BACKGROUND

The defendant was charged with burglary in August of 1982.[5] In addition, three prior, residential burglaries were alleged for purposes of sentence enhancement. Under newly enacted Penal Code section 667,[6] a consecutive five year term may be added to the sentence of convicted defendants who were "repeat offenders."[7]

Pursuant to a plea bargain, Jackson pled guilty to the burglary, while giving an admission that the burglary and the third prior burglary were residential.[8] In turn, the prosecution dropped the other burglary charges and agreed to request only a two year prison term on the count the defendant pled guilty to. The defendant was sentenced to the two year term plus the five year enhancement term of section 667. An integral part of the plea bargain was that the defendant could challenge the validity of the enhancement statute, and if successful would receive only a one year enhancement.[9]

III. COURT'S ANALYSIS

Initially, the court had to determine whether second degree burglary could be interpreted as a "burglary of a residence,"[10] thereby being a "serious felony" for purposes of the enhancement statute.[11] The defendant argued that burglary did not necessitate entry into a "residence," and therefore, section 667 did not apply.[12] The court, in rejecting the defendant's plea, emphasized that the enumerated "serious felonies"[13] were not all specific statutory crimes.[14] The purpose of the statute was to deter criminal conduct; hence, repeated felo-

5. 37 Cal. 3d at 830, 694 P.2d at 737, 210 Cal. Rptr. at 624.

6. CAL. PENAL CODE § 667 (West Supp. 1985). *See supra* note 1 for pertinent parts of the text.

7. Section 667(d) refers to Penal Code section 1192.7(c) to determine what crimes can be used for enhancement purposes. Section 1192.7(c) lists "burglary of a residence" as one of these "serious felonies." CAL. PENAL CODE § 1192.7(c) (West 1982).

8. 37 Cal. 3d at 830-31, 694 P.2d at 737-38, 210 Cal. Rptr. at 624-25. This is important because Jackson would now be open to the enhancement statute's penalty, as "burglary of a residence" is required. *See* CAL. PENAL CODE § 1192.7(c)(18) (West 1982).

9. 37 Cal. 3d at 831, 694 P.2d at 738, 210 Cal. Rptr. at 625.

10. *See* CAL. PENAL CODE § 1192.7(c)(18) (West 1982).

11. CAL. PENAL CODE § 667 (West Supp. 1985) incorporates section 1192.7 for purposes of determining crimes which are "serious felonies."

12. 37 Cal. 3d at 831, 694 P.2d at 738, 210 Cal. Rptr. at 625. *See also* CAL. PENAL CODE § 460 (West Supp. 1985) (burglary must only be of inhabited building).

13. CAL. PENAL CODE § 1192.7(c) (West 1982).

14. 37 Cal. 3d at 831, 694 P.2d at 738, 210 Cal. Rptr. at 625.

nies[15] and nonviolent crimes[16] were included in its coverage.

The defendant also claimed that his previous admitted burglary, being antecedent to the passage of Proposition 8, was not admissible for enhancement purposes. The court rejected this argument, pointing to Penal Code section 1192.7's inclusion of repeated offenses.[17]

The court refused to accept the defendant's construction of section 1192.7, which restricted "burglary of a residence" to first degree burglary.[18] The court next had to determine whether the prior conviction of burglary was of a residence. Since the conviction record of the second degree burglary did not reveal whether it was residential, the court held it would be double jeopardy to "go behind the record" and relitigate the previous offense.[19] However, this problem was held to be academic, as the defendant had previously taken advantage of plea bargaining[20] and admitted that the earlier burglary was residential in nature.[21] Therefore, the defendant was held to be subject to the enhancement statute.

Finally, the defendant contended that any enhancement was limited by Penal Code section 1170.1(g),[22] which provides that a "term of imprisonment shall not exceed twice the number of years imposed by the trial court as the base term."[23] Hence, the defendant argued that his enhancement could only be two years; that is, four years altogether or twice the base term. The court summarily rejected this contention, as any such base term limitation would restrict the application of the enhancement term in burglaries to only first degee aggravated terms.[24] Finally, the defendant cited section 1170.95 which

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15. CAL. PENAL CODE § 1192.7(c)(10), (12) (West 1982) (assault with intent to commit robbery and life prisoner's assault on noninmate respectively).

16. *Id.* § 1192.7(c)(18)-(24) (West 1982) (nonviolent crimes).

17. *Id.* 37 Cal. 3d at 833, 694 P.2d at 739, 210 Cal. Rptr. at 626. *See* CAL. PENAL CODE § 1192.7(c)(10), (12) (West 1982). The court stated: "The basic purpose of the section—the deterrence of recidivism—would be frustrated by a construction which did not take account of prior criminal conduct." 37 Cal. 3d at 833, 694 P.2d at 739, 210 Cal. Rptr. at 626.

18. 37 Cal. 3d at 835 n.11, 694 P.2d at 741 n.11, 210 Cal. Rptr. at 628 n.11. The court also stated that had the burglary section been amended to include daytime residential burglaries before the passage of Proposition 8's section 667, this determination might have been otherwise. *Id. See* CAL. PENAL CODE § 460 (West Supp. 1985).

19. 37 Cal. 3d at 836, 694 P.2d at 742, 210 Cal. Rptr. at 629. *See* People v. Crowson, 33 Cal. 3d 623, 660 P.2d 389, 190 Cal. Rptr. 165 (1983) (second degree burglary conviction does not prove residential entry).

20. 37 Cal. 3d at 836, 694 P.2d at 742, 210 Cal. Rptr. at 629. The court stated: "if, as part of a bargain, [the defendant] . . . finds it advantageous to admit an enhancement which the prosecution may be unable to prove, *Crowson* does not prevent the court from giving effect to the admission." *Id. See also* Brady v. United States, 397 U.S. 742, 756-58 (1970).

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

22. CAL. PENAL CODE § 1170.1(g) (West Supp. 1985).

23. *Id.*

24. 37 Cal. 3d at 837-38, 694 P.2d at 742-43, 210 Cal. Rptr. at 629-30. The court

came into effect after Proposition 8.[25] This section clearly negates the application of the base term rule to residential burglaries.[26] The defendant argued this section's later enactment was proof that the base term rule was in effect during the interim between Proposition 8's enactment and the enactment of section 1170.95. However, the court rejected this contention, as section 1170.95 had earlier been passed by the Assembly before the adoption of Proposition 8.[27] Thus, Jackson's enhanced sentence was affirmed.

Justice Lucas, in a separate concurring opinion, called for a reevaluation of *People v. Crowson*,[28] which held the state cannot "go behind the record" of prior convictions to determine if they are "serious felonies."[29] However, he also admitted the present case was not a "suitable vehicle" for this purpose.[30]

IV. CONCLUSION

In clarifying Proposition 8's section 667, the court held that, under certain circumstances, second degree burglary can be found to be a "serious felony" for enhancement purposes. In the face of the *Crowson* rule, however, these circumstances will be very limited. The court also determined that the base term rule did not limit application of the enhancement statute to burglaries. However, this is academic in light of section 1170.95, which expressly excludes residential burglaries from the base term rule.

C. *Prior conviction of first degree burglary is, as a matter of law, a burglary of a residence and results in a five year sentence enhancement:* **People v. O'Bryan.**

The sole issue raised in *People v. O'Bryan*, 37 Cal. 3d 841, 694 P.2d 135, 210 Cal. Rptr. 450 (1985), was whether the defendant's prior burglary conviction constituted a *serious felony* calling for an enhanced sentence. In answering this question in the affirmative, the court

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stated: "section 667 was intended to impose an enhancement unlimited by the double base term rule." *Id.*

25. CAL. PENAL CODE § 1170.95 (West Supp. 1985).

26. *Id.* It provides: "[n]otwithstanding the provisions of section 1170.1, the term of imprisonment may exceed twice the number of years imposed by the trial court as the base term . . . ." *Id.*

27. 37 Cal. 3d at 838, 694 P.2d at 743, 210 Cal. Rptr. at 630.

28. 33 Cal. 3d 623, 660 P.2d 389, 190 Cal. Rptr. 165 (1983).

29. *Id.* at 634, 660 P.2d at 396, 190 Cal. Rptr. at 172.

30. 37 Cal. 3d at 840, 694 P.2d at 744, 210 Cal. Rptr. at 631 (Lucas, J., concurring). That was because the defendant had admitted that the burglaries were residential.

held that a prior first degree burglary conviction was within the scope of the enhancement statute. *See* CAL. PENAL CODE § 667 (West Supp. 1985).

The case arose when the defendant was charged with two burglaries. The information also alleged a prior burglary conviction. In pleading nolo contendere to the first count, and admitting the prior conviction, the defendant signed a form which acknowledged that his plea and the prior burglary conviction could result in a maximum eight year prison sentence, consisting of the maximum sentence for second degree burglary of three years plus the enhancement statute's five year penalty. The trial court found the defendant guilty of second degree burglary and sentenced him to seven years—two years for the burglary plus the five year enhancement penalty of section 667. The remaining burglary count was dismissed.

The defendant argued on appeal that neither of his convictions could be considered a burglary of a residence, and thus a "serious felony," for purposes of the enhancement statute. If a defendant has been previously convicted of a "serious felony," section 667 provides for a five year term in addition to the present conviction's term. The court emphasized that section 667 derived its definition of "serious felony" from Penal Code section 1192.7, which holds "burglary of a residence" to be a "serious felony."

The court summarily dismissed the defendant's argument that his conviction was not for the burglary of a residence. The defendant's plea of nolo contendere to residential burglary and his written acknowledgement were determinative. The court also dismissed the defendant's contention that his original burglary conviction did not concern a residence, holding that first degree burglary was, as a matter of law, a burglary of a residence and therefore also a "serious felony."

V. CRIMINAL PROCEDURE

A. *Court upholds Truth-in-Evidence provision of Proposition 8; abrogates California's vicarious exclusionary rule: In re* Lance W.

In *In re Lance W.*,[1] the supreme court was asked to interpret article I, section 28(d) of the California Constitution, which was adopted as part of Proposition 8 in 1982. The specific issue addressed was whether section 28(d) abrogated either the vicarious exclusionary

1. 37 Cal. 3d 873, 694 P.2d 744, 210 Cal. Rptr. 631 (1985). Opinion by Grodin, J., with Kaus, Broussard, and Lucas, JJ., concurring. Separate dissenting opinion by Mosk, J., with Bird, C.J., and Reynoso, J., concurring. This case is treated in greater detail in *Proposition 8: California Law after In re* Lance W. *and* People v. Castro, which appears elsewhere in this issue.

rule or article I, section 13 of the state constitution as a basis for exclusion of evidence at a criminal trial. The majority concluded that Proposition 8 abrogated both the vicarious exclusionary rule and a defendant's right to object to and suppress evidence seized in violation of the California, but not the federal, Constitution.

I. FACTS

Lance W., a juvenile, was seen instigating what appeared to plainclothes police officers to be a drug sale. After being asked by the officers about a possible sale, Lance was observed dropping a baggie into a nearby pick-up truck. The officers opened the door to the truck and found the baggie, which contained marijuana. Two people were in the truck, neither of which gave the officers permission to open the truck door or to remove the baggie. Lance was arrested and the officers found a second baggie of marijuana on his person.

At the juvenile hearing which followed, Lance made a motion to suppress the evidence as being the product of a warrantless search undertaken without probable cause. The trial court held that the exchange which the police officers witnessed did not establish probable cause to search the truck or to arrest Lance. The evidence had to be suppressed, therefore, unless section 28(d) abrogated the grounds on which Lance had standing to object to the illegal search of the pick-up truck. The trial court concluded that the independent state ground for suppression had been eliminated by section 28(d) and therefore Lance lacked standing to object.[2]

At the disposition hearing, custody was removed from his parents and Lance was ordered to continue as a ward of the state. Confinement time was fixed at a maximum of three years in a camp-community program with further confinement for thirty days in juvenile hall upon his release from camp.[3]

II. THE VICARIOUS EXCLUSIONARY RULE AND SECTION 28(D): THE MAJORITY OPINION

A. Standing to Seek Suppression of Evidence

Both the United States and California Constitutions provide pro-

2. *See id.* at 880, 694 P.2d at 748, 210 Cal. Rptr. at 635.

3. *Id.* at 881, 694 P.2d at 748, 210 Cal. Rptr. at 635. The appellant contended that the trial court erred first in its conclusion that section 28(d) abrogated the vicarious exclusionary rule and second in its imposition of the thirty day juvenile hall time. *Id.*

tection against unreasonable searches and seizures.[4] The United States Supreme Court created the exclusionary rule, under which both federal and state courts must exclude evidence seized in violation of the fourth and fourteenth amendments.[5] Although originally perceived as an incident of one's rights, the exclusionary rule has recently been characterized by the Supreme Court as "a judicially created remedy" for fourth amendment violations.[6] Thus, state courts must apply the rule in criminal trials to uphold the guarantees of the fourth amendment, but the United States Supreme Court determines when it shall be applied in order to deter unlawful police conduct.[7]

The Supreme Court has stated that the deterrent purpose of the exclusionary rule is not served by allowing a defendant to object to evidence when his own rights have not been violated. "Thus, standing to invoke the exclusionary rule has been confined to situations where the government seeks to use such evidence to incriminate the victim of the unlawful search."[8] The policy reasons for such a holding were given in *Rakas v. Illinois*:[9] "Each time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected."[10]

In California, a broader application of the exclusionary rule has been deemed necessary.[11] The California Supreme Court applied the exclusionary rule as a rule of evidence even before the United States

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4. The fourth amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

Article I, section 13 of the California Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized.

CAL. CONST. art. I, § 13.

5. *See* Mapp v. Ohio, 367 U.S. 643 (1960).

6. United States v. Leon, 104 S. Ct. 3405, 3412 (1984) (quoting United States v. Calandra, 414 U.S. 338, 348 (1974)) (good faith exception to the exclusionary rule for searches conducted pursuant to defective warrants established).

7. 37 Cal. 3d at 882, 694 P.2d at 749, 210 Cal. Rptr. at 636.

8. *Id.* (quoting *Calandra*, 414 U.S. at 348). *See also* Brown v. United States, 411 U.S. 223 (1973) (defendants could not vicariously assert the personal fourth amendment right of the store owner in contesting admission of seized goods).

9. Rakas v. Illinois, 439 U.S. 128, 137 (1978).

10. *Id.*

11. 37 Cal. 3d at 883, 694 P.2d at 750, 210 Cal. Rptr. at 637. The expansion was thought necessary to "both deter unlawful police conduct and to preserve the integrity of the judicial process." *Id.*

Supreme Court extended the rule to the states.[12] The court went further and, within the same year, applied the rule to exclude evidence whenever it was unconstitutionally seized, even if the particular defendant's own rights had not been violated.[13] This judicially created rule of evidence was thereafter used to exclude evidence obtained in violation of the fourth amendment or article I, section 13 of the California Constitution.[14]

B. The Effect of Section 28(d)

Section 28(d) was adopted as part of Proposition 8 which set out to establish a "victim's bill of rights." Subsection (d) is itself entitled "Right to Truth-in-Evidence" and declares that no relevant evidence shall be excluded in any criminal proceeding.[15]

The appellant argued that because section 28(d) did not repeal either article I, section 13 or article I, section 24, section 13 remains a valid independent state ground for exclusion of the evidence.[16] The People argued that section 28(d) abrogated all independent state grounds for exclusion and permits exclusion only if mandated by the

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12. People v. Cahan, 44 Cal. 2d 434, 282 P.2d 905 (1955). The court adopted the exclusionary rule as a rule of evidence because other remedies failed to curtail police misconduct, resulting in the court's condoning, under the old rule, the illegal activities. *Id.* at 445, 282 P.2d at 911-12.

The exclusionary rule was extended to the states in Mapp v. Ohio, 367 U.S. 643 (1960).

13. People v. Martin, 45 Cal. 2d 755, 761, 290 P.2d 855, 857 (1955). The same rationale, police deterrence and judicial integrity, were cited by the court in support of the vicarious exclusionary rule. To disallow exclusion of illegally obtained evidence on the ground that a third person's rights were violated rather than those of the defendant invites police officers to violate the rights of third parties. *Id.* at 760, 290 P.2d at 857.

14. 37 Cal. 3d at 884, 694 P.2d at 750, 210 Cal. Rptr. at 637. *See also* People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975) (states may, on independent state grounds, adopt higher constitutional standards than the minimum required by the United States Constitution or United States Supreme Court cases); CAL. CONST. art. I, § 24 ("Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution").

15. Section 28(d) states in full:

> Except as provided by statute hereafter enacted by a two-thirds vote of the membership of each house of the Legislature, relevant evidence shall not be excluded in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court. Nothing in this section shall affect any existing statutory rule of evidence relating to privilege or hearsay, or Evidence Code, Sections 352, 782 or 1103. Nothing in this section shall affect any existing statutory or constitutional right of the press.

CAL. CONST. art. I, § 28(d).

16. 37 Cal. 3d at 884, 694 P.2d at 751, 210 Cal. Rptr. at 638.

fourth amendment exclusionary rule.[17] Appellant further contended that the result sought by the prosecution was not intended by the voters in their adoption of Proposition 8. He argued that the rule of vicarious exclusion in *People v. Martin* is a rule of procedure for admission of evidence and is unaffected by section 28(d).[18]

The court began its analysis with a determination of the meaning of section 28(d) as it relates to evidence obtained in violation of the fourth amendment and article I, section 13. The appellant urged that the voters never intended to eliminate the vicarious standing rule because the ballot pamphlet and the measure itself failed to indicate any impact on that rule or on state search and seizure law at all. The court found the express language of the provision to be dispositive rather than the omission pointed to by the appellant.[19]

The language of section 28(d) is a clearly stated command: "[R]elevant evidence shall not be excluded in any criminal proceeding . . . ."[20] This statement, said the court, has only one apparent meaning, and that meaning does not provide for exclusion of evidence seized in violation of article I, section 13, as appellant and amici curiae contended.[21] As a matter of statutory construction, when the language is clear and unambiguous, as here, there is no need for construction and courts should not indulge in it.[22]

Appellant sought to invoke another rule of construction by arguing that section 28(d) in effect repeals article I, sections 13 and 24 by mandating the admission of evidence seized in violation of those sections. The rule of construction raised by this argument creates a presumption against such an implied repeal and obliges the courts to settle conflicts so as to avoid having a later enacted provision repeal an existing provision.[23]

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17. *Id.*

18. *Id.* Further arguments were made by amici curiae for the defense. The State Public Defender argued that the section is unconstitutional because it requires admission of evidence which the fourth amendment requires to be excluded. *Id.* at 885, 694 P.2d at 751, 210 Cal. Rptr. at 638. It was also argued that the section is a constitutional *revision*, rather than an amendment, and is therefore impermissible. *Id. See infra* notes 43-50 and accompanying text.

California Attorneys for Criminal Justice sought to have section 28(d) invalidated on the basis of a denial of equal protection to criminal defendants who are unable to seek suppression of illegally obtained evidence on the same basis as civil litigants. *Id. See also infra* notes 51-54 and accompanying text. This organization also argued that the reenactment of Penal Code section 1538.5 after the people adopted section 28(d) serves to reinstate the vicarious exclusionary rule as a statutory rule of evidence, unaffected by section 28(d). *Id. See infra* notes 55-60 and accompanying text.

19. 37 Cal. 3d at 885-86, 694 P.2d at 751-52, 210 Cal. Rptr. at 638-39.

20. *See supra* note 15.

21. 37 Cal. 3d at 886, 694 P.2d at 752, 210 Cal. Rptr. at 639.

22. *Id. See also* Solberg v. Superior Court, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal. Rptr. 460 (1977); *In re* Waters of Long Valley Creek Stream Sys., 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979).

23. 37 Cal. 3d at 886, 694 P.2d at 752, 210 Cal. Rptr. at 639. *See In re* Thierry S., 19

The court responded by stating that Proposition 8 does not affect the substantive scope of either provision. What would have constituted an illegal search prior to passage of Proposition 8 would still be illegal today. "What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except to the extent that exclusion remains federally compelled."[24] The exclusionary rule and the vicarious standing rule have both been imposed as effective means to deter police misconduct. However, both rules were judicially created and work as remedies rather than forming the basis of substantive rights under the constitution. Through the Proposition 8 initiative measure, the people of California have apparently decided that exclusion is no longer an acceptable means by which to vindicate those rights, except as mandated by the United States Constitution.[25]

The court pointed to another aspect of the presumption which requires courts to maintain the integrity of both enactments when resolving a conflict, if they may stand together.[26] Furthermore, a court may assume that a new enactment is intended to change existing law.[27] No interpretation of section 28(d) is offered which can reasonably be said to avoid the import of its language. The court concluded that the language of the section, the accepted principles of statutory construction, and the available legislative history all confirm the intent of the electorate to require admission of all relevant evidence, even if illegally seized, to the extent admission is consistent with the United States Constitution.[28]

The court elaborated by pointing to the ballot pamphlet for the June, 1982 Primary Election and to the statements made by the Legislative Analyst as evidence of the voting public's intent.[29] The Legis-

Cal. 3d 727, 744, 566 P.2d 610, 619, 139 Cal. Rptr. 708, 717 (1977) (presumption against operation of doctrine of implied repeal).

24. 37 Cal. 3d at 886-87, 694 P.2d at 752, 210 Cal. Rptr. at 639 (emphasis in original).

25. *Id.* at 887, 694 P.2d at 752, 210 Cal. Rptr. at 639. The court felt that its task was not to determine whether this decision by the people was wise or not, but rather it was to implement the intent of the people, as expressed in the measure. *Id.*

26. *See* Warne v. Harkness, 60 Cal. 2d 579, 587-88, 387 P.2d 377, 382, 35 Cal. Rptr. 601, 606 (1963).

27. *See* Union League Club v. Johnson, 18 Cal. 2d 275, 278, 115 P.2d 425, 426 (1941).

28. 37 Cal. 3d at 887-88, 694 P.2d at 753, 210 Cal. Rptr. at 640.

29. *Id.* at 888, 694 P.2d at 753, 210 Cal. Rptr at 640. According to Legislature v. Deukmejian, 34 Cal. 3d 658, 673 n.14, 669 P.2d 17, 25 n.14, 194 Cal. Rptr. 781, 789 n.14 (1983), and Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 246, 583 P.2d 1281, 1300, 149 Cal. Rptr. 239, 258 (1978), ballot summaries

lative Analyst advised that, under current law, some evidence is not permitted and this measure would generally allow most evidence to be presented at trial.[30] This language, coupled with the explicit language of section 28(d) itself, including limited, enumerated exceptions,[31] supported the conclusion that without express statutory authority courts may not exclude illegally seized evidence unless exclusion is compelled by the United States Constitution.[32] The enumeration of a limited number of exceptions to the operation of section 28(d) further evidenced the intent of the people to enforce the provision literally. The court invoked the maxim *expressio unius est exclusio alterius*[33] meaning, "where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."[34]

Thus, a limitation is imposed on the court, restricting it from including as a statutory exception the power to exclude evidence. Impliedly, a further limitation is imposed preventing the court from creating nonstatutory rules of exclusion.[35] In construing the provision itself, the utmost consideration must be given to the intent of the enacting body, whether it be the legislature or the people in an initiative measure.[36] The court recognized the express purpose of section 28(d) to be the admission of all relevant evidence in a criminal trial. If the judiciary is allowed to adopt exclusionary rules not authorized by statute or by the constitution, the purpose of section 28(d) will be thwarted.

The court rejected another of appellant's arguments by invoking the presumption, referred to above, that enactment of a new provision is intended to change an existing provision.[37] The appellant relied on *Kaplan v. Superior Court*,[38] where the court held that section

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and arguments are considered valid sources from which voter intent and understanding can be determined in initiative measures. 37 Cal. 3d at 888 n.8, 694 P.2d at 753 n.8, 210 Cal. Rptr. at 640 n.8.

30. 37 Cal. 3d at 888, 694 P.2d at 753, 210 Cal. Rptr. at 640.

31. *See supra* note 15.

32. 37 Cal. 3d at 888, 694 P.2d at 753, 210 Cal. Rptr. at 640.

33. A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. . . . Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

BLACK'S LAW DICTIONARY 521 (5th ed. 1979).

34. 37 Cal. 3d at 888, 694 P.2d at 753, 210 Cal. Rptr. at 640 (quoting Wildlife Alive v. Chickering, 18 Cal. 3d 190, 195, 553 P.2d 537, 539, 132 Cal. Rptr. 377, 379 (1976)).

35. 37 Cal. 3d at 888-90, 694 P.2d at 753-54, 210 Cal. Rptr. at 640-41. This limitation applies equally to attempts to create procedural, evidentiary, or substantive rules, if those rules provide a criminal defendant with greater protection than provided by the fourth amendment. *Id.*

36. *Id.* at 890, 694 P.2d at 754, 210 Cal. Rptr. at 641. *See also* CAL. CIV. PROC. CODE § 1859 (West 1983).

37. *See supra* note 27 and accompanying text.

38. 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971).

351, newly added to the Evidence Code, was not intended to repeal or replace the vicarious exclusionary rule.[39] The appellant attempted to analogize this case to *Kaplan* due to the similarity of language used in both provisions. The court found sufficient evidence here, however, to support the conclusion that the voters intended to create a change in the law by adopting section 28(d).[40]

The court refrained from addressing the issue involving a possible conflict with the United States Constitution at length because it reached its conclusion by finding exclusion of evidence to be required if the federal constitution so mandates.[41] The court added that even if there were a conflict, invalidation of section 28(d) would not be the appropriate remedy because of the electorate's express intent for the section to be applied whenever constitutionally permissible.[42]

C. Constitutional Amendment versus Revision

The court previously addressed the issue of whether Proposition 8, in its entirety, constituted an amendment or a revision in *Brosnahan v. Brown*.[43] It held that the measure was a proper amendment and did not constitute a revision, which could only be proposed by delegates to a constitutional convention.[44] The decision in *Brosnahan* necessarily includes the conclusion that section 28(d) was properly adopted through the amendment process.[45] The restrictions imposed by the section on the judiciary's power to fashion nonstatutory rules of procedure or of evidence do not amount to a constitutional revision because the effect of the section is not that far-reaching.[46]

The people of this state have the power to prescribe rules of procedure and of evidence to be applied by the courts. This the people can do by statutory initiative or by the initiation and adoption of constitu-

39. *Id.* at 160-61, 491 P.2d at 7-8, 98 Cal. Rptr. at 655-56. *See* CAL. EVID. CODE § 351 (West 1966) ("[e]xcept as otherwise provided by statute, all relevant evidence is admissible").

40. 37 Cal. 3d at 890, 694 P.2d at 755, 210 Cal. Rptr. at 642. *See also supra* notes 28-32 and accompanying text.

41. *Id.* at 890, 694 P.2d at 755, 210 Cal. Rptr. at 642.

42. *Id. See also* section 10 of Proposition 8, *quoted at* 37 Cal. 3d at 890 n.12, 694 P.2d at 755 n.12, 210 Cal. Rptr. at 642 n.12, which provides that any invalid provision of the measure should be severed, leaving the remainder in full force and effect.

43. 32 Cal. 3d 236, 651 P.2d 274, 186 Cal. Rptr. 30 (1982).

44. *Id.* at 260, 651 P.2d at 288-89, 186 Cal. Rptr. at 44-45. *See also* CAL. CONST. art. XVIII, § 2.

45. 37 Cal. 3d at 891, 694 P.2d at 755, 210 Cal. Rptr. at 642.

46. *Id.*

tional amendments.[47] The legislature also has the power to regulate court rules by statute, as long as the power of the court is not constitutionally impaired.[48] This regulation may be through rules of evidence as well, and this would not impair the authority of the courts.[49]

The adoption of section 28(d) does not substantially affect the constitutional bounds of the authority of the judicial branch. It merely eliminates a judicially created remedy. Nor does it create such a sweeping change in the distribution of powers as to be considered a constitutional revision.[50]

D. Equal Protection

The court found no merit in the argument by amici that criminal defendants are denied equal protection of the laws because they may not seek exclusion of evidence while civil litigants may.[51] This argument assumes that the exclusionary rule is applicable to civil proceedings, an assumption for which there is no precedent in this state. To date, the exclusionary rule has only been applied in so-called "quasi-criminal" actions which are so closely identified with the aims of criminal prosecution that the purposes of the exclusionary rule required its application.[52]

Even if certain civil proceedings presented circumstances which warranted application of the exclusionary rule, criminal defendants are not thereby denied equal protection.[53] "It is constitutionally permissible for the electorate to determine that the public stake in criminal proceedings, and in assuring that all evidence relevant to the guilt of the accused be presented to the trier of fact, justifies the admission of evidence that would be excluded in other proceedings."[54]

E. Reenactment of Penal Code Section 1538.5

Amici contended that the 1982 amendment of section 1538.5 of the

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47. *See* CAL. CONST. art. II, § 8 (electors have the power to propose statutes and amendments to the constitution and to adopt or reject them through an initiative).

48. *See* Sacramento & San Joaquin Drainage Dist. v. Superior Court, 196 Cal. 414, 238 P. 687 (1925).

49. 37 Cal. 3d at 891, 694 P.2d at 756, 210 Cal. Rptr. at 643. *See also* People v. Johnson, 68 Cal. 2d 646, 657, 441 P.2d 111, 119, 68 Cal. Rptr. 599, 607 (1968) (the power to restrict the courts is limited by the state and federal constitutions).

50. 37 Cal. 3d at 892, 694 P.2d at 756, 210 Cal. Rptr. at 643.

51. *Id.*

52. *Id. See, e.g.,* People v. Moore, 69 Cal. 2d 674, 682, 446 P.2d 800, 805, 72 Cal. Rptr. 800, 805 (1968) (narcotic addict proceedings call for application of exclusionary rule); People v. One 1960 Cadillac Coupe, 62 Cal. 2d 92, 96-97, 296 P.2d 706, 709, 41 Cal. Rptr. 290, 293 (1964) (the purpose of forfeiture is deterrent in nature and closely related to the aims of criminal law enforcement).

53. 37 Cal. 3d at 893, 694 P.2d at 756-57, 210 Cal. Rptr. at 643-44.

54. *Id.* at 893, 694 P.2d at 757, 210 Cal. Rptr. at 644.

Penal Code[55] reestablished a violation of article I, section 13 as a basis for exclusion of evidence because it was enacted subsequent to the adoption of Proposition 8. Amici argued, in effect, for the virtual repeal of section 28(d). The court dismissed this argument, however, by recognizing that it cannot be assumed that the legislature intended such broad results when it enacted 1538.5 anew. The amendment was unanimously adopted as a "clean-up" measure. The far-reaching consequences suggested by amici for appellant could not have been contemplated in an amendment which was so casually adopted without opposition.[56]

As further evidence to rebut appellant's contention, the court brought attention to another amendment of section 1538.5 which was considered an urgency measure.[57] This provision explained that the amendment of 1538.5 was procedural only and did not create any new grounds for exclusion of evidence.[58] The urgency clause itself stated that urgency was necessary to render motions to suppress more uniform in result.[59]

In sum, section 1538.5, as amended, is not intended to revive the exclusionary rules eliminated by Proposition 8. It does continue to provide the procedure by which a defendant may attempt to suppress evidence illegally seized. A court, however, may exclude evidence on that basis only if compelled by the federal exclusionary rule under the fourth amendment.[60]

F. The Disposition Objection

The majority further addressed the appellant's contentions that the trial court erred in imposing the juvenile hall time in addition to

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55. 1982 Cal. Stat. ch. 1505, § 6, p. 5843. Subdivision (a) of section 1538.5 states,
> Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on either of the following grounds:
> (1)The search or seizure without a warrant was unreasonable.
> (2)The search or seizure with a warrant was unreasonable because (i) the warrant is insufficient on its face; (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; (v) there was any other violation of federal or state constitutional standards.

CAL. PENAL CODE § 1538.5(a) (West 1982).

56. 37 Cal. 3d at 894, 694 P.2d at 757, 210 Cal. Rptr. at 644.

57. 1982 Cal. Stat. ch. 625, §§ 2-3, p. 2627.

58. *Id.* § 2.

59. *Id.* § 3.

60. 37 Cal. 3d at 896, 694 P.2d at 759, 210 Cal. Rptr. at 646.

camp placement time.[61] Allegedly this amounted to an unauthorized "dual disposition" since commitment to juvenile hall may only be used as an alternative to removal of a ward from the custody of his parents.[62]

The court held that the order was proper and the trial court did not abuse its discretion in imposing the hall time.[63] The court relied on *In re Ricardo M.*[64] to support its conclusion. The appellate court there held that Welfare and Institutions Code section 730 authorizes a juvenile court to impose confinement in a juvenile hall as a condition of probation. Legislative enactments subsequent to *Ricardo M.* demonstrate an awareness and approval of that holding.[65]

Here the appellant had been under a grant of probation in the custody of his parents. The order contemplated that upon release from camp he would be returned to his parents and again placed on probation. There is no evidence of an intent by the legislature to prohibit a stayed *Ricardo M.* order as a condition of probation when the disposition of the case calls first for institutional placement.[66]

The trial court's order was further supported by the pattern of delinquency in the appellant's past history. The order was appropriate to serve the purpose of juvenile law by deterring future violations and encouraging rehabilitation.[67] The threat of further confinement upon his release to his parents would serve as a deterrent. The judgment of the trial court was therefore affirmed.

III. THE DISSENT

The dissent viewed the major issue as whether the voters intended to allow illegalities, such as the arrest based upon a search without probable cause here, to go undeterred by the vicarious exclusionary rule.[68] Based on considerations of the long history of the rule and of the vague, imprecise and inconclusive language of section 28(d), the dissent found no such intent on the part of the voters.

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61. *Id.* The dissent did not address this question in its opinion.

62. *See* CAL. WELF. & INST. CODE §§ 730, 777 (West 1984).

63. 37 Cal. 3d at 897, 694 P.2d at 760, 210 Cal. Rptr. at 647.

64. 52 Cal. App. 3d 744, 749, 125 Cal. Rptr. 291, 295 (1975).

65. Section 777 was amended to include a subsection which provided for hall confinement for *violation* of probation as well. This confinement, however, was limited to two fifteen-day periods. CAL. WELF. & INST. CODE § 777 (West 1984). This time of confinement has come to be called "*Ricardo M.* time." 37 Cal. 3d at 897, 694 P.2d at 760, 210 Cal. Rptr. at 647.

66. 37 Cal. 3d at 899, 694 P.2d at 761, 210 Cal. Rptr. at 648.

67. *Id.*

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

A. History of the Vicarious Exclusionary Rule

In *People v. Cahan,*[69] the court instituted the exclusionary rule to prevent evidence obtained in violation of the state or federal constitution from being used at trial. The rule was adopted to serve the purposes of deterrence of police misconduct and to maintain the integrity of the judicial branch and of the government as a whole. Even in the face of arguments claiming the exclusionary rule serves to obstruct the ascertainment of truth at trial, the court saw it as the only effective means of deterring unlawful conduct by the police.[70]

The vicarious exclusionary rule was thereafter adopted by the court in *Martin.*[71] The court found that the same reasons supporting the exclusionary rule compelled the exclusion of any evidence illegally obtained, whether or not in direct violation of the defendant's rights.[72] The court believed that to hold otherwise would nullify the deterrent effect of exclusion.[73] The federal exclusionary rule, to the contrary, does not provide for vicarious standing to object.[74]

B. The Construction of Section 28(d)

In construing section 28(d), the dissent made use of several rules of statutory construction. To begin with, constitutional amendments are to be construed in the same manner as statutes.[75] An amendment should be given a liberal construction according to the ordinary meaning of its words.[76] When a potential conflict arises with other law, there is a presumption against implied repeal,[77] and the literal

69. 44 Cal. 2d 434, 282 P.2d 905 (1955). *See supra* note 12 and accompanying text.

70. *Cahan,* 44 Cal. 2d at 447, 282 P.2d at 911-12. *See also Kaplan,* 6 Cal. 3d 150, 491 P.2d 1, 98 Cal. Rptr. 649 (1971); *Martin,* 45 Cal. 2d 755, 290 P.2d 855 (1955).

71. *See supra* notes 13 and 70 and accompanying text.

72. *Martin,* 45 Cal. 2d at 761, 290 P.2d at 857.

73. *Id.*

74. *See Rakas,* 439 U.S. at 134. The dissent criticized the federal rule as leading to flagrant abuses by the government. 37 Cal. 3d at 902 n.1, 694 P.2d at 763 n.1, 210 Cal. Rptr. at 650 n.1. *See also* United States v. Paynor, 447 U.S. 727 (1980) (IRS search produced evidence illegally obtained but not suppressed due to probative value and unnecessary penalty on society).

75. 37 Cal. 3d at 902, 694 P.2d at 763, 210 Cal. Rptr. at 650 (Mosk, J., dissenting). *See also Amador Valley,* 22 Cal. 3d at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 257.

76. *Amador Valley,* 22 Cal. 3d at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 257; *In re* Quinn, 35 Cal. App. 3d 473, 482, 110 Cal. Rptr. 881, 887 (1973).

77. *In re* Thierry S., 19 Cal. 3d at 744, 566 P.2d at 619, 139 Cal. Rptr. at 717; Warne v. Harness, 60 Cal. 2d at 587-88, 387 P.2d at 383, 35 Cal. Rptr. at 606. In addition, when language in the amendment being construed has been previously construed, it is presumed to be used in the same sense. Marina Point v. Wolfson, 30 Cal. 3d 721, 734, 640 P.2d 115, 123, 180 Cal. Rptr. 496, 504 (1982).

meaning of language used may be disregarded to avoid absurd results.[78] The dissent criticized the majority's construction of section 28(d) because it "results in an implied repeal of a fundamental aspect of article I, section 24, of the constitution, ignores judical precedent construing the language used by the drafters of section 28(d), and produces 'absurd results' in light of the avowed purposes of Proposition 8."[79]

1. The Presumption Against Implied Repeal

Although the voters may repeal constitutional provisions by initiative or legislative proposal, the power must be exercised unambiguously.[80] Of course, the presumption against implied repeal of an earlier provision arises with potential conflict. The courts are therefore obliged to maintain the integrity of both if they are not irreconcilable and clearly repugnant to each other.[81] The dissent contended that, under the interpretation of section 28(d) given by the majority, sections 13 and 24 of article I are repealed.

In order to reconcile the Proposition 8 section with the previously existing constitutional provisions, the dissent looked at the history and meaning of the latter. It is a basic premise of constitutional law that the states may provide their citizens with greater protection than that afforded by the United States Constitution. California has done this, particularly in section 13 which provides rights separate and distinct from those of the fourth amendment,[82] and in section 24 which was enacted to codify the principle itself.[83] The exclusionary rule, and vicarious standing to invoke the rule, are fundamental and long-standing aspects of California constitutional law.

The dissent found no intent by the voters in their adoption of section 28(d), vaguely worded and nonspecific, to overrule the firmly established and fundamental exclusionary rule. Other sections of Proposition 8 expressly repealed constitutional provisions, yet section 28(d) does not mention article I, sections 13 and 24, neither in the vague and general language of 28(d) nor in the ballot information explaining it.[84] Even the majority noted the statement that section

78. *Amador Valley*, 22 Cal. 3d at 245, 583 P.2d at 1300, 149 Cal. Rptr. at 258.

79. 37 Cal. 3d at 903, 694 P.2d at 764, 210 Cal. Rptr. at 651 (Mosk, J., dissenting).

80. CAL. CONST. art. XVIII, §§ 1, 3.

81. 37 Cal. 3d at 903, 694 P.2d at 764, 210 Cal. Rptr. at 651 (Mosk, J., dissenting).

82. *Id. See also Brisendine*, 11 Cal. 3d 528, 549-50, 531 P.2d 1099, 1113, 119 Cal. Rptr. 315, 329 (1975); *supra* note 14 and accompanying text.

83. *See supra* note 14.

84. 37 Cal. 3d at 905, 694 P.2d at 765, 210 Cal. Rptr. at 652. Section 2 of Proposition 8 deleted article I, section 12 of the constitution, which involved the right of accused persons to be released on bail. *Id.*

The dissent also rejected the majority's reference to language in the ballot pamphlet as determinative of an intent to eliminate sections 13 and 24 as bases for exclusion of

28(d) is the "most ambiguous and least understood section" of Proposition 8.[85] Under this line of reasoning, the nonspecificity of section 28(d) simply does not repeal the clear mandate of section 24 and the exclusionary rules embodied therein.

2. The Controlling Authority of Prior Judicial Construction

According to this rule of construction, it must be presumed that the drafters of section 28(d) were aware of and intended a construction consistent with prior judicial holdings construing the language used in the section. The *Kaplan* case, distinguished by the majority, involved the issue of whether Evidence Code section 351 repealed the *Martin* vicarious exclusion rule. It was held that it did not, based on the fundamental nature of the exclusionary rule and the vagueness of the Evidence Code provision.

The drafters of Proposition 8 chose to use virtually the same language as that in section 351, and presumably had knowledge of the *Kaplan* decision.[86] The dissent concluded, therefore, that they did not intend to abrogate vicarious standing for the exclusion of evidence.[87]

3. Voter Intent and Avoidance of Absurd Results

The avowed purpose of Proposition 8 was to provide a bill of rights for victims of crime by providing safeguards for victims and by dealing more harshly with violent criminals.[88] The dissent urged that the majority's interpretation of section 28(d) would lead to absurd results, counter to this stated purpose of the provision, by *removing* safeguards that state law has provided victims.[89]

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evidence. "[T]o say 'most' evidence generally would be allowed to be presented is hardly a clear mandate that *all* California exclusionary rules are to be abrogated." *Id.*

85. *See* 37 Cal. 3d at 906 n.6, 694 P.2d at 766 n.6, 210 Cal. Rptr. at 653 n.6.

86. 37 Cal. 3d at 907-08, 694 P.2d at 767, 210 Cal. Rptr. at 654. *See supra* notes 38-40 and accompanying text.

87. *Id.* at 908, 694 P.2d at 768, 210 Cal. Rptr. at 655.

88. *See id.* and CAL. CONST. art. I, § 28(a).

89. 37 Cal. 3d at 909, 694 P.2d at 768, 210 Cal. Rptr. at 655. The dissent provided examples of how such removal of safeguards would occur. Evidence Code, section 352.1, preventing the introduction of a rape victim's address and telephone number, would be repealed, as would section 789, which prevents a victim's religious beliefs to be introduced. Section 786 would also be eliminated, allowing general attacks on the character of a victim-witness; elimination of section 787 would allow attacks on the character of victims, police officers, and witnesses with regard to prior acts of misconduct. *Id.*

The reason for the repeal of these sections is the broad interpretation by the majority of section 28(d) which will abrogate *all* state grounds for exclusion of relevant evi-

The majority reached its conclusion in reliance on the ballot information distributed to voters. The dissent found nothing in that material which suggested an intent to abrogate *all* state grounds for exclusion. Additionally, the complexity of this particular initiative and the nature of the political battle surrounding it, make adherence to the ballot information as evidence of intent unreliable.[90] "Given the complexity and length of Proposition 8 and the vagueness of the language of section 28(d), it is impossible to discern a 'clear intent' of the electorate to abrogate independent state grounds for the exclusion of evidence."[91]

The dissent concluded by stating that the trial court erred in admitting the evidence seized in this case. Both parties conceded the search was unreasonable and, under the dissent's construction of section 28(d), the appellant had vicarious standing to object; the judgment should have been reversed.[92]

B. *A trial court may reopen jury selection and allow counsel to exercise unused peremptory challenges; counsel is entitled to use his remaining challenges after the regular jury is sworn in, as long as the alternate jurors to be assigned have not yet been sworn, and upon a showing of good cause:* **People v. Armendariz.**

People v. Armendariz, 37 Cal. 3d 573, 693 P.2d 243, 209 Cal. Rptr. 664 (1984), was before the supreme court on an automatic appeal from a judgment imposing the death penalty against the appellant, Armendariz. Two issues were addressed on appeal: an erroneous jury instruction and the denial of defense counsel's request to reopen jury selection. The court further addressed an evidentiary question for the purpose of guiding the court below in the event of a retrial.

The trial court failed to instruct the jury that intent was a necessary element of a felony-murder special circumstance allegation. The court held this failure to constitute reversible error under *Carlos v. Superior Court,* 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983). It was held there that before a special circumstance allegation, such as the felony-murder allegation here, can be sustained, the jury must find the intent to kill. Because the *Armendariz* case fit none of the exceptions to the per se reversal rule, the felony-murder special circumstance finding, rendered without proper instruction, required reversal.

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dence. The introduction of evidence previously prohibited by the above sections is, of course, dependent on the court's finding of relevancy.

90. *Id. See also* Note, *The California Initiative Process: A Suggestion for Reform,* 48 S. CAL. L. REV. 922, 934-36 (1975).

91. 37 Cal. 3d at 910, 694 P.2d at 769, 210 Cal. Rptr. at 656 (Mosk, J., dissenting).

92. *Id.*

The court next considered the appellant's claim that his exercise of peremptory challenges was erroneously restricted due to the trial court's refusal to reopen jury selection. If the offense charged is punishable by death, both the defense and the prosecution are entitled to twenty-six peremptory challenges. In the selection of alternate jurors, each side is additionally entitled to as many peremptory challenges as alternates are called. In this case, defense counsel used four of the twenty-six and all of the challenges allocated for alternates. Counsel's request to reopen jury selection and to be allowed to exercise his unused challenges was denied. The trial court felt it lacked authority to grant such a request.

The supreme court found this denial also to constitute reversible error. It based it decision on *In re Mendes,* 23 Cal. 3d 847, 592 P.2d 318, 153 Cal. Rptr. 831 (1979). The general rule is that when a court has indicated that alternate jurors will be used, jury selection is not complete until those alternates are selected and sworn. Under section 1089 of the Penal Code, alternates are treated in the same manner and are entitled to hear all testimony as the regular jurors are. Therefore, the jury itself is not able to function until impanelment is truly completed.

The code section relating to challenges to alternates provides that such challenges must be taken when the juror appears, *but* may for cause be taken after the juror is sworn and before the jury is complete. Thus section 1068 provided the trial court with the power to reopen jury selection.

The jury here was not complete because all the alternates had not yet been sworn. There was also good cause here for the court to allow defense counsel to exercise his remaining peremptory challenges because two jurors were to be replaced by alternates.

Relying again on *Mendes,* the court stated that to disallow unused challenges, even as to regular jurors already sworn, at a point where there is less than a full jury is to infringe on the party's right to compare and choose jurors. Because the appellant was charged with a capital crime, his right to exercise peremptory challenges was essential to a fair trial and should be safeguarded. The denial of appellant's right required reversal of the judgment.

Finally, the court provided guidelines for retrial concerning an evidentiary issue presented here. The appellant contended that testimony by the victim's brother referring to incidents which occurred seventeen months earlier should have been excluded. The court agreed. It stated that not only were the statements objectionable as

irrelevant hearsay, but the trial court erroneously failed to make an on-the-record determination that the probative value of the evidence substantially outweighed the risk of undue prejudice. The statements should not have been admitted.

In sum, the court held that the trial court's denial of the appellant's right to exercise peremptory challenges to which he was entitled was reversible error. In the event of a retrial, the jury was to be instructed in accordance with *Carlos* that it may not uphold special felony-murder allegations without first finding the intent to kill. Further, in any retrial, the statements made by the victim's brother must be excluded.

C. *It is reversible error where a trial court improperly fails to exercise its discretion to appoint advisory counsel at the request of a defendant who is acting as pro se counsel:* **People v. Bigelow.**

I. INTRODUCTION

In *People v. Bigelow*,[1] the court had to decide whether a trial court's refusal to appoint advisory counsel to assist a defendant who was defending himself was reversible error per se. The court, in holding this denial to be prejudicial error, laid down a rule of per se reversal in such circumstances.[2]

The court considered several ancillary issues as well, including: the admissibility of evidence of uncharged crimes;[3] jury instruction;[4] and the application of special circumstances in the imposition of capital punishment.[5]

II. FACTUAL BACKGROUND

The defendant, Jerry Bigelow, was convicted of first degree murder, robbery, and kidnapping, and thereafter sentenced to death.[6] The tale begins with the escape of the defendant and Michael Ra-

1. 37 Cal. 3d 731, 691 P.2d 994, 209 Cal. Rptr. 328 (1984). The majority opinion was delivered by Justice Broussard, with Justices Mosk, Reynoso, and Grodin concurring. Justice Lucas concurred in the judgment only. Justice Kaus filed a concurring opinion, while Chief Justice Bird filed a separate opinion, concurring and dissenting in part.

2. *Id.* at 744, 691 P.2d at 1001, 209 Cal. Rptr. at 335.

3. *See infra* notes 22-29 and accompanying text.

4. *See infra* notes 30-34 and accompanying text.

5. *See infra* notes 35-50 and accompanying text.

6. The jury found four special circumstances upon which to impose the death penalty. *See* CAL. PENAL CODE § 190.2 (West Supp. 1985). These included: (1) intentional murder for financial gain, *id.* § 190.2(a)(1); (2) murder to avoid arrest or perfect escape, *id.* § 190.2(a)(5); (3) murder while defendant was engaged in a robbery, *id.* § 190.2(a)(17)(i); and (4) murder while engaged in a kidnapping, *id.* § 190.2(a)(17)(ii). 37 Cal. 3d at 738, 691 P.2d at 997, 209 Cal. Rptr. at 331.

mandonovic from Calgary Correctional Institution, a Canadian prison. The escapees, aided by two women they had met, then made their way to Sacramento, California, robbing and burglarizing various victims along the way.[7]

On August 24, 1980, the escapees, posing as hitchhikers, were picked up by John Cherry in his automobile. At gunpoint, Cherry was forced to drive the men to Los Angeles. However, Bigelow and Ramandonovic had Cherry pull the car over near Merced, and there in an abandoned cornfield one of the men shot Cherry to death in an execution style killing.[8]

After being apprehended, Bigelow and Ramandonovic were charged with the robbery, kidnapping and murder of Cherry.[9] Bigelow, unsatisfied with his appointed counsel, unsuccessfully requested new counsel be appointed on several occasions.[10] Since Bigelow was unable to obtain new counsel, he decided to defend himself.[11] Upon a request for advisory counsel to assist him, the court replied that this is "not permitted under California law."[12] Throughout the trial, Bigelow presented an ineffectual defense, calling only three witnesses on his behalf.[13] The jury found him guilty of murder in the first degree and sentenced him to death.[14]

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7. In Sacramento, Ramandonovic burglarized the apartment of Robert Goodwin where he stole the .38 caliber revolver that was eventually used in the murder of John Cherry. Earlier, Ramandonovic had been arrested for attempting to use a stolen credit card, but he was freed on bail, enabling him to continue his crime spree. 37 Cal. 3d at 738-39, 691 P.2d at 997-98, 209 Cal. Rptr. at 331-32.

8. Although Bigelow was eventually found guilty of the murder, there was contradictory testimony over whether he or Ramandonovic pulled the trigger. Following the shooting both men were separately apprehended. Bigelow was arrested after attempting a grocery store holdup and Ramandonovic was apprehended for speeding. *Id.* at 739-40, 691 P.2d at 998-99, 209 Cal. Rptr. at 332-33.

9. *Id.* at 740, 691 P.2d at 998, 209 Cal. Rptr. at 332.

10. Bigelow complained of his counsel's competency on December 5, 1980 and March 20, 1981. After continued requests for the appointment of new counsel were denied, Bigelow, on March 23, 1981, asked to represent himself. *Id.*

11. Of course, Bigelow had a constitutional right to represent himself under Faretta v. California, 422 U.S. 806 (1975). *See also* People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959).

12. 37 Cal. 3d at 740-41, 691 P.2d at 998, 209 Cal. Rptr. at 332.

13. These included, in the guilt phase, the detective who had taken his confession, and, in the penalty phase, his sister and brother. *Id.* at 741, 691 P.2d at 999, 209 Cal. Rptr. at 333.

14. *Id.* *See supra* note 6.

III. COURT'S ANALYSIS

A. Advisory Counsel

Even the state had to concede that the trial judge's decision, that California law does not provide for the appointment of advisory counsel, was erroneous.[15] The supreme court pointed to California[16] and federal[17] authority which holds that a judge in his discretion should appoint advisory counsel to an indigent defendant proceeding pro se where the orderly administration of justice would be served. The court concluded that Bigelow was not competent to defend a capital case alone. Therefore, the trial court erred in not exercising its discretion to appoint advisory counsel.[18]

The court then addressed the question of whether it was reversible error per se for the trial court not to appoint advisory counsel. The court, ignoring the state's plea that the trial judge advised Bigelow throughout the trial, held that it was reversible error.[19] The court bottomed this "rule of per se reversal" upon the "impossibility of assessing the effect of the absence of counsel upon the presentation of the case."[20] Hence, the holding was based on the inability of the court to speculate on how the case would have been tried had advisory counsel been appointed.[21]

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15. 37 Cal. 3d at 742, 691 P.2d at 999, 209 Cal. Rptr. at 333. The court quoted People v. Mattson, 51 Cal. 2d 777, 336 P.2d 937 (1959), which states that a court,

> upon, what it may determine to be good cause shown, . . . [may] permit a defendant who appears *in propria persona* to employ an attorney to sit by him and advise him during the presentation of the case in court, or even appoint an attorney (with the latter's consent) to render such advisory services to an indigent defendant who wishes to represent himself . . . .

Id. at 797, 336 P.2d at 951.

16. *See* People v. Linden, 52 Cal. 2d 1, 338 P.2d 397 (1959); Ligda v. Superior Court, 5 Cal. App. 3d 811, 85 Cal. Rptr. 744 (1970).

17. *See, e.g.*, Faretta v. California, 422 U.S. 806 (1975) (court may appoint "standby counsel" to aid accused at his request); Mayberry v. Pennsylvania, 400 U.S. 455, 467 (1971) (Burger, C.J., concurring) (trial judge well advised to appoint "standby counsel" where defendant represents himself).

18. The court pointed to Bigelow's ninth grade education, his unfamiliarity with the United States court system, and the complexities of a capital case. 37 Cal. 3d at 743-44, 691 P.2d at 1000-01, 209 Cal. Rptr. at 335-36.

19. *Id.* at 744, 691 P.2d at 1001, 209 Cal. Rptr. at 335.

20. *Id.* at 745, 691 P.2d at 1001, 209 Cal. Rptr. at 335. *See* People v. Joseph, 34 Cal. 3d 936, 671 P.2d 843, 196 Cal. Rptr. 339 (1983) (analogy that denial of self-representation prejudicial per se).

The court initially dismissed the fundamental character of the right to counsel as calling for a "rule of per se reversal." Its rationale for rejecting this theory was that a defendant has no absolute right to advisory counsel. *See* People v. Mattson, 51 Cal. 2d 777, 795-96, 336 P.2d 937, 951 (1959).

21. The court stated, "[a] rule of per se reversal is the only way to protect the right of a defendant to a conscientious exercise of judicial direction on the appointment of advisory counsel, and to vindicate the state's independent interest in the fairness and accuracy of a capital proceeding." 37 Cal. 3d at 746, 691 P.2d at 1002, 209 Cal. Rptr. at 336.

B. Evidence of Uncharged Crimes

The court, in dictum,[22] next discussed the inadmissibility of evidence concerning uncharged crimes committed by Bigelow.[23] Normally, evidence of uncharged crimes is inadmissible to prove the conduct of a defendant.[24] However, under Evidence Code section 1101(b), relevant evidence as to motive, intent or plan may be admissible in certain circumstances.[25]

The court refused to accept the prosecution's theories of relevance, which included: that these uncharged crimes were committed in a concerted attempt to perfect an escape;[26] and that they proved Bigelow's motive in robbing, kidnapping and murdering Cherry.[27] Furthermore, the court refused admission of the crimes in order to prove identity by modus operandi.[28] That is, the court believed the lack of similarity between previous robberies and the robbery-murder was such that the uncharged crimes were no help in identifying the guilty party.[29]

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22. Since the court reversed the conviction on other grounds, it held that the defendant's failure to object to certain evidence of uncharged crimes need not be considered. Its reason for discussing the admissibility of the evidence was to emphasize the injustices suffered by the defendant. *Id.* at 746-47, 691 P.2d at 1002-03, 209 Cal. Rptr. at 336-37.

23. The various crimes included: escape from a Canadian prison; burglaries in Alberta; burglaries, auto theft, and credit card theft on the way to California; burglary of Goodwin's residence; credit card theft; a dry cleaning store robbery; burglaries in Arizona; and the grocery store robbery. *Id.* at 746, 691 P.2d at 1002-03, 209 Cal. Rptr. at 336-37.

24. CAL. EVID. CODE § 1101(a) (West 1966). It provides that "evidence of a person's character or a trait of his character . . . is inadmissible when offered to prove his conduct on a specified occasion." *Id.*

25. *Id.* § 1101(b). This section provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime . . . when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident) other than his disposition to commit such acts." *Id.*

26. *See* CAL. PENAL CODE § 190.2(a)(5) (West Supp. 1985). The court, in dismissing this theory, held that even if it was allowed to be introduced, there should be a jury instruction to limit its use. 37 Cal. 3d at 747-48, 691 P.2d at 1003, 209 Cal. Rptr. at 337.

27. The court dismissed this contention, holding it would be highly prejudicial to prove Bigelow's motive while only minimally relevant to a question of fact not contested (which was, whether whoever killed Cherry did it to steal his car). 37 Cal. 3d at 748, 691 P.2d at 1004, 209 Cal. Rptr. at 338.

28. The main reason for dismissing this contention was that the question was not whether Bigelow "was one of the perpetrators but whether he was the triggerman." *Id.* at 749, 691 P.2d at 1004-05, 209 Cal. Rptr. at 338-39.

29. The Attorney General pointed to two robberies—a dry cleaners in Sacramento and a grocery store in Seligman—to prove that Bigelow was the actual triggerman. The only "common marks to identify these robberies with the Cherry murder were Bigelow's ordering of all the victim's to lie down." The court concluded this common-

C. *Jury Instructions*

The court summarily disposed of two erroneous jury instructions that had been delivered by the trial court. Initially, the court disapproved the usage of a jury instruction which dealt with aiders and abettors.[30] The instruction read: "A person aids and abets the commission of a crime if, with knowledge of the unlawful purpose of the perpetrator of the crime, he aids, promotes, encourages or instigates by act or advice the commission of such crime."[31] The court held the instruction to be invalid because it neglected to require the aider or abettor to have some type of intent or knowledge of the perpetrator's purpose.[32]

Secondly, the court held that the lower court had incorrectly instructed the jury that kidnapping in connection with a murder constituted first degree murder under the felony-murder statute.[33] In reality, kidnapping was not enumerated among the various crimes of Penal Code section 189, the felony-murder statute.[34]

D. *Special Circumstances*

Finally, the court dealt with several special circumstances of the murder which supported the imposition of the death penalty.[35] Initially, the court held erroneous the trial court's instructions concerning the murder for hire provision of the special circumstances statute.[36] The court's fear was that this vague statutory language[37]—"[t]he murder was intentional and carried out for financial gain"[38]—would allow an overlap of special circumstances and felony-murder,

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ality was not sufficient to allow admissibility of the uncharged crimes. *Id.* at 749, 691 P.2d at 1004, 209 Cal. Rptr. at 338.

30. CALJIC (4th ed.) No. 3.01 (1979).

31. *Id.*

32. The court held that the jury should have been instructed in accordance with People v. Beeman, 35 Cal. 3d 547, 674 P.2d 1318, 199 Cal. Rptr. 60 (1984), which held that the aider or abettor must act "with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." *Id.* at 560, 674 P.2d at 1325, 199 Cal. Rptr. at 68.

33. 37 Cal. 3d at 750, 691 P.2d at 1005, 209 Cal. Rptr. at 339. *See* CAL. PENAL CODE § 189 (West Supp. 1985).

34. Penal Code section 189 provides that a killing "committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, or any act punishable under section 288, is murder of the first degree." *Id.*

35. *See* CAL. PENAL CODE § 190.2 (West Supp. 1985). *See also supra* note 6.

36. The Attorney General's contention was that section 190.2, which is actually a murder for hire provision, should apply to robberies. In other words, the killing of Cherry was to steal his property. Therefore, special circumstances apply raising the penalty to death. 37 Cal. 3d at 750-51, 691 P.2d at 1005-06, 209 Cal. Rptr. at 339-40.

37. The 1977 version of section 190.2(a) defined this special circumstance in specific terms: "The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder from any person other than the victim . . . ." 1977 Cal. Stat. ch. 316, § 9.

38. CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1985).

thereby prejudicing a defendant.[39] The court, in holding this section to be inapplicable to a murder in connection with a robbery, stressed that the "financial gain special circumstance applies only when the victim's death is the consideration for, or an essential prerequisite to the financial gain sought by the defendant."[40]

Similarly, the court held application of the special circumstance of killing to avoid arrest or to perfect an escape to be erroneous.[41] The court summarily dismissed the prosecution's first contention that Cherry had been killed to allow Bigelow and Ramandonovic to avoid being taken into custody, as the threatened arrest was not sufficiently "imminent."[42] Furthermore, it was held that the murder was not committed to enable the men to perfect an escape.[43] Instead of applying the Attorney General's theory of "once an escapee, always an escapee," the court held that "the killing must not only be motivated by the goal of escaping custody, but must take place before the defendant has departed the confines of the prison facility and reached a place of temporary safety outside the confines of the prison."[44]

Still another special circumstance, felony-murder based on robbery, was remanded to the trial court. The court ruled that it was error for the trial court to fail to instruct the jury that some proof of intent to kill was required under the felony-murder special circumstance.[45]

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39. The court stated that "[s]uch a limiting construction will not prejudice the prosecution, since there will remain at least one special circumstance—either financial gain or felony murder—applicable in virtually all cases in which the defendant killed to obtain money or other property." 37 Cal. 3d at 752, 691 P.2d at 1006, 209 Cal. Rptr. at 340.

40. *Id.*

41. *See* CAL. PENAL CODE § 190.2(a)(5) (West Supp. 1985). This special circumstance is implied where the murder is committed "for the purpose of avoiding or preventing a lawful arrest or to perfect, or attempt to perfect an escape from lawful custody." *Id.*

42. 37 Cal. 3d at 752, 691 P.2d at 1006, 209 Cal. Rptr. at 340. The court considered speculative the Attorney General's argument that Cherry had been killed to prevent his reporting of the two fleeing felons. *Id.*

43. *Id.* The court stated: "the verdict finding the murder was committed for the purpose of avoiding arrest or perfecting an escape is not supported by substantial evidence." *Id.* at 754, 691 P.2d at 1008, 209 Cal. Rptr. at 342.

44. *Id.* at 753-54, 691 P.2d at 1007-08, 209 Cal. Rptr. at 341-42. The court, in borrowing from the felony-murder rule's logic, held that an escape was perfected when the escapee had reached a place of temporary safety. *Id.* Therefore, Bigelow and Ramandonovic were no longer in the process of escape, and this special circumstance would not apply.

45. *Id.* at 754, 691 P.2d at 1008, 209 Cal. Rptr. at 342. This decision was based on

The court also determined that the felony-murder circumstance based on kidnapping should be remanded for lack of any instruction on the intent to kill.[46] Bigelow also contended that the felony-murder special circumstance statute's language—"[k]idnapping in violation of sections 207 *and* 209"[47]—required proof of simple kidnapping[48] and kidnapping to commit robbery.[49] However, the court held that the intent of the statute was to find special circumstances where there is a murder in connection with either simple kidnapping or kidnapping to commit robbery.[50]

IV. SEPARATE OPINIONS

Justice Kaus filed a concurring opinion which criticized the majority's decision that the denial of advisory counsel was reversible error per se. His rationale was that advisory counsel was not constitutionally guaranteed, and that such counsel only plays a "subordinate" role in an accused's defense.[51]

Chief Justice Bird, both concurring and dissenting, also filed a separate opinion. She found fault in the majority's allowance of inadmissible evidence in the guilt phase to prove special circumstances.[52] She contended that a jury instruction limiting its use would not erase the prejudicial matter from a juror's mind.[53] Chief Justice Bird argued that instead of a limiting instruction, there should be a bifurcation of guilt and special circumstance phases of the trial.[54] Also attacked was the majority's interpretation of Penal Code section 190.2(a)(17)(ii) which specifies felony-murder special circumstances during a kidnapping.[55] Instead of applying felony-murder in cases of

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Carlos v. Superior Court, 35 Cal. 3d 131, 672 P.2d 862, 197 Cal. Rptr. 79 (1983), which held that intent was requisite to a finding of felony-murder special circumstances.

46. *Id.* at 754, 691 P.2d at 1008, 209 Cal. Rptr. at 343.

47. CAL. PENAL CODE § 190.2(a)(17)(ii) (West Supp. 1985) (emphasis added).

48. Simple kidnapping under section 207 is merely transporting a person into another area of the county, or into another county, state or country. *See* CAL. PENAL CODE § 207 (West Supp. 1985).

49. Kidnapping to commit robbery, CAL. PENAL CODE § 209(b) (West Supp. 1985), or for ransom, reward, or extortion, *id.* § 209(a), requires additional proof beyond simple kidnapping.

50. 37 Cal. 3d at 755-56, 691 P.2d at 1009, 209 Cal. Rptr. at 343.

51. *Id.* at 756, 691 P.2d at 1009, 209 Cal. Rptr. at 343 (Kaus, J., concurring). Justice Kaus contested that "it is at least theoretically possible that a defendant who chooses to represent himself will conduct a faultless defense." *Id.*

52. *Id.* at 757, 691 P.2d at 1010, 209 Cal. Rptr. at 344 (Bird, C.J., concurring).

53. Chief Justice Bird quoted Justice Jackson concurring in Krulewitch v. United States, 336 U.S. 440 (1949), where he said, "[t]he naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction." *Id.* at 453 (Jackson, J., concurring).

54. The Chief Justice pointed to Penal Code section 190.1(a) which states that "the defendant's guilt shall be first determined," as allowing for a bifurcation procedure whereby the guilt and special circumstances phases are separated.

55. CAL. PENAL CODE § 190.2(a)(17)(ii) (West Supp. 1984).

either simple kidnapping or kidnapping to commit a robbery, she argued that the legislature's language should be given its literal effect.[56]

D. *Defendant's sixth amendment rights are violated when preliminary hearing testimony is admitted into evidence and defense counsel has not had a meaningful right to cross-examine:* **People v. Brock.**

In *People v. Brock,* 38 Cal. 3d 180, 695 P.2d 209, 211 Cal. Rptr. 122 (1985), part of the prosecution's case consisted of statements and testimony by Mrs. Mary Williams. In her testimony and statements, she stated she saw the defendant inject the deceased, who was in the hospital with Mrs. Williams, with what was later determined to be methamphetamines. The drugs caused the victim's death. Mrs. Williams was herself terminally ill and under heavy medication when she testified at the preliminary hearing. The defendant was convicted of second degree murder and unlawful administration of methamphetamine. The issue before the court was whether the defendant was given a meaningful opportunity to cross-examine Mrs. Williams since at the time of the preliminary hearing she was incoherent. Because of Mrs. Williams' condition, defense counsel was denied the opportunity to object to prosecution questions and was permitted to ask only three questions of his own.

The defendant, by virtue of the sixth amendment, was guaranteed meaningful cross-examination of witnesses as a fundamental right. Though Mrs. Williams was deceased at the time of trial, her prior statements and testimony from the preliminary hearing were introduced into evidence. The sixth amendment requirement of cross-examination and confrontation of witnesses may be satisfied if there was adequate opportunity for cross-examination at an earlier proceeding. The defendant's opportunity must be "complete and adequate." Because the defendant had the opportunity to ask Mrs. Williams only three questions on cross-examination and did not receive coherent answers, his rights under the sixth amendment were violated, as was California Evidence Code section 1237. The error of

56. *See* Loew's Inc. v. Byram, 11 Cal. 2d 746, 82 P.2d 1 (1938). The 1977 provision read "[k]idnapping in violation of section 207 or 209" (former Penal Code section 1190.2(c)(3)(ii)) while the 1978 version was amended to specify "[k]idnapping in violation of sections 207 *and* 209." CAL. PENAL CODE § 190.2(a)(17)(ii) (West Supp. 1985) (emphasis added).

admitting Mrs. Williams' preliminary hearing testimony at trial required reversal.

E. *Trial court's refusal to grant continuance in order to allow defendant to obtain retained counsel held to be abuse of discretion:* **People v. Courts.**

A trial court's denial of a request for a continuance to allow a defendant to obtain retained counsel was held to be reversible error in *People v. Courts,* 37 Cal. 3d 784, 693 P.2d 778, 210 Cal. Rptr. 193 (1985). The case arose when the defendant, Philip Courts, was charged with murder. Approximately eight days before trial, the defendant, represented by a public defender, requested a continuance so that he could have time to retain a private attorney he had contacted. The court deemed the request untimely, but the defendant subsequently paid the private attorney a retainer. When the trial judge was disqualified from the case, a similar plea to the new trial judge proved ineffective as well. The defendant was tried and convicted of voluntary manslaughter.

The supreme court, in reversing the lower tribunal, held that the defendant had made "a good faith, diligent effort to obtain the substitution of counsel before the scheduled trial date." Therefore, it was an abuse of discretion to deny the continuance, as the defense counsel should be allowed a reasonable amount of time for preparation. Thus, the court determined that a defendant could invoke the fundamental right to choose retained counsel as late as a week before trial. Finally, the court held that a denial of counsel of the defendant's choice necessitated reversal, regardless of whether he received a fair trial.

F. *It is proper for a court to consider the effect of delay on the memory of all witnesses, including those to be produced by the prosecution, in ruling on a motion alleging the denial of a speedy trial:* **People v. Hill.**

In *People v. Hill,* 37 Cal. 3d 491, 691 P.2d 989, 209 Cal. Rptr. 323 (1984), the supreme court considered an appeal taken from an order by the Santa Clara Superior Court dismissing a number of felony counts against the defendant, Hill. The charges were dismissed on the grounds of a denial of the defendant's federal and state constitutional rights to a speedy trial.

The defendant had been convicted of charges in San Mateo County and, while in prison, wrote the Santa Clara district attorney to demand a trial on charges against him in that county. Due to negligent error by the state, the ninety-day period provided by statute had elapsed before the defendant was brought to trial. According to sec-

tion 1381 of the Penal Code, such a violation results in dismissal of the action upon a motion by the defendant.

The right to a speedy trial is afforded to criminal defendants by the sixth amendment to the federal Constitution and by article I, section 15 of the California Constitution. To determine whether either right has been violated, courts must address the issue of whether the defendant was prejudiced by the delay in bringing him to trial. Prejudice is a relevant consideration under both federal and state analysis. It has been deemed more important under the state determination because the test employed by the court weighs the prejudicial effect of the delay against any justification for it.

Prejudice is a factual question which is reviewed on appeal by examining the sufficiency of the evidence upon which the trial court relied in its decision. The evidence here disclosed an unexcused delay of more than six months between the defendant's first letter of demand and the date the charges were refiled. More importantly, however, the record revealed prejudice to the defendant.

The prosecution's case consisted primarily of the eyewitness testimony of the victims. The witnesses' memories had admittedly deteriorated over the course of the delay. The prosecution contended, and Justice Lucas agreed in his dissenting opinion, that the defendant was not prejudiced by the faded memories, but instead received a benefit. The dissent viewed this as a "huge advantage" to the defendant because he was faced with a trial in which the victims positively identified him, and he is now faced with a trial in which the victims are uncertain.

The majority rebutted the contention of a benefit to the defendant by invoking the presumption of the defendant's innocence. "[T]o contend that a faded memory aids the defendant is to assume defendant's guilt; if he is innocent, obviously he would prefer witnesses who can forthrightly so testify." The court found no reason to distinguish witnesses for the prosecution from witnesses for the defense, with respect to the effect of a prolonged delay on their memory. The faded memory of the prosecution witnesses made a fair trial impossible here. The court noted this was particularly true where, as here, the only evidence against the defendant is the testimony of the witnesses whose memory has been affected by the delay.

The court concluded that it was proper to consider the effect of a delay on the memory of all witnesses, including those to be produced by the prosecution, when ruling on a motion alleging the denial of a

defendant's right to a speedy trial. The decision by the court below to dismiss the action was affirmed.

G. *A request by a defendant to have his preliminary hearing closed pursuant to Penal Code section 868 must be granted upon a showing of a reasonable likelihood of substantial prejudice:* Press-Enterprise Co. v. Superior Court.

I. INTRODUCTION

In *Press-Enterprise Co. v. Superior Court,*[1] the real party in interest, Diaz, was charged with the murder of twelve hospital patients. Defendant Diaz, at the preliminary hearing, made a motion pursuant to California Penal Code section 868 to close the proceeding to the public and the press. The motion was granted and the transcripts were sealed.[2] Petitioner, a newspaper, sought access to the transcripts in superior court. The court ordered the transcripts to remain sealed.[3] The petitioner then commenced a mandamus proceeding. The supreme court was asked to determine the standard to be applied by a magistrate in deciding when the public's right of access to preliminary hearings must give way to the defendant's right to a fair trial.

II. THE ASSERTED CONSTITUTIONAL RIGHT OF ACCESS

Prior to amendment in 1982, section 868 of the Penal Code provided the defendant with an absolute right to closure of his preliminary hearing upon request.[4] The statute was challenged in *San Jose Mercury-News v. Municipal Court*[5] as violating state and federal constitutional rights. The court there acknowledged the United States

1. 37 Cal. 3d 772, 691 P.2d 1026, 209 Cal. Rptr. 360 (1984). Opinion by Broussard, J., with Bird, C.J., and Mosk, Kaus and Reynoso, JJ., concurring. Separate opinions by Grodin, J., concurring, and Lucas, J., concurring in part and dissenting in part.

2. The trial had been completed, rendering the case technically moot. The court found, however, that the case presented "an important question affecting the public interest, and review [was] appropriate." *Id.* at 774 n.2, 691 P.2d at 1027 n.2, 209 Cal. Rptr. at 361 n.2.

3. The superior court judge based his ruling on a finding of a reasonable likelihood that opening the transcript to the public would prejudice the defendant's right to a fair and impartial trial. *Id.* at 774, 691 P.2d at 1027, 209 Cal. Rptr. at 361. The "reasonable likelihood" test applied by the lower court was based on language found in Gannett Co. v. De Pasquale, 443 U.S. 368, 397-403 (1979) (Powell, J., concurring). The supreme court ultimately couched its own test in similar language, but felt that the superior court had improperly applied the test. 37 Cal. 3d at 778-79, 691 P.2d at 1030, 209 Cal. Rptr. at 364.

4. CAL. PENAL CODE § 868 (West 1970). Prior to amendment the section read, in pertinent part: "The magistrate must also, upon the request of the defendant, exclude from the examination every person except [certain enumerated officials]." *Id.*

5. 30 Cal. 3d 498, 638 P.2d 655, 179 Cal. Rptr. 772 (1982).

Supreme Court's recognition of a qualified right of access to trials and to pretrial proceedings, such as suppression hearings.[6] It based its decision, however, on perceived distinctions between a preliminary hearing and a trial.[7] The court held that no right of access to preliminary hearings arose out of the first amendment to the United States Constitution.[8]

The petitioner urged the court to repudiate its conclusion in *San Jose Mercury-News* that the first amendment does not provide a right of access to a preliminary hearing. The newspaper relied on two recent United States Supreme Court cases, *Globe Newspaper Co. v. Superior Court*[9] and *Press-Enterprise Co. v. Superior Court,*[10] to support its argument.

The Court in *Globe* held that before a state may deny access it must show that the denial is necessary to serve a compelling governmental interest and is narrowly tailored for that purpose.[11] The statute involved in *Globe,* requiring mandatory closure, was not narrowly tailored and the Court found that a case-by-case determination of the necessity of closure would adequately protect the state's interests. In *Press-Enterprise,* the Court held that the preference for openness will be overcome by a finding that closure is "essential to preserve higher values."[12]

The cases relied on by the petitioner were distinguishable, however. They involved the right of access to trials, rather than to preliminary hearings. The main concern in those cases was with the

6. *Id.* at 503-06, 638 P.2d at 657-60, 179 Cal. Rptr. at 774-77. The qualified right of access developed out of a long history of openness. *Id.* at 506, 638 P.2d at 559-60, 179 Cal. Rptr. at 776-77. This traditional openness "guards against persecution or favoritism, increases public awareness of the judicial process, inspires confidence in the criminal justice system, and serves the cathartic needs of the community." *Id.* at 505, 638 P.2d at 659, 179 Cal. Rptr. at 776. *See also Gannett Co.,* 443 U.S. at 412-15 (Blackmun, J., concurring in part and dissenting in part).

7. 30 Cal. 3d at 505, 638 P.2d at 569, 179 Cal. Rptr. at 776 ("preliminary hearings, unlike trials, were traditionally private at common law.").

8. *Id.* at 506, 638 P.2d at 660, 179 Cal. Rptr. at 777.

9. Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982) (Massachusetts statute mandating closure during testimony of minor sex victims found to be too broad).

10. Press-Enterprise Co. v. Superior Court, 104 S. Ct. 819 (1984) (voir dire closure invalid due to trial judge's failure to consider alternative measures).

11. *Globe,* 457 U.S. at 603-07. It was noted that the state interest supporting the restriction was determinative; not the historic openness of the type of proceeding. *Id.* at 605 n.13.

12. *Press-Enterprise,* 104 S. Ct. at 824. The Court also relied on the "compelling interest" test stated in *Globe* to support its finding. *Id.*

public interest;[13] the concern in this case was with prejudice to the defendant. Neither case, therefore, warranted reversal of the California Supreme Court's decision in *San Jose Mercury-News* that the first amendment's right of access does not extend to preliminary hearings.

Petitioner's additional claim of conflict with the California Constitution was rejected as well, based on the legislature's authority to favor some rights over others. The legislature reasonably intended section 868 to give a defendant's fair trial rights precedence over the public's access rights; particularly in cases where the danger of prejudice to the defendant is strong.

Thus, section 868 survived both federal and state constitutional challenges, and the court chose to reaffirm its decision in *San Jose Mercury-News.*

III. THE STATUTORY RIGHT OF ACCESS

Section 868 was amended in 1982 to limit the defendant's right to closure.[14] The amended section now requires a finding by the magistrate that closure is *necessary* to protect the defendant's right to a fair trial. Thus, the court was required to determine the appropriate standard to be applied in deciding when exclusion of the public is "necessary."

The petitioner urged the court to require the defendant to show that closure is strictly and inescapably necessary to protect the defendant's fair trial rights.[15] The defendant suggested the proper test should be a finding of reasonable likelihood of substantial prejudice which would impinge on the defendant's right to a fair trial.[16]

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13. The interests at stake were the physical and psychological well-being of minor sex victims in *Globe,* and the privacy of prospective jurors in *Press-Enterprise.*

14. The amended portion reads:

> The examination shall be open and public. However, upon the request of the defendant and a finding by the magistrate that exclusion of the public is necessary in order to protect the defendant's right to a fair and impartial trial, the magistrate shall exclude from the examination every person except [certain enumerated officials].

CAL. PENAL CODE § 868 (West Supp. 1985).

15. The test urged by the petitioner derives from the standard found in United States v. Brooklier, 685 F.2d 1162 (9th Cir. 1982). Under that test, the defendant may satisfy his burden by showing:

> (1) "a substantial probability that irreparable damage to his fair-trial right will result from conducting the proceeding in public;" (2) "a substantial probability that alternatives to closure will not protect adequately his right to a fair trial;" and (3) "a substantial probability that closure will be effective in protecting against the perceived harm."

Id. at 1167 (quoting *Gannett Co.,* 443 U.S. at 440-42 (Blackmun, J., concurring in part and dissenting in part)).

16. *See supra* note 3. Justice Powell rejected Justice Blackmun's test, *supra* note 15, on the grounds that it was "inflexible and could prejudice defendant's right and disserve society's interest in the fair and prompt disposition of criminal trials." 37 Cal. 3d

A. Legislative History

As introduced, Assembly Bill Number 277 established the requirement that necessity be shown before closure of a preliminary hearing. The bill as adopted, however, provides no definition of the word "necessary." In the court's view, this lack of definition evidenced a legislative intent to allow the courts to determine the appropriate standard to be applied in balancing the public's right of access against the fair trial rights of a defendant.[17]

B. Policy Pros and Cons

In *San Jose Mercury-News,* the court discussed policy factors favoring open preliminary hearings. Societal interests, such as exposure of government activities to public view, are best served by granting the public and the press access to court proceedings.[18] Preliminary hearings are an important step in the accusatorial process and are similar to trials in many ways.[19] In fact, these hearings are often the only judicial proceeding to take place during a criminal prosecution. The public's right of access to preliminary hearings should not, therefore, be casually denied. Factors supporting the defendant's right to closure were also expressed in *San Jose Mercury-News.* These factors influenced the selection of the appropriate standard.[20]

The court rejected the view that a magistrate must find that an

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at 778-79, 691 P.2d at 1030, 209 Cal. Rptr. at 364 (discussing Justice Powell's concurring opinion in *De Pasquale*).

17. The court reviewed the original, amended, and final versions of the bill to reach this conclusion. *Id.* at 779-80, 691 P.2d at 1030-31, 209 Cal. Rptr. at 364-65. "Clear and present danger" language was originally used. The bill was amended in committee to require a "preponderant probability" of clear and present danger. At the time of final approval, however, such language had been deleted, leaving the word "necessary" undefined. *Id.*

18. *See supra* note 6. Preliminary hearings further serve as a forum for raising issues of police misconduct or the exclusion of evidence, issues not otherwise exposed to the public eye.

19. Preliminary hearings resemble trials in several ways: the calling of witnesses; the use of cross-examination; and each side's incentive to prevail. Apparently, the court felt the similarities supported opening preliminary hearings to the public, in accordance with recognized legislative intent. The right of access is not absolute, however. 37 Cal. 3d at 782, 691 P.2d at 1032, 209 Cal. Rptr. at 366.

20. The fact that preliminary hearings are often one-sided, with evidence introduced only by the prosecution, can be misleading to public observers. Evidence may be exposed to the media which will be inadmissible at trial. There is an additional concern of prejudicing the public with publicity adverse to the defendant to the extent that an impartial jury would be difficult to select. 37 Cal. 3d at 780-81, 691 P.2d at 1031, 209 Cal. Rptr. at 365. *See also San Jose Mercury-News,* 30 Cal. 3d at 512, 638 P.2d at 663-64, 179 Cal. Rptr. at 780-81.

open hearing will actually deny the defendant a fair trial.[21] The standards contemplated by the legislature prior to the actual amendment of section 868 indicated that a lesser standard than a finding of actual prejudice was intended.[22] Yet, the court recognized a legislative intent to make open preliminary hearings the rule rather than the exception.[23] Accordingly, the court adopted a test which requires the defendant to make a substantial showing of possible prejudice.

The court based its conclusion on its consideration of the language of section 868 as finally amended, the statute's legislative history, and the policy factors involved.[24] In order to close a preliminary hearing, the magistrate must find a reasonable likelihood of substantial prejudice which would impinge on the defendant's right to a fair trial.[25] When such a situation occurs, the defendant's right to a fair trial takes precedence over the public's right of access.

IV. SEPARATE OPINIONS

In a separate concurring opinion, Justice Grodin stated that the only question for the court was "whether the First Amendment requires a *greater* right of access than the Legislature has seen fit to establish by statute."[26] Believing that it did not, Justice Grodin agreed with the majority's establishment of a substantial showing requirement. He found it consistent with the mandates of the first amendment.

Justice Lucas, in another separate opinion, concurred in the judgment but dissented against the majority's analysis. He argued that a showing of reasonable likelihood is the equivalent to a showing of ne-

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21. Because a preliminary hearing takes place at an early stage in the prosecution, the defendant may not have the information or knowledge to make a showing that prejudice will in fact result if the hearing is left open to the public. The magistrate is asked to speculate as to the extent of possible prejudice. 37 Cal. 3d at 781, 691 P.2d at 1032, 209 Cal. Rptr. at 366.

22. *Id.* *See also supra* note 17 and accompanying text.

23. *Id.* The combined use of the terms "necessary," "clear and present danger" and "preponderant probability" indicated that a requirement of a *substantial* showing was contemplated by the legislature. Thus, the burden is placed on the defendant to make an affirmative demonstration of the potential adverse affect of a public hearing. If no showing is made, public access cannot be denied.

24. *Id.*

25. The burden is on the defendant to make such a showing. The prosecution or the media may, however, overcome the defendant's showing by demonstrating, by a preponderance of the evidence, that there is no reasonable likelihood of prejudice. If the prosecution fails to overcome the defendant's showing, it would be error for the magistrate to deny closure. *Id.* at 782, 691 P.2d at 1032, 209 Cal. Rptr. at 366. Thus, the court granted the defendant an absolute right to closure, but only when a reasonable likelihood of substantial prejudice is established.

26. *Id.* at 782-83, 691 P.2d at 1033, 209 Cal. Rptr. at 367 (Grodin, J., concurring) (emphasis in original). It was Justice Grodin's opinion that the majority unnecessarily reached the conclusion that no right of access to preliminary hearings arises out of the first amendment.

cessity, as required by section 868. The defendant should be required to show at least a substantial probability of prejudice in order to prevail.[27] Justice Lucas found no such showing here, but concurred in the judgment because the trial was complete and the case therefore moot.

VI. DISCOVERY

A. *A plaintiff in an intentional infliction of emotional distress action need not disclose information allegedly exchanged between herself and her attorney regarding the health effects of chemical exposure:* Mitchell v. Superior Court.

In *Mitchell v. Superior Court,* 37 Cal. 3d 591, 691 P.2d 642, 208 Cal. Rptr. 886 (1984), the real parties in interest [defendants] contended that information sought in discovery was not privileged, or, in the alternative, that any privilege that existed had been waived. The plaintiff claimed in her complaint, inter alia, that the makers of a pesticide, DBCP, contaminated the water supply and caused "considerable emotional pain, anguish and distress, since they [real parties in interest] are aware that DBCP and the other chemicals are highly toxic and carcinogenic and can produce sterility and genetic damage."

Interrogatories propounded to the plaintiff revealed evidence that information regarding possible effects of DBCP had been discussed between the plaintiff and her attorney. The plaintiff, at a deposition, also stated that the information she had acquired from all sources about the possible effects of DBCP had contributed to her emotional distress. Upon the plaintiff's refusal to answer questions regarding her conversations with her attorney, a motion to compel answers was granted. The plaintiff appealed that decision.

The court found the communications to lie within the attorney-client privilege as defined in Evidence Code section 952. As there is no distinction in the Code between factual information and legal advice, there was no question that the communications were privileged.

No waiver of privilege was found by the plaintiff's mere acknowledgment that the communications took place with her attorney. Though defendant contended that a significant part of the communication had been disclosed by the plaintiff's statements, the court cited *Travelers Insurance Co. v. Superior Court,* 143 Cal. App. 3d 436, 191

27. *Id.* (Lucas, J., concurring in part and dissenting in part).

Cal. Rptr. 871 (1983), which held that answers in the discovery process must be "wide enough in scope and deep enough in substance" to be significant enough to waive the privilege. As the plaintiff did not reveal any of the sought-after information in discovery, there was no waiver of the attorney-client privilege.

The defendants also contended that there should be an implied waiver of the attorney-client privilege due to the intentional infliction of emotional distress claim. The defendants cited authority which indicated that the attorney-client communications should be disclosed to determine the genuineness and reasonableness of the plaintiff's claim.

The court rejected this implied waiver theory. As only the plaintiff's state of mind was at issue, no waiver of the privilege was permitted. The court emphasized that "[p]rivileged communications do not become discoverable because they are related to issues raised in the litigation . . . . If tendering the issue of damages . . . waived the privilege, there would be no privilege, and Evidence Code section 954 would be meaningless."

The court concluded that the issue of damages in an intentional infliction of emotional distress action "can be properly litigated without such a broad invasion of the attorney-client privilege." Much of the plaintiff's investigative efforts and trial strategy would become discoverable if such an implied waiver existed. Moreoever, the focus of the intentional infliction cause of action is the *defendant's conduct;* the genuineness of the plaintiff's claims stems from these facts (which the plaintiff must prove) and "objective scientific and expert evidence, as opposed to any confidential communications" should be the focus of the litigation. Therefore, the court held the communications in question privileged with no waiver, express or implied, of the attorney-client privilege.

B. *A defendant in a criminal action arising from an automobile accident has a "proper purpose" within the meaning of Vehicle Code sections 20012 and 20014 to discover reports of accidents at the same location:* State *ex rel.* Department of Transportation v. Superior Court.

In *State ex rel. Department of Transportation v. Superior Court,* 37 Cal. 3d 847, 693 P.2d 804, 210 Cal. Rptr. 219 (1985), Phyllis Hall was charged with five counts of murder, five counts of vehicular manslaughter, and one count of drunk driving after an automobile accident in which she was a driver. A subpoena duces tecum was served on the California Department of Transportation requesting accident reports made during the years 1980 through 1983 concerning acci-

dents at the same location. The Department only furnished Ms. Hall with a report of her own accident.

Ms. Hall contended that she had a "proper purpose" for the reports as Vehicle Code section 20012 requires. Section 20012 provides that the contents of all reports, including the names and addresses of persons involved in, or witnesses to an accident shall be disclosed to any person who may have a proper interest therein. Moreover, Ms. Hall was willing to accept the reports in question with the names of parties and other identifying data deleted, subject to a later request for this information accompanied by a showing of particularized need.

Because the liberal policy of discovery is not endless in its scope, the court noted two requirements that must be satisfied to allow discovery of the requested reports. First, the plaintiff must show that the requested information will facilitate the ascertainment of the facts and a fair trial. There must be more than a desire to benefit from the state's investigation of a crime. Second, the information sought must be described with a "sufficient degree of specificity." More than a mere fishing expedition is essential to satisfy this requirement. In this case, the reports could lead to relevant and admissible evidence, and the reports were described with sufficient particularity. Therefore, the court held that the plaintiff showed a proper purpose under the Vehicle Code and was entitled to receive the reports.

VII. ELECTION LAW

Political parties are not prohibited by article II, section 6 of the constitution from endorsing, supporting or opposing candidates for nonpartisan offices: **Unger v. Superior Court.**

In *Unger v. Superior Court,*[1] the supreme court was asked to decide whether a political party and its governing body are prohibited by article II, section 6 of the California Constitution[2] from endorsing a campaign not to confirm justices of the supreme court at a general election. The question arose after the dismissal by the superior court

1. 37 Cal. 3d 612, 692 P.2d 238, 209 Cal. Rptr. 474 (1984). Opinion by Mosk, J., with Files and Janes, JJ., concurring. Separate concurring opinions by Grodin, Acting C.J., and Lucas, J. Separate dissenting opinion by Sims, J., with Potter, J. Justices Files, Janes, Sims and Potter are retired Associate Justices of the Court of Appeal sitting under assignment by the Acting Chairperson of the Judicial Council.

2. Article II, section 6 states that, "[j]udicial, school, county, and city offices shall be nonpartisan." CAL. CONST. art. II, § 6 [hereinafter referred to as section 6].

of a petition for a writ of mandate, filed by two registered voters, seeking to restrain the Republican Party from endorsing a campaign not to confirm justices. The supreme court denied the writ and held that political parties were *not* prohibited from endorsing or otherwise supporting such campaigns.

I. BACKGROUND

The petitioners filed their petition alleging that the Republican Party, the real party in interest on appeal, violated article II, section 6 of the state constitution and sections 9276 and 9440 of the Elections Code, which set out the guidelines for party campaigns.[3] The Code provides for campaigns on behalf of candidates of the Republican Party. Because the candidates in this case were judicial nominees and thus nonpartisan, the petitioners alleged that the use of party assets in a campaign for nonconfirmation of these justices was improper.

The trial court entered an order of dismissal. The petitioners sought a writ of mandate vacating the order, claiming that an appeal from it would be an inadequate remedy due to the impending election. The election was held prior to the court's decision, rendering the relief sought by petitioners unavailable. Although technically moot, the court addressed the issues presented due to the general public interest in the question and because of the likelihood of similar situations recurring in future elections.[4]

II. THE MAJORITY OPINION

The majority began its analysis by noting that article II, section 6 sets out the general principle that judicial offices, among others, are nonpartisan in nature; the section does not purport to restrict or prohibit specific conduct by a political party. The court viewed its task as determining whether or not the conduct of the Republican Party which the petitioners sought to enjoin violated this principle of nonpartisanship. In its consideration of the question, the court looked at the legislative intent and purpose behind section 6 and at the historical role of political parties in nonpartisan elections.

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3. Section 9276 states, "[The Republican Party State Central Committee] shall conduct party campaigns for this party and in behalf of the candidates of this party. It shall appoint committees and appoint and employ campaign directors and perfect whatever campaign organizations it deems suitable or desirable and for the best interest of the party." CAL. ELEC. CODE § 9276 (West 1977).

Section 9440 states, "A committee shall have charge of the party campaign under general direction of the state central committee or of the executive committee selected by the state central committee." CAL. ELEC. CODE § 9440 (West 1977).

4. 37 Cal. 3d at 614, 692 P.2d at 239, 209 Cal. Rptr. at 475. The confirmation of the justices was unsuccessfully opposed by the Party. *Id.*

A. Legislative Intent and Purpose

The court narrowed its inquiry further by focusing its analysis, not on whether a political party has legislative authority to support or oppose candidates for nonpartisan office, but on whether or not there are any restraints against such conduct.[5] Only two restrictions were identified by the court as legislative promotion of the nonpartisanship principle. The form of elections for nonpartisan office is regulated in various respects,[6] and the only restraint imposed on the conduct of a political party is that it may not nominate a candidate for a nonpartisan office.[7] Because no other limitation exists, the court inferred a legislative intent that no additional restriction be applied.[8]

As further support for this conclusion, factors were identified to defeat the restrictions asserted by the petitioners. The court recognized that broad discretion has been granted by the legislature to the governing bodies to act on behalf of the party.[9] It has also been the custom of the governing bodies to endorse or assist candidates for nonpartisan offices.[10] Furthermore, the legislature had ample oppor-

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5. *Id.* at 615, 692 P.2d at 240, 209 Cal. Rptr. at 476. The court narrowed its focus in this manner after examining legislative treatment of political parties in the past.

Originally, parties were considered private associations, free from legislative constraint in their selection of candidates for office. *See, e.g.,* Britton v. Board of Election Comm'rs, 129 Cal. 337, 61 P. 1115 (1900); People v. Cavanaugh, 112 Cal. 674, 44 P. 1057 (1896). Custom and usage prevailed and nominations were made by party conventions. In 1907, the state's power to regulate political parties emerged. "[T]he state has seen fit to declare that political parties shall be as to their mode of holding conventions and nominating candidates for public office, regarded as public bodies whose methods are to be controlled by the state." Katz v. Fitzgerald, 152 Cal. 433, 435, 93 P. 112, 113 (1907). Today, the Code has provisions regulating the organization and obligations of political parties and of their governing bodies. *See* CAL. ELEC. CODE §§ 8100-9956 (West 1977).

6. Declarations of candidacy and other nomination papers may not refer to party affiliation, CAL. ELEC. CODE § 6401.5 (West 1977), nor may the name of the party to which a nonpartisan candidate belongs appear on the ballot. *Id.* § 10200.5. Additionally, partisan and nonpartisan offices are to be listed separately on the ballot. *Id.* § 10207.

7. The Elections Code defines "nonpartisan office" as "an office for which no party may nominate a candidate." CAL. ELEC. CODE § 37 (West 1977). The section thereafter lists "[j]udicial, school [sic] county, and municipal offices" as nonpartisan positions. *Id.* A partisan office is defined as one "for which a party may nominate a candidate." *Id.* § 36.

8. 37 Cal. 3d at 616, 692 P.2d at 240-41, 209 Cal. Rptr. at 476-77.

9. Supporting candidates whose views are consistent with party beliefs is seen by the court as enhancing party interests. Presumably the court would agree that endorsement of the nonconfirmation of certain officers is an action which also may properly be done on behalf of the party.

10. *See* Unger v. Superior Court, 102 Cal. App. 3d 681, 684 & n.4, 162 Cal. Rptr.

tunity to restrict such activities of the parties had it so desired. In fact, the court refers to the 1963 adoption of section 11702 of the Elections Code, which prohibits endorsement of any party candidate for *partisan* office in the primaries.[11] There is no comparable prohibition for nonpartisan office, which raises the inference that the legislature never intended for such a limitation to apply.

The court concluded that the legislature has not prohibited the practice and custom of endorsing, supporting or opposing candidates for nonpartisan office by political parties. This conclusion would stand, unless section 6 expressed a contrary intent.

B. The History of Section 6

In 1926, article II, section 2 3/4 was added to the California Constitution. It represented the first constitutional provision relating to nonpartisan office.[12] The term "nonpartisan office" was undefined then, as it is now. However, prior to the adoption of section 2 3/4, there were a number of provisions, similar to present day code requirements,[13] which promoted the nonpartisan character of elections. The court surmised that the undefined term was intended to refer to "an office filled by an election nonpartisan in form, and for which a party could not nominate a candidate."[14]

In 1972, section 2 3/4 was deleted from the constitution and replaced by section 5. The intention to retain the guarantee of the nonpartisanship nature of the offices listed was expressed in the Revision Committee's notes and in the ballot pamphlet distributed to voters. No change in meaning was intended, "except that city offices were added to the list of nonpartisan offices, in recognition of existing

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611, 613 & n.4 (1980) (declarations filed by chairpersons of the local central committees state that their committees had endorsed and/or supported candidates for judicial and other nonpartisan positions for many years), *cert. denied,* 449 U.S. 1131 (1981).

11. Section 11702 was intended to prevent deception of the public in political campaigns. *See* 37 Cal. 3d at 617 n.8, 692 P.2d at 241 n.8, 209 Cal. Rptr. at 477 n.8. The section reads, in pertinent part, "[t]he state convention, state central committee, and the county central committee in each county shall not endorse, support, or oppose, any candidate for the nomination by that party for partisan office in the direct primary election." CAL. ELEC. CODE § 11702 (West 1977).

This section was recently declared unconstitutional by a federal district court in San Francisco County Democratic Central Committee v. Eu, No. C-83-5599, on the ground that it denies political parties first amendment rights. *See also* Weisburd, *Candidate-Making and the Constitution: Constitutional Restraints on and Protections of Party Nominating Methods,* 57 S. CAL. L. REV. 213 (1984).

12. CAL. CONST. art. II, § 2 3/4 (repealed in 1972 and replaced by what is now section 5). It provided that judicial, school, county, township or other nonpartisan office candidates were elected by majority vote at the primary. *See* 37 Cal. 3d at 617, 692 P.2d at 241, 209 Cal. Rptr. at 477.

13. *See supra* note 6. *See also* 37 Cal. 3d at 617 n.9, 692 P.2d at 241 n.9, 209 Cal. Rptr. at 477 n.9.

14. *Id.* at 617, 692 P.2d at 242, 209 Cal. Rptr. at 478. The court also noted at this point that petitioners presented no evidence to the contrary.

practice."[15] In 1976, section 5 was renumbered section 6, without change.[16]

From the foregoing analysis, the court concluded that section 6, at issue in this case, was not meant to impose greater restraints on political parties than those which existed prior to the voters' adoption of it as section 5 in 1972. The Republican Party thus acted within its rights in its opposition to the confirmation of justices.

C. Rejection of Petitioners' Claims

Petitioners pointed to an earlier court of appeal case, in which Unger was involved, as contrary authority to the conclusion reached by the supreme court.[17] That case, referred to as *Unger I* by the court, utilized a broader definition of "nonpartisan" and held that the party committee was prohibited from supporting or opposing candidates for the board of a college school district, a nonpartisan office.

The court gave precedence to its analysis in the present case and disapproved the holding in *Unger I.* The conclusion reached in *Unger I* was not the result of a thorough analysis of the legislative intent and purpose of the constitutional provision and of the historical role of political parties, as was done by the court here.[18] The appellate court had further failed to realize that there was no express limitation in the section, or elsewhere, regarding the type of conduct involved. It simply chose a very broad definition of nonpartisanship in its decision, which the court here disapproved.[19] The court also found fault with the petitioners' contention that a "poll" of party member preference is required by section 6 before the governing

15. *Id.* at 618, 692 P.2d at 242, 209 Cal. Rptr. at 478 (footnote omitted).

16. *Id.*

17. Unger v. Superior Court, 102 Cal. App. 3d 681, 162 Cal. Rptr. 611 (1980), *cert. denied,* 449 U.S. 1131 (1981). The real party in interest there was the Marin County Democratic Central Committee which endorsed and planned to support candidates for the governing board of the Marin Community College District. The petitioner, Unger, was a candidate who was not endorsed and sought to restrain the committee's action, claiming it violated section 6. The appellate court agreed with the petitioner.

The definition of "nonpartisan" used in *Unger I* was taken from WEBSTER'S NEW INTERNATIONAL DICTIONARY (3d ed. 1965): "not affiliated with or committed to the support of a particular political party: politically independent . . . viewing matters or policies without party bias . . . held or organized with all party designations or emblems absent from the ballot . . . composed, appointed or elected without regard to political party affiliations of members . . . ." 102 Cal. App. 3d at 685, 162 Cal. Rptr. at 613.

18. 37 Cal. 3d at 619, 692 P.2d at 242-43, 209 Cal. Rptr. at 478-79.

19. *Id.*

body of a political party can endorse or support a candidate.[20] The opinion of the Attorney General relied on by petitioners was seen as being more favorable to the real party in interest because it recognized the principle that the governing bodies of a party have powers defined by custom and usage of which the law has not deprived them.[21] The argument was rejected on the additional ground that the section relied on by petitioners, section 11702 of the Elections Code, has been declared unconstitutional by a federal district court.[22]

D. Conclusion

The majority thus concluded that article II, section 6 of the California Constitution did not prohibit political parties or their governing bodies from supporting, endorsing or opposing candidates for nonpartisan office. The writ sought by petitioners was accordingly denied.

III. CONCURRING OPINIONS

Justice Grodin, Acting Chief Justice, agreed with many of the views expressed in the dissent, but concurred in the majority's opinion due to first amendment considerations.[23] Support for these considerations was found in the United States Supreme Court's decision in *Buckley v. Valeo*.[24] The purpose of the first amendment is to protect the free discussion of not only ideas but of governmental affairs, including the discussion of candidates and campaigns.[25] Because an interpretation of section 6 was suggested which would effectively prohibit political expression, it must be demonstrated that a compelling state interest is being served and that the provision is narrowly drawn to avoid unnecessary infringement on first amendment rights.[26] No such demonstration was made in this case and thus this restrictive interpretation of section 6 failed. The rationale for reach-

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20. *Id.* The petitioners based their claim of a "poll" requirement on an opinion of the Attorney General. 23 Op. Cal. Att'y Gen. 119 (1954). The court distinguished that opinion from this case. 37 Cal. 3d at 619-20, 692 P.2d at 243, 209 Cal. Rptr. at 479.

21. 37 Cal. 3d at 620, 692 P.2d at 243, 209 Cal. Rptr. at 479.

22. *See supra* note 11. *See also* Concerned Democrats of Florida v. Reno, 458 F. Supp. 60, 64-65 (S.D. Fla. 1978) (Florida statute prohibiting political parties from endorsing candidates for judicial office held unconstitutional).

23. 37 Cal. 3d at 620-21, 692 P.2d at 244, 209 Cal. Rptr. at 480 (Grodin, Acting C.J., concurring). This Justice agreed with the dissent that the idea of political parties becoming directly involved in the election of judicial officers was unappealing. He felt that article II, section 6 was even amenable to an interpretation which would prohibit such conduct. Due to the rule of construction which calls for avoidance of raising doubts about the constitutionality of a provision, however, Justice Grodin found that interpretation to be questionable under the first amendment. *Id.*

24. 424 U.S. 1 (1976).

25. *Id.* at 14-15.

26. 37 Cal. 3d at 622, 692 P.2d at 244-45, 209 Cal. Rptr. at 480-81 (Grodin, Acting C.J., concurring). *See also* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978); Buckley v. Valeo, 424 U.S. 1 (1976).

ing this conclusion was brought out under a strict scrutiny analysis of the exact means employed by the state to further its interests.

One of the state's interests was said to be maintenance of judicial integrity and impartiality.[27] This contention was premised on the assumption that judges would, without the prohibition suggested by the petitioners, be beholden or appear to be beholden to political parties. The Supreme Court rejected a similar argument in *Buckley,* which attempted to justify a limitation on campaign expenditures.[28] Here Justice Grodin analogized that "[i]f the state's interest in preventing corruption or the appearance of corruption cannot justify a limit on independent campaign expenditures, surely it cannot justify an absolute prohibition on all forms of expression relating to a campaign."[29]

A second assumption underlying the judicial integrity argument was that the people will blindly follow the party's choices. This belief, even if true, was insufficient to justify the prohibition suggested here to prevent political parties from endorsing candidates for nonpartisan offices. Such a prohibition on this basis would amount only to a restriction of speech of some elements of society to the benefit of other elements.[30]

The fundamental problem with the position that a prohibition is necessary to protect judicial integrity was that the same arguments can be made with respect to endorsements by groups other than official political parties. They would remain free to endorse, support or oppose candidates for judicial office as they pleased.[31] This distinction raised serious equal protection problems and no state interest compelling enough to justify the distinction is suggested.[32]

In conclusion, Justice Grodin found that the risks suggested are inherent to a system which elects its judicial officers. Partisan endorse-

27. 37 Cal. 3d at 622, 692 P.2d at 245, 209 Cal. Rptr. at 480 (Grodin, Acting C.J., concurring).

28. 424 U.S. at 45. The Court held that the government's interest in this regard was sufficient to justify a limit on contributions made directly to a candidate, but was insufficient justification for a limit on contributions made on behalf of a candidate.

29. 37 Cal. 3d at 623, 692 P.2d at 245-46, 209 Cal. Rptr. at 481-82 (Grodin, Acting C.J., concurring) (footnote omitted).

30. *Id.* at 623-24, 692 P.2d at 246, 209 Cal. Rptr. at 482. *See also Bellotti,* 435 U.S. at 791 n.31; Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 96-97 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976); *Buckley,* 424 U.S. at 48-49.

31. 37 Cal. 3d at 624, 692 P.2d at 246, 209 Cal. Rptr. at 482 (Grodin, Acting C.J., concurring). Such other groups might be unofficial political parties or partisan organizations and special interest groups. *Id.*

32. *Id.* at 624 n.6, 692 P.2d at 246 n.6, 209 Cal. Rptr. at 482 n.6.

ments, however, do not pose such a threat as to justify limits on the freedom of expression of political parties. Because article II, section 6 is amenable to a less restrictive interpretation, Justice Grodin concurred in the interpretation reached by the majority.[33]

Justice Lucas wrote a separate concurring opinion in which he agreed with the majority's interpretation of the scope of the restrictions in section 6. Recognition was also expressed, however, of policy considerations raised by the dissent regarding the preservation of the nonpartisan nature of judicial offices.[34] In conclusion, Justice Lucas made a mild suggestion to the legislature to fashion a permissible limitation on endorsements by political parties.

IV. THE DISSENT

The dissent reached the conclusion that the people, in adopting article II, section 6 of the constitution, intended a broader meaning of nonpartisanship than that established by the majority. Upon consideration of the same factors examined by the majority, the background and purpose of section 6 and the historical role of political parties in nonpartisan elections, the dissent would prohibit a political party from lending the authority of its name to a campaign to support or oppose candidates for nonpartisan office.[35] The issue thus raised was whether the first amendment precludes a state from excluding established partisan interests from elections for nonpartisan office. Insofar as no individual or voluntary association of such individuals is restrained, the state has, in the dissent's view, properly served a compelling interest, that interest being the preservation of the nonpartisan nature of judicial office, properly protected by means of limiting the elections in which political parties may participate.[36]

A. The Dissent's View of the Purpose of Section 6 and the Intent of the Voters

The "plain meaning" of section 6 is laid out in *Unger I*.[37] Presumably the voters knew that registered voters of each party had the power to nominate candidates for partisan office in the primary election. The dissent contended that the voters, in adopting section 6, did not intend only to restrict political parties from nominating candidates to nonpartisan office, but intended also to restrain them from

33. *Id.* at 624-25, 692 P.2d at 247, 209 Cal. Rptr. at 483.

34. *Id.* at 625, 692 P.2d at 247, 209 Cal. Rptr. at 483 (Lucas, J., concurring). These policy considerations amount to a "strong state interest" according to Justice Lucas, yet he felt Justice Grodin's first amendment analysis was premature. *Id.*

35. *Id.* (Sims, J., dissenting).

36. *Id.* at 625-26, 692 P.2d at 247, 209 Cal. Rptr. at 483.

37. *See supra* note 17.

endorsing or supporting such candidates as well.[38] In selecting nonpartisanship for judicial and other specified offices, the people expressed their desire to have an independent judiciary.[39]

Nonpartisanship serves a number of purposes, all aimed at the preservation of the integrity of the judicial branch.

> It permits the voter to focus on the intelligence, experience and integrity of the candidates rather than their political affiliations. It frees the candidates from obligation to a political organization that may later seek to exact favors for former or future support. It permits the nomination and reelection of qualified candidates without the necessity of securing a nomination in a partisan election.[40]

By allowing political parties to endorse and support judicial candidates, the dissent believed the majority had subverted the purposes behind section 6. Political parties were created to advance the partisan views of their members, and by subjecting judicial candidates to their demands the integrity and independence of the judiciary was endangered. The voting public "[c]ertainly . . . had these evils in mind" when section 6 was adopted.[41]

The majority opinion was further criticized for adopting the Attorney General's rationale, disapproved in *Unger I,* which concluded that no prior statute prohibited party endorsements, therefore, the present constitutional provision was not intended as such a prohibition.[42] The dissent strenuously argued that the intent of section 6 was to define nonpartisanship by its common meaning. The majority presented no reason why some other meaning should attach, and, according to constitutional provision, the section is mandatory and prohibitory, and thus self-executing as well.[43] "The people used plain language in their organic law to express their intent in language which cannot be misunderstood, and we must hold that they meant what they said."[44]

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38. 37 Cal. 3d at 627-28, 692 P.2d at 249, 209 Cal. Rptr. at 485 (Sims, J., dissenting).

39. *Id.* at 628 n.4, 692 P.2d at 249 n.4, 209 Cal. Rptr. at 485 n.4.

40. *Id.* at 628, 692 P.2d at 249, 209 Cal. Rptr. at 485 (footnote omitted).

41. *Id.* at 628, 692 P.2d at 250, 209 Cal. Rptr. at 486.

42. *See* 59 Op. Cal. Att'y Gen. 60, 63 (1976).

43. 37 Cal. 3d at 629-30, 692 P.2d at 250, 209 Cal. Rptr. at 486 (Sims, J., dissenting). Article I, section 26 states, "[t]he provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." CAL. CONST. art. I, § 26.

44. 37 Cal. 3d at 630, 692 P.2d at 251, 209 Cal. Rptr. at 487 (Sims, J., dissenting) (quoting Oakland Paving Co. v. Hilton, 69 Cal. 479, 512, 11 P. 3, 18 (1886)).

Two legislative attempts were made to impose a mandatory primary system, however, both Acts were held unconstitutional. In the first instance, the court expressed misgivings about the state's power to regulate political parties. The Act, however, was held unconstitutional on technical grounds.[45] The second attempt involved an amendment to the Political Code which provided for mandatory election of delegates to conventions. This was held unconstitutional also.[46]

Article II, section 2 1/2 was then adopted by the people in 1900. This gave the legislature the power to provide for a direct primary.[47] The court upheld statutes enacted following the constitutional amendment in a series of cases.[48] Once the direct primary system was established, the major role of political parties in California was to campaign for the success of nominees at the general election. Theoretically, this task is performed under the direction of each party's governing body.[49]

Tracing the steps taken to the establishment of judicial offices as nonpartisan offices, the dissent found that, in 1911, candidates for judicial and school offices were defined as nonpartisan.[50] In 1913, county and township officers were added to the list of nonpartisan offices and those were to be listed apart from partisan offices on the ballot.[51]

From the foregoing historical analysis, the dissent concluded that the legislature intended judicial, school, county and township elections to be free from partisan influence. Although code provisions allow a party to perform duties and services "for the benefit of the party,"[52] and according to the majority, such duties and services included party endorsements for nonpartisan offices, the dissent stressed that such acts must be limited to acts not prohibited by the constitution. The people, in adopting section 6, intended for candi-

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45. *See* Spier v. Baker, 120 Cal. 370, 52 P. 659 (1898).

46. *See* Britton v. Board of Election Comm'rs, 129 Cal. 337, 61 P. 1115 (1900).

47. Article II, section 2 ½ is now section 5. For a history of its revisions and renumbering, see 37 Cal. 3d at 631 n.6, 692 P.2d at 252 n.6, 209 Cal. Rptr. at 488 n.6 (Sims, J., dissenting).

48. Katz v. Fitzgerald, 152 Cal. 433, 93 P. 112 (1907); Schostag v. Cator, 151 Cal. 600, 91 P. 502 (1907); Rebstock v. Superior Court, 146 Cal. 308, 80 P. 65 (1905). In *Rebstock* and *Schostag*, the court upheld the legislative prescription of tests for voting rights in primary elections. In *Katz*, the state's interest in guarding the purity of primary elections was recognized as was the interest of political parties to reserve to their members control of their internal affairs. *See also supra* note 5.

49. 37 Cal. 3d at 632-33, 692 P.2d at 252, 209 Cal. Rptr. at 488. *See also* Friedman, *Reflections Upon the Law of Political Parties*, 44 CAL. L. REV. 65, 69 (1956).

50. 37 Cal. 3d at 633, 692 P.2d at 253, 209 Cal. Rptr. at 489.

51. *Id.*

52. *See* CAL. ELEC. CODE §§ 8942, 9443, 9742, and 9852 (West 1977).

dates to nonpartisan offices to be elected without regard to their political affiliation. Thus, the dissent would not allow a political party to officially endorse or support a candidate for judicial office.

C. First Amendment Considerations

Based on assertions that the guarantees of freedom of speech and of association are violated by the conclusion that political parties cannot endorse candidates for nonpartisan office, the dissent examined the principles underlying the first amendment. As summarized in *Buckley,* the discussion of political issues is integral to the operation of our social and political systems.[53] Additionally, the freedom to associate is also protected by the first and fourteenth amendments, as recognized in *NAACP v. Alabama,*[54] and this includes, in particular, the freedom to associate with the political party of one's choice.[55]

Due to the importance of these freedoms, the state must show a compelling subordinate interest and employment of narrowly tailored means in order to sufficiently justify a restriction on speech or association.[56] It was conceded by the Republican Party that maintenance of judicial integrity is a compelling state interest. It argued, however, that the prohibition of party endorsements is not the least intrusive means available by which the state can further its interest. The dissent rebutted this contention by pointing to the intent of the people to keep judicial offices nonpartisan, as expressed by the adoption of section 6.[57] The dissent concluded that while political parties are prohibited from becoming officially involved in elections for nonpartisan office, this restriction does not infringe on any individual's right to associate with political parties nor does it infringe on an individual's or group's right to free speech.[58] "In fact the prohibition of partisan endorsement merely clears the air for free expression on the quality of the administration of justice, rather than reducing the se-

53. 424 U.S. at 14-15.

54. 357 U.S. 449, 460 (1958).

55. *See* Kusper v. Pontikes, 414 U.S. 51, 57 (1973).

56. 37 Cal. 3d at 637, 692 P.2d at 255, 209 Cal. Rptr. at 491 (Sims, J., dissenting).

57. The dissent also distinguished Concerned Democrats of Fla. v. Reno, 458 F. Supp. 60 (S.D. Fla. 1978), upon which the real party in interest relied. *See* 37 Cal. 3d at 637-38, 692 P.2d at 256, 209 Cal. Rptr. at 492 (Sims, J., dissenting).

58. 37 Cal. 3d at 639-41, 692 P.2d at 257-59, 209 Cal. Rptr. at 493-95 (Sims, J., dissenting). The court also rebuts the claim of a denial of equal protection of the laws. The nonpolitical groups which are left free to endorse nonpartisan elections are not state recognized entities, as are the political parties, and thus the impropriety of partisan influence on nonpartisan candidates is absent. The classification is therefore reasonable. *Id.* at 642, 692 P.2d at 259, 209 Cal. Rptr. at 495 (Sims, J., dissenting).

lection of candidates to a litmus test of endorsement by a given qualified political party."[59]

VIII. EVIDENCE

Trial court erred in admitting letters written by murder victim concerning the defendant; also erred in allowing experts who had viewed the letters to be questioned concerning their contents: **People v. Coleman.**

In *People v. Coleman*, 38 Cal. 3d 69, 695 P.2d 189, 211 Cal. Rptr. 102 (1985), the defendant, in a tragic turn of events, shot and killed his wife, son, and niece. His daughter was shot at but missed. He was charged with, and convicted of, two counts of first degree murder, one count of second degree murder, and assault with intent to commit murder. The defendant's relationship with his wife had not been blissful for the years prior to her death. Because their marriage was an interracial one, the defendant began to belive that there were conspiracies against him. His wife's infidelity only added to his problems. He was, however, found to be sane. The questions presented to the court on the defendant's appeal were whether the limited admission of letters written by the defendant's wife was proper and whether use of the letters by experts and by the prosecution on cross-examination was proper.

The letters in question described the victim's feelings of despair due to the many personal problems the couple had been having. She suggested that she was ready to face death, and that the defendant had twice before tried to hurt her. Most importantly, the letters indicated that the defendant had threatened to kill the family. The contents of the letters were entirely hearsay, but they were admitted by the trial court to impeach the defendant. Copies of the letters were made available to the jury.

In its analysis, the court weighed the probative value of the letters, for impeachment purposes, against the risk of unfair prejudice to the defendant. These statements from the grave, in hindsight, appeared truthful. With such inflammatory evidence, a limiting instruction could not be relied upon to prevent misuse of the letters. There was a substantial risk that they would be considered for the truth of the matters asserted therein and therefore should not have been admitted to impeach the defendant during cross-examination. The court ruled that it was prejudicial misconduct to do so.

Many experts were furnished with copies of the letters, which they considered in rendering their opinions as to the defendant's mental

59. *Id.* at 642, 692 P.2d at 260, 209 Cal. Rptr. at 496 (Sims, J., dissenting).

capacity. Evidence Code section 801 permits experts to use inadmissible evidence to form an opinion so long as that evidence is of a type that reasonably may be relied upon by an expert in forming an opinion. Cross-examination of an expert on the matter upon which his opinion is based is also permitted by Evidence Code section 721. During cross-examination of the defendant's experts, the prosecution tenaciously questioned the experts regarding the contents of the letters. The letters were not of major significance in the formation of the experts' opinions. The court was forced to balance the wide latitude given an advocate in cross-examination with the potential that the jury may misuse the evidence offered. The court held that the trial court abused its discretion by permitting the extensive questioning of the expert witnesses. The court reasoned that a more sanitized method of choosing which statements were to be used to attack the experts could have been fashioned to avoid the unfair prejudice of repeated reference to the letters' contents.

As to the propriety of use of the letters at all by the experts, the court, after a lengthy discussion of California law on the subject, reasoned that a case-by-case determination is required, focusing on "reasonable reliability." The trial court has broad discretion in this area. The court held that it was proper in this case for the experts to consider the letters in the formulation of their opinions.

IX. FAMILY LAW

A marital community is entitled to reimbursement for funds expended in the professional education of a spouse. This repayment is subject to an equal division between the spouses upon dissolution of marriage: In re **Marriage of Sullivan.**

The supreme court in *In re Marriage of Sullivan,* 37 Cal. 3d 762, 691 P.2d 1020, 209 Cal. Rptr. 354 (1984), was faced with the question of whether a spouse, who has made economic sacrifices to enable the other spouse to obtain an education, is entitled to compensation upon dissolution of marriage. Although the husband, who had been supported by his wife while in medical school, pointed to past precedent holding that a professional education is not community property, the court, in reliance upon the recently amended Family Law Act held that the community is entitled to reimbursement for expenses resulting from one spouse's professional education.

The Family Law Act's newly added section 4800.3 provides for "re-

imbursement" to the community upon dissolution "for community contributions to education or training of a party that substantially enhances the earning capacity of the party." CAL. CIV. CODE § 4800.3(b)(1) (West Supp. 1985). Community funds which are subject to reimbursement at dissolution include those expended for education and training or for the repayment of a student loan. *Id.* § 4800.3(a).

Since the pending case was remanded to the trial court and would not be final when section 4800.3 became effective on January 1, 1985, the court ruled that Janet Sullivan was entitled to reimbursement for her husband's professional education through her community property share at dissolution as provided in the statute.

Justice Mosk, both concurring and dissenting, attacked the majority's loose and misleading terminology in referring to a spouse's compensation for contributions to education. Justice Mosk correctly argued that the legislature intended that the community, and not the individual spouse, be entitled to reimbursement—that is, repayment of the community funds expended.

Finally, the court held that the trial court's judgment ordering the husband to pay the wife's attorney fees was not an abuse of sound judicial discretion. In considering the incomes and respective needs of the Sullivans, the court found that the husband, with a successful medical practice, could more easily shoulder the burden of legal fees. This case is treated more fully in California Practicum elsewhere in this issue.

X. JUVENILE LAW

Statements made in juvenile fitness hearing are inadmissible at trial: **Ramona R. v. Superior Court.**

I. INTRODUCTION

Should a juvenile's statements to either a probation officer or the court in a fitness hearing be admissible, substantive evidence at the minor's trial? The court in *Ramona R. v. Superior Court*[1] held that such statements were privileged and inadmissible.[2] Although this issue had been well settled in the past,[3] the passage of Proposition 8,

1. 37 Cal. 3d 802, 693 P.2d 789, 210 Cal. Rptr. 204 (1985). Justice Mosk delivered the majority opinion in which Chief Justice Bird and Justices Kaus, Broussard, Reynoso and Weil concurred. Justice Grodin submitted a separate concurring opinion. Justice Weil was sitting by assignment of the Chairperson of the Judicial Council.

2. *Id.* at 809-11, 693 P.2d at 794-95, 210 Cal. Rptr. at 209-10.

3. *See* Bryan v. Superior Court, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972), *cert. denied*, 410 U.S. 944 (1973), which held that a juvenile's statements are inadmissible at trial as substantive evidence when made at a fitness hearing.

which amended the California Constitution,[4] created an ambiguity that the court had to reconcile in *Ramona R.*

II. FACTUAL BACKGROUND

The case arose out of the brutal murder of the defendant's guardian. He had been shot with a handgun, stabbed repeatedly with a knife, and chopped with an axe.[5] The minor defendant turned herself in when she learned that police wanted her for questioning. Since the juvenile was only seventeen years of age, she was originally charged with the murder in juvenile court;[6] however, the prosecution requested a fitness hearing[7] to determine if she was unfit for juvenile proceedings. In this fitness hearing, which was primarily intended to determine if the minor was mature enough to be tried in superior court, the minor, under counsel's advice, refused to testify or present any evidence. This tactic was utilized in response to a denial of immunity from use at trial.[8] The referee, relying upon Ramona's probation officer's report, held her to be unfit for juvenile proceedings and allowed charges of murder to be brought in superior court.[9]

III. COURT'S ANALYSIS

In order to facilitate complete candor between a juvenile and his

4. In the June, 1982 Primary Election, Proposition 8 added section 28(d) to article I of the California Constitution. *See* CAL. CONST. art. I, § 28(d). *See infra* note 13 and accompanying text for text of section 28(d).

5. 37 Cal. 3d at 805, 693 P.2d at 791, 210 Cal. Rptr. at 206.

6. See CAL. WELF. & INST. CODE § 602 (West 1984), which requires minors under the age of eighteen to be within the juvenile court's jurisdiction.

7. Whenever a juvenile is over sixteen years of age at the time the offense is committed, the prosecutor can move for a fitness hearing to have the minor tried as an adult. CAL. WELF. & INST. CODE § 707(a) (West 1984). Factors considered in the fitness hearing include:

> (1) The degree of criminal sophistication exhibited by the minor. (2) Whether the minor can be rehabilitated prior to the expiration of the juvenile court's jurisdiction. (3) The minor's previous delinquent history. (4) Success of previous attempts by the juvenile court to rehabilitate the minor. (5) The circumstances and gravity of the offense alleged to have been committed by the minor.

Id.

8. 37 Cal. 3d at 805-06, 693 P.2d at 791, 210 Cal. Rptr. at 206. Included in this evidence was a psychiatric evaluation of the minor. However, the minor did agree to a lie detector test.

9. *Id.* at 806, 693 P.2d at 791, 210 Cal. Rptr. at 206. The probation officer's damaging evidence speculated that the killing was the result of an argument concerning the minor's involvement in prostitution and drugs. *Id.*

probation officer,[10] any statements made by the minor to his probation officer or to a court in a fitness hearing are considered privileged and inadmissible at a criminal trial.[11] However, this general rule was put in jeopardy with the passage of Proposition 8.[12] Article I of the California Constitution was amended by Proposition 8 to hold that all "relevant evidence shall not be excluded . . . in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court."[13] Thus, the court had to decide whether this amendment affected the validity of the common law use immunity.[14]

The defendant contended that denial of the use immunity at trial was erroneous, and therefore the court should vacate the order holding her unfit for juvenile court. Amicus curiae argued that the use immunity was within an exception of the newly enacted section 28(d), which states "[n]othing in this section shall affect any existing statutory rule of evidence relating to privilege . . . ."[15] The "statutory rule" concerning a privilege that the defendant relied upon was Evidence Code section 940, which provides for the basic privilege against self-incrimination.[16] The supreme court, in a state constitutional analysis,[17] advanced three reasons why the use immunity rule should fall within the section 28(d) exception. First, the court held that the prosecutor's burden of proof would be inequitably lightened if allowed to use the juvenile's prior probationary statements.[18] Secondly, the court was unwilling " 'to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt.' "[19]

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10. *See In re* Wayne H., 24 Cal. 3d 595, 596 P.2d 1, 156 Cal. Rptr. 344 (1979) (encouragement of candor in probation interviews is rationale for privilege).

11. 37 Cal. 3d at 806, 693 P.2d at 791, 210 Cal. Rptr. at 206 (citing Bryan v. Superior Court, 7 Cal. 3d 575, 498 P.2d 1079, 102 Cal. Rptr. 831 (1972), *cert. denied,* 410 U.S. 944 (1973)).

12. 37 Cal. 3d at 807-08, 693 P.2d at 793, 210 Cal. Rptr. at 208.

13. CAL. CONST. art. I, § 28(d).

14. The court stated that if it determined that the amended section preempted the use immunity rule, it would then have to determine the constitutionality of section 707(c) of the Welfare and Institutions Code, which imposes the burden of proof on the juvenile if charged with certain felonies. CAL. WELF. & INST. CODE § 707(c) (West 1984). Since the court determined the use immunity rule to still be in effect, it never had to pass on this issue. 37 Cal. 3d at 804, 693 P.2d at 790, 210 Cal. Rptr. at 205.

15. CAL. CONST. art. I, § 28(d).

16. CAL. EVID. CODE § 940 (West 1966). This section provides: "To the extent that such privilege exists under the Constitution of the United States or the State of California, a person has a privilege to refuse to disclose any matter that may tend to incriminate him." *Id.*

17. Because the federal law on the matter of use immunities was so confused, the court used a state constitutional analysis. 37 Cal. 3d at 808-09, 693 P.2d at 793, 210 Cal. Rptr. at 208.

18. *Id.* at 809, 693 P.2d at 794, 210 Cal. Rptr. at 209. *See also* People v. Coleman, 13 Cal. 3d 867, 533 P.2d 1024, 120 Cal. Rptr. 384 (1975).

19. 37 Cal. 3d at 809-10, 693 P.2d at 794, 210 Cal. Rptr. at 209 (citing People v. Coleman, 13 Cal. 3d at 878, 533 P.2d at 1034, 120 Cal. Rptr. at 394, quoting Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964)).

That is, the juvenile would be forced to choose between testifying and incriminating himself, or remaining silent, thereby indicating he was hiding something.[20] Finally, the court stressed that the determination of unfitness was the most serious punishment a juvenile court could impose, hence the use immunity should remain in effect.[21]

The court finally determined that the use immunity is applicable even when a juvenile is found to be fit for juvenile court.[22] Its rationale was that juvenile punishment was not sufficiently less severe than regular penal incarceration that a distinction should be made.

Since the lower court improperly refused to grant the defendant's request for immunity, the court vacated the order declaring the defendant to be unfit for juvenile court proceedings.[23] At a new hearing, the defendant would be able to present evidence supporting her fitness, without fear that the evidence would later be used against her.

Justice Grodin, in a separate concurring opinion, emphasized that to enjoy the use immunity under the guise of self-incrimination the juvenile must be *compelled* to testify in the fitness hearing.[24] Because the fitness proceeding combines rules of evidence, a lower burden of proof, and a "presumption of unfitness," the Justice concluded that the risk of an adverse judgment is so great that it constitutes a compulsive sanction against exercise of the privilege against self-incrimination.[25]

IV. CONCLUSION

Despite the addition of Proposition 8 to the California Constitution, the use immunity in juvenile proceedings was held to stand intact. Hence, whenever a minor confides in his probation officer or testifies at a fitness hearing, his statements will be considered privileged and inadmissible at any subsequent juvenile proceeding or criminal trial.

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20. 37 Cal. 3d at 810, 693 P.2d at 794, 210 Cal. Rptr. at 209.

21. *Id.* at 810, 693 P.2d at 795, 210 Cal. Rptr. at 210. The court referred to a determination of unfitness as " 'the worst punishment the juvenile system is empowered to inflict.' " *Id.* (quoting Note, *Separating the Criminal From the Delinquent: Due Process in Certification Procedure*, 40 S. CAL. L. REV. 158, 162 (1967)).

22. 37 Cal. 3d at 811, 693 P.2d at 795, 210 Cal. Rptr. at 210.

23. *Id.*

24. *Id.* (Grodin, J., concurring). He stated that to reach the majority's conclusion "we must necessarily find that a juvenile's testimony is compelled by the nature of the fitness proceeding." *Id.*

25. *Id.* at 811-12, 693 P.2d at 795-96, 210 Cal. Rptr. at 210-11.

XI. LABOR LAW

A. *Court upholds finding that grape growers committed unfair labor practices through surveillance, interrogation, and discharge of employees involved with a union:* **Karahadian Ranches v. Agricultural Labor Relations Board.**

In *Karahadian Ranches v. Agricultural Labor Relations Board,* 38 Cal. 3d 1, 694 P.2d 770, 210 Cal. Rptr. 657 (1985), the petitioner, an agricultural employer, appealed four findings of unfair labor practices as determined by the Agricultural Labor Relations Board (Board).

First, a worker, while preparing a meal in the camp kitchen for himself and a union attorney, was spied on by a management employee. Upon leaving the kitchen, the worker discovered the surveillance. The court held that only surveillance which interferes with, restrains, or coerces union activities is prohibited. The fact that the eavesdropping was discovered, and that the employee, a union sympathizer, was asked about his union affiliation immediately after discovery, made the petitioner's activity in this regard an unfair labor practice.

Second, the same employee was confronted by the farm's owner the next morning. According to the petitioner, only a casual conversation took place, but in it the owner alluded to the fact that union leaders may kill their enemies. During the conversation there was further inquiry into the extent of the employee's union activity. The court held that there was no implied threat because the statement could be construed as neutral; however, the court did find an unlawful interrogation. To establish a violation, an objective standard of whether the employer engaged in conduct which may reasonably be said to interfere with the free exercise of employee rights was used. A determination by the Board that an interrogation occurred will be sustained on review if supported by substantial evidence. In this case, the coercive potential of the conversation justified the Board's finding.

Third, a female employee was discharged after distributing union leaflets and buttons during work time. She was warned that she would be terminated if the activity was continued, even though she conducted her union activity during a time in which no productive work could be performed because there was no crop ready for packing. Nevertheless, the employee was first demoted, and then fired when she pinned a button on a tardy worker. The court held that solicitation on company time is permissible so long as it is during a "customary nonworking interval." Despite the warning of possible

termination, no business justification for the discharge existed and thus, the termination was improper.

Finally, the Board ordered the petitioner to cease and desist from interfering with, restraining, or coercing employees in the exercise of their statutory rights. The petitioner contended that the order's language was overly broad because it raised the possibility of contempt proceedings for future violations and went beyond the particular conduct found to be unlawful. The court noted that the Board may restrain broad types of conduct where the record reveals numerous attempts by the employer to abridge its employees' rights. Because of the numerous violations on the record, the court upheld the remedy prescribed by the Board. Moreover, the court approved a requirement that the petitioner post, mail, and read to employees a notice which revealed the petitioner's unfair labor practices. Due to significant illiteracy and semi-literacy among the farm workers, the reading provision was within the Board's discretion.

B. *It was error for a court of appeal to dismiss a timely filed labor petition because of clerical defects:* United Farm Workers of America v. Agricultural Labor Relations Board.

The court in *United Farm Workers of America v. Agricultural Labor Relations Board*, 37 Cal. 3d 912, 694 P.2d 138, 210 Cal. Rptr. 453 (1985), held it was erroneous for a court of appeal to deny an untimely petition for review based upon technical defects when it had originally been filed on time. The Agricultural Labor Relations Board (ALRB) issued a decision adverse to the United Farm Workers (UFW) in *Admiral Packing Co.*, 10 ALRB No. 9 (1984). The UFW filed a petition for a writ of review with the court of appeal on the last day of the statute of limitations. Although received within Code of Civil Procedure section 1160.8's thirty-day filing period, a clerk returned the petition because it lacked verification, hence causing the petition to be late.

On appeal, the ALRB and Admiral contended that the petition was untimely since it was filed outside the thirty-day period. The petitioner, UFW, argued that such "technical noncompliance" would not thwart the purpose of the statute of limitations—to prevent delays caused by caseload backlogs.

Initially, the court acknowledged that a lack of verification was not a jurisdictional requirement, therefore, amendment could cure the defect after the statute of limitations had run. Relying primarily on

Litzmann v. Workmen's Compensation Appeals Board, 266 Cal. App. 2d 203, 71 Cal. Rptr. 731 (1968), the court held that the public policy granting a party the right to an appeal on the merits of his case outweighed any "technical noncompliance." The court ruled that a filing, to be within the applicable statute of limitations, only requires "actual delivery of the petition to the clerk at his place of business during office hours."

The court found further authority for its holding in Rule 18 of the California Rules of Court, which allows for a reviewing court to return a defective brief to the party for correction within some specified time limit. Finally, the court distinguished and dismissed the ALRB's cited authority on the grounds that in those particular cases the petition was never timely filed and a request for an extension of the statute of limitations had been denied.

XII. LAND USE

City's newly enacted growth control ordinance did not violate the provisions of a consent judgment entered into between the parties which insured a right to develop the property in accordance with its master plan: **Pardee Construction Co. v. Camarillo.**

In *Pardee Construction Co. v. Camarillo,* 37 Cal. 3d 465, 690 P.2d 701, 208 Cal. Rptr. 228 (1984), Pardee Construction sought to enjoin the City of Camarillo from applying a growth control ordinance to its property development plan. The trial court denied the injunction and the supreme court affirmed, finding no infringement of any of Pardee's rights under a previous judgment by application of the growth ordinance.

Pardee had submitted a master plan for the development of a large tract of land which was approved by the city. The plan described the proposed development in detail, but contained no time schedule for the rate of development. The city proposed zoning changes, which led to the initial suit between the parties. The result was a consent judgment containing certain stipulations which insured for Pardee the right to develop the property in accordance with the plan and estopped the city from enacting zoning or use regulations inconsistent with the plan. Upon adoption of an initiative measure by the voters, the city enacted a growth control ordinance, which Pardee claimed interfered with its vested right to develop the property, and therefore should not be applicable.

The supreme court agreed with the city that the ordinance did not violate any vested rights and affected only the timing or rate of development; and, further, that the new ordinance was an exercise of

the city's police power, which had been specifically reserved in the earlier judgment.

The court first examined the consent judgment, which, being in the nature of a contract, was subject to interpretation. Pardee was granted the right to develop its property, subject to compliance with the applicable municipal code and ordinances and subject to the zoning ordinance in effect at the time. In examining the new ordinance, the court found that it was "not in the least inconsistent with the consent judgment." The growth ordinance did not change the zoning specifications nor did it affect the provisions of the master plan. It was essentially a regulation of the rate of development, which was not stipulated to by the parties. It therefore did not restrict Pardee in carrying out its plan of development for the property.

The applicability of the new ordinance was further supported by the provision in the judgment which expressly reserved to the city the right to exercise its "police power relative to general subject matter which may be applicable to all builders and developers alike throughout the City." There was nothing in the new ordinance which imposed conditions, limitations or restrictions on Pardee which were not evenhandedly imposed on all other developers. It was therefore in accord with the consent judgment as a valid exercise of the city's police power.

XIII. MEDICAL MALPRACTICE

A. *The constitutionality of Civil Code sections 3333.1, modifying the collateral source rule, and 3333.2, imposing a maximum limit on the recovery of noneconomic damages in medical malpractice cases, was upheld against due process and equal protection claims:* **Fein v. Permanente Medical Group.**

In *Fein v. Permanente Medical Group,*[1] the supreme court addressed constitutional due process and equal protection challenges to Civil Code sections 3333.1 and 3333.2. The case arose out of a claim of medical malpractice for which the plaintiff received a judgment awarding him $1 million in damages, from which both parties

1. 38 Cal. 3d 137, 695 P.2d 665, 211 Cal. Rptr. 368 (1985). Opinion by Kaus, J., with Broussard, Grodin, and Lucas, JJ., concurring. Separate dissenting opinion by Bird, C.J., with Woods, JPT, concurring. Separate dissenting opinion by Mosk, J., Woods, JPT, sitting by assignment of the Chairperson of the Judicial Council.

appealed.[2]

I. FACTS

The plaintiff, a thirty-four year-old attorney, experienced brief pain in his chest on a number of occasions. He contacted his regular physician, who was employed by defendant Permanente Medical Group, an affiliate of the Kaiser Health Foundation. At his appointment that afternoon, he was examined by a nurse practitioner who, after consultation with the supervising physician, diagnosed the pain as a muscle spasm and gave him a prescription.

That evening, the plaintiff experienced severe chest pains and was taken to the Kaiser Emergency room. The pain was again diagnosed by a physician as a muscle spasm. The next day, after experiencing further pain, the plaintiff was examined by yet another doctor who ran an electrocardiogram (EKG) on the plaintiff. The EKG showed that the plaintiff was suffering from a heart attack.

After a period of hospitalization and medical treatment, the plaintiff returned to his work on a part-time basis and eventually full-time.[3] The plaintiff brought suit alleging that his heart condition should have been diagnosed earlier and if that had been done, the heart attack he suffered could have been prevented or at least the residual effects lessened.

The jury rendered its verdict in favor of the plaintiff, despite sharply conflicting evidence.[4] The jury itemized its award, pursuant

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2. The defendant contended that the trial court erred in its selection of the jury, in its instructions on liability and damages, and in ordering a lump sum rather than a periodic payment. The plaintiff claimed that the trial court erred in applying the two provisions of the Civil Code which fixed noneconomic damages and which modified the collateral source rule. These claims were in the nature of constitutional challenges to the Medical Injury Compensation Reform Act of 1975 (MICRA) which was codified at sections 3333.1 and 3333.2 of the Civil Code. *See infra* note 77.

3. The first pains experienced by the plaintiff were in February, 1976. He resumed work, part-time, in October, 1976, and full-time in September, 1977. This action was filed in February, 1977.

4. The principal witness for the plaintiff was Dr. Harold Swan, head of cardiology at Cedars-Sinai Medical Center. He testified that, in his opinion, any patient complaining of chest pains should be given an EKG. He further stated that the nurse practitioner should have recognized the plaintiff's pain as indicative of a possible heart problem. The doctor who later examined the plaintiff knew that the prescribed medication had provided no relief and this should have prompted the physician to order an EKG.

Dr. Swan testified that the plaintiff's life expectancy had been reduced by one-half as a result of the attack. The doctor acknowledged that the plaintiff's other arteries suffer from disease but the decrease in life expectancy could have been only 10 to 15 percent if the plaintiff had been properly treated.

The nurse practitioner and doctor who treated the plaintiff initially were witnesses for the defense, and stated that the plaintiff had not reported the same symptoms to them which he described at trial. Other expert witnesses gave their opinions that medical personnel could not reasonably have foreseen the heart attack based on the

to the court's instruction.[5] The defendant requested that the court modify the award in accordance with section 3333.2, which sets a limit on the amount of noneconomic damages to be allowed in such cases,[6] and in accordance with section 3333.1, which alters the collateral source rule in medical malpractice cases.[7]

The trial court reduced the noneconomic damages to $250,000.00, and also reduced the award for past lost wages to take into account disability payments already received by the plaintiff. Future medical expenses were to be paid as incurred, while the awards for future lost wages and noneconomic damages were to be paid in a lump sum:[8]

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information reported to and observed by them. Additional evidence indicated that an EKG would not have shown that an attack was forthcoming; that with the existence of already diseased arteries, the attack could not have been prevented; and because of the extent to which the disease had caused deterioration the plaintiff's life expectancy was not so severely decreased by the heart attack as suggested by Dr. Swan. 38 Cal. 3d at 145, 695 P.2d at 670, 211 Cal. Rptr. at 373.

5. The jury awarded the following: $24,733.00 for lost wages to the time of trial; $63,000.00 for future medical expenses; $700,000.00 for future lost wages as the result of the plaintiff's decreased life expectancy; and $500,000.00 for "noneconomic damages" as compensation for pain and suffering, inconvenience, physical impairment and other intangible damages already sustained and to be sustained to the time of the plaintiff's death. *Id.*

6. Section 3333.2 sets the limit at $250,000.00. It reads in pertinent part:

> (a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement and other nonpecuniary damage.
>
> (b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000).

CAL. CIV. CODE § 3333.2 (West Supp. 1985).

7. Section 3333.1 reads in pertinent part:

> In the event the defendant so elects, in an action for personal injury against a health care provider based upon professional negligence, he may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the personal injury pursuant to the United States Social Security Act, any state or federal income disability or worker's compensation act, any health, sickness or income-disability insurance, accident insurance that provides health benefits or income-disability coverage, and any contract or agreement of any group, organization, partnership, or corporation to provide, pay for, or reimburse the cost of medical, hospital, dental, or other health care services. . . . [t]he plaintiff may introduce evidence of any amount which the plaintiff has paid or contributed to secure his right to any insurance benefits concerning which the defendant has introduced evidence.

CAL. CIV. CODE § 3333.1 (West Supp. 1985) (footnote omitted).

The defendant also requested modification pursuant to Code of Civil Procedure section 667.7 relating to periodic payment of damages.

8. The trial court deemed section 667.7 to be discretionary in nature, and further, determined that the periodic payment of damages in this case would be contrary to the purposes of section 667.7. 38 Cal. 3d at 146, 695 P.2d at 671, 211 Cal. Rptr. at 374. *See also infra* notes 41-49 and accompanying text.

Both parties appealed from the judgment.[9]

II. THE MAJORITY OPINION

A. The Defendant's Contentions

1. Improper Jury Empanelment

The defendant claimed that the trial court's summary discharge of all Kaiser members from the jury pool was improper and required reversal. It argued that under the applicable statute, section 602 of the Code of Civil Procedure,[10] a person's membership in Kaiser did not provide an adequate basis for a challenge for cause. The trial court explained the dismissals to the jury panel as being necessary to avoid an overly long voir dire proceeding requiring the detailed questioning of each and every juror.[11]

The question for the court was whether a potential juror's membership in Kaiser would render that juror subject to a challenge for cause.[12] Section 602 does not define the "interest" or connection with a party to the suit which would subject a juror to successful challenge. Other state courts have reached conflicting positions in similar situations.[13]

The court found no basis for reversal of the judgment because of the excusals.[14] A trial court is afforded broad discretion in its oversight of the jury selection process,[15] and this discretion was not

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9. The defendant claimed reversible error was committed in "(1) excusing all Kaiser members from the jury, (2) instructing on the duty of care of a nurse practitioner, (3) instructing on causation, (4) permitting plaintiff to recover wages lost because of his diminished life expectancy, and (5) refusing to order the periodic payment of all future damages." 38 Cal. 3d at 146, 695 P.2d at 671, 211 Cal. Rptr. at 374. The plaintiff sought to have the judgment affirmed, but claimed that the court erred in upholding the constitutionality of the MICRA provisions at issue here. *Id.*

10. *See id.* at 147 n.3, 695 P.2d at 672 n.3, 211 Cal. Rptr. at 375 n.3; CAL. CIV. PROC. CODE § 602 (West Supp. 1985).

11. The trial court stated to the jury, "I'm not suggesting that . . . everyone who goes to Kaiser could not fairly and with an open mind resolve the issues in this case, but we may be here for four weeks trying to get a jury under the circumstances." 38 Cal. 3d at 146-47, 695 P.2d at 671, 211 Cal. Rptr. at 374. Twenty-four of the 60 persons initially called were dismissed due to their membership in Kaiser. *Id.* at 147, 695 P.2d at 671, 211 Cal. Rptr. at 374.

12. *Id.*

13. *See, e.g.*, Weatherbee v. Hutchenson, 114 Ga. App. 761, 152 S.E. 2d 715 (1966) (error not to excuse policyholder of mutual insurance company); M & A Elec. Power Coop. v. Georger, 480 S.W.2d 868 (Mo. 1972) (trial court erred in failing to excuse members of "consumer" electrical cooperative). *Contra* McKernan v. Los Angeles Gas & Elec. Co., 16 Cal. App. 280, 119 P. 677 (1911) (dictum that jurors' excusal not mandated because they were customers of defendant utility company); Rowley v. Group Health Coop., 16 Wash. App. 373, 556 P.2d 250 (1976) (no error for failure to excuse member of health care cooperative).

14. 38 Cal. 3d at 148, 695 P.2d at 672, 211 Cal. Rptr. at 375.

15. *See, e.g.*, Rousseau v. West Coast House Movers, 256 Cal. App. 2d 878, 64 Cal. Rptr. 655 (1967).

abused by the court below. The trial court's comments demonstrated reliance on its experience in similar situations to reach its decision in this case. The court realized that individual questioning is overly time-consuming and a substantial number of Kaiser members would ultimately be subject to challenge.[16] It was also reasonable for the court to foresee possible prejudice to other jurors due to any extensive questioning of Kaiser members.[17] There was, therefore, no abuse of the trial court's discretion in dismissing Kaiser members from the jury panel.[18]

The court recognized further that, even if excusal of the jurors were considered erroneous, it was insufficient to warrant reversal.[19] The general rule that an erroneous exclusion for cause does not require reversal of the judgment was applicable.[20] As long as the jury finally selected is composed of qualified and competent jurors, a court may dismiss a juror on its own motion. Such a dismissal would not warrant reversal because a defendant or party is not entitled to a jury composed of particular jurors.[21]

The defendant's argument that Kaiser members constitute a "cognizable class" which was systematically excluded was also rejected by the court. The jury panel which ultimately decided the present action was not unconstitutionally underrepresented,[22] nor was it any less a cross-section of the community with the Kaiser members' absence.[23] The jury selection process therefore provided no basis for reversal of the judgment.[24]

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16. 38 Cal. 3d at 148, 695 P.2d at 672, 211 Cal. Rptr. at 375.

17. *Id.* The court noted that matters inadmissible at trial, such as the recounting of specific potentially prejudicial incidents occurring between jurors and Kaiser or the expression of satisfaction or dissatisfaction with Kaiser, might "taint" the entire voir dire proceeding.

18. *Id.*

19. *Id.* at 149, 695 P.2d at 673, 211 Cal. Rptr. at 376.

20. *See* Asevado v. Orr, 100 Cal. 293, 300-01, 34 P. 777, 779-80 (1893); Dragovich v. Slosson, 110 Cal. App. 2d 370, 371, 242 P.2d 945, 946 (1952); *McKernan*, 16 Cal. App. at 283, 116 P. at 678-79.

21. *See Dragovich*, 110 Cal. App. 2d at 371, 242 P.2d at 946.

22. *See, e.g.*, Thiel v. Southern Pac. Co., 328 U.S. 217 (1946) (exclusion of daily wage earners resulted in a nonrepresentative jury panel); People v. Fields, 35 Cal. 3d 329, 673 P.2d 680, 197 Cal. Rptr. 803 (1983) (plurality opinion) (cognizable class requires shared experiences, ideology, or background of its members); People v. White, 43 Cal. 2d 740, 278 P.2d 9 (1954) (use of organization and club rosters results in disproportionate inclusion of business and professional people and an exclusion of ordinary working people).

23. 38 Cal. 3d at 149, 695 P.2d at 673, 211 Cal. Rptr. at 377.

24. *Id.*

2. Erroneous Jury Instruction on Standard of Care of Nurse Practitioner

The court agreed with the defendant's contention that the trial court erroneously instructed the jury on the standard of care to be exercised by a nurse practitioner. The trial judge told the jury that when the nurse practitioner was examining a patient or making a diagnosis, the standard required was that of a physician or surgeon.[25] This instruction was contrary to recent legislation which expressed an intent to recognize the overlap between the functions of physicians and nurses.[26] The responsibility of diagnosing a patient is not reserved exclusively to physicians.[27] Although the plaintiff was entitled to have the jury determine whether or not the use of a nurse practitioner in this situation was negligent, and whether the particular nurse exercised the appropriate standard of care, the court should not have instructed that—as a matter of law—the nurse's conduct was to be measured against the standard applied to a physician or surgeon.[28]

Although the instruction was erroneous, it did not warrant reversal. The court deemed it improbable that the error affected the ultimate judgment.[29] Since a doctor examined the plaintiff and rendered the same diagnosis as previously given by the nurse, the jury could not reasonably have determined the nurse to have been negligent without also finding the doctor to have been negligent.[30]

3. Misinstructions on Causation

The defendant made several objections to instructions given on causation. The first involved the court's instruction on concurrent causation which the defendant felt was inappropriate because Permanente was the only defendant. The court explained, however, that the evidence suggested that the negligence of several non-defendant Kaiser employees could have been a proximate cause of the injury suffered by the plaintiff. The instruction was not required, but no error was committed in giving it.[31]

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25. *Id.* This instruction was given in addition to the general instruction on the duty of care of a graduate nurse. *See id.* at 149 n.4, 695 P.2d at 673 n.4, 211 Cal. Rptr. at 376 n.4.

26. *See* CAL. BUS. & PROF. CODE § 2725 (West 1974) ("It is the legislative intent also to recognize the existence of overlapping functions between physicians and registered nurses . . . .").

27. 38 Cal. 3d at 150, 695 P.2d at 674, 211 Cal. Rptr. at 377.

28. *Id. See also* Fraijo v. Hartland Hosp., 99 Cal. App. 3d 331, 340-44, 160 Cal. Rptr. 246, 251-53 (1979); Note, *A Revolution in White—New Approaches in Treating Nurses as Professionals*, 30 VAND. L. REV. 839, 871-79 (1977).

29. 38 Cal. 3d at 151, 695 P.2d at 675, 211 Cal. Rptr. at 378.

30. *Id.*

31. *Id.* at 151-52, 695 P.2d at 675, 211 Cal. Rptr. at 378.

The defendant also objected to the court's instructions on proximate cause, which set forth the general rule that the defendant's conduct is no less a proximate cause of the injury because of the unforeseeability of the *extent* of the injury.[32] Such an instruction is applicable regardless of the number of tortfeasors involved. The instruction, contended the defendant, could have been taken as imposing strict liability. This argument, however, ignored the context in which the instruction was given, especially when combined with the other instructions regarding causation and liability.[33] There was no error committed in the reading of this instruction.

4. "Lost Years" Award

The defendant next alleged that the trial court erroneously allowed the jury to compensate the plaintiff for lost earnings due to the "lost years"[34] of the plaintiff's life expectancy. Although the issue had not been previously decided in California, the United States Supreme Court ruled on the lost years issue in *Sea-Land Services v. Gaudet.*[35] The general rule the Court enunciated was that a tort victim is allowed to recover the loss of prospective earnings for the balance of his life expectancy " *'undiminished by any shortening of that life expectancy as a result of the injury.'* "[36] This rule is consistent with the rule in California permitting a plaintiff to recover future earnings " *'for as long a period of time in the future as he could have done had he not sustained the accident.'* "[37]

The availability of a set-off in any future wrongful death action overcame the defendant's contention of a possible "double payment."[38] In *Blackwell v. American Film Co.,*[39] the supreme court held that the jury was properly told to consider amounts the dece-

32. *Id.* at 152, 695 P.2d at 675, 211 Cal. Rptr. at 378. *See also* Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 665 P.2d 947, 197 Cal. Rptr. 857 (1983); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Torts* § 629, 2911-12 (8th ed. 1974).

33. 38 Cal. 3d at 152, 695 P.2d at 675, 211 Cal. Rptr. at 378.

34. *See generally* Fleming, *The Lost Years: A Problem in the Computation and Distribution of Damages,* 50 CAL. L. REV. 598 (1962).

35. 414 U.S. 573 (1974).

36. *Id.* at 594 (quoting 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 24.6 (1956)) (emphasis in original).

37. 38 Cal. 3d at 153, 695 P.2d at 676, 211 Cal. Rptr. at 379 (quoting Robison v. Atchison, Topeka & Santa Fe Ry. Co., 211 Cal. App. 2d 280, 288, 27 Cal. Rptr. 260, 264 (1962)) (emphasis added).

38. 38 Cal. 3d at 153, 695 P.2d at 676, 211 Cal. Rptr. at 379; *see also* 414 U.S. at 592-94 & n.30.

39. 189 Cal. 689, 209 P. 999 (1922).

dent previously received from the defendant for impairment of earning capacity.[40] Thus, no "double" recovery would be had under this scheme.

5. Periodic versus Lump Sum Payment of Damages

The defendant's request for periodic payment of future damages was denied by the trial court because it deemed the governing statute, section 667.7 of the Civil Procedure Code, to be discretionary, rather than mandatory.[41] The defendant contended that the statute was misinterpreted by the trial court. The court agreed that the trial court erred in deeming the statute to be a discretionary provision.[42] A literal reading of the statute combined with its legislative history demonstrated that it was intended to impose a mandatory duty on courts to order the periodic payment of damages in cases within the scope of the section.[43]

For several reasons, however, the court concluded that the judgment below should not be reversed on the basis of this error.[44] First, the trial court did order periodic payment of the damages designated for future medical expenses, even though it rejected the defendant's request for the periodic payment of all future damages.[45]

Secondly, the defendant was in no position to complain since no motion for periodic payment was made until after the jury returned its special verdicts.[46] Consequently, the plaintiff was denied the opportunity to seek a special verdict designating the amount of future noneconomic damage, which was awarded in a lump sum by the jury.

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40. *Id.* at 700-02, 209 P. at 1004.

41. *See supra* note 8 and accompanying text. The trial court also rejected the defendant's constitutional challenges to the provision. The court here held that that provision was consistent with its holding in American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

42. 38 Cal. 3d at 154, 695 P.2d at 677, 211 Cal. Rptr. at 380.

43. *Id.* The court quoted the appropriate and relevant language of section 667.7 as follows:

> In any [medical malpractice action], a superior court *shall*, at the request of either party, *enter a judgment ordering that money damages* or its equivalent *for future damages* of the judgment creditor *be paid in whole or in part by periodic payments rather than by a lump-sum payment* if the award equals or exceeds fifty thousand dollars ($50,000) . . . .

38 Cal. 3d at 154-55, 695 P.2d at 677, 211 Cal. Rptr. at 380 (quoting CAL. CIV. PROC. CODE § 667.7 (West 1980)) (emphasis in court's opinion).

The bill which eventually became section 667.7 originally stated that a trial court "may" and upon the request of a party "shall" order periodic payment. The "shall" was removed in the bill's first amendment, and, as finally adopted, "shall" was reinserted and "may" deleted, thus leaving the bill mandatory in nature. 38 Cal. 3d at 155 n.12, 695 P.2d at 678 n.12, 211 Cal. Rptr. at 381 n.12.

44. 38 Cal. 3d at 156, 695 P.2d at 678, 211 Cal. Rptr. at 381.

45. *Id.* The defendant was to pay medical expenses as they were incurred. *See supra* note 5 and text accompanying note 8.

46. 38 Cal. 3d at 156, 695 P.2d at 678, 211 Cal. Rptr. at 381.

The amount awarded was reduced to $250,000.00, in accordance with section 3333.2 of the Civil Code, and that amount could reasonably be deemed to reflect plaintiff's noneconomic damage at that time. In the interests of justice, the lump sum award was affirmed.[47]

Finally, the court examined the portion of the lump sum award designated for future lost earnings. Because the lost earnings here were attributable to the plaintiff's lost years, any amounts paid periodically over the period of time when the loss was expected to be incurred would be paid *after* the plaintiff's death.[48] It was incumbent on the defendant to present evidence from which the jury could apportion the award between the amount necessary to support the plaintiff and the amount which should go to his surviving dependents, arguing additionally that the dependents' share was to be periodically paid.[49] Because the defendant failed to raise the issue in a timely manner, no apportionment was made and the trial court correctly held that periodic payment was not required.

The court hereby addressed all of the defendant's contentions. Although errors had occurred, none warranted reversal of the trial court's decision. The supreme court next turned to the plaintiff's contentions.

B. The Plaintiff's Contentions

1. Alleged Unconstitutionality of Section 3333.2

The plaintiff first challenged the validity of section 3333.2 of the Civil Code, under which the trial court reduced the noneconomic damages award from $500,000.00 to $250,000.00.[50] The plaintiff alleged that the MICRA provision violated both due process and equal protection.

a. Due Process.

The plaintiff alleged the denial of due process because medical

47. *Id.*

48. *Id.* The court acknowledged that lost future earnings are generally well suited to periodic payment. This case presents an unusual situation due to the lost years aspect of the award. *Id.*

49. *Id.* at 157, 695 P.2d at 679, 211 Cal. Rptr. at 382.

50. *See supra* notes 5-6 and accompanying text. The court noted that these same constitutional challenges were rejected in its earlier decisions of Roa v. Lodi Medical Group, 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985); Barme v. Wood, 37 Cal. 3d 174, 684 P.2d 446, 207 Cal. Rptr. 816 (1984); and American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984).

malpractice claimants' potential recovery is limited without an adequate quid pro quo.[51] This argument was rejected by the court in *American Bank & Trust Co. v. Community Hospital,* based on the legislature's broad power to modify the scope and nature of such damages, and on the fact that a plaintiff has no vested property right in a particular measure of damages.[52] The constitutionality of a measure which affects economic rights does not depend on the court's assessment of the measure's justification, i.e., the adequacy of the quid pro quo, but rather depends on whether or not it is rationally related to a legitimate state interest.[53] As it did in previous cases involving MICRA, the court determined that the statute satisfied this standard.

The legislature, in enacting MICRA, was responding to a perceived medical malpractice insurance "crisis," where the cost of such insurance was posing serious problems for health care providers in California. MICRA was therefore enacted as a means of reducing rising costs.[54] Section 3333.2, which places a cap of $250,000.00 on noneconomic damages, is rationally related to the legislature's objective of reducing the costs of malpractice litigation for defendants and their insurers. The legislature did not place a limit on a plaintiff's right to recover all of the economic, pecuniary damages sustained. Only noneconomic damages were effected and these were not eliminated, only capped.[55] No state or federal principle prevents the California legislature from limiting the recovery of damages in order to further a legitimate state interest. Hence, section 3333.2 does not violate due process.[56]

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51. 38 Cal. 3d at 157, 695 P.2d at 679, 211 Cal. Rptr. at 382.

52. *Id.* (relying on *American Bank,* 36 Cal. 3d at 368-69, 683 P.2d at 675, 204 Cal. Rptr. at 676). *See also* Werner v. Southern Cal. Assoc. Newspapers, 35 Cal. 2d 121, 129, 216 P.2d 825, 828 (1950); Feckensher v. Gamble, 12 Cal. 2d 482, 499-500, 85 P.2d 885, 893 (1938); Tulley v. Tranor, 53 Cal. 274, 280 (1878).

53. *American Bank,* 36 Cal. 3d at 368-69, 683 P.2d at 675, 204 Cal. Rptr. at 676. The court recognized the difference between the MICRA provisions challenged in *American Bank* and in *Fein.* The periodic payment provision simply postpones a plaintiff's recovery of damages whereas section 3333.2 sets a dollar limit on the amount of noneconomic damages a plaintiff may receive. 38 Cal. 3d at 158, 695 P.2d at 679-80, 211 Cal. Rptr. at 382-83. This distinction, however, did not change the applicable standard of review for due process challenges. *Id.*

54. 38 Cal. 3d at 158, 695 P.2d at 680, 211 Cal. Rptr. at 383. The court further explained,

> the Legislature retains broad control over *the measure,* as well as *the timing,* of damages that a defendant is obligated to pay and a plaintiff is entitled to receive, and . . . the Legislature may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest.

Id. (emphasis in original).

55. *Id.* The court noted the inherent difficulties in placing a dollar value on pain and suffering. Such damages are, however, deeply imbedded in our legal system. *Id.* at 159 & n.16, 695 P.2d at 680-81 & n.16, 211 Cal. Rptr. at 383-84 & n.16.

56. *Id.* at 161, 695 P.2d at 682, 211 Cal. Rptr. at 385. Some courts have invalidated statutory limitations on recoverable medical malpractice damages. *See, e.g.,* Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736 (1976); Carson v. Maurer,

b. Equal Protection.

The plaintiff alleged that section 3333.2 violated the equal protection clause because it discriminated between medical malpractice victims and other tort victims and because it discriminated within the class of medical malpractice victims, denying a "complete" recovery to only those whose damages exceed the $250,000.00 limit.[57] The plaintiff's first contention was nonmeritorious because the statute was held to bear a rational relation to the stated purpose of solving the malpractice insurance problem. Furthermore, the legislature limited the applicability of the statute to medical malpractice cases specifically to curb the ill effects of that "crisis."[58]

The argument that equal protection was violated because of unequal treatment of members within the class of potential plaintiffs was also refuted by the court. First, the legislature, as explained, had reasonable grounds for making a distinction.[59] Second, the legislature permissibly chose to obtain cost savings through the limit as opposed to abolishing noneconomic damages altogether.[60] Finally, the fact that other alternatives existed did not make the method which the legislature chose—a dollar limit—any less reasonable.[61]

Having found a sufficient rationale, the court made an additional

120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984). *Contra* Johnson v. St. Vincent Hosp., 273 Ind. 374, 404 N.E.2d 585 (1980); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977) (plurality opinion).

57. 38 Cal. 3d at 161-62, 695 P.2d at 682, 211 Cal. Rptr. at 385.

58. *Id.* at 162, 695 P.2d at 683, 211 Cal. Rptr. at 386.

59. *See supra* notes 53-55 and accompanying text.

60. The court rejected the plaintiff's argument that a limit on damages is more invidious, in terms of equal protection, than complete elimination of damages. The rationale behind the argument is that those who suffer greater injuries are most severely affected by the limit. However, the same analysis would hold true of the abolition of damages because it too would impose greater losses on plaintiffs with larger damages. "Just as the complete elimination of a cause of action has never been viewed as invidiously discriminating within the class of victims who have lost the right to sue, the $250,000 limit—which applies to all malpractice victims—does not amount to an unconstitutional discrimination." 38 Cal. 3d at 162, 695 P.2d at 683, 211 Cal. Rptr. at 386.

61. This choice is one left to the legislature, and the court identified a number of reasons supporting the choice made here. One reason was that the legislature could reasonably have decided that an across-the-board limit would result in more easily predictable and calculable damage awards. Another was that the limit would promote settlement. The final reason suggested was that the legislature preferred, and thought it more fair, to reduce greater damage awards rather than smaller recoveries in the greater number of cases. *Id.* at 163, 695 P.2d at 683, 211 Cal. Rptr. at 386.

Amici contended the limit was unconstitutional because the legislature could have used a fixed-percentage reduction of all noneconomic damage awards as opposed to the cost savings hoped for with the imposition of the $250,000.00 limit. As explained in the

observation in response to some of the comments made by the dissent.[62] The majority's application of the equal protection principles developed in the series of cases construing the various MICRA provisions[63] was not inconsistent with the principles enunciated by the court in *Cooper v. Bray*[64] and *Brown v. Merlo.*[65]

Under *Cooper*, "a serious and genuine judicial inquiry" is to be made into the relationship between the classification and the legislative goals propounded.[66] This was done here and in all the MICRA cases, and the findings were that the statutory classifications are rationally related to the objectives of the legislature. It was not for the court to adjudicate the wisdom or lack thereof in adopting the challenged provisions;[67] "[t]he forum for the correction of ill-considered legislation is a responsive legislature."[68] Based on its conclusion that section 3333.2 was constitutional, the court ruled that the trial court made no error in reducing the noneconomic damage award in accordance with the statute's terms.[69]

2. Alleged Unconstitutionality of Section 3333.1

The plaintiff's contentions as to the unconstitutionality of section 3333.1, which modifies the collateral source rule,[70] were equally lacking in merit as those discussed above, and for similar reasons. The section allows the use of evidence of payments by collateral sources but does not explain how the jury is to apply it. Presumably, the jury would award lower damages with the knowledge of the plaintiff's net benefits.[71]

Although the court addressed a constitutional challenge to section

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text and in footnote 60, *supra*, the legislature's choice was reasonable and well supported.

62. *See infra* notes 75-76, 78-79, 82, 89 and accompanying text.

63. Those cases are *American Bank, Barme* and *Roa; see supra* note 50.

64. 21 Cal. 3d 841, 582 P.2d 604, 148 Cal. Rptr. 148 (1978).

65. 8 Cal. 3d 855, 506 P.2d 212, 106 Cal. Rptr. 388 (1973).

66. 21 Cal. 3d at 848, 582 P.2d at 608, 148 Cal. Rptr. at 152 (quoting Newland v. Board of Governors, 19 Cal. 3d 705, 711, 566 P.2d 254, 257, 139 Cal. Rptr. 620, 623 (1977)).

67. 38 Cal. 3d at 163, 695 P.2d at 684, 211 Cal. Rptr. at 387. *See also id.* at 160 n.17, 695 P.2d at 681 n.17, 211 Cal. Rptr. at 384 n.17.

68. *Id.* at 164, 695 P.2d at 684, 211 Cal. Rptr. at 387 (quoting Justice Traynor in *Werner*, 35 Cal. 2d at 129, 216 P.2d at 828).

69. 38 Cal. 3d at 165, 695 P.2d at 684, 211 Cal. Rptr. at 387.

70. Under the traditional collateral source rule, a jury, in calculating a plaintiff's damages in a tort action, does not take into consideration benefits—such as medical insurance or disability payments—which the plaintiff has received from sources other than the defendant—i.e., "collateral sources"—to cover losses resulting from the injury.

38 Cal. 3d at 164, 695 P.2d at 684, 211 Cal. Rptr. at 387. *See generally* Schwartz, *The Collateral-Source Rule*, 41 B.U.L. REV. 348 (1961).

71. 38 Cal. 3d at 164-65, 695 P.2d at 684-85, 211 Cal. Rptr. at 387-88. *See also id.* at 165 n.21, 695 P.2d at 685 n.21, 211 Cal. Rptr. at 388 n.21.

3333.1 in *Barme v. Wood,* that case was not controlling here.[72] With respect to the plaintiff's due process contention, the same principles discussed with regard to section 3333.2 were applicable. A plaintiff has no vested right in a particular measure of damages. Thus, the fact that a statutory provision results in a reduction in damages does not render it violative of the due process clause. The only condition necessary for validity is that the section rationally relate to a legitimate state interest.[73] Because it is likely that section 3333.1 will produce lower malpractice awards, it is rationally related to the objectives of MICRA and therefore not violative of due process.[74]

The plaintiff's equal protection challenge to section 3333.1 was also without merit. As with all the challenged MICRA provisions, it was appropriate for the legislature to restrict the application of section 3333.1 to medical malpractice cases because the act was intended to be a solution to the malpractice crisis.[75] There was no error by the trial court in applying section 3333.1.

III. THE DISSENTING OPINIONS

Chief Justice Bird's dissenting opinion strongly criticized the majority's decision to uphold the MICRA provisions challenged here. The dissent contended that the provisions afford relief to negligent health care providers and their insurers, and arbitrarily removes protections for injured patients.[76] The majority was further criticized for departing from established principles of constitutional analysis which require the court to invalidate irrational and invidious classifications.[77]

The dissent noted that MICRA was adopted in response to the

72. In *Barme,* the action was brought by a collateral source whose subrogation rights had been eliminated by the section. Here the plaintiff brought suit because his rights as a malpractice victim were at issue. *Id.* at 166, 695 P.2d at 685, 211 Cal. Rptr. at 388.

73. *Id.* at 167, 695 P.2d at 686, 211 Cal. Rptr. at 389.

74. Rationale to support the reasonable relationship are: the reduction of insurance costs would serve the public interest by preserving the availability of medical care and by assuring insurance coverage; modification of the rule prevents "double recovery" for plaintiffs, *see, e.g.,* Helfend v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 1, 465 P.2d 61, 84 Cal. Rptr. 173 (1970); and many jurisdictions have already gone so far as to repeal the rule altogether, *see, e.g., id.* at 6-7 & nn.4-6, 465 P.2d at 63-64 & nn.4-6, 84 Cal. Rptr. at 175-76 & nn.4-6; 38 Cal. 3d at 167 n.22, 695 P.2d at 686 n.22, 211 Cal. Rptr. at 389 n.22.

75. 38 Cal. 3d at 167, 695 P.2d at 686, 211 Cal. Rptr. at 389.

76. *Id.* at 168, 695 P.2d at 687, 211 Cal. Rptr. at 390 (Bird, C.J., dissenting).

77. *Id. See supra* notes 62-69 and accompanying text for the majority's view.

medical malpractice insurance crisis,[78] but that the crisis is fading into the past. Courts are now taking a closer look at such provisions, and the number of courts which have invalidated them has doubled since MICRA was enacted.[79] The majority declined, however, to follow this growing trend and chose instead to give deferential treatment to the legislature's solution to the crisis. In the Chief Justice's opinion, this deference served only to "perpetuate a fundamentally unjust stautory scheme."[80]

A. The Issue

This case presented the first MICRA challenge involving a provision which directly prohibits plaintiffs from receiving complete compensation. Unlike the other challenged provisions, the limit on noneconomic damages does not affect only windfalls, protect plaintiff awards, or discourage nonmeritorious suits.[81] "The statute plainly and simply denies severely injured malpractice victims compensation for negligently inflicted harm."[82]

This case also presented the rare situation where the weight of authority *supported* the constitutional challenge. A substantial majority of state courts have invalidated the same or similar provisions in their own statutory schemes.[83] None of these like provisions were

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78. In May, 1975, the governor convened the state legislature in extraordinary session to consider remedies to the rising cost of malpractice insurance and the inability of doctors to obtain such insurance, which threatened the stability of the health care industry in California. MICRA was enacted in response to this crisis.

> In broad outline, the act (1) attempted to reduce the incidence and severity of medical malpractice injuries by strengthening governmental oversight of the education, licensing and discipline of physicians and health care providers, (2) sought to curtail unwarranted insurance premium increases by authorizing alternative insurance coverage programs and by establishing new procedures to review substantial rate increases, and (3) attempted to reduce the costs and increase the efficiency of medical malpractice litigation by revising a number of legal rules applicable to such litigation.

American Bank, 36 Cal. 3d at 363-64, 683 P.2d at 674, 204 Cal. Rptr. at 673.

79. *See id.* at 370 n.10, 683 P.2d at 679 n.10, 204 Cal. Rptr. at 678 n.10.

80. 38 Cal. 3d at 169, 695 P.2d at 688, 211 Cal. Rptr. at 391 (Bird, C.J., dissenting). The problems identified by the Chief Justice were characterized as the "human consequences" of the MICRA provisions. These include the *American Bank* decision upholding section 666.7, the periodic payment provision, for which the court mandated additional special procedures to offset the worst effects of the section. *See American Bank*, 36 Cal. 3d at 377 n.14, 683 P.2d at 684 n.14, 204 Cal. Rptr. at 683 n.14. The section was held inapplicable to the case at bar. *Id.* at 378, 683 P.2d at 684, 204 Cal. Rptr. at 683. Here the majority approved the trial court's refusal to apply the rule to all but a small portion of the plaintiff's judgment. The dissent viewed this ad hoc application of the rule as a less desirable result than complete invalidation of the provision followed by legislative revision. 38 Cal. 3d at 169, 695 P.2d at 688, 211 Cal. Rptr. at 391.

81. 38 Cal. 3d at 169-70, 695 P.2d at 688, 211 Cal. Rptr. at 391.

82. *Id.* at 170, 695 P.2d at 688, 211 Cal. Rptr. at 391. *But see also supra* note 61 for a discussion of the possible rationale the legislature could have relied on in enacting the provision.

83. *See, e.g.*, Wright v. Central Du Page Hosp. Ass'n, 63 Ill. 2d 313, 347 N.E.2d 736

substantially more severe or more oppressive than the provisions challenged here.[84] The majority cited only to *Johnson v. St. Vincent Hospital*[85] as a decision upholding a limit on damages. That decision rested, however, on the finding of a strong public interest which was absent in this case. There is no requirement imposed on physicians or insurers to reduce insurance costs due to savings purportedly resulting from the MICRA provisions.[86]

B. The Proper Analysis

The court was urged to apply the strictest level of scrutiny in its equal protection analysis. The dissent found, however, that the limit on damages did not survive even the minimal level of scrutiny requiring "serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals."[87]

MICRA's goal of preserving medical malpractice insurance so plaintiffs could collect something was deemed legitimate. Moreover, the legislature could have reasonably decided that protecting medical practitioners and their insurers would effectuate that goal.[88] But, *each* statutory classification must be rational, nonarbitrary and bear a

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(1976); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Baptist Hosp. v. Baber, 672 S.W.2d 296 (Tex. Ct. App. 1984).

In *Carson*, the New Hampshire court invalidated a damage limit identical to the limit at issue in this case. The majority cited this case as the single exception to its conclusion, distinguishing the other state court decisions holding such provisions unconstitutional. *See* 38 Cal. 3d at 161 & n.19, 695 P.2d at 682 & n.19, 211 Cal. Rptr. at 385 & n.19. *See also supra* note 56.

84. 38 Cal. 3d at 170, 695 P.2d at 688, 211 Cal. Rptr. at 391 (Bird, C.J., dissenting). The dissent goes further to note that simply because noneconomic damages are limited and economic damages are not, the burden on victims is no less.

> For a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from noneconomic damages. Similarly, a person who has been hideously disfigured receives only noneconomic damages to ameliorate the resulting humiliation and embarrassment.
>
> Pain and suffering are afflictions shared by all human beings, regardless of economic status. For poor plaintiffs, noneconomic damages can provide the principal source of compensation for reduced lifespan or loss of physicial capacity. Unlike the attorney in the present case, these plaintiffs may be unable to prove substantial loss of future earnings or other economic damages.

Id. at 171, 695 P.2d at 689, 211 Cal. Rptr. at 392.

85. 273 Ind. 374, 404 N.E.2d 585 (1980). *See also* 38 Cal. 3d at 172 n.3, 695 P.2d at 689-90 n.3, 211 Cal. Rptr. at 392-93 n.3.

86. 38 Cal. 3d at 172, 695 P.2d at 690, 211 Cal. Rptr. at 393.

87. *See Cooper*, 21 Cal. 3d at 848, 582 P.2d at 608, 148 Cal. Rptr. at 152 (quoting *Newland*, 19 Cal. 3d at 711, 566 P.2d at 257, 139 Cal. Rptr. at 623). *See also supra* notes 66-68 and accompanying text for the majority's application of the *Cooper* test.

88. 38 Cal. 3d at 172-73, 695 P.2d at 690, 211 Cal. Rptr. at 393.

substantial relation to the legislative objective.[89]

The statute here placed the greatest costs on the most seriously injured victims. This is not at all reasonably or logically related to the goal of protecting physicians and their insurers. Thus, the statute was a fundamentally arbitrary classification which was not justifiable considering the stated purpose of MICRA.[90] The rationale used by the majority to support its finding of constitutionality were so broad and speculative that they could support any enactment.

A two-tier system of analysis was adopted by the court in *American Bank.* The test which resulted requires that the statute serve some conceivable legislative purpose and that each classification bear a fair and substantial relationship to a legitimate purpose.[91] If applied here, the $250,000.00 limit would have to be invalidated. There was no rational relationship between singling out severely injured malpractice victims and the reduction of insurance costs to physicians. The damage limit of section 3333.2 therefore fails, in the dissent's analysis, to survive any meaningful level of judicial scrutiny.[92]

Section 3333.1 was also, in the dissent's opinion, not rationally related to any legitimate state purpose and thus unconstitutional. Moreover, the effect of the collateral source rule, prior to section 3333.1's enactment, was to prevent tortfeasors and insurers from benefitting from collateral source funds received by the plaintiff.[93] The validity of the elimination of the rule required a rational relationship between the classification and a legitimate state interest.

Two purposes were put forward by advocates of section 3333.1 and both were rejected by the dissent. The first was the prevention of a double recovery by the plaintiff. There was no reason, however, why a section adopted for that purpose should be limited to medical mal-

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89. *Id.* at 173, 695 P.2d at 690, 211 Cal. Rptr. at 393 (relying on Brown v. Merlo, 8 Cal. 3d at 861, 506 P.2d at 222, 106 Cal. Rptr. at 392).

90. An example was given to demonstrate the arbitrariness of the classification: a person who suffers severe injuries late in life may recover up to $250,000.00 for the resulting loss while an infant who suffers identical injuries must depend on the same amount of recovery for what is probably a longer lifetime.

The dissent provides alternatives which the legislature could have implemented to reach the same goal. These include special relief to physicians and insurers without imposing such heavy burdens on arbitrarily selected victims; spreading the cost to consumers and taxpayers generally; or reducing all noneconomic damages by a pro rata amount. 38 Cal. 3d at 173, 695 P.2d at 691, 211 Cal. Rptr. at 394.

The suggested rationale given by the majority, *see supra* note 61, were criticized because they ignored the nature of the classification, that is a classification among tort victims. *Id.* at 174, 695 P.2d at 691, 211 Cal. Rptr. at 394.

91. *Id. See also Brown,* 8 Cal. 3d at 861, 506 P.2d at 222, 706 Cal. Rptr. at 392.

92. 38 Cal. 3d at 175, 695 P.2d at 692, 211 Cal. Rptr. at 395. The statute is also underinclusive. *Id.*

93. *Id.* at 175-76, 695 P.2d at 692, 211 Cal. Rptr. at 395. *See also supra* notes 69-70 and accompanying text.

practice victims.[94] The second purported purpose was to reduce the cost of insurance. The relationship between section 3333.1 and that goal is purely speculative. There was no requirement that insurers reduce their rates; they could keep any windfalls. Furthermore, the section was only a rule of evidence which did not mandate that a jury offset collateral source funds.[95] Thus, the provision was arbitrary and allowed negligent physicians and their insurers to reap the benefits of the plaintiff's collateral source funds.[96]

Justice Mosk, in his separate dissenting opinion,[97] agreed with Chief Justice Bird's conclusions but would have employed an intermediate level of scrutiny due to the impracticality of either the strict scrutiny or rational relationship test in this situation. This middle level test, cited with approval in many jurisdictions,[98] was used by the New Hampshire court in *Carson v. Maurer*,[99] where provisions similar to those of MICRA were successfully challenged. The test requires a fair and substantial relationship between the legislation and the purpose of the legislation.[100] In the case of malpractice provisions, a balancing between the measure's benefits to the general public and the restriction of the private right involved is required.[101] Applying this test, Justice Mosk would invalidate both sections.

B. *Limitation of plaintiff's attorney's fees in medical malpractice actions upheld:* **Roa v. Lodi Medical Group.**

I. INTRODUCTION

Roa v. Lodi Medical Group[1] involved a challenge to the Medical In-

94. 38 Cal. 3d at 176, 695 P.2d at 693, 211 Cal. Rptr. at 396. *See also Helfend*, 2 Cal. 2d at 12, 465 P.2d at 68, 84 Cal. Rptr. at 180 (tort victims not fully compensated by judgments alone because attorney's fees and costs account for a substantial portion of the recovery amount).

95. 38 Cal. 3d at 177, 695 P.2d at 693, 211 Cal. Rptr. at 396.

96. *Id.* For other state cases in accord, see Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978). *Contra* Eastin v. Bloomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Pinillos v. Cedars of Lebanon Hosp. Corp., 403 So. 2d 365 (Fla. 1981); Rudolph v. Iowa Methodist Medical Center, 293 N.W.2d 550 (Iowa 1980).

97. 38 Cal. 3d at 178, 695 P.2d at 694, 211 Cal. Rptr. at 397 (Mosk, J., dissenting).

98. *See* Hawkins v. Superior Court, 22 Cal. 3d 584, 595-603, 586 P.2d 916, 932-38, 150 Cal. Rptr. 435, 442-47 (1978) (Mosk, J. concurring).

99. 120 N.H. at 932-33, 424 A.2d at 831.

100. *Id.*

101. *Id.* The provision in *Carson* was struck down as imposing too great a cost on the general public and on individual malpractice plaintiffs. *Id.* at 940-41, 424 A.2d at 837.

1. 37 Cal. 3d 920, 695 P.2d 164, 211 Cal. Rptr. 77 (1985). Opinion by Kaus, J., with

jury Compensation Reform Act of 1975 (MICRA). Though not the first challenge the court had heard regarding MICRA,[2] this challenge was the first to address significantly Business and Professions Code section 6146 which limits the plaintiff's attorney's fees in an action for medical malpractice to forty percent of the first $50,000.00, thirty-three and one-third percent of the next $50,000.00, twenty-five percent of the next $100,000.00 recovered, and ten percent of any recovery over $200,000.00.[3]

II. FACTS

The plaintiffs negotiated a $500,000.00 settlement with the defendants for injuries caused by negligent treatment of the plaintiffs' child during birth. The amount was approved by the court as required under the Probate Code.[4] The maximum fee the plaintiffs' attorneys could be awarded under section 6146 was $90,800.00, however, the arrangement between the plaintiffs and their attorneys was for the plaintiffs' attorneys to receive twenty-five percent of the settlement—about $122,800.00.[5] The plaintiffs' attorneys asked the trial court to award the higher amount, arguing that section 6146 was unconstitutional. While the trial court stated that $122,800.00 was a "fair and reasonable amount for attorney's fees" in this case, the constitutional challenge to section 6146 was rejected, and the $90,800.00 fee was approved.[6]

III. MAJORITY OPINION

The plaintiffs, and amici curiae on their behalf, contended that section 6146 was unconstitutional on due process, equal protection, and separation of powers grounds. The court, in evaluating the due process and equal protection challenges, applied the rational basis test.

The due process argument was that section 6146 impermissibly infringed on the rights of victims of medical malpractice to retain counsel. The court, however, interpreted section 6146 as merely a limitation on compensation and not an infringement on the right to

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Broussard, Grodin, and Lucas, JJ., concurring. Separate dissenting opinion by Bird, C.J., with Mosk and McCloskey, JJ., concurring. McCloskey, J., sitting under assignment by the Chairperson of the Judicial Council.

2. In 1984, the court decided Barme v. Wood, 37 Cal. 3d 174, 689 P.2d 446, 207 Cal. Rptr. 816 (1984) (MICRA provision which bars a "collateral source" from obtaining reimbursement from a medical malpractice defendant upheld); and American Bank & Trust Co. v. Community Hosp., 36 Cal. 3d 359, 683 P.2d 670, 204 Cal. Rptr. 671 (1984) (MICRA provision which requires the periodic payment of damages over $50,000.00 in medical malpractice actions upheld).

3. CAL. BUS. & PROF. CODE § 6146 (West Supp. 1985).

4. CAL. PROBATE CODE § 3500 (West 1981).

5. 37 Cal. 3d at 924, 695 P.2d at 164-65, 211 Cal. Rptr. at 78-79.

6. *Id.* at 924-25, 695 P.2d at 166, 211 Cal. Rptr. at 79.

counsel. Moreover, the court noted that statutory limits on attorney's fees are neither uncommon nor impermissible on the state and federal levels.[7] Therefore, "legislative ceilings on attorney fees are in no respect 'constitutionally suspect' or subject to 'strict' judicial scrutiny."[8]

The "sliding scale" fee schedule was also challenged by the plaintiffs as creating a conflict of interest between attorney and client. Under this schedule, the plaintiffs argued, an attorney would be more likely to settle a big claim than go to trial because only ten percent of any amount over two hundred thousand dollars could be statutorily awarded to the attorney. The court determined that the legislature could rationally have determined that the sliding scale would promote fairness and therefore rejected the challenge. The court cited reports from the American Bar Association, and the United States Department of Health, Education, and Welfare which recommended such a scale and which could reasonably have been considered by the legislature.[9] Applying the rational basis test, the court upheld section 6146 on the due process challenge.

The plaintiffs also contended that the legislature acted arbitrarily in imposing section 6146's attorney fee limits only in medical malpractice actions. However, the court found that "the Legislature could reasonably have determined that the provision would serve to reduce malpractice insurance costs"[10] and therefore the provision bore a rational relation to the purposes of MICRA.

The plaintiffs also contended that because section 6146 limits *plaintiff's* attorney's fees to a percentage of the plaintiff's judgment, no effect on malpractice premiums will result as a jury may not properly consider attorney fees in assessing damages.[11] Had the legislature

7. The court analogized the section 6146 regulation of fees to workers' compensation, probate, and federal tort claims fee regulation as well as similar statutes enacted in New York, New Jersey, Indiana, Nebraska and Delaware. *Id.* at 926-27, 695 P.2d at 166-67, 211 Cal. Rptr. at 79-80.

8. *Id.* at 927, 695 P.2d at 167, 211 Cal. Rptr. at 80 (footnote omitted). The court also stated that the amount of fees permitted under section 6146 did not render the statute unconstitutional on its face, thus rejecting the plaintiff's argument that section 6146 so severely limits attorney fees that injured persons would find it impossible to obtain competent representation. *Id.* at 928, 695 P.2d at 168, 211 Cal. Rptr. at 81.

9. *Id.* at 929, 695 P.2d at 169, 211 Cal. Rptr. at 82 (citing Report of Committee on Medical Professional Liability, 102 ABA Annual Report 786, 851 (1977); Department of HEW, Report of Secretary's Committee on Medical Malpractice 34-35 (1973); Kohlman, *An Equitable Contingency Fee Contract*, 50 STATE BAR. J., 268, 295-98 n.42 (1975)).

10. 37 Cal. 3d at 930-31, 695 P.2d at 170, 211 Cal. Rptr. at 83.

11. *Id.* at 930, 695 P.2d at 170, 211 Cal. Rptr. at 83 (citing Krouse v. Graham, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977)).

wanted to reduce malpractice premiums, it should have placed limits on defense attorney's fees instead. The court, in applying the rational basis test, held that limits on plaintiffs' attorney's recoveries will reduce the cost of malpractice insurance by encouraging settlement, thus saving trial costs and preparation. Money will be saved because "a plaintiff will be more likely to agree to a lower settlement since he will obtain the same net recovery from the lower settlement."[12] Moreover, frivolous suits and unrealistically high demands for settlement will be discouraged.[13] Alternative arguments that section 6146 unreasonably limits plaintiffs' attorney's fees and not defense attorney's fees, and that more seriously injured plaintiffs are limited while less seriously injured plaintiffs are not, were also found to be without merit when viewed under the rational basis test.

Finally, the plaintiffs' separation of powers argument was quickly disposed of. The area of imposing limits on attorney fees is not exclusive to the judicial branch, and therefore the legislature has power to act in this setting.[14] As a result, the majority affirmed the order of the lower court and rejected the plaintiff's challenges.

IV. DISSENTING OPINION

Chief Justice Bird, in her dissent, pursued a tack which the majority left to a footnote[15]—whether section 6146 infringed upon the plaintiff's right to petition the government for redress of grievances. This right, which is protected by the first and fourteenth amendments to the United States Constitution and article I, section 3 of the California Constitution, may be restricted "only where necessary to serve a compelling governmental interest."[16] The dissent analogized the limits on the expenditure of money for attorney fees to limits imposed on political campaigns,[17] and because

> meaningful access to the courts is a fundamental right within the protection

12. 37 Cal. 3d at 931, 695 P.2d at 170, 211 Cal. Rptr. at 83.

13. *Id.*

14. *See* Brydonjack v. State Bar, 208 Cal. 439, 281 P. 1018 (1929); Estate of Goodrich, 6 Cal. App. 730, 93 P. 121 (1907).

15. *See* 37 Cal. 3d at 927 n.5, 695 P.2d at 167 n.5, 211 Cal. Rptr. at 80 n.5.

16. *Id.* at 937, 695 P.2d at 175, 211 Cal. Rptr. at 88 (Bird, C.J., dissenting) (emphasis omitted). The majority said of this claim, "[a]lthough the argument is creative, its logic clearly proves too much, for it would preclude a state from imposing *any* limitation on attorney fees, no matter how unconscionably high such fees might be, a position even amicus does not embrace." 37 Cal. 3d at 927 n.5, 695 P.2d at 167 n.5, 211 Cal. Rptr. at 80 n.5 (emphasis in original).

17. 37 Cal. 3d at 937-38, 695 P.2d at 175, 211 Cal. Rptr. at 88 (Bird, C.J., dissenting). The majority, however, cited Government Code section 86205(f) which prohibits lobbyists from accepting any employment on a contingency basis as analogous and equally as persuasive. 37 Cal. 3d at 927 n.5, 695 P.2d at 168 n.5, 211 Cal. Rptr. at 81 n.5. The dissent quoted extensively from National Ass'n of Radiation Survivors v. Walters, 589 F. Supp. 1302 (N.D. Cal. 1984), *probable jurisdiction noted*, 105 S. Ct. 588 (1984), *stay granted*, 105 S. Ct. 11, *request to vacate stay denied*, 105 S. Ct. 238 (1984). In *Walters*, a

> of the First Amendment . . . [i]t is evident that the First Amendment protects individuals' rights to obtain the adequate legal representation necessary to ensure their rights of petition, access to the courts, and association, just as it protects organizations' rights to such representation.[18]

No compelling governmental interest was found by the dissent to justify section 6146 against this first amendment challenge.[19]

The dissent also addressed the due process and equal protection issues. Chief Justice Bird stated that "section 6146 *does* significantly interfere with the right of certain victims of medical malpractice to retain counsel . . . [and] it exacerbates the conflict of interest between plaintiffs and their attorneys inherent in the contingent fee arrangement."[20] The fee restrictions in other areas of the law and in other states noted by the majority were distinguished and the dissent concluded that section 6146 "does not bear a reasonable relationship to the legislative purposes of protecting plaintiffs' recoveries and lowering malpractice premiums."[21] Therefore, section 6146 failed the dissent's application of the rational basis test and should be struck down on due process grounds.

The dissent found that plaintiffs' arguments that heightened scrutiny should be used in the an equal protection analysis due to a classification based on wealth had merit, but since the statute could not withstand any level of judicial scrutiny, such an argument need not be considered to find section 6146 unconstitutional.[22] The statute was "grossly underinclusive" and there was "no rational basis to single out medical malpractice contingent fees for special treatment."[23] The dissent concluded that section 6146 works a grave injustice and should be declared unconstitutional.

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federal district court issued a preliminary injuction barring enforcement of a fee constraint applied in death and disability cases brought by veterans.

18. 37 Cal. 3d at 938-39, 695 P.2d at 176, 211 Cal. Rptr. at 89 (Bird, C.J., dissenting) (emphasis omitted).

19. *Id.* at 942, 695 P.2d at 178, 211 Cal. Rptr. at 91. The dissent also argued that section 6146 violated the constitutional bar against content discrimination. *Id.*

20. *Id.* (emphasis in original).

21. *Id.* at 948, 695 P.2d at 183, 211 Cal. Rptr. at 96 (Bird, C.J., dissenting).

22. *Id.* at 949, 695 P.2d at 183, 211 Cal. Rptr. at 96 (Bird, C.J., dissenting).

23. *Id.* at 950-51, 695 P.2d at 184-85, 211 Cal. Rptr. at 97-98 (Bird, C.J., dissenting). Many alternatives are presented by the dissent, among them the restriction of defendants' attorney's fees.

C. *A minor with a medical malpractice claim has three years from the date of the wrongful act within which to bring an action, regardless of when the minor reaches the age of majority or when the injury is discovered:* **Steketee v. Lintz, Williams & Rothberg.**

In *Steketee v. Lintz, Williams & Rothberg,* 38 Cal. 3d 46, 694 P.2d 1153, 210 Cal. Rptr. 781 (1985), the supreme court was asked to determine whether a minor victim of medical malpractice is subject to the three year statute of limitations set out in section 340.5 of the Civil Procedure Code, regardless of when he reaches the age of majority. The question arose in a legal malpractice action brought by the plaintiff. It was alleged that the defendants, who were previously retained as counsel for the plaintiff's medical malpractice claim, had failed to file the action within the statute of limitations period. The trial court held that the plaintiff was subject to the separate statute of limitations for minors, because at the time of the wrongful act the plaintiff was a minor. Under this limitation period, the defendants were not guilty of malpractice.

The plaintiff contended on appeal that upon his reaching eighteen years of age, the adult statute of limitations, which provided for a three year limit from the date of the injury, or a one year limit from the date of discovery of the malpractice, applied to him. The defendants contended that the statute of limitations applicable to minors was appropriate. Under that theory, three years from the date of the wrongful act, rather than from the date of the injury, fell several months after the attorney-client relationship had been terminated. Thus, the defendants were under no duty to file an action because they did not represent the plaintiff when the statutory period ran out.

The supreme court affirmed the trial court's summary judgment in favor of the defendants. The decision was based on the rule of statutory construction requiring that a word or phrase be given the same meaning wherever it appears in the entire enactment. Thus, the phrase "actions by a minor" as used in section 340.5 refers to the plaintiff's age at the time of the alleged wrongful act, not, as the plaintiff had contended, his age at the time the action is filed.

Further rationale was offered in support of this construction. First, bizarre and arbitrary results would occur if the statute of limitations were to suddenly switch at the time a malpractice victim reaches majority age. Second, it was the intent of the legislature to curtail malpractice litigation costs, but not limit the right of an injured minor to bring suit by imposing additional restrictions intended for adults. Finally, public policy protects minors against loss of their rights caused by the running of statutes of limitations.

In conclusion, the literal meaning of section 340.5, its statutory construction, and public policy all favor the trial court's interpretation of the provision. A minor negligently injured by a health care provider must be afforded a three year period within which to file a malpractice action, regardless of when the minor reaches majority or when the injury is discovered.

Here, the statute of limitations did not run until September, 1979. The attorney-client relationship between the defendants and the plaintiff expired in January, 1979. Therefore the defendants were not liable for failing to file an action because they did not represent the plaintiff throughout the entire statutory period, but were replaced by other counsel before the statute of limitations had expired.

XIV. PUBLIC ASSISTANCE

Court preliminarily enjoins county assistance program which requires single, employable welfare recipients to reside in a poorhouse: **Robbins v. Superior Court.**

In *Robbins v. Superior Court,* 38 Cal. 3d 199, 695 P.2d 695, 211 Cal. Rptr. 398 (1985), the supreme court preliminarily enjoined the County of Sacramento from administering a program which required single, employable welfare recipients to live in a county facility rather than receive the usual cash benefits. Twenty residents of the county attacked the validity of the ordinance, and its take-it-or-leave-it offer of "in-kind benefits." The residents at the county's Bannon Street facility were forced to sleep in open dormitory style rooms, use communal bathrooms, and be in the facility after the daily nine o'clock bedcheck. The plaintiffs, unsuccessful in the lower court, requested a writ of mandamus compelling the court below to grant a preliminary injunction against operating the "poorhouse."

The court had to determine whether the lower court abused its discretion in not granting the injunction. Initially, the court questioned whether the petitioners were "likely to suffer greater injury from a denial of the injunction than the defendants [were] likely to suffer from its grant." The court noted that while only two percent of the county-assisted citizens would be affected by the injunction, the plaintiffs were forced to surrender fundamental rights of privacy. This tipped the scales in the petitioners' favor.

Having decided the first prong of the test, the court next determined whether the petitioners had a reasonable likelihood of prevailing on the merits. The court emphasized that the state legislature

intended county assistance programs to promote self-respect and self-reliance. The court found the regimented county facility in direct conflict with this purpose, since the individuals were forced to give up fundamental privacy rights.

In addition, the petitioners contended that their constitutional right to privacy had been violated. The court noted that the right to privacy—one's right to be left alone—extends to choosing whom to live with. Here, the defendants denied the residents their personal privacy, while refusing to seek reasonable adequate alternatives to the poorhouse resident requirement. The court concluded that the petitioners were likely to be successful on the merits of their privacy claim. The writ of mandamus ordering the preliminary injunction was therefore granted.

XV. PUBLIC UTILITIES

Amendment of Public Utilities Code rendered utility's challenge to participation costs moot: **Southern California Gas Co. v. Public Utilities Commission.**

The supreme court in *Southern California Gas Co. v. Public Utilities Commission,* 38 Cal. 3d 64, 695 P.2d 186, 211 Cal. Rptr. 99 (1985), held moot the question whether intervenors in commission proceedings were entitled to "public participation costs." It had been argued by the utilities that these fees, which included the cost of attorneys and expert witnesses, were beyond the power of the Public Utilities Commission after the decision of *Consumers Lobby Against Monopolies v. Public Utilities Commission,* 25 Cal. 3d 891, 603 P.2d 41, 160 Cal. Rptr. 124 (1979).

However, the court determined that a recent amendment to the Public Utilities Code rendered the issue moot. *See* CAL. PUB. UTIL. CODE §§ 1801-1808 (West Supp. 1985). These new sections allow the commission to award reasonable participation costs to consumer groups who are involved in commission decisions. *Id.* § 1801. In reference to the retroactivity of the new sections, the court held that it was the legislature's intent to validate existing commission rules that had awarded such costs. The court held that even in the absence of such legislative intent, the retroactivity question was academic, since no awards by the commission had been granted before the January 1, 1985, date of effectiveness. Hence, the court determined the utilities' challenge to the commission's award of participation costs to be moot.

XVI. RENT CONTROL

Municipal rent control ordinance survives challenges under the Sherman Antitrust Act and the due process clause: **Fisher v. City of Berkeley.**

I. INTRODUCTION

In *Fisher v. City of Berkeley*,[1] the court upheld the City of Berkeley's rent control ordinance under antitrust and constitutional attacks.[2] The plaintiffs, a group of landlords from Berkeley, challenged the legality of the ordinance under the Sherman Antitrust Act,[3] arguing it unreasonably restrained interstate commerce[4] and amounted to monopolization of the rental field.[5] The supreme court dismissed the landlords' antitrust attacks, holding that the Berkeley ordinance serves a proper local purpose that is rationally related to a legitimate exercise of the police power.[6] The plaintiffs' inability to allege any reasonable adequate alternatives to such an ordinance was a decisive factor in the court's decision to uphold the ordinance against antitrust attacks.[7]

The landlords also challeged the validity of the rent control ordinance on due process grounds. The court, in upholding the ordinance in the face of federal and state constitutional due process attacks, emphasized that a landlord is only entitled to a fair return on his investment, not a fair return on the value of his property.[8] However, the court did hold a "severable" portion[9] of the ordinance invalid, which

1. 37 Cal. 3d 644, 693 P.2d 261, 209 Cal. Rptr. 682 (1984). Justice Mosk delivered the majority opinion in which Justices Reynoso, Grodin, Cooperman, and Mills concurred. Chief Justice Bird filed a separate concurring opinion, and Justice Lucas a dissenting opinion. Justices Cooperman and Mills were sitting under assignment by the Chairperson of the Judicial Council.

2. *Id.* at 709, 693 P.2d at 312, 209 Cal. Rptr. at 732.

3. *See* 15 U.S.C. §§ 1-7 (1982). The Act is primarily intended to prevent the practice of anticompetitive activities by private business. 37 Cal. 3d at 656, 693 P.2d at 272, 209 Cal. Rptr. at 693.

4. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (1982), which holds all unreasonable restraints on interstate commerce through contracts, combinations or conspiracies to be illegal.

5. *See id.* § 2, which provides that monopolization or any attempt to monopolize interstate commerce is illegal.

6. 37 Cal. 3d at 652, 693 P.2d at 269, 209 Cal. Rptr. at 690.

7. *Id. See infra* note 53 and accompanying text.

8. 37 Cal. 3d at 652, 693 P.2d at 269, 209 Cal. Rptr. at 690. *See* U.S. CONST. amend V. *See also infra* notes 60-77 and accompanying text.

9. By "severable," the court means the invalid portion of the ordinance is extractable, leaving the valid remainder of the ordinance in effect. 37 Cal. 3d at 652, 693 P.2d at 269, 209 Cal. Rptr. at 690.

provided for an evidentiary presumption concerning the burden of proof in retaliatory evictions.[10]

II. FACTUAL BACKGROUND

The plaintiffs, a group of landlords from the City of Berkeley, filed this action in the Alameda County Superior Court seeking injunctive and declaratory relief against the enforcement of the Berkeley rent control ordinance.[11] In June of 1980, the City of Berkeley had passed by initiative the "Rent Stabilization and Eviction for Good Cause Ordinance,"[12] which applied to some 23,000 rental units. The ordinance's purpose was to prohibit unwarranted rent increases and retaliatory evictions.[13]

The ordinance required landlords to register with a Board of Commissioners[14] and to follow base rent ceilings,[15] while allowing the Board to adjust rents according to a landlord's expenses.[16] In order to evict a tenant, a landlord would have to show certain types of "good cause."[17] Furthermore, there was a presumption that an eviction was retaliatory if it occurred within six months of a tenants' assertion of his rights under the ordinance.[18]

While the case was on appeal, the United States Supreme Court de-

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10. *Id.* *See infra* notes 89-101 and accompanying text.

11. 37 Cal. 3d at 653, 693 P.2d at 270, 209 Cal. Rptr. at 691. This original challenge to the ordinance was based only on due process grounds.

12. *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance (June 1980).

13. *Id.* § 3. The purpose of the rent control ordinance was:

> to regulate residential rent increases in the City of Berkeley and to protect tenants from unwarranted rent increases and arbitrary, discriminatory, or retaliatory evictions, in order to help maintain the diversity of the Berkeley community and to ensure compliance with legal obligations relating to the rental of housing. This legislation is designed to address the City of Berkeley's housing crisis, preserve the public peace, health and safety, and advance the housing policies of this City with regard to low and fixed income persons, minorities, students, handicapped, and the aged.

37 Cal. 3d at 652, 693 P.2d at 269-70, 209 Cal. Rptr. at 690-91 (quoting Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 3 (June 1980)).

14. Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, §§ 6, 8 (June 1980).

15. *Id.* § 10. The base rent ceiling was the rental charged as of May 31, 1980. If there was no rental arrangement in effect at that time, an estimate was made from comparable units in the city. 37 Cal. 3d at 653 n.1, 693 P.2d at 270 n.1., 209 Cal. Rptr. at 691 n.1.

16. Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 11 (June 1980).. Where a landlord is not satisfied by this adjustment, he may ask for an individual increase based upon his increased utilities, taxes, and other expenses. *Id.* § 12.

17. *Id.* § 13.

18. *Id.* § 14. This section of the ordinance was the only one held invalid by the court. 37 Cal. 3d at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725. *See infra* notes 89-101 and accompanying text.

cided in *Community Communications Co. v. City of Boulder*[19] that a municipality can be in violation of federal antitrust law. Since this new development could have affected the outcome of the decision, the court allowed amici curiae to introduce the antitrust issue on appeal.[20]

III. ANTITRUST

A. Federal Antitrust Law and Municipal Action

The court initially discussed whether the Sherman Antitrust Act[21] was applicable to a municipality. Relying on *Parker v. Brown*,[22] the court held that a state in its sovereign capacity was free to legislate anticompetitive laws, while escaping the scrutiny of federal antitrust law.[23] However, this exemption, based on state sovereignty, has, as a result of the Supreme Court's decision in *Community Communications Co. v. City of Boulder*,[24] been held applicable to municipalities only in very limited circumstances. That is, where the municipal ordinance is premised on the action of the state itself, or where it is in accordance with recognized state policy.[25] The *Parker* exception is based on state sovereignty,[26] but the antitrust laws are formulated to protect against more than private business abuses.[27] The court held that it was unnecessary to determine the applicability of the *Boulder* exception,[28] however, until a conflict between the Sherman Antitrust Act and the ordinance was found.[29]

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19. 455 U.S. 40 (1982).

20. 37 Cal. 3d at 654, 693 P.2d at 270-71, 209 Cal. Rptr. at 691-92. The parties and amici curiae were granted leave to file supplemental briefs on the antitrust issue. *Id.*

21. *See* 15 U.S.C. §§ 1-7 (1982).

22. 317 U.S. 341 (1943).

23. The Court in *Parker* stated, "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-51. *See also* Bates v. State Bar, 433 U.S. 350 (1977); Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).

24. 455 U.S. 40 (1982) (municipal regulation of cable television susceptible to antitrust attack).

25. *Id.* at 52.

26. *Id.* at 50-51.

27. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978), which held that municipally owned utilities are subject to the Sherman Act.

28. A city ordinance "cannot be exempt from antitrust scrutiny unless it constitutes the action of the State . . . in its sovereign capacity, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy." Community Communications Co. v. City of Boulder, 455 U.S. at 52 (citation omitted).

29. 37 Cal. 3d at 660, 693 P.2d at 275, 209 Cal. Rptr. at 696. Because the plaintiffs failed to prove any conflict with the Sherman Antitrust Act, the court did not address

B. *Ordinance's Validity Under Section 1 of the Sherman Antitrust Act*

The plaintiffs' initial contention was that Berkeley's rent control ordinance unreasonably restrained trade in violation of section 1 of the Sherman Antitrust Act.[30] This section provides: "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . ."[31] The court enumerated the following three factors which must be proven to find a section 1 violation: "(a) that two or more 'persons' acted in concert, (b) that the activities complained of affect interstate commerce, and (c) that the action constitutes an unreasonable restraint on commerce."[32] In placing particular emphasis on whether there was an unreasonable restraint of trade, the court considered three standards: the rule of per se illegality, the rule of reason, and a modified rational relation standard.

1. The Rule of Per Se Illegality

The rule of per se illegality is defined as an irrebuttable presumption that conduct is illegal where it involves the concerted action of price fixing, regardless of economic benefits to consumers.[33] Hence, any concerted stabilization, lowering, or raising of prices is automatically deemed illegal.[34] However, two principal justifications must be present before the rule of per se illegality can be applied. These justifications include economic reliability and ease of administration.[35]

The court first addressed the economic reliability justification, which holds that price fixing usually has anticompetitive effects and rarely produces positive effects of a "redeeming virtue."[36] The court stressed the fear of "predatory" activities, which may be absent in the original scheme, but which may later appear and utilize the price fix-

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the exemption of *Boulder*. *Id.* at 662-63, 693 P.2d at 277, 209 Cal. Rptr. at 697-98. *See* Rice v. Norman Williams Co., 458 U.S. 654, 662 n.9 (1982).

30. 15 U.S.C. § 1 (1982). The court in dictum dismissed the defendant's contention that a city ordinance to further the health, safety, and welfare of the public is exempt from antitrust scrutiny. 37 Cal. 3d at 661, 693 P.2d at 276, 209 Cal. Rptr. at 696-97.

31. 15 U.S.C. § 1 (1982).

32. 37 Cal. 3d at 662, 693 P.2d at 276, 209 Cal. Rptr. at 697. The court only dealt with the unreasonable restraint of trade question.

33. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). The early application of this rule centered on the prohibition of cartels. *See* United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

34. *Socony*, 310 U.S. at 223. The court in *Fisher* stated, "The per se rule reflects an irrebuttable presumption that, if the court were to subject the conduct in question to a full-blown inquiry, a violation would be found under the traditional rule of reason." 37 Cal. 3d at 666, 693 P.2d at 280, 209 Cal. Rptr. at 701 (citation omitted).

35. 37 Cal. 3d at 667, 693 P.2d at 280-81, 209 Cal. Rptr. at 701-02.

36. *Id.* at 668, 693 P.2d at 281, 209 Cal. Rptr. at 702. *See also* Monsanto Co. v. Spray-Rite Service Corp., 104 S. Ct. 1464 (1984).

ing power to set unreasonable prices.[37] The court, recognizing that a municipality is to serve the public welfare, held that neither price fixing's anticompetitive nature nor the apprehension of predatory activity called for application of the economic reliability justification in this situation.[38]

The ease of judicial administration is another justification for the rule of per se illegality. The argument under the per se rule is that any inquiry into the validity of price fixing "would necessitate constant detailed supervision and analysis by the government to assure that reasonable prices remain reasonable as economic conditions vary."[39] The court also found this justification absent in the Berkeley ordinance. The reasons advanced by the court centered on the ordinance's own administrative safeguards, which included: the Board's duty to review rents; a landlord's guarantee of a "fair return" on his investment; procedures for administrative readjustment of rents; and the administrative costs being paid by the City.[40] Hence, since the justifications of economic reliability and ease of judicial administration were absent, the court refused to apply the rule of per se illegality.

2. The Rule of Reason

If a restraint on trade is not illegal per se, it should be scrutinized to determine its effects on the market.[41] Under the rule of reason, a restraint will be valid if determined to be reasonable; that is, the restraint only regulates and facilitates competition rather than having an anticompetitive effect.[42] The question is whether the restraint facilitates or suppresses competition.[43] The court, in contrasting the competitiveness of private business and the police power aspect of a

37. 37 Cal. 3d at 668-69, 693 P.2d at 281, 209 Cal. Rptr. at 702-03. The court stated that, "[t]he court's fear of facilitating such 'predatory' activity is grounded on assumptions about how unrestrained business competitors will act if given the opportunity." *Id.*

38. *Id.* at 669, 693 P.2d at 281-82, 209 Cal. Rptr. at 702-03. *See also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 397-98 (1927).

39. 37 Cal. 3d at 670, 693 P.2d at 282, 209 Cal. Rptr. at 703.

40. *Id.* The court stated, "In our view, maximum rents price fixing, implemented by local government, is simply not of the same character as price fixing among private business defendants." *Id.* at 670, 693 P.2d at 283, 209 Cal. Rptr. at 704 (footnote omitted).

41. Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

42. 37 Cal. 3d at 665, 693 P.2d at 279, 209 Cal. Rptr. at 700.

43. National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 691 (1978) (rule of reason directly related to effect on market competitiveness).

municipality, held that the judiciary must create and recognize a "public welfare 'defense' " to antitrust attacks against municipal regulation.[44] Hence, the rule of reason was held inapplicable as well.

3. The Modified Rational Relation Standard

The court's decision not to apply either the rule of per se illegality or the rule of reason to Berkeley's ordinance led it to create a modified standard by which to judge alleged municipal violations of federal antitrust law.[45] The court, in borrowing from the United States Supreme Court's commerce clause analysis,[46] stated:

> [W]e conclude that if a municipal regulation has a proper local purpose, is rationally related to the municipality's legitimate exercise of its police power, and operates in an even handed manner, it must be upheld against a claim that it conflicts with section 1 of the Sherman Act unless the plaintiff demonstrates that the city's purposes could be achieved as effectively by means that would have a less instrusive impact on federal antitrust policies.[47]

In applying this standard to the Berkeley ordinance, the court first held that it served a legitimate purpose of serving the health, safety and welfare of the community.[48]

Furthermore, the court affirmed that rent control is rationally related to a valid exercise of the police power.[49] In determining whether the ordinance was even-handed, the court had to deal with an exception in the ordinance concerning rental properties of four or less units where one of the units was occupied by the landlord.[50] The challenge here was primarily based on the exception's applicability only to landlords who were in this position before December 31,

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44. 37 Cal. 3d at 673, 693 P.2d at 284-85, 209 Cal. Rptr. at 705. The court stated: "To prevent unwarranted interference with a municipal government's legitimate exercise of its police power, and to accommodate the motives that underlie local government regulation, courts must develop tests that recognize a public welfare 'defense' to alleged violation of the antitrust laws by municipalities." *Id.* (citation omitted).

45. *Id.* at 674, 693 P.2d at 285-86, 209 Cal. Rptr. at 706-07.

46. The Supreme Court has held that state or local regulation will hold up against commerce clause attack if: it does not discriminate against interstate commerce; it bears a rational relation to legitimate state ends; and no reasonably adequate alternatives are available. Then a balancing test is applied to determine if the local benefits outweigh the burdens on interstate commerce. *Id.* at 674, 693 P.2d at 286, 209 Cal. Rptr. at 707. *See, e.g.,* Edgar v. MITE Corp., 457 U.S. 624 (1982); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); and Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951). The court chose not to include the "standardless" cost benefit analysis in its test. 37 Cal. 3d at 675, 693 P.2d at 286, 209 Cal. Rptr. at 707.

47. 37 Cal. 3d at 675, 693 P.2d at 286-87, 209 Cal. Rptr. at 707-08 (footnotes omitted).

48. *Id.* at 676, 693 P.2d at 287, 209 Cal. Rptr. at 708. *See* Birkenfeld v. City of Berkeley, 17 Cal. 3d 129, 160, 550 P.2d 1001, 1023, 130 Cal. Rptr. 465, 487 (1976).

49. *See Birkenfeld,* 17 Cal. 3d at 153-64, 550 P.2d at 1018-27, 130 Cal. Rptr. at 482-91 (rent control rational exercise of police power).

50. Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 5(f) (June 1980).

1979.[51] However, the court held that this disparate treatment bore a rational relationship to the purpose of the ordinance.[52] Finally, the court determined that no less intrusive alternatives to the rent control ordinance had been advanced by the plaintiffs.[53]

C. Ordinance's Validity Under Section 2 of the Sherman Antitrust Act

The plaintiffs had also contended that the City was in violation of section 2 of the Sherman Antitrust Act, which prohibits monopolization.[54] The court reviewed factors which constitute private monopolization, including: the possession of monopoly power—the "power to control prices or exclude competition;"[55] and the purposeful acquisition of monopoly power.[56] The court again refused to apply essentially private business tests, and applied its commerce-based, rational relation test.[57] Going through exactly the same analysis as under section 1,[58] the court found that no violation of section 2 had occurred.[59]

IV. CONSTITUTIONALITY

A. Ordinance's Fair Return Standard

One of the main challenges to the rent control ordinance was whether it was unconstitutional to guarantee a landlord a fair return only on his investment, instead of a return on the value of his property.[60] Since the court recognized that a state is not bound by any particular formula in administering rent control,[61] it found the sole

51. 37 Cal. 3d at 677, 693 P.2d at 287-88, 209 Cal. Rptr. at 708.

52. *Id.* at 677, 693 P.2d at 288, 209 Cal. Rptr. at 708. *See Clover Leaf Creamery,* 449 U.S. at 464.

53. 37 Cal. 3d at 677, 693 P.2d at 288, 209 Cal. Rptr. at 709.

54. Sherman Antitrust Act, 15 U.S.C. § 2 (1982). This section provides: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . ." *Id.*

55. 37 Cal. 3d at 678, 693 P.2d at 288, 209 Cal. Rptr. at 709 (quoting United States v. du Pont Co., 351 U.S. 377, 391 (1956)). *See, e.g.,* United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

56. 37 Cal. 3d at 678, 693 P.2d at 288, 209 Cal. Rptr. at 709. *See, e.g.,* United States v. du Pont Co., 351 U.S. 377 (1956).

57. 37 Cal. 3d at 678, 693 P.2d at 288, 209 Cal. Rptr. at 709. The court said it would "not mechanically apply to municipal defendants rules of law fashioned exclusively in the context of private business regulation." *Id.*

58. *See supra* notes 45-53 and accompanying text.

59. 37 Cal. 3d at 678, 693 P.2d at 289, 209 Cal. Rptr. at 710.

60. *Id.* at 679, 693 P.2d at 289, 209 Cal. Rptr. at 710.

61. *See* Federal Power Comm'n v. Natural Gas Pipeline Co., 315 U.S. 575 (1942);

question to be whether this "fair return on investment" standard would allow the City to avoid confiscatory results.[62]

The plaintiffs' major challenge to this standard was that it limits landlords to the profit they earned several years ago[63] while inflation continually devalues their return.[64] The court tended to agree with the plaintiffs' contention, recognizing that the risk to such businesses in inflationary periods calls for more than the maintenance of a status quo profit.[65] Furthermore, any type of "freeze" concerning profits inevitably leads to prohibitive, confiscatory results.[66] The court, reserving judgment on this matter until a real claim was made, stated that the ordinance possessed anti-inflationary provisions to guard against confiscatory results.[67]

The court then summarily disposed of the plaintiffs' contention that the return on investment standard violates equal protection, as there would be different rent ceilings for essentiallly similar rental units. It held that the standard was rationally related to the legitimate public end of providing stabilized rents in times of inflation.[68]

Furthermore, the plaintiffs challenged the ordinance's determination of "investment."[69] They argued that inequitable results would occur as between landlords who had invested capital in the rental units, and those who had only put in time and labor.[70] The court quickly dismissed this attack, holding that the Board could consider a landlord's time and labor in improving his property, as well as subsequent monetary investments like mortgage payments.[71] The ordinance itself provides for individual rent adjustment to ensure a fair

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Carson Mobilehome Park Owner's Ass'n v. City of Carson, 35 Cal. 3d 184, 672 P.2d 1297, 197 Cal. Rptr. 284 (1983).

62. 37 Cal. 3d at 679, 693 P.2d at 290, 209 Cal. Rptr. at 710. *See also* Cotati Alliance for Better Housing v. City of Cotati, 148 Cal. App. 3d 280, 287, 195 Cal. Rptr. 825, 829 (1983) (regulation is invalid on its face if it causes confiscatory results).

63. *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 10 (June 1980). Section 10 fixes profits at those earned as of May, 1980.

64. 37 Cal. 3d at 682, 693 P.2d at 291-92, 209 Cal. Rptr. at 712-13.

65. *Id.* at 683, 693 P.2d at 292, 209 Cal. Rptr. at 713. The court held: "we must agree with plaintiffs that investment in rental units contemplates a higher risk and hence, in times of high inflation . . . demands more than mere maintenance of an existing profit amount." *Id.*

66. *Id. See, e.g., Cotati Alliance,* 148 Cal. App. 3d at 293, 195 Cal. Rptr. at 834 (inflationary diminution in value is confiscatory).

67. 37 Cal. 3d at 684, 693 P.2d at 293, 209 Cal. Rptr. at 714.

68. *Id. See Cotati Alliance,* 148 Cal. App. 3d at 292, 195 Cal. Rptr. at 833.

69. "Investment" in this context means any outlay of assets to secure some return through revenue.

70. 37 Cal. 3d at 685, 693 P.2d at 294, 209 Cal. Rptr. at 714-15.

71. *Id.* The court stated, "[t]hose who purchased with no down payment, improved property years ago with 'preinflation dollars,' or who obtained property through gift or inheritance, need not be deprived of a fair return simply because they made no initial monetary investment." *Id.*

return on investment.[72]

Finally, the plaintiffs argued that the fair return on investment standard was unconstitutional under the due process clause, because it prevented landlords from realizing the full long-term appreciation of their property.[73] The court, in dismissing this challenge, held restraint on appreciation to be a necessary evil of any rent control law.[74] A mere diminution in the property's value does not render a regulation unconstitutional.[75] The court's ultimate conclusion was that a rent control ordinance need not guarantee a fair return on the value of the property to be valid.[76] Thus, the court held the fair investment standard to be constitutional, and capable of avoiding confiscatory results.[77]

B. Ordinance's Rent Adjustment Procedures

The court next considered whether the ordinance's rent adjustment procedures satisfy the requirements of due process. The court first recognized that some rent adjustment procedure is required to ensure landlords a fair return on their investment.[78] Furthermore, any inordinate delays—"those . . . longer than practically necessary to achieve the legitimate purposes of the legislation"[79]—in the adjustment procedure—can also defeat the validity of the ordinance.[80] The court held that Berkeley's ordinance avoids the inequities of a unit by unit approach,[81] as citywide increases and comprehensive adjustment

72. *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 12(i) (June 1980).

73. 37 Cal. 3d at 685, 693 P.2d at 294, 209 Cal. Rptr. at 715.

74. *Id. See Cotati Alliance,* 148 Cal. App. 3d at 290, 195 Cal. Rptr. at 832, which held, "[s]ome lessening of appreciation is a necessary consequence of any rent control, since future appreciation is to a significant extent a function of increased rental income." *Id.* (citation omitted).

75. 37 Cal. 3d at 686, 693 P.2d at 294, 209 Cal. Rptr. at 715. *See, e.g.,* Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd,* 447 U.S. 255 (1980) (total diminution in property value required before a fifth amendment taking is found).

76. 37 Cal. 3d at 686, 693 P.2d at 295, 209 Cal. Rptr. at 716.

77. *Id.*

78. *Id.* at 687, 693 P.2d at 295, 209 Cal. Rptr. at 716. *See Birkenfeld,* 17 Cal. 3d at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 494 (continued delay in adjustment procedure is confiscatory).

79. *Carson,* 35 Cal. 3d at 192, 672 P.2d at 1301, 197 Cal. Rptr. at 288.

80. 37 Cal. 3d at 687, 693 P.2d at 295, 209 Cal. Rptr. at 716. *See Carson,* 35 Cal. 3d at 192, 672 P.2d at 1301, 197 Cal. Rptr. at 288; *Birkenfeld,* 17 Cal. 3d at 169, 550 P.2d at 1030, 130 Cal. Rptr. at 464.

81. *See Birkenfeld,* 17 Cal. 3d at 170-72, 550 P.2d at 1030-32, 130 Cal. Rptr. at 494-96 (previous Berkeley ordinance held invalid because of excessive procedural delays).

procedures eliminate any undue delays.[82]

C. *Unreasonable Restraint on Alienation*

The plaintiffs also argued that certain "antispeculation" clauses[83] of the ordinance unreasonably restrained alienation of rental property in violation of California Civil Code section 711.[84] These clauses are intended to prevent speculation on mortgages acquired after the ordinance is put into effect.[85] The court summarily dismissed this contention, holding that the "fair return on investment clause"[86] prohibits any unreasonable restraint on alienation.[87] Furthermore, the court held that section 711 does not apply to governmental regulation in any event.[88]

D. *The Retaliatory Eviction Presumption*

The Berkeley rent control ordinance provides,[89] as does case law,[90] that retaliatory eviction is a defense to eviction. However, the ordinance creates a presumption that an eviction is retaliatory if a tenant has exercised his rights under the ordinance in the last six months.[91] The plaintiffs contended that such a presumption affecting the burden of proof was preempted by state law.[92]

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82. 37 Cal. 3d at 687-88, 693 P.2d at 296-97, 209 Cal. Rptr. at 717-18. Procedures which decrease the possibility of delay include: the ability to consolidate landlord's petitions from the same building, Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 12(b)(9) (June 1980); procedure to appoint additional hearing officers, *id.* § 12(b)(1)(11); and a time limit of 120 days on landlord petitions, *id.* § 12(b)(12).

83. *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 12(d), (e) (June 1980). These subsections deny a landlord rent increases as a result of the sale or refinancing of rental units, after adoption of the ordinance, where it is foreseeable that the existing rental ceiling would not have covered the expense. *Id.*

84. Civil Code section 711 provides: "[c]onditions restraining alienation, when repugnant to the interests created, are void." CAL. CIV. CODE § 711 (West 1982).

85. *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 12(d), (e) (June 1980).

86. *Id.* § 12(i). This provision overrides all others by stating: "[n]o provision of this Ordinance shall be applied so as to prohibit the Board from granting an individual rent adjustment that is demonstrated necessary by the landlord to provide the landlord with a fair return on investment." *Id.*

87. 37 Cal. 3d at 692, 693 P.2d at 299-300, 209 Cal. Rptr. at 720.

88. *Id.* at 692-93, 693 P.2d at 300, 209 Cal. Rptr. at 720.

89. *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 14 (June 1980).

90. *See* Schweiger v. Superior Court, 3 Cal. 3d 507, 476 P.2d 97, 90 Cal. Rptr. 729 (1970) (landlord retaliation against tenant a defense to eviction).

91. Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 14 (June 1980). It provides: "evidence of the assertion or exercise by the tenant of rights under this Ordinance within six months prior to the alleged act of retaliation shall create a presumption that the landlord's act was retaliatory."

92. 37 Cal. 3d at 694, 693 P.2d at 301, 209 Cal. Rptr. at 721-22. The plaintiffs contended that the section would be preempted by Evidence Code section 500.

The court initially had to determine if the retaliatory eviction presumption affected the burden of producing evidence or the burden of proof. The burden of producing evidence is merely a party's obligation to prove a prima facie case,[93] while the burden of proof refers to a sufficient amount of evidence to influence the trier of fact concerning an issue of the party's case.[94] Hence, if the court found an effect on the burden of proof, the landlord would be unfairly saddled with the burden of persuasion. The court, citing the recent amendment of the presumption section, held it created a presumption concerning the burden of proof.[95]

Finally, the court was faced with the question of whether such a presumption, affecting the burden of proof, should be preempted by the state's Evidence Code.[96] The City referred to Evidence Code section 500,[97] which provides: "Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."[98] Therefore, the City defended the ordinance's presumption, arguing that the phrase "[e]xcept as otherwise provided by law" granted them legislative license to change the burden of proof.[99] The City also referred to Evidence Code section 160,[100] which defines "law" to include "constitutional, statutory, and decisional law." The court, however, refused to accept the argument that the legislature intended a municipal ordinance to be within the exception of section 500, and declared the retaliatory eviction presumption invalid.[101]

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93. 37 Cal. 3d at 694, 693 P.2d at 301, 209 Cal. Rptr. at 722.

94. *Id.* at 695, 693 P.2d at 301, 209 Cal. Rptr. at 722.

95. *Id.* at 696, 693 P.2d at 302, 209 Cal. Rptr. at 723. The amendment changed the definition of "presumption." Initially, the ordinance stated that the "Court must find the existence of the fact presumed unless and until evidence is introduced which would support a finding of its nonexistence." Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 14 (June 1980). It was amended to hold that, " '[p]resumption' means that the Court must find the existence of the fact presumed unless and until its nonexistence is proven by the preponderance of the evidence." *Id.* (as amended in 1982).

96. 37 Cal. 3d at 697, 693 P.2d at 303, 209 Cal. Rptr. at 724. *See Birkenfeld*, 17 Cal. 3d at 152, 550 P.2d at 1018, 130 Cal. Rptr. at 482. *See also* CAL. CONST. art. XI, § 7.

97. CAL. EVID. CODE § 500 (West 1966).

98. *Id.*

99. 37 Cal. 3d at 697, 693 P.2d at 303, 209 Cal. Rptr. at 724.

100. CAL. EVID. CODE § 160 (West 1966).

101. 37 Cal. 3d at 698, 693 P.2d at 304, 209 Cal. Rptr. at 725. The court, in citing several cases holding ordinances to be preempted by the state evidence code, stated: "we cannot believe that the Legislature, when it enacted Evidence Code sections 500 and 160 in 1965, ever intended municipal ordinances to come within the exception clause of Evidence Code section 500." *Id.*

E. Ordinance's Rent-Withholding Provisions

The Berkeley ordinance provides for a rent-withholding remedy when the landlord has failed to register with the Board or if he is charging rents above those provided in the ordinance.[102] The landlord plaintiffs challenged the validity of these sections, claiming that they were preempted by applicable state law and were in violation of due process.[103]

1. Due Process

Initially, the plaintiffs contended that these rent-withholding remedies were not reasonably related to the ordinance's purpose, as the remedy was applicable in two different situations: when the landlord failed to register and when he charged rent above that provided in the ordinance.[104] The court, however, in relying on the inexpensiveness of this remedy and the registration fee's primary funding of the Board's activities,[105] held that the rent-withholding section was reasonably related to the legitimate purpose of the rent control ordinance.[106]

The court next considered the plaintiffs' challenge that these provisions were unconstitutionally vague and overbroad.[107] To overcome a vagueness attack, the court stated that the section must give fair notice of the prohibited conduct and allow for adequate enforcement standards.[108] The requirement of fair notice is met when a law's terms are of a "reasonable degree of certainty so that an ordinary landlord can understand what conduct is proscribed on his part, and under what conditions his rent-withholding tenant will be afforded a defense to an unlawful detainer action."[109] The court summarily dismissed the plaintiffs' arguments that the provisions in the act were unclear,[110] and held fair notice was given.

The plaintiffs also contended that the standards for enforcement were violative of due process, as the tenant can arbitrarily enforce

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102. *See* Berkeley, Cal., Rent Stabilization and Eviction for Good Cause Ordinance, § 15(a)(1)-(2). Subsection (1) permits a tenant to withhold rent with the Board's permission, while subsection (2) allows the tenant to withhold rent without any permission if he has a good faith belief that the landlord has violated the ordinance. *Id.*

103. 37 Cal. 3d at 700, 693 P.2d at 305, 209 Cal. Rptr. at 726.

104. *Id.*

105. *Id.* at 700-01, 693 P.2d at 305-06, 209 Cal. Rptr. at 726-27. The court stated: "all other enforcement remedies . . . except for subdivision (a), subsection (2) [rent withholding provision], suffer the same serious weakness: to invoke them can cost substantial amounts of money, either to the tenant or to the Board." *Id.* at 700, 693 P.2d at 305, 209 Cal. Rptr. at 726.

106. *Id.* at 702, 693 P.2d at 306, 209 Cal. Rptr. at 727.

107. *Id. See* Connally v. General Const. Co., 269 U.S. 385 (1926).

108. 37 Cal. 3d at 702-03, 693 P.2d at 306-07, 209 Cal. Rptr. at 727-28.

109. *Id.* at 702, 693 P.2d at 306, 209 Cal. Rptr. at 727.

110. *Id.*

the rent-withholding provisions, as long as they claim they possess a good faith belief a violation has occurred.[111] However, the court held it was a question for the trial court to determine if the tenant had a good faith belief, and hence a defense to a landlord's eviction suit.[112]

Finally, the court dismissed the plaintiffs' challenge that the ordinance denies them due process by confiscating rents without any safeguards.[113] The landlord was said to always have the power to recover in unlawful detainer and sue for his back rent lost if withholding was not in good faith.[114]

2. Preemption by State Law

The plaintiffs next contended that the rent-withholding provisions of the Berkeley ordinance either directly or impliedly conflict with state law and therefore are preempted.[115] They referred to state provisions which: provide for the payment of rent;[116] describe when a tenant is guilty of unlawful detainer;[117] and allow a repair and deduct remedy.[118]

Since none of these sections deal with rent-withholding, the court held that they did not directly preempt Berkeley's rent-withholding provision.[119] Hence, the court still had to decide whether the provision was preempted by implication.[120] The court used the *Hubbard* test, which holds there is an intent to preempt an area only if:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been

111. *Id.* at 703, 693 P.2d at 307, 209 Cal. Rptr. at 728. *See* Smith v. Goguen, 415 U.S. 566 (1974) (personal belief of tenant is not dispositive).

112. 37 Cal. 3d at 703, 693 P.2d at 307, 209 Cal. Rptr. at 728.

113. *Id.*

114. *Id.* at 704, 693 P.2d at 308, 209 Cal. Rptr. at 728-29. *See* CAL. CONST. art. I, § 7.

115. *See* CAL. CONST. art. XI, § 7. Every city has the authority to "make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." *Id.*

116. CAL. CIV. CODE § 1947 (West 1954).

117. CAL. CIV. PROC. CODE § 1161 (West 1982).

118. CAL. CIV. CODE § 1942 (West Supp. 1985).

119. 37 Cal. 3d at 707, 693 P.2d at 310, 209 Cal. Rptr. at 731. *See Birkenfeld*, 17 Cal. 3d at 149, 550 P.2d at 1016, 130 Cal. Rptr. at 480 ("statutory remedies for recovery of possession and of unpaid rent do not preclude a defense based on municipal rent control legislation.") (citations omitted).

120. 37 Cal. 3d at 707, 693 P.2d at 310, 209 Cal. Rptr. at 731. The court stressed that it would hesitate to "preempt a field covered by municipal regulation when there is a significant local interest to be served that may differ from one locality to another." *Id.*

> partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.[121]

The court, in applying these tests, held: there was no full state coverage of the field; that rent-withholding can tolerate local action; and the ordinance would rarely affect transient citizens.[122] Therefore, the court found no direct conflict nor conflict by implication necessitating preemption.

V. SEPARATE OPINIONS

Chief Justice Bird, agreeing with the majority's analysis, concurred to voice her disapproval of the court's hearing the antitrust issue. She emphasized the fact that amici curiae had raised this issue on appeal, while the plaintiffs neglected to mention the recent development of *Boulder*[123] in their petition to the supreme court. She reiterated that an appellate court should not consider matters not raised by the appealing parties.[124]

Justice Lucas filed a dissenting opinion to argue that the Berkeley ordinance's price fixing is in violation of the Sherman Antitrust Act and therefore preempted by the supremacy clause.[125] He pointed to the rule of per se illegality as applied to price-fixing in the private sector.[126] He contended that the justifications for the per se rule—anticompetitive effects and no overriding virtues—were present in the Berkeley ordinances.[127] Finally, he found fault in the majority's rational relation test by suggesting reasonable alternatives to rent control, including: rent subsidies; public housing; and municipally acquired property by purchase or condemnation.[128]

VI. CONCLUSION

The court articulated a new test to determine a municipality's susceptibility to federal antitrust law. The challenged municipal regulation will be upheld if it serves a proper local purpose, is rationally

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121. *In re* Hubbard, 62 Cal. 2d 119, 128, 396 P.2d 809, 815, 41 Cal. Rptr. 393, 399 (1965).

122. 37 Cal. 3d at 709-10, 693 P.2d at 311, 209 Cal. Rptr. at 732.

123. *See* Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982). *See supra* notes 19-20 and accompanying text.

124. 37 Cal. 3d at 710-11, 693 P.2d at 312-13, 209 Cal. Rptr. at 733-34 (Bird, C.J., concurring). *See also* Younger v. State, 137 Cal. App. 3d 806, 187 Cal. Rptr. 310 (1982) (additional propositions presented by amici curiae not considered).

125. 37 Cal. 3d at 713-14, 693 P.2d at 315, 209 Cal. Rptr. at 735-36 (Lucas, J., dissenting). *See* Sherman Antitrust Act, 15 U.S.C. §§ 1-2 (1982). *See also* U.S. CONST. Art. VI, § 2.

126. *See supra* notes 33-40 and accompanying text.

127. 37 Cal. 3d at 715-18, 693 P.2d at 315-17, 209 Cal. Rptr. at 736-38 (Lucas, J., dissenting). *See supra* notes 35-40 and accompanying text.

128. 37 Cal. 3d at 718, 693 P.2d at 318, 209 Cal. Rptr. at 739.

related to a valid exercise of the municipality's police power, and operates in an even handed way. However, if a plaintiff can present reasonable alternative means to achieve the regulation's purpose, the ordinance may be held invalid.

The court also held that due process does not necessitate a fair return on the value of a landlord's property, rather it only guarantees a fair return on his investment. Rent-withholding procedures were held to not be violative of due process, nor preempted by state law. However, the ordinance's provision relating to a presumption of retaliatory eviction was held invalid.

XVII. TAXATION

A. *Sales tax imposed by redevelopment agency held to be valid:* **Huntington Park Redevelopment Agency v. Martin.**

A writ of mandate compelling the Secretary of the Huntington Park Redevelopment Agency to publish a sales tax ordinance was granted in *Huntington Park Redevelopment Agency v. Martin,* 38 Cal. 3d 100, 695 P.2d 220, 211 Cal. Rptr. 133 (1985). The action arose when Martin, the agency's Secretary, refused to publish an ordinance enabling the agency to impose sales and use taxes. Redevelopment agencies, which serve to eliminate "blighted" areas, are able to levy a use or sales tax of one percent or less. The agency may only levy the tax if the city in which it operates applies a credit against the city's sales taxes, allowing the taxpayer's burden to remain the same. *See* CAL. REV. & TAX. CODE §§ 7202.5-.6 (West Supp. 1985). When the City of Huntington Park agreed to such an arrangement, the Huntington Park Redevelopment Agency adopted a sales tax ordinance, which Martin subsequently refused to publish.

Martin challenged the ordinance's validity under the California Constitution. Initially, he cited section four of article XIII A of the constitution to argue that the tax was a "special tax" requiring a two-thirds approval by the electorate. The court recognized that this section only applies to "Cities, Counties and special districts." Since the agency was neither a city nor a county, it would have to be a special district for the section to apply. The court held that the agency's inability to levy property taxes was sufficient to establish that it was not a special district. Such agencies receive their revenue from other taxing agencies. Therefore, the ordinance survived this constitutional attack.

The ordinance was also challenged under a California constitu-

tional provision which limits a governmental agency's expenditures to that expended in the prior year. *See* CAL. CONST. art. XIII B, § 1. Since the agency admittedly had no proper appropriations limit, Martin contended the new ordinance's revenues from the taxes would be in violation of article XIII B. However, the court applied section 3(a) of article XIII B which allows a governmental transferee to apply the appropriation limit of its transferor. The court determined that the City of Huntington Park, which held the responsibility to eliminate urban blight, validly transferred this duty to the agency, thereby satisfying section 3(a). Therefore, the writ of mandamus was granted requiring Martin to publish the ordinance.

B. *The "valuation rollback" provision of Proposition 13 does not apply to unit taxation of a public utility:* ITT World Communications v. City and County of San Francisco.

In *ITT World Communications v. City and County of San Francisco,* 37 Cal. 3d 859, 693 P.2d 811, 210 Cal. Rptr. 226 (1985), the supreme court held that article XIII A, section 2(a) of the California Constitution (Proposition 13) does not apply to unit taxation of public utility property. One of the primary objectives of unit taxation is to ascertain and reach with the taxing power the entire real value of all public utility property. Because the value of public utility property depends upon the "interrelation and operation" of the entire utility, unit taxation allows for fair valuation, preventing real but intangible value from escaping assessment. The plaintiff argued that Proposition 13's one percent ceiling on ad valorem taxes on real property, assessed on the property's 1975-1976 value, is applicable to unit taxation of public utility property.

In rejecting the argument, the court ruled that unit taxation is not taxation of real property, personal property, or even a combination of both. Construing unit taxation as real or personal property taxation and therefore subject to valuation rollback ignored the fact that unit taxation is a taxation of property as a going concern. To find public utility property eligible for rollback would violate this proposition as well as statutory rules of construction.

Moreover, public utility property is state-assessed, while article XIII A applies only to locally-assessed property. Although the court indicated that the plain meaning of the statute justifies this conclusion, the court tested this interpretation against various extrinsic aids. Of particular significance was the Legislative Analyst's lack of reference to state-assessed property in the context of a valuation rollback. Also, the State Board of Equalization concluded that the rollback provision did not apply to state-assessed property. This con-

clusion was left untouched by the legislature during its succeeding sessions.

The court also rejected the argument that article XIII, section 19 mandated an equal valuation of public utility property with other property. Section 19, said the court, applies only to the rate of taxation and not the valuation, and to read it otherwise would go against the legislature's understanding and the intent of the public who adopted Proposition 13.

VXIII. TORTS

A. *Common law damages may be awarded to heirs of victims of an airplane crash even though the FAA exclusively regulates civil aviation. A negligence per se instruction which allows the jury to consider whether FAA regulations were complied with is proper:* **Elsworth v. Beech Aircraft Corp.**

I. INTRODUCTION

The case of *Elsworth v. Beech Aircraft Corp.*[1] arose out of a plane crash. Edward O. Miro took three prospective buyers for a demonstration flight in a Travel Air twin engine airplane manufactured by Beech Aircraft Corporation (defendant). After takeoff, the plane climbed to 800 feet. While maneuvering in the traffic pattern, the plane suddenly made a sharp left turn, fell over, and began spinning. After a brief recovery the plane entered a final flat spin and crashed, killing all aboard. An examination of the wreckage showed that the left engine had been shut down by Miro, probably in response to the loss of indicated oil pressure. Miro had also shut off the fuel to the left engine and feathered the left propeller in his unsuccessful attempt to land the Travel Air safely.

Suit was brought against the manufacturer of the airplane. Conflicting evidence and theories were presented by the respective parties as to the cause of the crash. The plaintiffs,[2] through expert testimony, contended that the crash was caused by the failure of the left engine due to the broken valve. It was surmised that Miro acted quickly to prevent engine break up and fire by feathering the left en-

1. 37 Cal. 3d 540, 691 P.2d 630, 208 Cal. Rptr. 874 (1984). Opinion by Mosk, J., expressing the unanimous view of the court.

2. Those parties bringing the action were the three passengers' heirs. Miro's insurer had settled with the heirs of the passengers, and thus Miro's heir cross-complained against Beech.

gine propeller.[3] However, due to an inadequate stall warning system and an undue tendency for the Travel Air to spin, the Travel Air stalled and spun into the ground. Conversely, the defendant attributed the crash to pilot error, claiming that Miro did not maintain sufficient air speed to keep the Travel Air from stalling.

The plaintiffs sought recovery on several theories, including negligence per se, by alleging that the Travel Air "did not comply with various safty regulations adopted by the FAA."[4] The Travel Air's design was certified by the FAA in 1957 as complying with all safety regulations. The inspections and tests required by statute to receive certification were conducted by Beech employees.[5] However, tests to determine the spinning characteristics of the Travel Air were never performed. These important tests were omitted because an FAA official incorrectly construed the safety regulations as not requiring them.[6] They were performed, however, after a Travel Air crashed in 1958. Certification of the aircraft was continued after these tests on the recommendation of an FAA test pilot. The Travel Air remained certified as complying with all applicable safety regulations at the time of the ensuing crash. Nevertheless, a negligence per se instruction was read to the jury.[7]

The defendant Beech appealed from a judgment for the plaintiffs. Three claims were asserted by Beech. The first was that an instruction of negligence per se to the jury regarding whether Beech complied with existing FAA regulations was improper. Beech argued that "the effect of the instruction was to allow the jury to second-guess the FAA decision that the Travel Air complied with the regula-

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3. A broken valve caused the instrument in the cockpit that measured oil pressure to register a low reading and thus made Miro's actions reasonable, according to the plaintiffs' experts.

4. *Id.* at 546, 691 P.2d at 633, 208 Cal. Rptr. at 877. Other theories advanced by the plaintiffs were negligence and strict liability for design defects. *See id.* at 546 n.4, 691 P.2d at 633 n.4, 208 Cal. Rptr. at 877 n.4.

5. 49 U.S.C. § 1421(a)(1) (1982) provides that:

> The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> (1) Such minimum standards governing the design, . . . and performance of aircraft, aircraft engines . . . as may be required in the interest of safety.

Id. This procedure of allowing private parties to conduct tests to receive certification is permissible under 49 U.S.C. § 1355(a) (1982) which states: "the Administrator may . . . delegate to any properly qualified private person . . . any work . . . respecting (1) the examination, inspection, and testing necessary to the issuance of certificates . . . and (2) the issuance of such certificates." *Id.*

6. According to Harold Hermes, then regional chief of the FAA flight test branch, the regulations did not require "spin testing for twin engine aircraft." 37 Cal. 3d at 546, 691 P.2d at 633, 208 Cal. Rptr. at 877.

7. *Id.* at 547, 691 P.2d at 633, 208 Cal. Rptr. at 877 (citing BAJI No. 3.45 (6th ed. 1977)).

tions, thereby intruding into an area pre-empted by federal law."[8] The second was the improper admission of various items of evidence, among them an FAA report and evidence of twenty other crashes of the Travel Air or a similar aircraft. The third was that a new trial should be granted because two jurors watched a 60 Minutes television broadcast bearing on the case. The supreme court rejected the defendant's claims and affirmed the verdict.

II. ANALYSIS

A. Preemption

The law to be followed in preemption cases was stated in the recent United States Supreme Court case of *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission.*[9]

> [F]ederal law prevails over state law if Congress has expressed an intent to occupy a given field in which federal law is supreme. But even if there is no such intent, state law is preempted if it conflicts with federal law so that it is impossible to comply with both, or if the state regulations stand as an obstacle to the accomplishment of the full purposes that Congress sought to achieve.[10]

The court first addressed the issue of whether a state court may grant damages in cases where the federal legislature or administrative agency has entirely occupied the field in question by regulating it exclusively. In applying the test of *Pacific Gas & Electric,* a court must first determine if there was an express intent by the federal government to forbid states from awarding damages for violation of such regulations.

The United States Supreme Court was faced with a similar issue in the recent and well known case of *Silkwood v. Kerr-McGee Corp.*[11] While the Court acknowledged the tension between the minimum regulatory standards set forth by the federal government and the state law remedy of damages in *Silkwood,* the Court held that "Congress intended to stand by both concepts and to tolerate whatever tension there was between them."[12] Therefore, even though the nuclear power industry is exclusively regulated by the federal govern-

8. *Id.* at 547, 691 P.2d at 634, 208 Cal. Rptr. at 578.

9. 461 U.S. 190 (1984).

10. 37 Cal. 3d at 548, 691 P.2d at 634, 208 Cal. Rptr. at 878 (quoting *Pacific Gas & Elec.,* 461 U.S. at 203).

11. 104 S. Ct. 615 (1984).

12. 37 Cal. 3d at 549, 691 P.2d at 653, 208 Cal. Rptr. at 879 (quoting *Silkwood,* 104 S. Ct. at 625).

ment, the Court allowed the award of common law damages.[13]

The area of nuclear regulation is not unlike the area of aviation regulation, as serious consequences can result from an accident in either area. Thus, by analogy to *Silkwood,* the court stated that "there can be no question as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes."[14] Moreover, the court cited the Federal Aviation Act of 1958 which declares that the provisions of the Act "are not intended to abridge remedies that a party may have under state law."[15]

The critical issue before the court was whether the second part of the *Pacific Gas and Electric* test was satisfied. That is, was it impossible to comply with both federal and state standards, or would the imposition of a state standard (i.e., an award of damages) frustrate the objectives of the federal law?

The court could not discern any irreconcilable conflict between the federal government issuing certificates and the state court awarding damages against a defendant for a defective design. While Beech argued that deference should be accorded the FAA in its determination that the Travel Air was not defective, the court responded that the plaintiffs did not wish to challenge either the certification of the Travel Air or the power of the FAA to do so.[16] Allowing a jury to determine whether the Travel Air had a defective design "would have no effect on the FAA's power to certify aircraft, or on the validity of its certification decisions."[17] As for a negligence per se instruction, it "affects only the jury's *reason* for finding a design defect, rather than its power to find such a defect in the face of FAA certification."[18] Therefore, as it was not physically impossible for Beech to pay state-imposed damages and face fines from the federal government, negligence per se was not an improper instruction.[19]

The final aspect of the preemption issue was whether state law

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13. In *Silkwood,* the evidence showed that "Kerr-McGee complied with most federal regulations," 104 S. Ct. at 619, just as Beech did in the case at hand.

14. 37 Cal. 3d at 549, 691 P.2d at 635, 208 Cal. Rptr. at 879.

15. *Id.; see* 49 U.S.C. § 1506 (1982).

16. *See* 37 Cal. 3d at 549-50, 691 P.2d at 635, 208 Cal. Rptr. at 879. The FAA does provide for those wishing an opportunity to be heard regarding the certification process. *See* 49 U.S.C. §§ 1482(a), 1486(a) (1982).

17. 37 Cal. 3d at 550, 691 P.2d at 635, 208 Cal. Rptr. at 879. Moreover, Beech conceded that a manufacturer may be held liable even if the airplane complied with FAA regulations. *Id.* at 550, 691 P.2d at 636, 208 Cal. Rptr. at 880.

18. *Id.*

19. In order to find the negligence per se instruction invalid, Beech needed to show that "a significant risk of prohibition of protected conduct" was created. Sears, Roebuck & Co. v. Carpenters, 436 U.S. 180, 207 (1978). Because failure to comply with FAA regulations is not protected conduct, as construed in *Sears, Roebuck & Co.,* this argument failed.

posed an obstacle to the federal regulatory scheme.[20] The purpose of the regulations is to "protect those who fly in airplanes or are affected by their flight."[21] The defendant's contention that the remedies in the regulations[22] were the plaintiff's exclusive remedies was dismissed by the court. Furthermore, the court stated that "an action for damages promotes the safety of the travelling public by revealing violations or defects which may not have come to the attention of the FAA."[23] As a result, the overall policy of protecting those who fly in airplanes "would be enhanced rather than defeated by allowing a jury to consider whether the design of an aircraft complies with safety regulations"[24] despite agency certification. As the foregoing analysis indicates, no obstacle was found by the court; therefore, the court affirmed the lower court's ruling of no preemption.

B. Evidentiary Rulings

Beech alleged error in the admission of a report written by an unidentified employee of the General Accounting Office. The lower court admitted the report as relevant and admissible under the official records exception to the hearsay rule.[25] Once admitted, the report was read aloud by the plaintiff's attorney. The same report was

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20. *See* 37 Cal. 3d at 550, 691 P.2d at 636, 208 Cal. Rptr. at 880.

21. *Id.* at 551, 691 P.2d at 636, 208 Cal. Rptr. at 880. *See* Rauch v. United Instruments, 548 F.2d 452, 457 (3d Cir. 1976); Arney v. United States, 479 F.2d 653, 658 (9th Cir. 1973).

22. *See supra* note 16. These remedies, however, provide no relief in the form of damages; rather, they are provided for those who wish to challenge certification. As the public has no expertise in aircraft safety, these remedies were held inadequate by the court.

23. 37 Cal. 3d at 551, 691 P.2d at 637, 208 Cal. Rptr. at 881.

24. *Id.* at 551, 691 P.2d at 636, 208 Cal. Rptr. at 880. The court cited the case of McGee v. Cessna Aircraft Co., 139 Cal. App. 3d 179, 188 Cal. Rptr. 542 (1983), which held that a "Federal Aviation Regulation is entitled to as much weight as a statute, ordinance, or regulation of a public entity." *Id.* at 186-87, 188 Cal. Rptr. at 547. Therefore, if the jury found a violation, negligence per se under California Evidence Code section 669 could apply if the other requirements of the doctrine were satisfied by a preponderance of the evidence.

25. California Evidence Code section 1280 provides:

> Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:
>
> (a) The writing was made by and within the scope of duty of a public employee;
>
> (b) The writing was made at or near the time of the act, condition, or event; and
>
> (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

CAL. EVID. CODE § 1280 (West 1966).

excluded as hearsay in *Baker v. Beech Aircraft Corp.*[26] Beech contended that the report was irrelevant because it was made thirteen years after the Travel Air was certified and seven years after the witness to whom the plaintiff's attorney read the report, left his position with Beech. The court held that the report should have been excluded as hearsay as the official reports exception criteria was not satisfied.[27] The trustworthiness and relevance of the report were questionable. First, the author of the study and the identity of key FAA officials were unknown, and second, the report was made "several years after [the witness'] contact with Beech in the FAA central region had terminated."[28] However, the error of admitting the report was not prejudicial because there was ample evidence to support a determination by the jury in the plaintiff's favor,[29] coupled with the decreased relevance of the report due to the passage of years between the certification and the date of the report. The references to the report at trial were harmless because it was not "reasonably probable that a result more favorable to Beech would have been reached absent the references to the report at trial."[30]

Beech also alleged error in the admission of other accidents of aircraft built by Beech. The evidence in question was twenty stall/spin accidents, five involving the Travel Air, and fifteen involving another aircraft built by Beech, the Baron. The court held the accidents of the Baron admissible because the plaintiff introduced expert testimony at trial that showed the Baron and the Travel Air shared the same alleged design defect in the wings. This similarity of design made the trial court's conclusion of admissibility allowable. All of the accidents themselves were admissible to show Beech had notice of a possible design defect even if there was no evidence presented to show that each accident happened in the same manner.[31] The court

26. 96 Cal. App. 3d 321, 157 Cal. Rptr. 779 (1979). In *Baker*, the court stated: "no evidence at the trial was presented as to the identity and qualifications of the individuals who prepared said report, the facts upon which they based the report, or the circumstances under which it was prepared." *Id.* at 339, 157 Cal. Rptr. at 790.

27. 37 Cal. 3d at 554, 691 P.2d at 638, 208 Cal. Rptr. at 882. *See also supra* note 25 and accompanying text.

28. *Id.*

29. The court cited as evidence "voluminous testimony regarding the testing of the Travel Air, Beech's relationship to the FAA during the certification process, the requirements of the safety regulations, and the respects in which Beech failed to comply with them. *Id.* at 554, 691 P.2d at 639, 208 Cal. Rptr. at 883.

30. *Id.* (citing CAL. CONST. art. IV, § 13; People v. Watson, 46 Cal. 2d 818, 299 P.2d 243 (1956)).

31. To satisfy the notice requirement, the court quoted Hasson v. Ford Motor Co., 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982), *cert. dismissed*, 459 U.S. 1190 (1983), which indicated that "all that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation." 37 Cal. 3d at 555, 691 P.2d at 639, 208 Cal. Rptr. at 883 (quoting *Hasson*, 32 Cal. 3d at 404, 650 P.2d at 1181, 185 Cal. Rptr. at 664).

stated that "[t]here can be no question that the prior accidents should have alerted Beech to the faulty spinning characteristics of the Travel Air."[32] Therefore, the notice requirement was satisfied and the evidence of the crashes was admissible.

C. Jury Misconduct

During the trial's Christmas recess, 60 Minutes broadcasted a segment criticizing the safety record of light aircraft. Three days later, the jury began deliberations in the case at hand. Outside of the jury room, two jurors indicated that they had viewed the program; another juror, who voted in Beech's favor, came forward with a declaration stating that two jurors had indicated that they had seen the program. Beech sought a new trial due to juror misconduct.[33] Beech contended that the two jurors who viewed the program were guilty of misconduct, and that such misconduct raises a presumption of prejudice. *People v. Pierce*[34] was cited by Beech. In *Pierce*, the foreman of the jury, contrary to the judge's admonition, approached a police officer who testified for the prosecution (and who also was a good friend and neighbor of the juror) and discussed the case. The court in *Pierce* held that the refusal to grant a new trial was error due to the serious prejudice to the defendant.[35] This case was distinguished from *Pierce* because "the jurors in question did not deliberately set out to discover information regarding the issues at the trial; they simply watched a popular television program that happened to discuss the subject matter of the trial in a general way."[36] The court drew a parallel to the case of *Hasson v. Ford Motor Co.*,[37] in which a juror who attended nighttime paralegal classes heard a lecturer discuss the possibility of punitive damages. The court found no misconduct in *Hasson* because the information was unsolicited and mentioned in

32. 37 Cal. 3d at 555, 691 P.2d at 639-40, 208 Cal. Rptr. at 883-84.

33. The court that heard the motion for a new trial reviewed a videotape of the broadcast in question and concluded that the broadcast did not harm one party any more than the other. *Id.* at 556, 691 P.2d at 640, 208 Cal. Rptr. at 884.

34. 24 Cal. 3d 199, 595 P.2d 91, 155 Cal. Rptr. 657 (1979).

35. The court in *Pierce* stated that "[b]ecause a defendant charged with crime has a right to the unanimous verdict of 12 impartial jurors, it is settled that a conviction cannot stand if even a single juror has been improperly influenced." 24 Cal. 3d at 208, 595 P.2d at 96, 155 Cal. Rptr. at 662 (citations omitted). *See* People v. Honeycutt, 20 Cal. 3d 150, 570 P.2d 1050, 141 Cal. Rptr. 698 (1977); Anderson v. Pacific Gas & Elec. Co., 218 Cal. App. 2d 276, 32 Cal. Rptr. 328 (1963); Kritzen v. Citroen, 101 Cal. App. 2d 33, 224 P.2d 808 (1950).

36. 37 Cal. 3d at 559, 691 P.2d at 640-41, 208 Cal. Rptr. at 884-85.

37. 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982).

passing.[38] Though 60 Minutes did more than mention the subject of this litigation in passing, no misconduct was found because the jurors' acquisition of the information was inadvertent.

Even if misconduct was found, the court would have found the presumpton of prejudice rebutted by the plaintiffs.[39] The program made no mention of the Travel Air, and the court was "unable to conclude whether [the program] favored plaintiffs' theory of a design defect in the Travel Air or Beech's claim of pilot error."[40] Therefore, the court was unable to find that any misconduct was "of such a character as is likely to have influenced the verdict improperly"[41] so Beech's request for a new trial on the ground of juror misconduct was denied.

III. CONCLUSION

The plaintiffs were not to be denied a remedy in this case. The issue of preemption was viewed by the court with an unyeilding eye. As the policy of the aviation regulations is to protect the public, so too are the damage awards to make those injured whole. Awarding damages does nothing to obstruct manufacturers from complying with federal regulations; on the contrary, it gives manufacturers added incentive to comply. Manufacturers have no safe harbor by mere certification by the FAA.

No prejudicial error was found by the court on the evidentiary questions presented. In addition, inadvertent viewing by jurors of an impartial television broadcast regarding the topic of the litigation did not amount to misconduct as no improper influence on the verdict could be found.

B. *Foreseeability of criminal acts by third parties can be established by evidence other than prior similar events:* **Issacs v. Huntington Memorial Hospital.**

I. INTRODUCTION

The court in *Issacs v. Huntington Memorial Hospital*[1] held that a plaintiff in a suit against a landowner for the criminal acts of third

38. *Id.* at 409, 650 P.2d at 1184, 185 Cal. Rptr. at 667.

39. The *Hasson* case set out the test to be applied to determine whether jury misconduct results in prejudice. The reviewing court must examine "the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." *Id.* at 417, 650 P.2d at 1189, 185 Cal. Rptr. at 672 (citations omitted).

40. 37 Cal. 3d at 558, 691 P.2d at 641, 208 Cal. Rptr. at 885.

41. *Id.* (quoting CAL. EVID. CODE § 1150(a) (West 1966)).

1. 38 Cal. 3d 112, 695 P.2d 653, 211 Cal. Rptr. 356 (1985). Chief Justice Bird authored the majority opinion in which Justices Mosk, Kaus, Broussard, Reynoso, Grodin and Lucas concurred. No separate opinions were filed.

parties may show foreseeability by evidence other than prior similar events. Thus, to impose a duty of care on the landowner based upon foreseeability, a plaintiff need only show that under the totality of the circumstances the third party criminal conduct was reasonably foreseeable. Furthermore, the plaintiff's evidence can be limited to evidence other than prior similar incidents.[2]

II. FACTUAL BACKGROUND

The plaintiff, Mervyn Issacs, brought an action against the Huntington Memorial Hospital and its insurer, Truck Insurance Exchange, for injuries he received at the hand of a third party criminal while on the defendant's premises. The plaintiff, an anesthesiologist, had finished seeing some patients at the hospital and returned to his car with his wife and a family friend. While opening the trunk, the plaintiff was accosted and shot in the chest by an unknown assailant.[3] Issacs survived and brought an action against the defendants, alleging the hospital had breached its duty of care to protect persons on its premises from third party criminal attack.[4]

The plaintiff argued that the hospital was in a "high crime area," as several assaults had occurred on the premises in the last few years. He also urged that the security provided by the hospital was ineffective: hospital guards were unarmed and were not in the parking lot; lights were not on; television cameras neglected the parking lot; and an escort service was not utilized by hospital staff. A summary judgment for the defendants was granted in the trial court, and the plaintiff appealed.[5]

III. THE COURT'S ANALYSIS

The court limited its inquiry to "whether foreseeability, for the purposes of establishing a landowner's liability for the criminal acts of third persons on the landowner's property, may be established other than by evidence of prior similar incidents on those premises."[6]

2. *Id.* at 133, 695 P.2d at 663, 211 Cal. Rptr. at 366.

3. *Id.* at 120, 695 P.2d at 655, 211 Cal. Rptr. at 358. Dr. Issacs suffered severe injuries from the gunshot wound, which included loss of a kidney. The gunman was never apprehended.

4. *Id.* The plaintiff based the insurer's liability on their participation in determining to disarm the hospital guards.

5. *Id.* at 123, 695 P.2d at 657, 211 Cal. Rptr. at 360. The trial court determined that the plaintiff failed to establish foreseeability via proof of prior similar incidents on the premises.

6. *Id.* at 123, 695 P.2d at 657, 211 Cal. Rptr. at 360.

The court acknowledged that a landowner has a duty to anticipate reasonably foreseeable criminal acts of third parties on its premises and to protect invitees from such a threat.[7] The degree of foreseeability required to impose liability determined on a case-by-case basis, is dependent upon the burden of preventing the harm.[8] Where the possible harm is easily guarded against, a low degree of foreseeability is necessary. The court quickly disposed of an earlier rule which based foreseeability, and thus liability, on the existence of prior similar incidents.[9] The court noted that such a rule discouraged precaution, led to arbitrariness, and deprived the jury of its function to determine a case on its merits.[10]

Instead, the court held that foreseeability need not be based on similar prior incidents.[11] A totality of the circumstances determines whether a landowner should have forseen the criminal acts of third parties. Here, the owners neglected to provide proper lighting and adequate security so the court reversed the lower court's determination that the attack was not foreseeable.[12]

The court also reviewed several evidentiary challenges by the plaintiff. First, the court determined that the lower court's holding, that a separate hearing be held on each prior incident before admission, was proper.[13] Furthermore, the court held that there is no set rule as to when a prior incident is too remote in time to indicate foreseeability.[14] This is qualified by the court's discretion to exclude prior events when probative value is outweighed by the prejudicial effect.[15]

Finally, the court determined that the summary judgment in favor of the hospital's insurer was proper.[16] The court based this affirmation upon the insurance company's lack of ownership, possession or

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7. *See* Taylor v. Centennial Bowl, 65 Cal. 2d 114, 416 P.2d 793, 32 Cal. Rptr. 561 (1966).

8. 38 Cal. 3d at 128-30, 695 P.2d at 60-61, 211 Cal. Rptr. at 363-64 (citing Gomez v. Ticor, 145 Cal. App. 3d 622, 193 Cal. Rptr. 600 (1983)).

9. The court stated the earlier rule as follows: " 'in the absence of prior similar incidents, an owner of land is not bound to anticipate the criminal activities of third persons . . . .' " 38 Cal. 3d at 125, 695 P.2d at 658, 211 Cal. Rptr. at 361 (quoting Wingard v. Safeway Stores, 123 Cal. App. 3d 37, 43, 176 Cal. Rptr. 320, 324 (1981)).

10. The court held that "[a] rule that limits evidence of foreseeability to prior similar incidents deprives the jury of its role in determining that question." 38 Cal. 3d at 127, 695 P.2d at 659, 211 Cal. Rptr. at 362.

11. *Id. See* Kwaitkowski v. Superior Trading Co., 123 Cal. App. 3d 324, 176 Cal. Rptr. 494 (1981).

12. 38 Cal. 3d at 130-35, 695 P.2d at 661-64, 211 Cal. Rptr. at 364-67.

13. The court held this hearing, outside of the presence of the jury, was reasonable. *Id.*

14. *Id.* at 133, 695 P.2d at 663, 211 Cal. Rptr. at 366.

15. *See* CAL. EVID. CODE § 352 (West 1966) (remoteness in time only one factor in the determination).

16. 37 Cal. 3d at 134-35, 695 P.2d at 665, 211 Cal. Rptr. at 368.

control of the premises.[17]

IV. CONCLUSION

A plaintiff in an action against a landowner for injuries received from a criminal third party is able to prove the requisite foreseeability by proof of facts other than prior similar incidents. Now a landowner, based on the totality of the circumstances, must anticipate reasonably foreseeable dangers posed by third parties on his premises.

C. *One who sells or furnishes alcoholic beverages to an unintoxicated minor is immune from civil liability for injuries to third persons resulting from the minor's subsequent intoxication:* **Strang v. Cabrol.**

The supreme court in *Strang v. Cabrol*[1] affirmed the decision of the trial court sustaining the defendant's general demurrer and adopted the opinion of the court of appeal[2] as the majority opinion. Hearing was granted to resolve a conflict among the appellate courts concerning whether civil liability for personal injuries to third parties may be predicated on the sale or furnishing of alcoholic beverages to a not obviously intoxicated minor. The court found that no liability exists in such a situation.[3]

I. FACTS

Cabrol and four other individuals, members of a partnership doing business as a liquor store, were named as defendants in a personal injury suit brought by Strang. Plaintiff Strang alleged that the defendants sold alcoholic beverages to Shawn Patterson, who was under twenty-one, in violation of section 25658 of the Business and Professions Code.[4] Patterson then provided the alcohol to Donald Baas,

17. *Id. See also* Whitneys at the Beach v. Superior Court, 3 Cal. App. 3d 258, 83 Cal. Rptr. 237 (1970).

1. 37 Cal. 3d 720, 691 P.2d 1013, 209 Cal. Rptr. 347 (1984). Opinion by the court. Separate dissenting opinion by Kaus, J., with Bird, C.J., and Reynoso, J., concurring.

2. Opinion by Puglia, J., for the Court of Appeal, Third Appellate District. The supreme court made minor modifications and deletions in its adoption of the appellate court's decision.

3. 37 Cal. 3d at 721, 691 P.2d at 1014, 209 Cal. Rptr. at 348.

4. Section 25658 states in pertinent part, "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any person under the age of 21 years is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25658(a) (West Supp. 1985).

also under twenty-one, who drank the liquor and became intoxicated.

The plaintiff sustained her injuries as a passenger in a vehicle driven by Baas, such injuries being proximately caused by the driver's intoxication. The plaintiff alleged that at the time of the sale of liquor, the defendants knew the under-age purchasers would give the liquor to others, also under-age, who would become intoxicated and drive while intoxicated. The trial court dismissed the claim and the appellate court affirmed.

II. THE MAJORITY OPINION

A. The 1978 Amendments

The defendants were deemed immune from liability under the 1978 amendments to Civil Code section 1714[5] and Business and Professions Code section 25602.[6] Both sections contain, as part of their amendment, an express declaration by the legislature of its intent to reinstate prior judicial interpretation.

Section 1714 retains its imposition of responsibility for one's willful or negligent acts but is qualified in subsections (b) and (c), added in 1978. Subsdivision (b) evidences the legislative intent to restore the prior judicial interpretation of proximate cause. Specifically, the section abrogates certain case holdings and declares that the furnishing of alcoholic beverages to an intoxicated person is not the proximate cause of resultant injuries, but instead the consumption of the beverages is the proximate cause of any injuries inflicted on a third person by an intoxicated person.[7] A similar provision was added to section

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5. Section 1714, prior to the 1978 amendments, read:

> Every one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, willfully or by want of ordinary care, brought the injury upon himself . . . .

CAL. CIV. CODE § 1714 (West 1973). The 1978 amendments added two subsections to the existing provision. *See infra* note 7 and accompanying text.

6. Section 25602, prior to amendment, read, "[e]very person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." CAL. BUS. & PROF. CODE § 25602 (West 1964).

7. Subsection (b) states in full:

> It is the intent of the Legislature to abrogate the holdings in cases such as Vesely v. Sager (5 Cal. 3d 153), Bernhard v. Harrah's Club (16 Cal. 3d 313), and Coulter v. Superior Court ([21] Cal. 3d [144]) and to reinstate the prior judicial interpretation of this section as it relates to proximate cause for injuries incurred as a result of furnishing alcoholic beverages to an intoxicated person, namely that the furnishing of alcoholic beverages is not the proximate cause of injuries resulting from intoxication, but rather the consumption of alcoholic beverages is the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. CIV. CODE § 1714(b) (West Supp. 1985).

Section 1714 was also amended to include subsection (c), which states,

> No social host who furnishes alcoholic beverages to any person shall be held

25602 of the Business and Professions Code as subdivision (c).[8] Subdivision (b) of that section is straightforward in removing civil liability from anyone who sells or furnishes liquor to a habitual drunkard or an intoxicated person who then inflicts injury on a third person as a result of intoxication.[9]

Taken together, the 1978 amendments created broad civil immunity. Only one exception was instituted, which is found in Business and Professions Code section 25602.1, also added in 1978. That section provides that a cause of action may be brought against a licensed liquor store operator who sells or furnishes alcoholic beverages to "any obviously intoxicated minor" who causes injury or death to another.[10]

The plaintiff based her claim here on the absence of express civil immunity in section 25658,[11] rather than section 25602.1, because the minor who purchased the beverages was not obviously intoxicated. She claimed that the defendants remained subject to common law tort liability for selling liquor to someone under twenty-one years of age.

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legally accountable for damages suffered by such person, or for injury to the person or property of, or death of, any third person, resulting from the consumption of such beverages.

CAL. CIV. CODE § 1714(c) (West Supp. 1985).

8. That amendment reads:

The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as [*Vesely, Bernhard* and *Coulter*] be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1985).

9. Subsection (b) states in full:

No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

CAL. BUS. & PROF. CODE § 25602(b) (West Supp. 1985).

10. Section 25602.1 states in full:

Notwithstanding subdivision (b) of Section 25602, a cause of action may be brought by or on behalf of any person who has suffered injury or death against any person licensed pursuant to Section 23300 who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale, or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person.

CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1985).

11. CAL. BUS. & PROF. CODE § 25658(a) (West Supp. 1985). *See supra* note 4.

B. *Abrogation of* Vesely, Bernhard *and* Coulter

The 1978 amendments expressly abrogated the holdings of three cases. The court analyzed each as part of a phase in the development of the law of proximate cause. It then analyzed the effect of the amendments on that phase.

In *Vesely v. Sager*,[12] the supreme court rejected the common law rule of nonliability for furnishing liquor to an already intoxicated person in violation of law. The commercial vendor in the case was held liable for the plaintiff's injuries because the sale of liquor proximately caused those injuries.[13] It was further reasoned that the sale was within the class of conduct sought to be prevented by the statute restricting sales to obviously intoxicated persons and the plaintiff was within the class of persons whose safety the statute was designed to protect.[14] Thus, the court in *Vesely* relied on a violation of the statute to make out a breach of a duty of care owed by the defendant to the plaintiff.[15]

The *Bernhard v. Harrah's Club* case[16] involved a choice of laws conflict as well as a liability for injuries issue. The court held that the California rule of civil liability, imposed on tavern keepers who furnish alcoholic beverages to an obviously intoxicated person who then inflicts injury on a third person, should prevail over the Nevada rule of nonliability.[17] This was true despite the absence of a statute upon which to base liability. The court relied on its holding in *Vesely* that the sale of alcoholic beverages may be the proximate cause of injuries rather than merely the consumption of alcoholic beverages and stated that there was "no bar to civil liability under modern negligence law."[18]

In *Coulter v. Superior Court*,[19] the *Vesely* holding was further applied to noncommercial suppliers of alcoholic beverages.[20] The court

12. Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

13. *Id.* at 163-64, 486 P.2d at 158-59, 95 Cal. Rptr. at 630-31. Furnishing of alcoholic beverages is the proximate cause of the injuries because of the foreseeability of the injury-producing conduct. *Id.*

14. *Id.* at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32.

15. *Id.* at 164-65, 486 P.2d at 159, 95 Cal. Rptr. at 631. *See also* CAL. EVID. CODE § 669 (West Supp. 1985), which codifies the presumption of a breach of duty upon a showing by the plaintiff that the statutory violation proximately caused the injuries.

16. Bernhard v. Harrah's Club, 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215, *cert. denied*, 429 U.S. 859 (1976).

17. *Id.* at 323, 546 P.2d at 725-26, 128 Cal. Rptr. at 221-22. The court elaborated that California and Nevada both had interests to protect, but California's was the stronger. *Id.* at 322, 546 P.2d at 725, 128 Cal. Rptr. at 221. The law encompassed the out-of-state defendant because it advertises and solicits in California for the business of California residents. *Id.*

18. *Id.* at 325, 546 P.2d at 726, 128 Cal. Rptr. at 222.

19. Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

20. This holding was reached in reliance on section 25602 and on traditional com-

reasoned that providing an already intoxicated person with liquor, knowing that the person intends to drive, creates a reasonably foreseeable risk of injury to others on the highways. "Simply put, one who serves alcoholic beverages under such circumstances fails to exercise reasonable care."[21]

The court concluded here that the intended import of the 1978 amendments was to "supersede evolving common law negligence principles which would otherwise permit a finding of liability under the circumstances here pled."[22]

C. Statutory Construction

The court cited the maxim *expressio unius est exclusio alterius*[23] as applicable to the situation here. Under this rule of construction, "an express exclusion from the operation of a statute indicates the Legislature intended no other exceptions are to be implied."[24] The only exception to the immunity provided by the 1978 amendments involves the sale of liquor by a licensee to an obviously intoxicated minor.[25] Therefore, had the legislature intended to extend liability to include sales to sober, under-age persons, it could have done so by simply amending section 25658 to reflect that intent.

Although the *Vesely, Bernhard* and *Coulter* cases involved obviously intoxicated persons, the court found no intent of the legislature to restrict immunity only to that narrow factual situation. The statute uses the language "in cases such as" to refer to these holdings generally as reflective of the evolving common law on this type of

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mon law negligence principles. *Id.* at 149-53, 577 P.2d at 672-74, 145 Cal. Rptr. at 537-39.

21. *Id.* at 152-53, 577 P.2d at 675, 145 Cal. Rptr. at 539. *See also* Cory v. Shierloh, 29 Cal. 3d 430, 435, 629 P.2d 8, 10, 174 Cal. Rptr. 500, 502 (1981) (section 25602(b) bars suit by the intoxicated consumer as well as by third parties injured by him).

22. 37 Cal. 3d at 725, 691 P.2d at 1016, 209 Cal. Rptr. at 350. The court reached this conclusion by applying "settled principles of statutory construction" and referred specifically to Civil Code section 22.2 which names the common law of England as the rule of decision in all courts of this state, unless repugnant to the constitution. *See generally* 58 CAL. JUR. 3D, *Statutes*, §§ 4, 5.

23. A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another. Mention of one thing implies exclusion of another. . . . Under this maxim, if statute specifies one exception to a general rule or assumes to specify the effects of a certain provision, other exceptions or effects are excluded.

BLACK'S LAW DICTIONARY 521 (5th. ed. 1979) (citations omitted).

24. 37 Cal. 3d at 725, 691 P.2d at 1016, 209 Cal. Rptr. at 350.

25. *See* CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1985); *See also supra* note 10 and accompanying text.

liability.[26]

The amendments further serve to reinstate the judicial interpretation of liquor liability which existed prior to *Vesely*. The court refers to *Cole v. Rush*[27] as being typical of that prior common law doctrine.

In *Cole*, the plaintiffs sought to recover damages from the defendants in a wrongful death action. The defendants had furnished the decedent with liquor, knowing he became belligerent when drunk, and decedent was subsequently killed in a fist fight. The court held that no cause of action had been pled and that it is the voluntary consumption of intoxicating liquor, not the sale or furnishing, which is the proximate cause of injury from its use.[28]

Although the *Cole* court spoke in terms of an "ordinary man" who voluntarily consumes alcoholic beverages, the definition of such a person would include a minor.[29] Indeed, the civil code provides that a minor is responsible for his torts, just as an adult is.[30] The court further cited *Fleckner v. Dionne*[31] with approval, a case which exemplifies "prior judicial interpretation" of the proximate cause issue arising in this case.

In *Fleckner*, a presumptive negligence argument based on statutory violation was rejected and a common law rule was applied which found no proximate relationship between the sale of liquor and the injury.[32] The case involved a tavern owner who knowingly sold liquor to a minor who was already intoxicated. The owner knew also that the minor had a car parked nearby that he would drive after he left. The minor did, in fact, drive while intoxicated, causing an accident and injuring the plaintiff. No recovery was awarded.

The *Fleckner* case was similar to the facts in *Strang* in that both involved under-age consumers with resulting third-party injuries. The cases differ in that the minor in *Fleckner* was already intoxi-

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26. 37 Cal. 3d at 725, 691 P.2d at 1016, 209 Cal. Rptr. at 350.

> Were the reference interpreted as limiting, then the 1978 amendments (except as provided by § 25602.1) would bar suit only against a person supplying alcoholic beverages to an obviously intoxicated consumer, yet permit tort recovery against one who supplies to a sober individual who later becomes intoxicated . . . . We do not believe the Legislature intended such a whimsical anomaly.

Id.

27. 45 Cal. 2d 345, 289 P.2d 450 (1955).

28. *Id.* at 356, 289 P.2d at 457.

29. 37 Cal. 3d at 726, 691 P.2d at 1017, 209 Cal. Rptr. at 351. The rule applies to minors as long as no additional showing is made as to the minor's incompetence, incapacity of voluntary action or the suffering of some peculiar mental disability. *Id. See also* Cantor v. Anderson, 126 Cal. App. 3d 124, 178 Cal. Rptr. 540 (1981) (cause of action was to be amended to show defendants, as social hosts, had knowledge of guest's developmental disability and provided him with alcoholic beverages despite such knowledge).

30. *See* CAL. CIV. CODE § 41 (West 1982).

31. 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

32. *Id.* at 251, 210 P.2d at 534.

cated when he made the purchase and he was also the driver who caused the accident. The rule of *Fleckner*, however, has been "crystallized" in the law and should, as a matter of stare decisis, be followed.[33]

D. Section 25658 as a Basis for Liability

The court next addressed the case of *Cory v. Shierloh*[34] as support for the conclusion that the defendants here were not liable for plaintiff's injuries by reason of violating section 25658.[35] *Cory* involved a minor plaintiff who was served alcoholic beverages at a party. He was injured on his way home after losing control of his car. The court concluded that the "sweeping immunity" of the 1978 amendments barred a suit against the social host. This rule barred recovery by intoxicated consumers as well as by injured third parties.[36]

E. Conclusion

Recognizing that *Burke v. Superior Court*[37] stood as contrary authority, the court distinguished that case and disapproved those portions of it which were inconsistent with the court's holding in this case. *Burke* held that a liquor licensee who sold intoxicating beverages to a sober minor may be liable for injury to third persons from the drunk driving of the minor.[38] The appellate court used foreseeability as the test.[39] *Vesely, Bernhard* and *Coulter* similarly employed the foreseeability test and were expressly abrogated by the 1978 amendments. Thus, the test used in *Burke* has been rejected by the amendments.[40]

Tort liability was abolished by the legislature in all but one situation, where alcohol is sold to an obviously intoxicated minor. Because no other exceptions exist, no civil liability may be imposed on one who provides alcoholic beverages to an unintoxicated minor. The judgment granting the defendants' demurrer was affirmed.[41]

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33. *See* Fuller v. Standard Stations, Inc., 250 Cal. App. 2d 687, 692-93, 58 Cal. Rptr. 792, 795 (1967) (the court followed the *Fleckner* rule, in reliance on *Cole*).
34. 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981).
35. *See supra* note 4 and accompanying text.
36. 29 Cal. 3d at 436-37, 629 P.2d at 11-12, 174 Cal. Rptr. at 503 (1981).
37. 129 Cal. App. 3d 570, 181 Cal. Rptr. 149 (1982).
38. *Id.* at 571-72, 181 Cal. Rptr. at 149.
39. *Id.* at 577, 181 Cal. Rptr. at 152-53.
40. 37 Cal. 3d at 728, 691 P.2d at 1018-19, 209 Cal. Rptr. at 352-53.
41. *Id.*

III. THE DISSENT

The dissent interpreted the majority's opinion as "grant[ing] absolution by an unnecessarily generous interpretation" of the 1978 amendments.[42] The defendants were actually in a situation where no law condones their conduct, and yet the majority ignored this void.

The 1978 amendments were viewed by the dissenters as efforts to "bury" *Vesely*.[43] The amendments were classified into three groups: (1) those creating immunities from liability;[44] (2) those which reinstate pre-*Vesely* law, called "anti-*Vesely*" provisions;[45] and (3) one which recognizes furnishing alcohol as a proximate cause when an obviously intoxicated minor is involved.[46]

The anti-*Vesely* provisions purport to reinstate the rule that the consumption, *not* the furnishing, of alcoholic beverages is the proximate cause of resultant injury to third parties. However, this directly contradicts the rule involving intoxicated minors, where furnishing is the proximate cause.

The dissent suggested that the two anti-*Vesely* provisions are more "modest" and more "sensible" in that they are merely explanatory with respect to the immunities they create.[47]

In sum, the dissenting justices felt the sections reviving pre-*Vesely* law should be limited to the situations in which the two specific immunities apply, that is, the social host and the person who serves common drunkards and obviously intoxicated persons. In all other situations, the *Vesely* rule, which was based on an attempt to harmonize this area of negligence law, would remain in force, untouched by the 1978 amendments.[48]

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42. *Id.* at 729, 691 P.2d at 1019, 209 Cal. Rptr. at 353 (Kaus, J., dissenting).

43. *Id.* The dissent characterizes the *Vesely* opinion as one which "simply brought this area of the law into conformity with modern notions of proximate cause." *Id.*

44. CAL. CIV. CODE § 1714(c) (West Supp. 1985) and CAL. BUS. & PROF. CODE § 25602(b) (West Supp. 1985). Neither of these provisions apply to the case law.

45. CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1985) and CAL. CIV. CODE § 1714(b) (West Supp. 1985).

46. CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1985).

47. 37 Cal. 3d at 730, 691 P.2d at 1020, 209 Cal. Rptr. at 354 (Kaus, J., dissenting).

48. *Id.*

XIX. WORKERS' COMPENSATION

The "going and coming rule," which normally bars an award of workers' compensation benefits to an employee injured enroute to or from his place of employment, should not be construed to preclude such an award where the employee has arrived at his place of employment and, while awaiting its opening, is injured: **Price v. Workers' Compensation Appeals Board.**

I. INTRODUCTION

In *Price v. Workers' Compensation Appeals Board*,[1] the court was faced with the question of whether an employee, who was injured while waiting for his place of employment to open, would be denied an award of workers' compensation benefits under the "going and coming rule."[2] The court answered this question of first impression for California in the negative.

The "going and coming rule" prohibits the awarding of workers' compensation benefits to an employee who is injured while enroute to or from his place of business.[3] This rule was successfully used by the Workers' Compensation Appeals Board to bar the plaintiff's recovery of workers' benefits.[4] The suit arose when the plaintiff, Andrew Leo Price, arrived early for work on June 20, 1980 to discover he could not yet enter the employment premises.[5] It was Price's custom to arrive before working hours began and to start his duties early.[6] On this occasion, Price found the doors to the premises locked, so while waiting he returned to his car to put in a quart of oil.[7] While straddling the front of the car, Price was struck by a passing car and received serious injuries, which he then sought compen-

1. 37 Cal. 3d 559, 693 P.2d 254, 209 Cal. Rptr. 674 (1984). Chief Justice Bird delivered the majority opinion, while Justices Mosk, Kaus, Broussard, Reynoso, and Grodin, concurred. Justice Lucas filed a dissenting opinion.

2. *Id.* at 563, 693 P.2d at 255, 209 Cal. Rptr. at 676.

3. *See* Parks v. Workers' Compensation Appeals Bd., 33 Cal. 3d 585, 660 P.2d 382, 190 Cal. Rptr. 158 (1983); Hinojosa v. Workmen's Compensation Appeals Bd., 8 Cal. 3d 150, 501 P.2d 1176, 104 Cal. Rptr. 456 (1972).

4. The Workers' Compensation Appeals Board reversed an award of benefits to Price, holding that the "going and coming rule" precluded recovery. Since Price was held not to have completed his journey to his place of employment, he was barred from collecting any benefits. *See Parks*, 33 Cal. 3d 585, 660 P.2d 382, 190 Cal. Rptr. 158.

5. 37 Cal. 3d at 564, 693 P.2d at 255, 209 Cal. Rptr. at 678.

6. *Id.* Furthermore, there was no way to enter the premises until the doors were unlocked; and no parking lot or working area on the premises was provided for the employees.

7. *Id.* It is significant that Price was physically off the premises when he was in-

sation for.[8] Thus, the court was faced with the issue of whether Price had sufficiently terminated his journey to work to avoid the preclusion of the "going and coming rule."

II. CASE ANALYSIS

A. *The Going and Coming Rule*

Normally, an employer will be liable under California's Workers' Compensation Act for injuries to one of its employees "arising out of and in the course of the employment . . . ."[9] However, if the "going and coming rule" is determined to be applicable, a plaintiff is barred from receiving any award of workers' benefits.[10] The court stated "that an injury suffered 'during a local commute enroute to a fixed place of business at fixed hours in absence of special or extraordinary circumstances' is not within the course of employment . . . and is not compensable."[11] Therefore, the Board's contention was that Price, still enroute to his place of employment, was not yet in the course of his employment and precluded from recovery by the "going and coming rule."

The issue was whether Price, while awaiting the opening of the premises, was actually at the end of his journey and close enough to the premises to be considered within the course of employment. Under the "premises line" test, the employment relationship, for purposes of determining workers' benefits, does not begin until the employee enters the work premises.[12] The court held that Price had arrived at work, therefore the "going and coming rule" was inapplicable.[13]

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jured. In other words, it is arguable that Price had yet to finish his journey under the "going and coming rule."

8. CAL. LAB. CODE § 3600 (West Supp. 1985). This section provides that liability "without regard to negligence, exist[s] against an employer for any injury sustained by his or her employees arising out of and in the course of the employment and for the death of any employee if the injury proximately causes the death . . . ." *Id.* § 3600(a).

9. *See* General Ins. Co. v. Workers' Compensation Appeals Bd., 16 Cal. 3d 595, 546 P.2d 1361, 128 Cal. Rptr. 417 (1976) (widow of employee killed while crossing street to place of employment barred from recovery under "going and coming rule").

10. 37 Cal. 3d at 565, 693 P.2d at 256, 209 Cal. Rptr. at 677 (quoting Hinojosa v. Workmen's Compensation Appeals Bd., 8 Cal. 3d 150, 157, 501 P.2d 1176, 1181, 104 Cal. Rptr. 456, 461 (1972)).

11. *Id. See General Ins.*, 16 Cal. 3d at 598, 546 P.2d at 1362, 128 Cal. Rptr. at 418 ("prior to entry the going and coming rule ordinarily precludes recovery").

12. 37 Cal. 3d at 567-68, 693 P.2d at 257, 209 Cal. Rptr. at 678. The court stated that "[t]he going and coming rule governs injuries incurred 'during the course of a local commute' or 'while traveling to and from work,' However, it does not apply to an employee who has arrived at his or her workplace." *Id.* at 565, 693 P.2d at 256, 209 Cal. Rptr. at 677 (citations omitted).

13. In the event the "going and coming rule" was not applied, the Board had alternatively argued that Price was not within the course of his employment when injured

B. Course of Employment

The court, after holding the "going and coming rule" to be inapplicable, was still faced with the question of whether Price was in the course of his employment when he was injured, and therefore entitled to workers' benefits.[14] Initially, the court considered the applicability of the "special risk" exception, which allows for compensation outside of the place of employment where the "risk associated with the employment causes injury just outside the employer's premises."[15] Although the court ruled that Price was in this "zone of employment,"[16] wherein he took special risks, they held the exception inapposite because of the inapplicability of the "going and coming rule."[17]

Secondly, the court considered and applied the "personal convenience rule" to hold that Price was in his course of employment. The court defined acts of "personal convenience" to be "[s]uch acts as are necessary to the life, comfort, and convenience of the servant while at work, though strictly personal to himself, and not acts of service, are incidental to the service, and injury sustained in the performance thereof is deemed to have arisen out of the employment."[18] The court first held that acts of "personal convenience" are not limited to those performed on the work premises.[19] Therefore, Price's putting in a quart of oil was held to be an act of "personal convenience"[20] that could be reasonably expected by the employment.[21]

Furthermore, the court applied the "dual purpose" rule[22] to hold that Price was in the course of his employment. The "dual purpose" rule is:

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and thus should be denied recovery. 37 Cal. 3d at 566, 693 P.2d at 257, 209 Cal. Rptr. at 677-78.

14. Parks v. Workers' Compensation Appeals Bd., 33 Cal. 3d at 592, 660 P.2d at 386, 190 Cal. Rptr. at 162.

15. This "zone of employment" is determined on a case-by-case basis. 37 Cal. 3d at 566, 693 P.2d at 257, 209 Cal. Rptr. at 678.

16. *Id.*

17. *Id.*

18. *Id.* at 567, 693 P.2d at 258, 209 Cal. Rptr. at 679 (quoting Whiting-Mead Co. v. Industrial Accident Comm'n, 178 Cal. 505, 507, 173 P.2d 1105, 1106 (1918)).

19. The factors considered in determination of an act of "personal convenience" include: the nature of the act; the type of employment; and the terms of the employment agreement. North Am. Rockwell Corp. v. Workmen's Compensation Appeals Bd., 9 Cal. App. 3d 154, 158, 87 Cal. Rptr. 774, 776 (1970).

20. 37 Cal. 3d at 570, 693 P.2d at 260, 209 Cal. Rptr. at 680-81.

21. *See* Lockheed Aircraft Corp. v. Industrial Accident Comm'n, 28 Cal. 2d 756, 172 P.2d 1 (1946).

22. *Id.* at 758-59, 172 P.2d at 3.

> where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business he was actually engaged in at the time of injury, unless it clearly appears that neither directly or indirectly could he have been serving his employer.[23]

The court reasoned that Price's act of putting in the oil served a "dual purpose," that is, a personal one of maintaining his car as well as serving his employer by waiting near the premises to immediately enter upon opening.[24] Therefore, Price was held to be in the course of his employment pursuant to the "dual purpose" rule.

III. CONCLUSION

The importance of the majority decision in *Price* is twofold. Most importantly, it delineates a bright line standard to apply the "going and coming rule." That is, when an employee has arrived at his place of employment but is unable to enter the premises, he still is considered to have ended his journey for purposes of the "going and coming rule."

Secondly, the court did not rest its holding on either the "personal convenience" or "dual purpose" rules.[25] Instead, the court stressed the point that an employee's acts should be considered in the course of employment if they are " 'reasonably to be contemplated because of its general nature as a normal human response in a particular situation.' "[26]

GWEN POLLAK
ROBERT TESSIER
TIMOTHY C. WILLIAMS

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23. 37 Cal. 3d at 569, 693 P.2d at 259, 209 Cal. Rptr. at 680. The court stated, "as Price put oil in his car, he provided a benefit to the employer by waiting near the premises so he could enter and begin work as soon as the doors were unlocked." *Id.*

24. Only Justice Lucas dissented from the majority opinion. He argued that the plaintiff's failure to enter the premises connoted he was still in commute. Furthermore, he stated that Price "was injured while engaged in an act of personal convenience of no benefit to his employer, prior to his ordinary working hours." *Id.* at 571-72, 693 P.2d at 260-61, 209 Cal. Rptr. at 681 (Lucas, J., dissenting).

25. The court stated: "This case involves elements of both rules. . . . This court need not determine which of the two rules better fits the facts of this case." *Id.* at 570, 693 P.2d at 260, 209 Cal. Rptr. at 680-81.

26. *Id.* (quoting *North Am. Rockwell Corp.*, 9 Cal. App 3d at 159, 87 Cal. Rptr. at 777).