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The California Supreme Court Survey: A Review of Decisions: July 1982-November 1982

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The California Supreme Court Survey

A Review of Decisions: July 1982-November 1982

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

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I. ADMINISTRATIVE LAW

- A. *Department of Motor Vehicles regulations prohibiting false and misleading communications held valid: Ford Dealers Association v. Department of Motor Vehicles.*

I. INTRODUCTION

In *Ford Dealers Association v. Department of Motor Vehicles*,¹ the supreme court addressed a challenge to five administrative regulations promulgated by the Department of Motor Vehicles (DMV).² In November 1977, the DMV, pursuant to Vehicle Code section 1651,³ adopted twenty-four new regulations relating to Division 5 of the Vehicle Code.⁴ The following month, the Ford Dealers Association brought an action for declaratory and injunctive relief seeking invalidation of seven of the regulations as "beyond the scope of the authorizing statutes and/or unconstitutional."⁵ The supreme court held that the regulations were a valid exercise of the DMV's authority to implement the Vehicle Code's

1. 32 Cal. 3d 347, 650 P.2d 328, 185 Cal. Rptr. 453 (1982). Chief Justice Bird wrote the majority opinion with Justices Mosk, Richardson, Kaus, Broussard, and Reynoso concurring. Justice Newman concurred in the result.

2. The trial court declared the regulations invalid, granted an injunction preventing their enforcement and awarded sanctions against the DMV for allegedly failing to respond adequately to a request for admissions. See CAL. CIV. PROC. CODE § 2034(c) (West Supp. 1982). The supreme court reversed the sanctions awards on the basis that the denial by the DMV of the requests for admission was justified. See 32 Cal. 3d at 369-70, 650 P.2d at 341-42, 185 Cal. Rptr. at 466-67. The court of appeal, per Roth, P.J., affirmed the trial court order. *Ford Dealers Ass'n v. Department of Motor Vehicles*, 122 Cal. App. 3d 308, 176 Cal. Rptr. 120 (1981).

3. Section 1651 provides in its entirety:

The director may adopt and enforce rules and regulations as may be necessary to carry out the provisions of this code relating to the department.

Rules and regulations shall be adopted, amended, or repealed in accordance with the Administrative Procedure Act, commencing with Section 11370 of the Government Code.

CAL. VEH. CODE § 1651 (West 1971).

4. Division 5 pertains to occupational licensing and business regulations. See CAL. VEH. CODE §§ 11100-12104 (West 1971 & Supp. 1982).

5. 32 Cal. 3d at 354; 650 P.2d at 332, 185 Cal. Rptr. at 457. The trial court held 7 of the 24 regulations invalid on constitutional and statutory grounds. The DMV challenged the rulings on five of the regulations and the impositions of sanctions. The Ford Dealers appealed from a trial court evidentiary ruling. *Id.* at 355, 650 P.2d at 332, 185 Cal. Rptr. at 457.

statutory scheme.⁶

II. CASE ANALYSIS

A. Standard of Review

In identifying the level of review to be accorded an administrative regulation, Chief Justice Bird stressed that the court's role is a limited one.⁷ The court's task is to review the legality of the regulation to determine whether the regulation is within the scope of the authority conferred and reasonably necessary to effectuate the purposes of the statute.⁸ Unless the administrative agency has clearly promulgated regulations beyond its statutory authority or has rendered an unconstitutional regulation, the court will not interfere.⁹ Chief Justice Bird concluded that because the five regulations were adopted to implement Vehicle Code section 11713(a),¹⁰ which precludes false or misleading statements to the public,¹¹ the remedial nature of the statute called for a liberal construction.¹²

6. *Id.* at 370, 650 P.2d at 342, 185 Cal. Rptr. at 467.

7. *Id.* at 355, 650 P.2d at 332, 185 Cal. Rptr. at 457. The administrative regulations were adopted pursuant to the former Administrative Procedure Act (former CAL. GOV'T CODE §§ 11371-11445). The Administrative Procedure Act was repealed and reenacted in 1979, effective July 1, 1980. See CAL. GOV'T CODE §§ 11340-11370.5 (West 1980 & Supp. 1982). 32 Cal. 3d at 355 n.3, 650 P.2d at 332 n.3, 185 Cal. Rptr. at 457 n.3.

8. 32 Cal. 3d at 355, 650 P.2d at 332, 185 Cal. Rptr. at 457 (citing former Gov't Code §§ 11373 and 11374). The court further stated that a determination of whether a regulation is "reasonably necessary" involves a deference to the agency's expertise, not a substitution of the court's policy, unless the decision of the agency is arbitrary and capricious. *Id.* See, e.g., *Pacific Legal Found. v. California Unemp. Ins. App. Bd.*, 29 Cal. 3d 101, 642 P.2d 244, 172 Cal. Rptr. 194 (1981); *International Business Machines v. State Bd. of Equal.*, 26 Cal. 3d 923, 609 P.2d 1, 163 Cal. Rptr. 782 (1980) (review of decision by State Board of Equalization).

9. 32 Cal. 3d at 355-56, 650 P.2d at 332, 185 Cal. Rptr. at 457-58. See *ALRB v. Superior Court*, 16 Cal. 3d 392, 546 P.2d 687, 128 Cal. Rptr. 183 (1976).

10. Section 11713(a) provides in its entirety:

It shall be unlawful and a violation of this code for the holder of any license issued under this article:

(a) To make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading; or to so make or disseminate or cause to be so disseminated any such statement as part of a plan or scheme with the intent not to sell any vehicle or service so advertised at the price stated therein, or as so advertised.

CAL. VEH. CODE § 11713(a) (West Supp. 1982).

11. See *Merrill v. Department of Motor Vehicles*, 71 Cal. 2d 907, 920, 458 P.2d 33, 41, 80 Cal. Rptr. 89, 97 (1969).

12. 32 Cal. 3d at 356, 650 P.2d at 333, 185 Cal. Rptr. at 458. See also *California State Restaurant Ass'n v. Whitlow*, 58 Cal. App. 3d 340, 347, 129 Cal. Rptr. 824, 828

B. The Challenged Regulations

1. Regulation 402.00: "Advertising Defined"

The Ford Dealers challenged the dual definition of "advertise" given in Regulation 402.00¹³ as internally inconsistent and unjustified in light of the language of the authorizing statutes.¹⁴ The court rejected this challenge and agreed with the interpretation offered by the DMV¹⁵ that the definition of "advertise" contained in section 11713(a) is different than the definition of "advertise" used elsewhere in the Vehicle Code, and is broad enough to include oral statements to individual members of the public.¹⁶ The court concluded that, based upon the language and history of section 11713(a), its version of "advertise" prohibited the making of "untrue or misleading statements before the public by any manner or means whatever."¹⁷

Chief Justice Bird noted that this interpretation was in conformity with other statutes dealing with false and misleading statements to the public.¹⁸ The court placed heavy emphasis

(1976) (Labor Code § 450 must be liberally construed to protect wage earners against employer coercion).

13. Regulation 402.00 provides in its entirety:

(a) In the broad context of Vehicle Code section 11713(a), any statement advertised refers to any statement, representation, act or announcement intentionally communicated to any member of the public by any means whatever, whether orally, in writing or otherwise.

(b) As used elsewhere in the Vehicle Code and in this article, the terms "advertising", "advertisement", or "advertise" refer to a statement, representation, act or announcement intentionally communicated to the public generally for the purpose of arousing a desire to buy or patronize.

CAL. ADMIN. CODE tit. 13, R. 77 (1982).

14. 32 Cal. 3d at 357, 650 P.2d at 333, 185 Cal. Rptr. at 458-59.

15. The DMV argued that the revision of § 11713(a) from its former version ("intentionally publish or circulate any advertising which is misleading or inaccurate") to its present form evidenced an intent on the part of the legislature to include both oral representations and media advertising. *Id.*

16. *Id.* The court distinguished other areas of the Vehicle Code which utilize the word "advertise" by stating that those sections restrict its meaning to media advertising. See CAL. VEH. CODE § 11713(c) (West Supp. 1982) (failing to withdraw within 48 hours any advertisement of vehicle that has been sold or withdrawn from sale).

17. 32 Cal. 3d at 357, 650 P.2d at 333, 185 Cal. Rptr. at 458.

18. As a rule of judicial construction, statutes dealing with the same subject matter should be given the same interpretation where the words involved have an accepted judicial interpretation. *Id.* at 359, 650 P.2d at 334, 185 Cal. Rptr. at 459. See also *Kuntz v. Kern County Employee Retirement Ass'n*, 64 Cal. App. 3d 414, 421-22, 134 Cal. Rptr. 501, 505 (1976) (construing County Employees Retirement Act of 1937 and Workers' Compensation Law).

upon the fact that Business and Professions Code section 17500¹⁹ has been interpreted to include oral statements made to individual members of the public.²⁰ The court also observed that in *Feather River Trailer Sales, Inc. v. Sillas*,²¹ the appellate court held that oral statements to individual parties were within the coverage of the word "advertise" in section 11713(a).

The Ford Dealers also contended that because Vehicle Code section 11705(a)(14)²² authorizes suspension of a dealer's license if there are fraudulent representations, this section covers misrepresentations made to individuals, and therefore supersedes section 11713(a).²³ The court rejected this argument on the basis that recovery under section 11713(a)(14) requires actual reliance on the misrepresentations,²⁴ while recovery for a violation of sec-

19. Business and Professions Code § 17500 provides:

False or misleading statements.

It is unlawful for any person, firm, corporation or association, or any employee thereof with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or anything of any nature whatsoever or to induce the public to enter into any obligation relating thereto, to make or disseminate or cause to be made or disseminated before the public in this state, or to make or disseminate or cause to be made or disseminated from this state before the public in any state, in any newspaper or other publication, or any advertising device, or by public outcry or proclamation, or in any other manner or means whatever, any statement, concerning such real or personal property or services, professional or otherwise, or concerning any circumstance or matter of fact connected with the proposed performance or disposition thereof, which is untrue or misleading, and which is known, or which by the exercise of reasonable care should be known, to be untrue or misleading, or for any such person, firm, or corporation to so make or disseminate or cause to be so made or disseminated any such statement as part of a plan or scheme with the intent not to sell such personal property or services, professional or otherwise, so advertised at the price stated therein, or as so advertised. Any violation of the provisions of this section is a misdemeanor punishable by imprisonment in the county jail not exceeding six months, or by a fine not exceeding two thousand five hundred dollars (\$2,500), or by both.

CAL. BUS. & PROF. CODE § 17500 (West Supp. 1982) (emphasis in original).

20. 32 Cal. 3d at 358, 650 P.2d at 334, 185 Cal. Rptr. at 459. See *Chern v. Bank of America*, 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976); *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973); *People v. Conway*, 42 Cal. App. 3d 875, 117 Cal. Rptr. 251 (1974). The court concluded that the prior interpretations of § 17500 should be followed because of their precedential value and their interpretations of the disputed language. 32 Cal. 3d at 359, 650 P.2d at 334, 185 Cal. Rptr. at 459.

21. 96 Cal. App. 3d 234, 158 Cal. Rptr. 26 (1979). The court in *Feather River* also relied upon prior interpretations of Business and Professions Code § 17500. *Id.* at 248-49, 158 Cal. Rptr. at 34-35. See also *People v. Schmitt*, 155 Cal. App. 2d 87, 317 P.2d 673 (1957) (interpreting former Health & Safety Code § 26286.5 and Business and Professions Code § 17500).

22. CAL. VEH. CODE § 11705(a)(14) (West Supp. 1982) (allows suspension or revocation of dealer's license upon finding that fraud, deceit or fraudulent representation has been made in sale or purchase of vehicle, parts or accessories).

23. 32 Cal. 3d at 359, 650 P.2d at 335, 185 Cal. Rptr. at 460.

24. *Id.*

tion 11713(a) does not depend upon the actual reliance of the customer.²⁵ Section 11713(a) covers a far broader spectrum and its reach would be curtailed if actual reliance were made a prerequisite to recovery.²⁶

The Ford Dealers' final challenge to section 11713(a) was based upon the claim that section 11713(a) does not authorize the DMV to penalize licensed dealers for statements made by their employees.²⁷ The court rejected this argument based upon the well-recognized rule that licensees are responsible for the acts of their employees.²⁸ Relying again on the decision in *Feather River Trailer Sales, Inc. v. Sillas*,²⁹ and the cases which construed Business and Professions Code section 17500,³⁰ the court held that section 11713(a) imposes liability upon the dealers themselves for one-to-one statements by salespeople in violation of section 11713(a).³¹ The court cautioned, however, that a dealer *may* be able to offer a defense to an action under section 11713(a) where three elements are shown: (1) the dealer made every effort to discourage the misrepresentation; (2) the dealer had no knowledge of the misleading statements;³² and (3) when the dealer was informed of the misstatement, it refused to accept the benefits resulting therefrom and took action to prevent a reoccurrence.³³

25. *Id.* See *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 541, 110 P.2d 992, 996-97 (1941).

26. 32 Cal. 3d at 359, 650 P.2d at 335, 185 Cal. Rptr. at 460.

27. *Id.* at 360, 650 P.2d at 335, 185 Cal. Rptr. at 460.

28. See *Camacho v. Youde*, 95 Cal. App. 3d 161, 157 Cal. Rptr. 26 (1979); *Kirby v. Alcoholic Beverage Control App. Bd.*, 33 Cal. App. 3d 732, 109 Cal. Rptr. 291 (1973); *Cornell v. Reilly*, 127 Cal. App. 2d 178, 273 P.2d 572 (1954). See also CAL. CIV. CODE § 2330 (West 1954) (principal-agent liability).

29. 96 Cal. App. 3d 234, 158 Cal. Rptr. 26 (1979) (corporation held liable under § 11713(a) for misleading oral statements of its salesperson).

30. *Chern v. Bank of America*, 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976) (defendant bank held liable for damages under § 17500 for misleading statements made by bank employee); *People v. Superior Court (Jayhill)*, 9 Cal. 3d 283, 507 P.2d 1400, 107 Cal. Rptr. 192 (1973) (misrepresentations by sales persons sufficient to state cause of action against corporation for violation of § 17500); *People v. Conway*, 42 Cal. App. 3d 875, 117 Cal. Rptr. 251 (1974) (criminal conviction upheld against president of corporation for false and misleading statements by employees).

31. 32 Cal. 3d at 362, 650 P.2d at 336 185 Cal. Rptr. at 461.

32. *Id.* at 361 n.8, 650 P.2d at 336 n.8, 185 Cal. Rptr. at 461 n.8. Lack of knowledge by itself would not constitute a defense where the dealer either appeared to have tolerated such misleading statements in the past or created a climate where such misstatements were likely to occur. *Id.*

33. *Id.* The court limited the possible use of this defense by stating that be-

2. Regulation 404.03: "Dealer Added Charges"

The Ford Dealers challenged regulation 404.03³⁴ as exceeding the DMV's scope of authority under section 11713(a) and also as invalid because it barred statements that were not in fact false and misleading.³⁵ The DMV contended that the trial court erred in holding regulation 404.03 invalid as beyond the scope of section 11713(a) because the regulation was promulgated to prevent a specific type of false and misleading statement and, therefore, was authorized by the broad statutory requirements not allowing false and misleading statements.³⁶

The court rejected the claim of the Ford Dealers and recognized that the absence of specific statutory authorization does not render the regulation invalid.³⁷ A regulation which bars a specific type of misleading statement is within the DMV's authority to "fill up the details" of the statutory scheme.³⁸ In holding that the trial court erred in ruling that regulation 404.03 was beyond the DMV's scope of authority, Chief Justice Bird concluded that a regulation such as 404.03 is clearly within the DMV's discretion, because the DMV is charged with the authority to conclude that practices such as those prohibited by regulation 404.03 are inherently misleading or could possibly be misleading.³⁹

cause the validity of the regulation was the only issue before them, a specific factual setting was necessary to decide the exact scope of such an exception. *Id.*

34. Regulation 404.03 provides in its entirety:

404.03. Dealer Added Charges. A dealer may not identify a separate charge or charges for services performed on vehicle prior to delivery to the extent the dealer is or will be reimbursed for such expenditures by another party. If a dealer does identify a separate charge or charges for delivery and preparation services performed over and above those delivery and preparation obligations specified by the franchisor and for which the dealer is to be reimbursed by the franchisor, then the services performed and the charges therefore shall be separately itemized. Such added charges must be included in the advertised price.

CAL. ADMIN. CODE tit. 13, R. 77 (1982).

35. 32 Cal. 3d at 362, 650 P.2d at 337, 185 Cal. Rptr. at 462.

36. *Id.*

37. *Id.* See *Credit Ins. Gen. Agents Ass'n v. Payne*, 16 Cal. 3d 651, 547 P.2d 993, 128 Cal. Rptr. 881 (1976) (absence of specific provisions in Insurance Code regarding regulation of compensation of insurance agents does not mean that such regulation exceeds statutory authority).

38. 32 Cal. 3d at 362, 650 P.2d at 337, 185 Cal. Rptr. at 462 (citing *Kugler v. Yocum*, 69 Cal. 2d 371, 376, 445 P.2d 303, 306, 71 Cal. Rptr. 687, 690 (1968)) (quoting *First Indus. Loan Co. v. Daugherty*, 26 Cal. 2d 545, 549, 159 P.2d 921, 923 (1945)).

39. 32 Cal. 3d at 363, 650 P.2d at 337, 185 Cal. Rptr. at 462. See also *Fletcher v. Security Pac. Nat'l Bank*, 23 Cal. 3d 442, 591 P.2d 51, 153 Cal. Rptr. 28 (1979) (interpreting Business & Professions Code § 17535); *Chern v. Bank of America*, 15 Cal. 3d 866, 544 P.2d 1310, 127 Cal. Rptr. 110 (1976) (interpreting Business & Professions Code § 17500).

3. Regulation 403.02(b): "Rental Vehicles"

The Ford Dealers challenged the validity of regulation 403.02(b),⁴⁰ requiring affirmative disclosure that the vehicle was a rental vehicle, claiming that the DMV was not authorized to require such disclosure of the vehicle's history.⁴¹ The trial court held that the DMV had the authority to issue such a regulation⁴² but found that the administrative record contained insufficient evidence to support the necessity of such a disclosure.⁴³

Chief Justice Bird limited the court's review of the administrative record to a finding of whether regulation 403.02(b) was "entirely lacking in evidentiary support."⁴⁴ The court held that there was sufficient evidence in the record to allow the DMV to conclude that a refusal to disclose the prior rental history of a vehicle would constitute a violation of section 11713(a).⁴⁵

40. Regulation 403.02 provides in pertinent part: "(b) Former taxicabs, rental vehicles, publicly owned vehicles, insurance salvage vehicles and revived salvage vehicles shall be clearly identified as such if the previous status is known to the seller." CAL. ADMIN. CODE tit. 13, R. 77 (1982).

41. 32 Cal. 3d at 363, 650 P.2d at 337-38, 185 Cal. Rptr. at 462-63.

42. *Id.* The supreme court agreed that the DMV had the authority to issue regulation 403.02, because the DMV could reasonably conclude that the omission of material information was as misleading as a direct misstatement of fact. *Id.* at 363-64, 650 P.2d at 338, 185 Cal. Rptr. at 463. *Accord* Encyclopaedia Britannica, Inc., v. FTC, 605 F.2d 964, 971-73 (7th Cir. 1977), *cert. denied*, 445 U.S. 934 (1979) (FTC has the authority to require clear and conspicuous disclosure to prevent future deception).

43. 32 Cal. 3d at 364, 650 P.2d at 338, 185 Cal. Rptr. at 463. The Ford Dealers argued that rental cars are in better condition than private cars and that any requirement to disclose previous rental history is arbitrary and capricious. *Id.*

44. *Id.* (quoting *Pitts v. Perluss*, 58 Cal. 2d 824, 833, 377 P.2d 83, 88, 27 Cal. Rptr. 19, 24 (1962) (citations omitted).) The Ford Dealers further contended that the former procedures of the Administrative Procedures Act, under which regulation 403.02 was adopted, were unconstitutional because the agencies were not required to conduct a full hearing on the merits. Chief Justice Bird rejected this argument on the ground that a judicial hearing is not required in a quasi-legislative proceeding. *Id.* at 364 n.10, 650 P.2d at 338 n.10, 185 Cal. Rptr. at 463 n.10. *See* *Franchise Tax Bd. v. Superior Court*, 36 Cal. 2d 538, 549, 225 P.2d 905, 911 (1950); *California Optometric Ass'n v. Lackner*, 60 Cal. App. 3d 500, 507-08, 131 Cal. Rptr. 744, 748-49 (1976).

45. 32 Cal. 3d at 365, 650 P.2d at 338-39, 185 Cal. Rptr. at 463-64. The administrative record included testimony concerning the attitudes of consumers toward the purchase of rental vehicles as well as evidence presented by automobile dealers relating to the condition of rental vehicles. *Id.* at 364-65, 650 P.2d at 338, 185 Cal. Rptr. at 463. The Ford Dealers further argued that the trial court's refusal to allow them to submit additional evidence in the form of expert testimony as to the reasonableness of the regulation was in error. The supreme court held that the trial court's refusal was proper because the judiciary is limited to an examination of

4. Regulations 403.00 and 404.09: Vagueness Challenges

The Ford Dealers' final challenge to the DMV regulations constituted a claim that regulations 403.00⁴⁶ and 404.09⁴⁷ were unconstitutionally vague.⁴⁸ The phrases attacked in regulation 403.00 were the requirements that advertisements be "based on facts" and "clearly set forth." The challenged statements in regulation 404.09 included the requirements that qualifying statements be "large enough and displayed for a sufficient period of time" to enable the "average" reader or viewer to comprehend them.⁴⁹

Chief Justice Bird emphasized that the standard of constitutional vagueness for criminal statutes is inapplicable to a vagueness challenge of an administrative regulation.⁵⁰ The Ford Dealers argued that these regulations should be examined under the vagueness standards applied to criminal statutes since a violation of section 11713(a) can be punished as a misdemeanor.⁵¹ The court rejected this claim, noting that only the administrative aspects of the case were before the supreme court.⁵²

The Ford Dealers further claimed that the regulations unconstitutionally curtailed first amendment rights.⁵³ The court held that this claim had no merit because, although commercial speech is protected by the first amendment, false, deceptive or misleading advertising is not protected.⁵⁴ In connection with this argument,

the administrative record in a proceeding challenging an administrative regulation. *See Id.* at 356 n.11, 650 P.2d at 339 n.11, 185 Cal. Rptr. at 464 n.11.

46. Regulation 403.00 provides in its entirety: "Any advertised statements, representations, or offers made in connection with the sale or attempted sale of any vehicle(s) shall be clearly set forth, and based on facts and shall be subject to these regulations and the Vehicle Code." CAL. ADMIN. CODE tit. 13, R. 77 (1982).

47. Regulation 404.09 provides in its entirety: "Qualifying statements used in connection with vehicle advertisements, including the qualifying statements required by this article, shall be large enough and displayed for a sufficient period of time to enable the average reader or viewer to comprehend such statements." CAL. ADMIN. CODE tit. 13, R. 77 (1982).

48. 32 Cal. 3d at 365, 650 P.2d at 339, 185 Cal. Rptr. at 464.

49. *Id.* at 366, 650 P.2d at 339, 185 Cal. Rptr. at 464.

50. *Id.* The standard of constitutional vagueness is more strictly applied to criminal statutes than to statutes regulating business activities. *See Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972); *Winters v. New York*, 333 U.S. 507, 515 (1948).

51. *See* CAL. VEH. CODE § 40000.11 (West Supp. 1982). Punishment for conviction of a misdemeanor is imprisonment for up to six months in county jail and/or imposition of a fine not exceeding five hundred dollars. CAL. PENAL CODE § 19 (West 1970).

52. 32 Cal. 3d at 366 n.12, 650 P.2d at 339 n.12, 185 Cal. Rptr. at 464 n.12. *See also* *Judson Steel Corp. v. Workers' Comp. App. Bd.*, 22 Cal. 3d 658, 668, 586 P.2d 564, 569-70, 150 Cal. Rptr. 250, 256 (1978) (liberally construing Labor Code § 132(a) even though violation was misdemeanor).

53. 32 Cal. 3d at 366 n.12, 650 P.2d at 339 n.12, 185 Cal. Rptr. at 464 n.12.

54. *Id.* *See* *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977); *United States v. National Dairy Corp.*, 372 U.S. 29, 36 (1963).

the Ford Dealers claimed that section 11713(a) should be narrowly construed because a violation of that section could result in a loss of their livelihood.⁵⁵ The court also rejected this argument on the basis that the state's interest in regulating licensed professions does not require that license revocation proceedings be conducted in the same manner as criminal proceedings.⁵⁶ Addressing the vagueness challenges to regulation 403.00, the court held that the statement "based on facts" clearly was not vague since an advertiser who makes a claim or offer concerning a vehicle must know of the facts that support such a statement.⁵⁷ The phrase requiring that advertisements be "clearly set forth" gave the court more trouble because it must be applied in its specific factual settings.⁵⁸ However, a statute which must be developed on a case-by-case basis is not unconstitutional.⁵⁹ Relying upon various cases⁶⁰ which rejected vagueness challenges to statutes containing language similar to regulation 403.00, the court held that the language contained in regulation 403.00 was not void for vagueness.⁶¹

The court then applied its analysis of regulation 403.00 to the vagueness challenge directed against regulation 404.09. Reiterating the rule that a statute is not vague because its exact scope must be determined through application,⁶² the court formulated an "essential test" to determine whether regulation 404.09 was un-

55. 32 Cal. 3d at 367 n.12, 650 P.2d at 340 n.12, 185 Cal. Rptr. at 465 n.12. See *supra* note 22.

56. 32 Cal. 3d at 367 n.12, 650 P.2d at 340 n.12, 185 Cal. Rptr. at 465 n.12. See *Webster v. Board of Dental Examiners*, 17 Cal. 2d 534, 538, 110 P.2d 992, 995 (1941).

57. 32 Cal. 3d at 367, 650 P.2d at 340, 185 Cal. Rptr. at 465.

58. *Id.*

59. *Id.* See *Volkswagen InterAmericana, S.A. v. Rohlsen*, 360 F.2d 437, 445 (1st Cir. 1966).

60. See, e.g., *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548, 577-79 (1973) ("active part in managing," actively participating in . . . fund-raising"); *Boyce Motor Lines v. United States*, 342 U.S. 337, 340-42 (1952) ("so far as practicable and where feasible"); *FTC v. Raladam Co.*, 283 U.S. 643, 648 (1931) ("unfair methods of competition"); *Encyclopaedia Britannica, Inc. v. FTC*, 605 F.2d 964, 969 (7th Cir. 1977), *cert. denied*, 445 U.S. 934 (1979) ("clearly and conspicuously displayed"); *Bantam Books, Inc., v. FTC*, 275 F.2d 680, 683 (2d Cir. 1960), *cert. denied*, 364 U.S. 819 (1960) ("clear, conspicuous type," "adapted readily to attract the attention of a prospective purchaser").

61. 32 Cal. 3d at 369, 650 P.2d at 341, 185 Cal. Rptr. at 466.

62. *Id.* at 368-69, 650 P.2d at 341, 185 Cal. Rptr. at 466. See also *People ex rel. Mosk v. National Research Co. of Cal.*, 201 Cal. App. 2d 765, 772, 20 Cal. Rptr. 516, 521 (1962) (construing "unfair competition" and "unfair or fraudulent business practice").

constitutionally vague: "whether the reader or viewer is likely to be deceived or confused by an advertisement that is so small or displayed so briefly that it cannot be understood."⁶³ The court held that under this test, the requirement that statements be "large enough" and "displayed for a sufficient period of time" was not vague because it established a reasonable standard of conduct for the industry.⁶⁴

The court further found that the use of the term "average reader or viewer" in regulation 404.09 was permissible on the basis that the term "average" is often used by the courts to test the vagueness of a statute.⁶⁵ Analogizing to the obscenity law⁶⁶ and the use of the "reasonable person" standard,⁶⁷ the court held that the term "average reader or viewer" was not unconstitutionally vague.⁶⁸

III. IMPACT OF THE CASE

The court in *Ford Dealers Association* expressed a great deal of concern over the susceptibility of the consumer to fraudulent and deceptive business practices.⁶⁹ Through its heavy reliance on statutes prohibiting similar practices⁷⁰ and the application of a liberal vagueness test,⁷¹ the court has extended to the consumer greater protection in the automobile market.⁷² Through the use of

63. 32 Cal. 3d at 369, 650 P.2d at 341, 185 Cal. Rptr. at 466.

64. *Id.*

65. *Id.* "Indeed, the definition of vagueness is often phrased in terms of the 'average' person's ability to understand a statute." *Id.* See *People v. Newble*, 120 Cal. App. 3d 444, 452-53, 174 Cal. Rptr. 637, 641 (1981) ("a person of ordinary intelligence").

66. See, e.g., *Miller v. California*, 413 U.S. 15, 24 (1973) ("average person" test of obscenity laws applied); *Bloom v. Municipal Court*, 16 Cal. 3d 71, 76, 545 P.2d 229, 232, 127 Cal. Rptr. 317, 320 (1976) (applying the *Miller* "average person" test).

67. 32 Cal. 3d at 369, 650 P.2d at 341, 185 Cal. Rptr. at 466.

68. *Id.*

69. The closing passage of Chief Justice Bird's opinion is evidence of this concern:

The prohibition of untrue or misleading statements is one aspect of a statutory scheme designed to protect consumers and deter irresponsible sales practices. In the highly competitive environment of our modern business world, such safeguards are an essential protection against deceptive and unscrupulous business transactions. In keeping with its mandate to implement this statutory scheme through rules and regulations, the DMV has promulgated a series of regulations intended to ensure compliance with the strict language of the statute. These regulations represent a thorough and reasonable effort to implement the statute in a fair and effective manner.

32 Cal. 3d at 370, 650 P.2d at 342, 185 Cal. Rptr. at 467.

70. See *supra* notes 19-20 and accompanying text.

71. See *supra* notes 50-52 and accompanying text.

72. As previously noted, the court interpreted § 11713(a) to prohibit the making of "untrue or misleading statements before the public *by any manner or means*

section 11713(a) as an enabling statute, the court's opinion indicates that any reasonable regulation designed to protect the consumer against untrue or misleading statements by license holders under the Vehicle Code will be upheld.

IV. CONCLUSION

The court's opinion in *Ford Dealers Association* represents an attitude consistent with that employed in the cases decided under Business and Profession Code section 17500.⁷³ The *Ford Dealers* court further indicates no hesitancy to impose liability upon dealers for the statements of their salespersons.⁷⁴ The availability of a defense for the dealers,⁷⁵ however, remains subject to a factual situation where the elements enunciated by the court can be applied.

II. ATTORNEYS' FEES

- A. *Fee-related services properly compensated under California statutory private attorney general theory; statutory attorneys' fees recovered by successful party in settlement agreement: Serrano v. Unruh; Folsom v. Butte County Association of Governments.*

I. INTRODUCTION

In *Serrano v. Unruh*,¹ the California Supreme Court considered the question of whether fee-related services² may be compensated under the private attorney general theory, which is codified at California Code of Civil Procedure section 1021.5.³ The court

whatever." 32 Cal. 3d at 357, 650 P.2d at 333, 185 Cal. Rptr. at 458 (emphasis added).

73. See *supra* notes 19-20 and accompanying text.

74. See *supra* notes 27-31 and accompanying text.

75. See *supra* notes 32-33 and accompanying text.

1. 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982). Justice Newman wrote the majority opinion with Chief Justice Bird and Justices Mosk, Broussard, Reynoso, and Grodin concurring. Justice Richardson dissented. Justice Grodin was assigned by the Chairperson of the Judicial Council.

2. "Fee-related services" are those efforts expended by an attorney in securing his fees in connection with the litigation for which he seeks compensation.

3. CAL. CIV. PROC. CODE § 1021.5 (West 1980) provides:

Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in

held that unless circumstances rendered the fee award unjust, recoverable attorneys' fees under section 1021.5 included reasonable hours spent on the underlying litigation, as well as the time necessary to establish and defend the fee claim.⁴

In *Folsom v. Butte County Association of Governments*,⁵ the court confronted the issue of whether a settlement agreement, silent as to costs and attorneys' fees, operated as a merger and bar, thereby depriving a trial court of jurisdiction to award costs⁶ and statutory attorneys' fees.⁷ The court held that a settlement agreement containing no provisions for costs or statutory attorneys' fees does not deprive a trial court of jurisdiction to consider a cost bill or a motion for statutory attorneys' fees.⁸

II. HISTORICAL ANALYSIS

The general rule at both the federal⁹ and state¹⁰ levels is that attorneys' fees are not recoverable by the prevailing party unless

the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the public or a large class of persons, (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any. With respect to actions involving public entities, this section applies to allowances against, but not in favor of, public entities, and no claim shall be required to be filed therefor.

Id.

4. 32 Cal. 3d at 639, 652 P.2d at 997, 186 Cal. Rptr. at 766. The court also held that the trial court's denial of defendants' motion to discover the salaries paid and overhead costs of the organizations that employed plaintiffs' attorneys was not an abuse of discretion. See *infra* notes 56-60 and accompanying text.

5. 32 Cal. 3d 668, 652 P.2d 437, 186 Cal. Rptr. 589 (1982). Justice Newman wrote the majority opinion with Chief Justice Bird and Justices Broussard, Mosk, and Reynoso concurring. Justice Kaus filed a dissenting opinion in which Justice Richardson joined.

6. CAL. CIV. PROC. CODE § 1032(c) (West 1980) provides:

In other actions than those mentioned in this section costs may be allowed or not, and, if allowed, may be apportioned between the parties, on the same or adverse sides, in the discretion of the court.

Id.

7. CAL. CIV. PROC. CODE § 1021.5 (West 1980). See *supra* note 3.

8. 32 Cal. 3d at 680, 652 P.2d at 446, 186 Cal. Rptr. at 598. The court also held that an award under § 1021.5 may properly be made to a legal services group funded primarily by public money, and that a claimant who settles a lawsuit may be deemed a "successful party" under § 1021.5 if the underlying action made a substantial contribution to remedying the conditions at which it was directed. See *infra* notes 106-119 and accompanying text.

9. See, e.g., *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), wherein the Supreme Court held that the federal courts were not free to adopt the private attorney general theory, as this was the province of Congress. *Id.* at 269-71.

10. See, e.g., CAL. CIV. PROC. CODE § 1021 (West 1980):

Except as attorneys' fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to ac-

provided for by statute¹¹ or agreement to the contrary. Three exceptions to this general rule have been formulated by the courts: the common fund, substantial benefit, and private attorney general theories.¹²

The common fund theory has long been recognized by the California courts.¹³ This exception allows the party who preserves or protects a fund for the benefit of himself and others to recover his costs and attorneys' fees from the fund.¹⁴ The substantial benefit exception allows a litigant who confers a substantial pecuniary or nonpecuniary benefit to recover fees from those receiving the benefit of the litigation.¹⁵

The private attorney general theory is based upon the policy of encouraging private attorneys to pursue actions which vindicate important public rights, without regard for financial gain.¹⁶ A court may exercise its equitable powers to award attorneys' fees based upon the private attorney general theory where a substantial number of persons stand to benefit from litigation which vindicates important public policies, and the costs in securing this

tions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Id.

11. Under federal law, Congress has provided certain specific exceptions to the general rule that attorneys' fees are not recoverable by the successful party. For an exhaustive list see *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 260 n.33 (1975). See also ATTORNEY'S FEES: PRACTICAL AND ETHICAL CONSIDERATIONS, 225-54 (Cal. C.E.B. 1981) (comparative tables of fee awards under federal and California statutes).

12. The federal courts recognize a fourth exception for bad faith in conducting a lawsuit. See, e.g., *Hutto v. Finney*, 437 U.S. 678, 689-93 (1978) (holding that award of attorneys' fees for bad faith against state officials did not violate eleventh amendment).

13. The earliest reported California case establishing the common fund exception was *Fox v. Hale & Norcross S.M. Co.*, 108 Cal. 475, 41 P.2d 328 (1895). See also *Trustees v. Greenough*, 105 U.S. 527 (1881).

14. See *Quinn v. California*, 15 Cal. 3d 162, 539 P.2d 761, 124 Cal. Rptr. 1 (1975). See also 4 WITKIN, CAL. PROCEDURE, *Judgment* § 129 (2nd ed. 1971) and cases cited therein.

15. See *Card v. Community Redev. Agency*, 61 Cal. App. 3d 570, 131 Cal. Rptr. 153 (1976); *Mandel v. Hodges*, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976); *Knoff v. City of San Francisco*, 1 Cal. App. 3d 184, 81 Cal. Rptr. 683 (1969); *Fletcher v. A.J. Indus.*, 266 Cal. App. 2d 313, 72 Cal. Rptr. 146 (1968).

16. *Woodland Hills Residents Ass'n v. City Council*, 23 Cal. 3d 917, 933, 593 P.2d 200, 208, 154 Cal. Rptr. 503, 511 (1979) (*Woodland Hills II*). At the federal level, a federal court may not award attorneys' fees under the private attorney general theory absent specific statutory authorization. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975).

result exceed the individual plaintiff's financial boundaries.¹⁷

III. *SERRANO V. UNRUH*

A. Introduction

The appeal involved in *Serrano v. Unruh*¹⁸ represents over ten years of litigation in the California state courts.¹⁹ Within one month of the trial court decision,²⁰ which held that the California public school financing system violated the equal protection clause, the plaintiffs'²¹ attorneys, Public Advocates, Inc. (Public Advocates)²² and Western Center on Law and Poverty (Western Center)²³ filed separate motions for fee awards against the state defendants.²⁴ The trial court, per Judge Bernard Jefferson, awarded fees to Public Advocates and Western Center²⁵ based on the private attorney general doctrine.²⁶ The state defendants ap-

17. *Serrano v. Priest*, 20 Cal. 3d 25, 45, 569 P.2d 1303, 1314, 141 Cal. Rptr. 315, 325-26 (1977) (*Serrano III*). See also Comment, *Court Awarded Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 666-81 (1974) (development and analysis of private attorney general theory).

18. 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982).

19. Chronologically, the *Serrano* litigation has progressed in the following manner: *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *cert. denied*, 432 U.S. 907 (1977) (*Serrano I*) (plaintiffs who challenged financing of California public school system stated cause of action that financing system was unconstitutional under equal protection clause); *Serrano v. Priest*, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 970 (1977) (*Serrano II*) (affirming trial court's conclusion that California public school financing system violated equal protection clauses of federal and state constitutions); *Serrano v. Priest*, 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (*Serrano III*) (award of attorneys' fees to plaintiffs' attorneys for protecting rights grounded in California Constitution, which benefit many people, was proper under private attorney general theory); *Serrano v. Unruh*, 123 Cal. App. 3d 573, 177 Cal. Rptr. 141 (1981) (compensation for fee-related services held improper under private attorney general doctrine codified at Code of Civil Procedure § 1021.5).

20. *Serrano I*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (on remand).

21. The plaintiffs involved in the *Serrano I* litigation were Los Angeles County public school children and their parents, representing classes consisting of all public school children in California and parents of children in the public school system. *Serrano I*, 5 Cal. 3d at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604 (1971).

22. Public Advocates, Inc. is a nonprofit corporation supported by foundation funds. It may not accept fee-paying clients.

23. Western Center on Law and Poverty was established pursuant to the Legal Services Corporation Act, 42 U.S.C. § 2996 (1976 and Supp. IV 1980).

24. The state defendants were the State Treasurer, the Superintendent of Public Instruction and the State Controller. The county defendants included the Superintendent of Schools of the County of Los Angeles, the Tax Collector, and the Treasurer. The county defendants had yet to appeal on the merits when the plaintiffs' attorneys filed motions for fee awards against the state defendants.

25. Public Advocates and Western Center each received \$400,000 for representation through April 1975. 32 Cal. 3d at 625, 652 P.2d at 986, 186 Cal. Rptr. at 755.

26. The basis, or "touchstone" for computing the reasonable market value of the attorneys' legal services is based upon the reasonable hourly rates of the public-interest attorneys employed by the plaintiffs. These hourly rates are based

pealed the fee award, which was deferred until the judgment on the merits in *Serrano II*²⁷ was final.

Public Advocates and Western Center then filed motions seeking fee awards for services in connection with *Serrano II*, for services in opposing an unsuccessful petition for certiorari before the United States Supreme Court and for services in connection with *Serrano III*.²⁸ In 1979 the superior court, per Judge Deutz, granted the motions by Public Advocates and Western Center²⁹ but denied their motion for services in preparing the fee motion.³⁰ The appeals before the Supreme Court in *Serrano v. Unruh*³¹ included the state defendant's appeal of *Serrano III* and plaintiffs' attorneys' cross-appeal from the order denying fees for services in preparing the fee motions.³²

B. The Majority Opinion

The central issue involved in *Serrano v. Unruh*³³ was whether an attorney's efforts to secure fees for the underlying litigation may be compensated under the private attorney general theory codified at California Code of Civil Procedure section 1021.5.³⁴ The court rejected as inapposite cases based on the common fund³⁵ or substantial benefit³⁶ theory, which denied compensation

upon those received by private attorneys "of comparable skill, experience, and stature conducting noncontingent class litigation in the Los Angeles area." *Id.*

27. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). *See supra* note 19.

28. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977). In *Serrano III* the California Supreme Court affirmed the fee award for trial services under the private attorney general theory. *Id.* at 50, 569 P.2d at 1317, 141 Cal. Rptr. at 329.

29. The superior court made the following fee awards: 1) against county defendants for services in defending *Serrano II*: \$44,966.50 to Public Advocates, \$29,288.20 to Western Center; 2) partial costs against county defendants: \$503.74 for printing the brief in opposition to the petition for certiorari; 3) against state defendants for defending the fee award (*Serrano III*): \$31,280 to Public Advocates, \$8,280 to Western Center. 32 Cal. 3d at 625, 652 P.2d at 987, 186 Cal. Rptr. at 756 (citation omitted). The superior court also reduced the *Serrano II* hours by 20% and enhanced the touchstone figure by 15%. Enhancement of the touchstone figure for *Serrano III* was denied. *Id.* at 625-26, 652 P.2d at 987, 186 Cal. Rptr. at 756.

30. 32 Cal. 3d at 626, 652 P.2d at 987, 186 Cal. Rptr. at 756.

31. 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982).

32. The county defendants settled and abandoned their appeal. Public Advocates and Western Center abandoned the position of their cross-appeal relating to the county defendants. *Id.* at 626, 652 P.2d at 987, 186 Cal. Rptr. at 756.

33. *Id.* at 621, 652 P.2d at 985, 186 Cal. Rptr. at 754.

34. *Id.* at 626, 652 P.2d at 987-88, 186 Cal. Rptr. at 756-57.

35. *City of Detroit v. Grinnell Corp.*, 560 F.2d 1093 (2d Cir. 1977) (counsel not entitled to compensation for services relating to fee motion and appeal under common fund doctrine because such services do not benefit fund); *Lindy Bros. Build-*

for fee-related services, stating that the private attorney general theory "must be accepted or rejected on its own merits. . . ." ³⁷ The court noted that the considerations involved in the rejection of compensation for fee-related services under the common fund and substantial benefit theories³⁸ did not apply where the fee is awarded under a statute based upon the private attorney general theory.³⁹

In arriving at the conclusion that the common fund and substantial benefit theories did not apply to a fee award under the private attorney general theory, the court emphasized that the federal courts have awarded compensation for fee-related matters under statutes similar to section 1021.5.⁴⁰ California's statutory

ers, Inc. v. American Radiator & Standard Sanitary Corp., 540 F.2d 102 (3d Cir. 1976) (*Lindy II*) (services performed in connection with fee application are not compensable under equitable fund doctrine as such services benefit attorney, not fund itself). See also Gabrielson v. City of Long Beach, 56 Cal. 2d 224, 363 P.2d 883, 14 Cal. Rptr. 651 (1961) (where objective of attorney and client is to establish adverse interests in common fund, no fees will be awarded). But see Central R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885) (holding that attorney has right, apart from client, to compensation from fund which had been protected through his efforts). The court rejected these cases on the ground that the basis for the common fund theory was unjust enrichment and that the attorney's efforts to secure compensation for fee-related services did nothing to benefit the fund. 32 Cal. 3d at 627-28, 652 P.2d at 988-89, 186 Cal. Rptr. at 757-58. The court also noted that a second reason for denying compensation from the fund for fee-related services was the potential for conflict of interest. *Id.* at 628, 652 P.2d at 989, 186 Cal. Rptr. at 758. See Gabrielson v. City of Long Beach, 56 Cal. 2d 224, 363 P.2d 883, 14 Cal. Rptr. 651 (1961).

36. *Mandel v. Lackner*, 92 Cal. App. 3d 747, 155 Cal. Rptr. 269 (1979) (*Mandel II*) (compensation for fee-related services under substantial benefit theory denied because counsel were representing their own interests, not interests of public who received benefits of litigation); *County of Inyo v. City of Los Angeles*, 78 Cal. App. 3d 82, 144 Cal. Rptr. 71 (1978) (no legal fees recoverable under substantial benefit theory where such an award would cause conflict between attorney's interest in fee and client's interest in lawsuit). The court also rejected these cases on the ground that the substantial benefit theory was based upon the prevention of unjust enrichment. 32 Cal. 3d at 629-30, 652 P.2d at 989-90, 186 Cal. Rptr. at 758-59.

37. *Id.* at 631, 652 P.2d at 991, 186 Cal. Rptr. at 760 (quoting *Serrano III*, 20 Cal. 3d at 45 n.16, 569 P.2d at 1314 n.16, 141 Cal. Rptr. at 326 n.16).

38. "Common-fund and substantial-benefit rest squarely on the principle of avoiding unjust enrichment. The private-attorney-general theory rests on the policy of encouraging private actions to vindicate important rights affecting the public interest, without regard to material gain." 32 Cal. 3d at 632, 652 P.2d at 991, 186 Cal. Rptr. at 760.

39. *Id.* at 630-31, 652 P.2d at 990, 186 Cal. Rptr. at 759. See *Gagne v. Maher*, 594 F.2d 336 (2d Cir.), *aff'd*, 448 U.S. 122 (1979); *Prandini v. National Tea Co.*, 585 F.2d 47 (3d Cir. 1978).

40. See, e.g., *Manhart v. City of Los Angeles Dep't of Water and Power*, 652 F.2d 904, 909 (9th Cir. 1981) (holding that it would be inconsistent to refuse award of fees that compensates attorney for time spent to establish reasonable fee); *Jorstad v. IDS Realty Trust*, 643 F.2d 1305, 1314-15 (8th Cir. 1981) (where attorneys' fees are authorized by statute, court may compensate for time spent in preparing fee petition); *Copeland v. Marshall*, 641 F.2d 880, 896 (D.C. Cir. 1980) (time spent litigating fee request is compensable); *Bond v. Stanton*, 630 F.2d 1231, 1235-36 (7th

attorney general theory⁴¹ was based upon this federal precedent.⁴² Agreeing with the rationale⁴³ for awarding fees for fee-related services under the statutory private attorney general theory, the court held that practitioners of public interest litigation should be assured that the compensation awarded "fairly covers the legal services required."⁴⁴ The court placed two limitations on an award for fee-related services: 1) only prevailing parties are entitled to such compensation;⁴⁵ and 2) the court may reduce or deny altogether a fee request that appears unreasonably inflated.⁴⁶

The court further held that a statutory fee motion under section 1021.5 did not constitute a separate cause of action⁴⁷ which must independently satisfy statutory requirements.⁴⁸ A statutory fee

Cir. 1980), *cert. denied*, 454 U.S. 1063 (1981) (congressional policy of enforcing civil rights through private litigation mandates that counsel be compensated for time spent establishing fee claim); *Bills v. Hodges*, 628 F.2d 844, 847 (4th Cir. 1980) (counsel entitled to attorneys' fees for partial success in defending fee claim on appeal); *Love v. Mayor of Cheyenne*, 620 F.2d 235, 237 (10th Cir. 1980) (counsel entitled to fees for work done in resolving fee issue); *Johnson v. Mississippi*, 606 F.2d 635, 637-38 (5th Cir. 1979) (attorneys' fees may be awarded for time spent litigating fee claim); *Weisenberger v. Huecker*, 539 F.2d 49, 53-54 (6th Cir. 1978), *cert. denied*, 444 U.S. 880 (1979) (denial of attorneys' fees for time spent defending fee award on appeal would frustrate congressional policy behind civil rights suits); *Souza v. Southworth*, 564 F.2d 609, 614 (1st Cir. 1977) (fee-related services litigation over fees does not directly benefit class, but may be considered in determining the reasonableness of fee for such services).

41. CAL. CIV. PROC. CODE § 1021.5 (West 1980). *See supra* note 3.

42. *See Woodland Hills Residents Ass'n v. City Council*, 23 Cal. 3d 917, 933-34, 593 P.2d 200, 208-09, 154 Cal. Rptr. 503, 511-12 (1979).

43. If an attorney must spend his time litigating a fee claim, with no assurance of compensation, attorneys may hesitate to offer their services for public interest litigation. Where statutory attorneys' fees are authorized, a denial of fees for establishing a fee award would circumvent congressional policy encouraging attorneys to act as private attorney generals. *See Prandini*, 585 F.2d at 53.

44. 32 Cal. 3d at 635, 652 P.2d at 993, 186 Cal. Rptr. at 762-63.

45. *Id.* CAL. CIV. PROC. CODE § 1021.5 (West 1980) defines the prevailing party as the "successful party." *See supra* note 3.

46. 32 Cal. 3d at 635, 652 P.2d at 994, 186 Cal. Rptr. at 763. *See Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980); *Gagne v. Maher*, 594 F.2d 336 (2nd Cir.), *aff'd*, 448 U.S. 122 (1979) (time spent litigating fee request is compensable); *Lund v. Affleck*, 587 F.2d 75 (1st Cir. 1978); *Reynolds v. Coomey*, 567 F.2d 1166 (1st Cir. 1978); *Farris v. Cox*, 508 F. Supp. 222 (N.D. Cal. 1981); *Vocca v. Playboy Hotel of Chicago, Inc.*, 519 F. Supp. 900 (N.D. Ill. 1981); *Jordan v. United States Dep't of Justice*, 89 F.R.D. 537 (D.D.C. 1981).

47. The defendants contended that the *Serrano* litigation ended when the *Serrano II* judgment was final, and that the enforcement of the right to a fee (*Serrano III*) constituted a new cause of action. 32 Cal. 3d at 636, 652 P.2d at 994, 186 Cal. Rptr. at 763.

48. *Id.* at 636-37, 652 P.2d at 995, 186 Cal. Rptr. at 764.

motion under section 1021.5 is a collateral matter⁴⁹ seeking what is due because of the judgment.⁵⁰ In addition, the fee motion may not be heard until there has been a decision on the merits.⁵¹

The court rejected the argument by the defendants that no fees are recoverable on an appeal defending a fee award because the appeal did not independently satisfy the requirements of section 1021.5.⁵² The court stated that the requirements of section 1021.5 did not need to be met because courts routinely award fees on an appeal which is brought solely to vindicate the right to fee entitlement.⁵³ In light of the majority view⁵⁴ on the question of compensation for fee-related services, the court held that unless circumstances rendered the fee award unjust,⁵⁵ the court, in its discretion, may award a successful party compensation under section 1021.5 for the hours reasonably spent in the litigation, including the time necessary to establish and defend the fee claim.⁵⁶

The court also rejected the defendants' claim that the trial judge abused his discretion by denying their motion to discover the salaries of the attorneys employed by Public Advocates and Western Center and the overhead costs of those organizations.⁵⁷ The defendants proposed that costs should be included in the "touchstone"⁵⁸ figure calculation to prevent a windfall to legal services organizations.⁵⁹ The court held that costs are not rele-

49. See *Kievlan v. Dahlberg Elec., Inc.*, 78 Cal. App. 951, 144 Cal. Rptr. 585 (1978).

50. See *White v. New Hampshire Dep't of Employment Sec.*, 102 S. Ct. 1162 (1982); *Knighton v. Watkins*, 616 F.2d 795 (5th Cir. 1980).

51. *White v. New Hampshire Dep't of Employment Sec.*, 102 S. Ct. 1162 (1982); *Marini v. Santa Cruz Mun. Ct.*, 99 Cal. App. 3d 829, 160 Cal. Rptr. 465 (1979).

52. 32 Cal. 3d at 637, 652 P.2d at 995, 186 Cal. Rptr. at 764.

53. *Id.* See *Russell v. Thermalito Union School Dist.*, 15 Cal. App. 3d 880, 176 Cal. Rptr. 1 (1981) (CAL. EDUC. CODE § 44944); *Wilkerson v. City of Placentia*, 118 Cal. App. 3d 435, 173 Cal. Rptr. 294 (1981) (CAL. CIV. PROC. CODE § 1021.5); *County of Humboldt v. Swoap*, 51 Cal. App. 3d 442, 124 Cal. Rptr. 510 (1975) (CAL. WELF. & INST. CODE § 10962); *Horn v. Swoap*, 37 Cal. App. 3d 375, 116 Cal. Rptr. 113 (1974) (CAL. WELF. & INST. CODE § 10962).

54. The court has envisioned an independent state rule concerning the implementation of § 1021.5. Although the federal decisions provide "analogous precedential value," reliance on such case law is limited due to evidence of congressional intent embodied in the federal private attorney general statutes. California has no legislative counterpart in § 1021.5. 32 Cal. 3d at 639 n.29, 652 P.2d at 997 n.29, 186 Cal. Rptr. at 766 n.29.

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

56. 32 Cal. 3d at 639, 652 P.2d at 996-97, 186 Cal. Rptr. at 765-66.

57. *Id.* at 640, 652 P.2d at 997. 186 Cal. Rptr. at 766. The defendants argued that discovery of these costs was pertinent in the determination of the reasonable hourly compensation of plaintiffs' attorneys. *Id.*

58. The "touchstone" or "lodestar" figure is the basis used to calculate the award of attorney's fees based upon the reasonable market value of such services. See CALIFORNIA ATTORNEY'S FEES AWARD PRACTICE, 51-64 (Cal. C.E.B. 1982).

59. The defendants contended that due to the fact that public legal services attorneys are paid at a lower rate than private attorneys, an award to a legal services

vant to the calculation of the touchstone figure⁶⁰ and that any "windfall" to legal services organizations is permissible because it accrues to the benefit of public-interest litigation.⁶¹

C. *The Dissenting Opinion*

The sole dissenter in *Serrano v. Unruh* was Justice Richardson. Justice Richardson believed that the correct analysis of the question of compensation for fee-related services was contained in the court of appeal opinion.⁶²

The court of appeal held that the appeal involved in *Serrano III*⁶³ was not compensable under section 1021.5 because the attorneys' efforts did not vindicate an important right affecting the public interest.⁶⁴ Applying the rule that fee-related services will not be entitled to fee awards under the substantial benefit theory,⁶⁵ the court stated that the attorneys were essentially representing their own interests⁶⁶ in *Serrano III* and that the fee-related claim must fail because it did not meet the statutory re-

attorney based upon the reasonable market value of comparable work by a private attorney results in a windfall. 32 Cal. 3d at 641, 652 P.2d at 998, 186 Cal. Rptr. at 767.

60. *Id.* at 643, 652 P.2d at 1000, 186 Cal. Rptr. at 769. The "reasonable market value" approach is the prevailing federal view where fees are authorized by statute. The federal courts which have been presented with the theory that costs should be included in the reasonable market value of services have rejected it. *See, e.g.,* *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101 (3rd Cir. 1981); *Palmigiano v. Garrahy*, 616 F.2d 598 (1st Cir. 1980), *cert. denied*, 449 U.S. 839 (1980); *Rodriguez v. Taylor*, 569 F.2d 1231 (3rd Cir. 1977), *cert. denied*, 436 U.S. 913 (1978); *Torres v. Sachs*, 538 F.2d 10 (2d Cir. 1976); *Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102 (1976) (*Lindy II*). The court also dismissed the discovery of plaintiffs' attorneys salaries as irrelevant to the standard of "reasonable value." 32 Cal. 3d at 641, 652 P.2d at 998, 186 Cal. Rptr. at 767.

61. *Id.* at 642, 652 P.2d at 999, 186 Cal. Rptr. at 768. The court stated that the fate of a plaintiff's claim should not rest upon the choice between private or public counsel. *Id.* at 642, 652 P.2d at 999, 186 Cal. Rptr. at 768. *See Oldham v. Ehrlich*, 617 F.2d 163 (8th Cir. 1980).

62. *Serrano v. Unruh*, 123 Cal. App. 3d 573, 177 Cal. Rptr. 141 (1981). Justice Stevens, Acting Presiding Justice, wrote the opinion in which Justices Ashby and Hastings concurred. Justice Richardson's dissent consisted solely of a quotation from the court of appeal opinion. 32 Cal. 3d at 644-48, 652 P.2d at 1000-03, 186 Cal. Rptr. at 769-72.

63. *See supra* note 19.

64. 123 Cal. App. 3d at 578-79, 177 Cal. Rptr. at 144-45. *See Save El Toro Ass'n v. Days*, 98 Cal. App. 3d 544, 159 Cal. Rptr. 577 (1979).

65. *See supra* note 35 and accompanying text.

66. 123 Cal. App. 3d at 579-80, 177 Cal. Rptr. at 145 (quoting *Mandel v. Lackner*, 92 Cal. App. 3d 747, 760, 155 Cal. Rptr. 269, 278 (1979) (*Mandel II*)). *See also* *Bruno v. Bell*, 91 Cal. App. 3d 776, 154 Cal. Rptr. 435 (1979).

quirements of section 1021.5.⁶⁷

IV. *FOLSOM v. BUTTE COUNTY ASSOCIATION OF GOVERNMENTS*

A. *Introduction*

In *Folsom v. Butte County Association of Governments*,⁶⁸ a group of elderly disabled taxpayers residing in Butte County, California brought suit against the Butte County Association of Governments (BCAG) seeking declaratory and injunctive relief against county allocations to street and road projects of funds collected under the Transportation Development Act of 1971 (TDA/the Act).⁶⁹ The Act was based upon legislative findings concerning the need for public transportation and addressed special problems concerning its design and operation.⁷⁰ The legislature further found that the state had an interest in the full development of transit systems for California.⁷¹ The Act autho-

67. 123 Cal. App. 3d at 581-82, 177 Cal. Rptr. at 146-47. The court held that the litigation establishing the right to fee entitlement vindicated no important societal policy, would have no widespread benefit, and the burden placed upon plaintiffs' attorneys was not out of proportion to their individual stake in the controversy. *Id.*

68. 32 Cal. 3d 668, 652 P.2d 437, 186 Cal. Rptr. 589 (1982).

69. CAL. GOV'T CODE §§ 29530-29536 (West Supp. 1982); CAL. PUB. UTIL. CODE §§ 99200-99407 (West 1973 & Supp. 1982) (Mills-Alquist/Deddeh Act).

70. CAL. PUB. UTIL. CODE § 99220 (West Supp. 1982) provides in pertinent part:

The Legislature finds and declares as follows:

(a) Public transportation is an essential component of the balanced transportation system which must be maintained and developed so as to permit the efficient and orderly movement of people and goods in the urban areas of the state. Because public transportation systems provide an essential public service, it is desirable that such systems be designed and operated in such a manner as to encourage maximum utilization of the efficiencies of the service for the benefit of the total transportation system of the state, and all the people of the state, including the elderly, the handicapped, the youth, and the citizens of limited means of the ability to freely utilize the systems.

(b) The fostering, continuance, and development of public transportation systems are a matter of state concern. Excessive reliance on the private automobile for transportation has caused air pollution and traffic congestion in California's urban areas, and such pollution and congestion are not confined to single incorporated areas but affect entire regions. Thus, the Legislature has elected to deal with the multiple problems caused by lack of adequate public transportation on a regional basis through the counties, with coordination of the programs being the responsibility of the state pursuant to contract with county governments.

(c) While providing county assistance to a particular transportation system may not be of primary interest and benefit to each and every taxpayer in a county, providing an integrated and coordinated system to meet the public transportation needs of an entire county will benefit the county as a whole. It is the purpose of this chapter to provide for such systems in those counties where they are needed.

Id. The plaintiffs in *Folsom* averred that they are "elderly, disabled, of limited means and, hence, transit-dependent." 32 Cal. 3d at 671, 652 P.2d at 440, 186 Cal. Rptr. at 592.

71. CAL. PUB. UTIL. CODE § 99222 (West Supp. 1982) provides in pertinent part:

rizes counties to contract with the Board of Equalization to increase the motor vehicle fuel tax by one percent, which is deposited in a local fund to be allocated by the local transportation agency for purposes set forth in the Act.⁷²

The implementing regulations⁷³ mandate that the local agency may not allocate TDA funds to local streets and roads until it is determined that there are no unmet public transportation needs in the jurisdiction.⁷⁴ In 1978, BCAG⁷⁵ determined that no unmet public transportation needs existed and allocated all funds collected since 1972 (TDA funds) to street and road projects.⁷⁶

In 1978 plaintiffs filed suit against both local defendants⁷⁷ and state defendants⁷⁸ claiming that the allocations to local street and road projects violated section 6658 of the Administrative Code.⁷⁹

The Legislature hereby finds and declares that:

(a) It is in the interest of the state that funds available for transit development be fully expended to meet the transit needs that exist in California.

(b) Such funds be expended for physical improvement to improve the movement of transit vehicles, the comfort of the patrons, and the exchange of patrons from one transportation mode to another.

Id.

72. 32 Cal. 3d at 672, 652 P.2d at 440, 186 Cal. Rptr. at 592.

73. CAL. ADMIN. CODE tit. 21, R. 81 (1982) (§§ 6600-6680).

74. CAL. ADMIN. CODE § 6658 provides in pertinent part:

Before any allocation is made for a purpose not directly related to public transportation services, specialized transportation services or facilities provided for the exclusive use of pedestrians and bicycles, the transportation planning agency shall have taken the following actions. . . .

(d) The transportation planning agency shall, after consideration of all available information, including that presented at the public hearing, adopt by resolution its finding for the area of the claimant. The finding shall be either (1) that there are no unmet transit needs, (2) that there are no unmet transit needs that are reasonable to meet, or (3) that there are unmet transit needs, including needs that are reasonable to meet.

Id. at tit. 21, R. 61 (1982). The determination must include a public hearing upon 10 days notice and must make specific reference to efforts taken to identify the transportation needs of the elderly, handicapped, and poor. *Id.*

75. BCAG was created in 1969 by Chico, Oroville, Gridley, Biggs and the County of Butte.

76. 32 Cal. 3d at 673, 652 P.2d at 441, 186 Cal. Rptr. at 593. A request by the Chico City Council for \$140,400 to provide for an intracity system in Chico was rejected. *Id.*

77. The local defendants included BCAG, the cities of Gridley, Oroville and Biggs, Butte County and the county auditor-controller as trustee of the county's TDA funds. *Id.*

78. The state defendants included the Secretary of the Business and Transportation Agency and the Director of the Department of Transportation. *Id.*

79. The plaintiffs challenged that the allocations for fiscal 1973-74 through 1978-79 were invalid on the grounds that the BCAG failed to identify unmet transportation needs and did not comply with § 6658. *Id.*

The plaintiffs sought to enjoin further allocations and to rescind the unexpended allocations.⁸⁰ The prayer contained a request for costs⁸¹ and statutory attorney fees.⁸²

In June 1979, BCAG rescinded the prior allocations and the local defendants moved for partial summary judgment.⁸³ The motion was based upon two grounds: 1) because the allocations had been rescinded and restored to the fund, relief for the years prior to 1978-79 should be denied as moot,⁸⁴ and 2) section 6658 was invalid as an excessive exercise of the authority of the Secretary of the Business and Transportation Agency.⁸⁵ The trial court granted the local defendants' motion upon specified conditions⁸⁶ but held section 6658 to be valid.⁸⁷

The settlement agreement was filed with the stated purpose of settling the plaintiffs' claims concerning all improper allocations.⁸⁸ In consideration of the local defendants' promise to establish four new transit systems, the plaintiffs promised to have the frozen TDA funds released and to file a dismissal with prejudice.⁸⁹ The plaintiffs filed a cost bill and a motion for attorneys' fees under section 1021.5.⁹⁰ The trial court ruled that the plaintiffs were "successful parties"⁹¹ and awarded costs and attor-

80. The plaintiffs sought rescission of unexpended allocations to street and road projects until Butte County had an adequate public transportation system. They also sought an order to establish a system whereby local agency allocations would be reviewable. *Id.*

81. CAL. CIV. PROC. CODE § 1032 (West 1980). *See supra* note 6.

82. CAL. CIV. PROC. CODE § 1021.5 (West 1980). *See supra* note 3.

83. 32 Cal. 3d at 674, 652 P.2d at 441, 186 Cal. Rptr. at 593. Prior to this the county auditor-controller froze approximately three million dollars in TDA funds. *Id.* at 673-74, 652 P.2d at 441, 186 Cal. Rptr. at 593.

84. 32 Cal. 3d at 674, 652 P.2d at 441, 186 Cal. Rptr. at 593.

85. *Id.* The state defendants objection to the motion alleging that rescission of allocations for prior years violated § 6648 (rescission of allocation allowed only after three years and upon 30 day notice to claimant) and § 6659 (special circumstances for rescission and reallocation of allocated funds) of the California Administrative Code. 32 Cal. 3d at 675 n.9, 652 P.2d at 442 n.9, 186 Cal. Rptr. at 594 n.9.

86. The court granted the motion upon the following conditions: 1) BCAG had to rescind all outstanding allocations from the local fund; 2) BCAG must refrain from making further allocations of funds unencumbered on July 6, 1979 until such time as there were further allocations; and 3) preface any 1979-80 allocations with the required survey of unmet needs. 32 Cal. 3d at 674, 652 P.2d at 442, 186 Cal. Rptr. at 594.

87. *Id.*

88. *Id.* at 675, 652 P.2d at 442, 186 Cal. Rptr. at 594. The settlement agreement contained no provision for costs and attorneys' fees.

89. *Id.* The dismissal was to be filed within one week of the date that the last new transit system initiated service. The action was dismissed with prejudice on February 22, 1982. 32 Cal. 3d at 676 n.12, 652 P.2d at 443 n.12, 186 Cal. Rptr. at 595 n.12.

90. *See supra* notes 6 & 3.

91. 32 Cal. 3d at 675, 652 P.2d at 442, 186 Cal. Rptr. at 594. The trial court based

neys' fees.⁹²

B. The Majority Opinion

The central issue faced by the supreme court in *Folsom* was whether the settlement agreement operated as a merger and bar of the issues in the complaint, thereby depriving the trial court of jurisdiction to award costs and statutory attorneys' fees.⁹³ The court rejected the contentions of both the plaintiffs⁹⁴ and the defendants⁹⁵ and held that an agreement, silent as to costs and statutory attorneys' fees, did not deprive the trial court of jurisdiction to consider a cost bill or a section 1021.5 motion for attorneys' fees.⁹⁶

The court noted that a valid compromise agreement concludes all matters put in issue by the pleadings⁹⁷ and, in the absence of fraud or undue influence, operates as a bar to those issues.⁹⁸ Relying upon the well established rule that statutory costs do not constitute part of the judgment⁹⁹ and may be awarded in an

its ruling upon the condition in the court order that BCAG rescind all remaining outstanding allocations of money from the local transportation fund, stating that "this obviously became at least one of the bases for B.C.A.G.'s further action in meeting the transportation needs of Butte County." *Id.* (footnote omitted).

92. The plaintiffs were awarded fees of \$35,257.50 and costs of \$2,068. The trial court held that the fee award satisfied the requirements of § 1021.5. *Id.* at 675-76, 652 P.2d at 442-43, 186 Cal. Rptr. at 594-95.

93. *Id.* at 671, 652 P.2d at 439, 186 Cal. Rptr. at 591.

94. The plaintiffs contended that their attorneys did not discuss the fee issues during negotiations on the merits because such conduct is improper. *Id.* at 676, 652 P.2d at 443, 186 Cal. Rptr. at 595. See *Obin v. District No. 9*, 651 F.2d 574 (8th Cir.), cert. denied, 450 U.S. 912 (1980); *Lyon v. Arizona*, 80 F.R.D. 665 (D. Ariz. 1978); *Regalado v. Johnson*, 79 F.R.D. 447 (E.D. Ill. 1978); *Jamison v. Butcher & Sherrerd*, 68 F.R.D. 479 (E.D. Pa. 1975); *City of Philadelphia v. Charles Pfizer & Co.*, 345 F. Supp. 454 (S.D.N.Y. 1972); *Norman v. McKee*, 290 F. Supp. 29 (N.D. Col. 1968); *Anthony v. Superior Court*, 59 Cal. App. 3d 760, 130 Cal. Rptr. 758 (1976).

95. The defendants contended that the settlement agreement operated as a merger and bar which deprived the trial court of jurisdiction to award fees or costs. 32 Cal. 3d at 676, 652 P.2d at 443, 186 Cal. Rptr. at 595. See *Gregory v. Hamilton*, 77 Cal. App. 3d 213, 142 Cal. Rptr. 563 (1978). The plaintiffs relied on cases where costs or fees were awarded when the agreement contained no provision for them. See *Chicano Police Officers Ass'n v. Stover*, 642 F.2d 127 (10th Cir. 1980); *Regalado v. Johnson*, 79 F.R.D. 447 (E.D. Ill. 1978); *Rappenecker v. Sea-Land Serv., Inc.*, 93 Cal. App. 3d 256, 155 Cal. Rptr. 516 (1979).

96. 32 Cal. 3d at 680, 652 P.2d at 446, 186 Cal. Rptr. at 598.

97. *Id.* at 677, 652 P.2d at 443-44, 186 Cal. Rptr. at 595-96. See *Ellena v California*, 69 Cal. App. 3d 245, 138 Cal. Rptr. 110 (1977).

98. 32 Cal. 3d at 677, 652 P.2d at 443, 186 Cal. Rptr. at 595. See *Shriver v. Kuchel*, 113 Cal. App. 2d 421, 248 P.2d 35 (1952).

99. See *Rappenecker v. Sea-Land Serv., Inc.*, 93 Cal. App. 3d 256, 155 Cal. Rptr.

agreement silent as to costs,¹⁰⁰ the court held that because statutory attorneys' fees are authorized solely by statute, they also do not constitute part of the judgment.¹⁰¹

The court concluded that, absent an affirmative agreement to the contrary, a trial court retains jurisdiction to consider a cost bill and, where the showing required by the statute could not be made before judgment, the court may also consider a statutory fee motion.¹⁰² Analogizing to the recent decision of *White v. New Hampshire Department of Employment Security*,¹⁰³ the court declined to rule upon the issue of the propriety of discussion of fee matters in conjunction with negotiation on the merits¹⁰⁴ and joined the view of the United States Supreme Court in *White*.¹⁰⁵

The defendants challenged the fee award itself¹⁰⁶ on two grounds: 1) that the plaintiffs' attorneys were not "parties" within the meaning of section 1021.5;¹⁰⁷ and 2) that the plaintiffs' attor-

516 (1979); *Wells Fargo & Co. v. City of San Francisco*, 25 Cal. 2d 37, 152 P.2d 625 (1944).

100. *Rappenecker v. Sea-Land Serv., Inc.*, 93 Cal. App. 3d 256, 155 Cal. Rptr. 516 (1979).

101. 32 Cal. 3d at 678, 652 P.2d at 444-45, 186 Cal. Rptr. at 596-97. "They are incidents to the cause, properly awarded after entry of a stipulated judgment, unless expressly or by necessary implication excluded by the stipulation." *Id.* The court noted that this reasoning would not apply where fees must be pleaded and proved at trial as part of the relief sought. *Id.* at n.16, 652 P.2d at 44 n.16, 186 Cal. Rptr. at 596 n.16. The court relied upon *Rapp v. Spring Valley Gold Co.*, 74 Cal. 532, 16 P. 325 (1888) (attorneys' fees allowed where stipulation was silent as to statutory attorney's fees) in reaching its conclusion that statutory costs and statutory attorneys' fees should be treated similarly. 32 Cal. 3d at 678-79, 652 P.2d at 445, 186 Cal. Rptr. at 597.

102. 32 Cal. 3d at 679, 652 P.2d at 445, 186 Cal. Rptr. at 597. Under § 1021.5 the claimant must show the conferral of a significant benefit through the enforcement of an important public right, a showing which usually cannot be made until the "benefit is secure." *Id.* See *Marini v. Municipal Court*, 99 Cal. App. 3d 829, 160 Cal. Rptr. 465 (1979).

103. 455 U.S. 445 (1982). In *White*, the Supreme Court held that a request for attorneys' fees under the Civil Rights Attorneys' Fees Award Act, 42 U.S.C. § 1988 (1976), requires an inquiry separate from the merits which cannot be undertaken until one party has "prevailed." 455 U.S. at 451-52. Section 1988 is also a codification of the private attorney general theory and is frequently compared to § 1021.5. 32 Cal. 3d at 680 n.20, 652 P.2d at 445 n.20, 186 Cal. Rptr. at 597 n.20.

104. See *supra* note 94 and cases cited therein.

105. 32 Cal. 3d at 681, 652 P.2d at 446, 186 Cal. Rptr. at 598. The Court in *White* stated that while a defendant's attorney may have a good reason to know his total liability, including fees, the Court could not say that no resolution of this issue was available to an ethical plaintiff's counsel. 455 U.S. at 453-54 n.16. The California Supreme Court also held that the parties did not intend to waive costs or statutory fees. 32 Cal. 3d at 680-81, 652 P.2d at 446, 186 Cal. Rptr. at 598.

106. See *supra* note 92.

107. See *supra* note 3. The plaintiffs were represented by Legal Services of Northern California, California Rural Legal Assistance, Legal Aid Society of Sacramento County and a private attorney. The defendants claimed that groups like Legal Services of Northern California should be deemed "public entities" not benefited by the statute because the agencies are primarily funded with public

neys were not "successful" within the meaning of section 1021.5.¹⁰⁸ Relying upon the rationale of *Serrano v. Priest*¹⁰⁹ and federal decisions such as *Incarcerated Men of Allen County Jail v. Fair*,¹¹⁰ the court held that the public funding of a legal services organization does not prevent the court from awarding statutory attorney's fees under section 1021.5 because "an award to lawyers who have vindicated an important public interest achieved the desired result whether they worked for a private firm or a legal services organization."¹¹¹

Rejecting the defendants' reliance on *Bruno v. Bell*,¹¹² the court stated that the determinative question of whether the plaintiffs were a "successful party" under section 1021.5 was whether or not their actions conferred a "benefit."¹¹³ This question is to be resolved by looking at the impact of the action, and not the manner of its resolution.¹¹⁴ The court held that where the substantive requirements of section 1021.5 are met,¹¹⁵ a fee award will not be barred simply because no formal relief is granted.¹¹⁶

money, and that a fee award to such an agency would violate § 1021.5. 32 Cal. 3d at 681, 652 P.2d at 446-47, 186 Cal. Rptr. at 598-99.

108. See *supra* note 3.

109. 20 Cal. 3d 25, 569 P.2d 1303, 141 Cal. Rptr. 315 (1977) (*Serrano III*). The court in *Serrano III* stated that a denial of a fee award under the private attorney general theory to a public interest law firm would be inconsistent with the rule itself. *Id.* at 48, 569 P.2d at 1316, 141 Cal. Rptr. at 327. Both Legal Services of Northern California and Western Center on Law and Poverty (awarded fees in *Serrano III*) were established under the Legal Services Corporation Act. See *supra* note 23.

110. 507 F.2d 281 (6th Cir. 1974). In *Incarcerated Men*, the court of appeal held that partial public funding of a legal services organization is irrelevant in determining the propriety of a fee award under the private attorney general theory. *Id.* at 286. *Accord* Leeds v. Watson, 630 F.2d 674, 677 (9th Cir. 1980); Bills v. Hodges, 628 F.2d 844, 847 (4th Cir. 1980); Oldham v. Erlich, 617 F.2d 163, 169 (8th Cir. 1980); Reynolds v. Coomey, 567 F.2d 1166, 1167 (1st Cir. 1978).

111. 32 Cal. 3d at 683, 652 P.2d at 448, 186 Cal. Rptr. at 600.

112. 91 Cal. App. 3d 776, 154 Cal. Rptr. 435 (1979). In *Bruno*, the plaintiff's challenge to § 104.10 of the Streets and Highways Code succeeded in diverting funds from one public use to another. *Id.* at 784, 154 Cal. Rptr. at 439. The court in *Bruno* held that a fee award was not proper under any theory and would violate public policy because the plaintiff, in *pro per*, was also an attorney. *Id.* at 782-89, 141 Cal. Rptr. at 438-42.

113. 32 Cal. 3d at 684, 652 P.2d at 448-49, 186 Cal. Rptr. at 600-01.

114. *Id.* at 685, 652 P.2d at 449, 186 Cal. Rptr. at 601. This rule is followed by most federal courts. See *Chicano Police Officer's Ass'n v. Stover*, 642 F.2d 127 (10th Cir. 1980); *Bonnes v. Long*, 599 F.2d 1316 (4th Cir. 1979); *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978); *F & M Schaefer Corp. v. C. Schmidt & Sons, Inc.*, 476 F. Supp. 203 (S.D.N.Y. 1978).

115. See *supra* note 3.

116. 32 Cal. 3d at 685, 652 P.2d at 450, 186 Cal. Rptr. at 602: *accord* *Maier v.*

In determining whether the plaintiffs were “successful,” the court stated that the test is “whether their action substantially contributed to [the] result.”¹¹⁷ The court concluded that due to the evidence which showed that BCAG dramatically changed its position after the lawsuit was filed,¹¹⁸ the litigation demonstrably influenced BCAG’s decision to build four new transit systems, thus entitling the plaintiffs to the status of “successful” parties.¹¹⁹

C. *The Dissenting Opinion*

Justice Kaus, joined by Justice Richardson, dealt only with the issue of whether the settlement agreement operated as a merger and bar to an award of costs and fees.¹²⁰ Justice Kaus believed that under the circumstances of the case, an award of costs and fees was improper because the original and amended complaint included specific prayers for costs and attorneys’ fees.¹²¹ In addition, because the settlement agreement provided that the plaintiffs were to dismiss the action with prejudice, nothing but the delay in establishing the agreed-upon transit system prevented the immediate filing of the notice of dismissal.¹²²

Justice Kaus objected to the majority’s reliance on *Rappenecker v. Sea-Land Service, Inc.*¹²³ and other authorities on the ground

Gagne, 448 U.S. 122 (1980); *Woodland Hills Residents Ass’n v. City Council*, 23 Cal. 3d 917, 593 P.2d 200, 154 Cal. Rptr. 503 (1979) (*Woodland Hills II*).

117. 32 Cal. 3d at 686, 652 P.2d at 450, 186 Cal. Rptr. at 601. The trial court phrased this question as “whether or not the local politicians would have done what they have done absent the lawsuit.” *Id.*

118. Prior to the initiation of the lawsuit, BCAG had determined that there were no unmet transit needs even in the face of the fact that no public transit system existed in Chico or Oroville, and that service for the handicapped was limited and violated applicable regulations. After the court issued a contingent order on November 1, 1979, the local defendants agreed to implement a system to cure these deficiencies. In addition, the BCAG agreed to institute the four new transit systems. *Id.* at 686-87, 652 P.2d at 450, 186 Cal. Rptr. at 602.

119. *Id.* at 687, 652 P.2d at 451, 186 Cal. Rptr. at 603. The court remanded the case to the trial court to determine the plaintiffs’ request for fees on appeal in conformity with *Serrano v. Unruh*, 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982).

120. 32 Cal. 3d at 687, 652 P.2d at 451, 186 Cal. Rptr. at 603.

121. *Id.* at 687-88, 652 P.2d at 451, 186 Cal. Rptr. at 603.

122. *Id.* at 688, 652 P.2d at 451, 186 Cal. Rptr. at 603. “Can there be any question that once such a dismissal had been filed, it would have been curtains for any effort to trigger an encore in the form of fees and costs?” *Id.* See, e.g., *Kronkright v. Gardner*, 31 Cal. App. 3d 214, 218-19, 107 Cal. Rptr. 270, 272-73 (dismissal of an earlier action with prejudice constitutes retraxit to the second action); *Wouldridge v. Burns*, 265 Cal. App. 2d 82, 84-85, 71 Cal. Rptr. 394, 396 (1968) (dismissal with prejudice is bar to litigation of same issue in subsequent cause of action).

123. 93 Cal. App. 3d 256, 155 Cal. Rptr. 516 (1979). See *supra* notes 99 & 100 and accompanying text. In *Rappenecker* the court of appeal held that CAL. CIV. PROC. CODE § 998 (West 1980) (allowing judgment to be taken in full compromise settlement of a claim) did not bar an award of costs under CAL. CIV. PROC. CODE § 1032 (West 1980). 93 Cal. App. 3d at 263, 155 Cal. Rptr. at 519.

that none of the cases were precisely on point.¹²⁴ In Justice Kaus' opinion, "a favorable judgment invites the filing of a cost bill; a dismissal with prejudice forbids it."¹²⁵

V. CONCLUSION

Both *Serrano v. Unruh*¹²⁶ and *Folsom v. Butte County Association of Governments*¹²⁷ represent an expansion of the available means of recovery under California's private attorney general theory.¹²⁸ The *Serrano* opinion has brought the recovery available under section 1021.5 closer to that allowed under federal civil rights statutes¹²⁹ and avoids additional proceedings that could arise if the California and federal rules were substantially different.¹³⁰ The holding in *Folsom*, by extending the rule that costs are recoverable when not provided for¹³¹ to attorneys' fees authorized by statute, has also aligned California decisional law with that of the federal courts.¹³²

The *Serrano* and *Folsom* decisions recognize that to deny statutory fees for other fee-related services or when they are not provided for by a settlement would contravene the purpose of the statutory private attorney general theory: to encourage attorneys to represent worthy clients who lack sufficient legal resources and to vindicate important public policies.¹³³

III. CIVIL RIGHTS

A. *Termination of employment for high blood pressure constitutes prohibited discrimination under the California Fair Employment and Housing Act: American National Insurance Co. v. Fair Employment and Housing Commission*

In American National Insurance Company v. Fair Employment

124. 32 Cal. 3d at 688, 652 P.2d at 451, 186 Cal. Rptr. at 603.

125. *Id.*

126. 32 Cal. 3d 621, 652 P.2d 985, 186 Cal. Rptr. 754 (1982).

127. 32 Cal. 3d 668, 652 P.2d 437, 186 Cal. Rptr. 589 (1982).

128. CAL. CIV. PROC. CODE § 1021.5 (West 1980). See *supra* note 3.

129. See *supra* note 40 and cases cited therein.

130. 32 Cal. 3d at 638 n.27, 652 P.2d at 996 n.27, 186 Cal. Rptr. at 765 n.27.

131. See *supra* notes 99 & 100 and accompanying text.

132. 32 Cal. 3d at 679-80 & n.21, 652 P.2d at 446 & n.21, 186 Cal. Rptr. at 598 & n.21.

133. 32 Cal. 3d at 634, 652 P.2d at 993, 186 Cal. Rptr. at 762; 32 Cal. 3d at 682-83, 652 P.2d at 447, 186 Cal. Rptr. at 599.

and Housing Commission,¹ the court addressed the question of whether high blood pressure is a protected physical handicap under the California Fair Employment and Housing Act.² In 1975, American National Life Insurance Company hired Dale Rivard as a sales and debit agent.³ Rivard's employment was terminated by the company six weeks later on the ground that, as a matter of policy, the company did not hire persons with elevated blood pressure for positions as sales and debit agents.⁴

Rivard filed a complaint with the State Fair Employment Practice Commission alleging that his termination constituted discrimination based upon a physical handicap in violation of Labor Code section 1420.⁵ The Commission held that the company had unlawfully discriminated against Rivard. The superior court and court of appeal affirmed, holding that high blood pressure was a protected physical handicap under Labor Code section 1420.⁶

In a relatively short opinion by Justice Newman, the court focused upon whether the legislature intended to restrict the definition of "physical handicap" contained in Government Code

1. 32 Cal. 3d 603, 651 P.2d 1151, 186 Cal. Rptr. 345 (1982). Justice Newman wrote the majority opinion with Chief Justice Bird and Justices Kaus, Broussard and Reynoso concurring. Justice Mosk wrote the dissenting opinion with Justice Richardson concurring.

2. CAL. GOV'T CODE § 12940 provides in pertinent part:

It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California:

(a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge such person from employment or from a training program leading to employment, or to discriminate against such person in compensation or in terms, conditions or privileges of employment.

CAL. GOV'T CODE § 12940(a) (West Supp. 1982). At the time suit was filed, the above provision was contained in the California Fair Employment Practice Act, Labor Code § 1420. In 1980 the Fair Employment Practice Act was repealed and reenacted as part of the California Fair Employment and Housing Act, CAL. GOV'T. CODE § 12900-12993 (West 1980 & Supp. 1982). Act of September 18, 1959, 1959 Cal. Stat. 1999-2005, repealed by California Fair Employment and Housing Act of 1980, 1980 Cal. Stat. 3138.

3. Rivard's employment was subject to the approval of the home office; however, he had been employed by the Company in a similar position between 1963 and 1968. 32 Cal. 3d at 606, 651 P.2d at 1152-53, 186 Cal. Rptr. at 346-47.

4. The Company claimed that the work of a sales and debit agent was stressful and therefore terminated Rivard because he did not meet the health requirements for that position. *Id.*

5. The State Fair Employment Practice Commission's duties are now vested in the Fair Employment and Housing Commission pursuant to the repeal of the Fair Employment Practice Act and enactment of the Fair Employment and Housing Act. See *supra* note 2.

6. See *American Nat'l Ins. Co. v. California Fair Employment Practice Comm'n.*, 114 Cal. App. 3d 1008, 170 Cal. Rptr. 887 (1981).

section 12926(h).⁷ Relying upon the use of the word "includes" in the definition of physical handicap, the court inferred that the legislature did not endorse a restrictive definition.⁸ Concluding that the statutory definition was not restrictive, the court then proceeded to define the meaning of "physical handicap" under the statute. The court, relying upon the dictionary definition of "handicap,"⁹ held that "a condition of the body which has [a] disabling effect is a physical handicap."¹⁰

Justice Newman refused to restrict the coverage of the statute to handicaps which are presently disabling because having a presently disabling handicap is one of the few defenses to a discrimination charge.¹¹ To limit the definition of "physical handicap" to presently disabling conditions would, in effect, allow discrimination as to future handicaps which have no presently disabling effect.¹² The court also rejected the company's contention that high blood pressure is a "medical condition,"¹³ and concluded that in light of the liberal construction called for by the statute,¹⁴ high blood pressure was both physical and often handicapping.¹⁵

In a lengthy dissent, Justice Mosk criticized the majority's analysis of the statute for several reasons. Initially, Justice Mosk believed that the majority's reliance on the term "includes" was

7. "'Physical handicap' includes impairment of sight, hearing or speech, or impairment of physical ability because of amputation or loss of function or coordination, or any other health impairment which requires special education or related services." CAL. GOV'T CODE § 12926(h) (West 1980).

8. 32 Cal. 3d at 608, 651 P.2d at 1154, 186 Cal. Rptr. at 348. The court inferred that the use of the term "includes" rather than "means" or "refers to" evidenced a statutory intent to contemplate "all handicaps that are physical." *Id.* (emphasis original).

9. "Webster's tells us that a handicap is a 'disadvantage that makes achievement unusually difficult.' [WEBSTER'S NEW INT'L DICTIONARY 1027 (3d ed. 1961)]." 32 Cal. 3d at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 349.

10. 32 Cal. 3d at 609, 651 P.2d at 1155, 186 Cal. Rptr. at 349.

11. See CAL. GOV'T CODE § 12940(a)(1) (West Supp. 1982). See also *Sterling Transit Co. v. Fair Employment Practice Comm'n*, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981) (bona fide occupational qualification defense relates to whether handicapped persons are unable to presently, safely, and efficiently perform their duties).

12. 32 Cal. 3d at 610, 651 P.2d at 1155, 186 Cal. Rptr. at 349. "We should not conclude that the Legislature intended any such anomalous result." *Id.*

13. Employers may not discriminate based upon a "medical condition," but this term is restricted to conditions related to a cured or rehabilitated cancer. CAL. GOV'T CODE §§ 12920, 12926(f) (West 1980). The court rejected this definition as "bizarre." 32 Cal. 3d at 610, 651 P.2d at 1155, 186 Cal. Rptr. at 349.

14. See CAL. GOV'T CODE §§ 12920, 12993(a) (West 1980).

15. 32 Cal. 3d at 610, 651 P.2d at 1155-56, 186 Cal. Rptr. at 349-50.

misplaced because the other definitional sections of the Act were inconsistent.¹⁶ Justice Mosk further accused the majority of ignoring the words of the statute itself in forming the definition of "physical handicap."¹⁷

Justice Mosk also believed that the majority's definition of "physical handicap" expanded the coverage of the statute beyond that intended by the legislature.¹⁸ Not only would "impairment of physical ability" be expanded, but also the requirement that it resulted from a loss of function.¹⁹ Examining the legislative history of the "loss of function" provision, Justice Mosk concluded that the legislature intended that requirement to be restricted by a loss of mobility of strength caused by a substantial impairment which resulted in a total or partial deprivation of a major structural component of the body.²⁰

Recognizing that his definition would exclude other health conditions not traditionally referred to as "handicaps," Justice Mosk noted that restrictive definitions were found elsewhere in the

16. See, e.g., CAL. GOV'T CODE § 12926(f) ("'medical condition' means"); § 12926(c) ("Employer includes; does not include"); § 12926(a) ("'age' refers"); § 12925 ("means, includes"); § 12927 ("means, includes"); (West 1980) (emphasis added). Because of such inconsistencies, Justice Mosk concluded that no inference that the statute was not restrictively defined could be drawn as § 12926(h) utilized the term "includes." 32 Cal. 3d at 611, 651 P.2d at 1156, 186 Cal. Rptr. at 350.

17. 32 Cal. 3d at 612, 651 P.2d at 1156-57, 186 Cal. Rptr. at 350-51. Justice Mosk believed that the majority's opinion was deficient because their definition constituted nothing more than an "impairment of physical ability," thus disregarding the statutory requirement that the impairment be the result of "loss of function," "amputation," or "loss of coordination." Since high blood pressure obviously does not involve the latter two requirements and is often controlled by medication, Justice Mosk concluded that high blood pressure did not result in the impairment of physical ability. *Id.* Justice Mosk relied on *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979), wherein the North Carolina Supreme Court held that simple glaucoma correctable by eyeglasses was not protected under the North Carolina disability statute. It should be noted, however, that the court interpreted the disability statute in *Burgess* to be limited to protecting only those persons who were *presently disabled*. *Id.* at 528, 259 S.E.2d at 253-54. See *supra* note 11 and accompanying text.

18. 32 Cal. 3d at 612-13, 651 P.2d at 1157; 186 Cal. Rptr. at 351. By defining "physical handicap" without the concomitant requirement of loss of function, Justice Mosk asserted that the majority's definition would include major disabilities that were already covered by the statute, thus rendering the remainder of the statute mere surplusage. *Id.*

19. *Id.* at 613, 651 P.2d at 1158, 186 Cal. Rptr. at 352.

20. *Id.* at 614, 651 P.2d at 1158, 186 Cal. Rptr. at 352. Justice Mosk believed that the legislature's intent in removing the term "being crippled" from the proposed statute defining a physical handicap amounted to nothing more than a substitution of an outdated term for more modern terminology. The exclusion of "being crippled," in his opinion, did not change the legislative intent to include only those traditional handicaps due to the loss of limbs, extremities or major joints. *Id.* at 613-14, 651 P.2d at 1157-58, 186 Cal. Rptr. at 351-52.

Act.²¹ In light of the restrictive interpretation of the statute, Justice Mosk claimed that the majority's reliance on the "liberal construction" of the Act contravened the language and purpose of the statute.²²

Justice Mosk further addressed a contention by the Commission that was not dealt with by the majority. The Commission advanced the argument that its regulation defining "impairment of physical ability due to loss of function"²³ be adopted because it constituted an exercise of administrative construction and legislative acquiescence.²⁴ Justice Mosk rejected this argument stating that the "construction" offered by the Commission would not only rewrite the statute beyond its legislative intent²⁵ but also that the language contained in the regulation was adopted from an inappropriate source.²⁶

The impact of the opinion in *American National* could be far-reaching in light of the expansive definition accorded to "physical handicap" by the majority.²⁷ The *American National* court has constructed a two part test for determining a "physical impairment": that the condition (1) is a condition of the body, and (2) has a disabling effect. The development of this test will de-

21. See *supra* note 16. Justice Mosk apparently agreed with the majority that high blood pressure is not a medical condition, noting that the definition of a "medical condition" is specifically limited to rehabilitated or cured cancer. 32 Cal. 3d at 614, 651 P.2d at 1158, 186 Cal. Rptr. at 352.

22. 32 Cal. 3d at 615, 651 P.2d at 1158, 186 Cal. Rptr. at 352. See *Wheeler v. Board of Admin.*, 25 Cal. 3d 600, 605, 601 P.2d 568, 570, 159 Cal. Rptr. 336, 338 (1979); *Justus v. Atchison*, 19 Cal. 3d 564, 579-80, 565 P.2d 122, 132, 139 Cal. Rptr. 97, 107 (1977).

23. § 7293.6(d), defining impairment of physical disability due to loss of function, provides:

Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitourinary, hemic and lymphatic, skin and endocrine.

CAL. ADMIN. CODE tit. 2, R. 80 (1982).

24. 32 Cal. 3d at 615, 651 P.2d at 1159, 186 Cal. Rptr. at 352-53.

25. *Id.* at 616-17, 651 P.2d at 1159, 186 Cal. Rptr. at 353.

26. *Id.* at 617, 651 P.2d at 1160, 186 Cal. Rptr. at 354. Justice Mosk noted that the Commission's regulation was substantially similar to that found in the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-794 (1976 & Supp. IV 1980) and that the federal regulations granted more expansive jurisdiction than that allowed to the Commission. See 32 Cal. 3d at 617-18 & nn.12-13, 651 P.2d at 1160-61 & nn.12-13, 186 Cal. Rptr. at 354-55 & nn.12-13.

27. See *supra* note 10 and accompanying text.

pend upon the type of ailment involved in each situation. Due to the emphasis placed upon the purpose of the Act, it seems that this test will enlarge the class of physical handicaps deemed to be protected from employment discrimination.

IV. CIVIL PROCEDURE

A. *Jury inattentiveness does not constitute prejudicial misconduct requiring a new trial: Hasson v. Ford Motor Co.*

In *Hasson v. Ford Motor Co.*,¹ the supreme court clarified the circumstances under which juror inattentiveness during trial constitutes misconduct requiring a new trial.² The court also addressed an issue concerning the type of evidence admissible to rebut or establish claims of juror misconduct.³ The allegations of juror misconduct arose out of the retrial⁴ of a strict liability and negligence suit filed by James Hasson against the Ford Motor Company.⁵ At retrial, the jury found Ford to be negligent and strictly liable in tort.⁶

Initially, Ford challenged the sufficiency of the evidence supporting the findings of the jury.⁷ The court rejected all of Ford's

1. 32 Cal. 3d 388, 650 P.2d 1171, 185 Cal. Rptr. 654 (1982). Justice Mosk wrote the majority opinion with Chief Justice Bird and Justices Newman, Broussard, Reynoso, and Brown concurring. Justice Richardson wrote the dissenting opinion.

2. *Id.* at 396, 650 P.2d at 1176, 185 Cal. Rptr. at 659.

3. *Id.*

4. The suit was originally filed in 1971. The jury awarded Hasson \$1,123,840. The judgment was reversed by the supreme court on the basis that the trial judge failed to instruct the jury on the defense of contributory negligence. The court found the evidence sufficient to support a verdict against Ford. *Hasson v. Ford Motor Co.*, 19 Cal. 3d 530, 564 P.2d 857, 138 Cal. Rptr. 705 (1977). The case was retried in 1978 on the theories of strict liability and negligence. The retrial lasted nearly three months and involved the calling of fifty witnesses. Both Hasson and Ford produced expert witnesses. 32 Cal. 3d at 397-98, 650 P.2d at 1177, 185 Cal. Rptr. at 660.

5. James Hasson was injured when the brakes of his father's 1966 Lincoln Continental failed as the car descended from the top of Mount Olympus Drive in Los Angeles. Hasson suffered extensive brain damage and permanent physical disability. 32 Cal. 3d at 396-97, 650 P.2d at 1176, 185 Cal. Rptr. at 659.

6. The jury's award of \$7,570,719 in compensatory damages was reduced pursuant to CAL. CIV. PROC. CODE § 662.5(b) (West 1980), in order to avoid a new trial upon Ford's motion. Additional grounds for a new trial were rejected and the trial court entered judgment. *Id.* at 398, 650 P.2d at 1177, 185 Cal. Rptr. at 660.

7. Ford's claim that there was insufficient evidence to support a finding that the brake system was defective or that fluid vaporization in the brake system was not the proximate cause of Hasson's accident was denied by the supreme court on the basis of Justice Richardson's opinion in *Hasson v. Ford Motor Co.*, 19 Cal. 3d 530, 544-45, 564 P.2d 857, 866-67, 138 Cal. Rptr. 705, 714-15 (1977). *See* 32 Cal. 3d at 398-402, 650 P.2d at 1177-79, 185 Cal. Rptr. at 660-62. Ford further contended that the evidence at trial was not sufficient to support an award of punitive damages under CAL. CIV. CODE § 3294 (West 1980). The court held that under the limited scope of appellate review, substantial evidence supported the award of damages even

claims on the basis that Ford's presentation amounted to nothing more than an attempt to reargue factual issues decided adversely to it at both trials.⁸

Addressing the primary issue of jury misconduct, the court initially held that concealment of bias by two witnesses against Ford when questioned on voir dire did not constitute error requiring a retrial.⁹ Ford further contended that the paralegal studies of one juror and the exposure of other jurors to newspaper articles concerning litigation involving Ford Pinto automobiles constituted improper reception of evidence concerning the subject of the trial.¹⁰ The court held, however, that Ford had not met the burden of establishing prejudice based upon improper reception of evidence.¹¹

The claim of juror misconduct due to inattentiveness was more difficult for the court. Ford presented three juror declarations stating that a fellow juror had been observed reading "A Night in Byzantium" during the trial proceedings.¹² Counterdeclarations

where the testimony favoring the plaintiffs was assertedly inconsistent and conflicting. 32 Cal. 3d at 402-03, 650 P.2d at 1179-80, 185 Cal. Rptr. at 662-63. Ford's contention that the trial court improperly admitted evidence of pre-recall brake failures in 1965 models and letters describing incidents of brake failure in 1965 and 1966 Lincoln Continentals was rejected upon two grounds. First, the court held that substantial similarity of conditions satisfied the requisites for admission. Second, the evidence was properly offered as proof of notice. *Id.* at 403-05, 650 P.2d at 1180-81, 185 Cal. Rptr. at 663-64. The court also rejected Ford's final challenge to the trial court's rulings on requested jury instructions concerning superceding causation, nondelegation of duty, existence of a manufacturing defect, and standards of the Society of Automotive Engineers. *See id.* at 405-07, 650 P.2d at 1181-83, 185 Cal. Rptr. at 664-66.

8. *Id.* at 398-99, 650 P.2d at 1177, 185 Cal. Rptr. at 660.

9. *Id.* at 408, 650 P.2d at 1183, 185 Cal. Rptr. at 666. Ford did not present any evidence of actual bias other than insufficient proof of concealed bias, nor did it advance any authority for the proposition that concealment of bias establishes misconduct. *See Weathers v. Kaiser Found. Hosp.*, 5 Cal. 3d 98, 485 P.2d 1132, 95 Cal. Rptr. 516 (1971) (comments by jury foreman and second juror sufficient to infer intentional concealment of bias on voir dire).

10. 32 Cal. 3d at 408, 650 P.2d at 1184, 185 Cal. Rptr. at 667. Both sides obtained declarations and counterdeclarations from the paralegal's lecturer, the juror who allegedly provided the articles, and the jurors who read them. *See id.* at 408-10, 650 P.2d at 1183-84, 185 Cal. Rptr. at 666-67.

11. *Id.* at 410, 650 P.2d at 1184, 185 Cal. Rptr. at 667. Although Ford had established a prima facie case of misconduct, the court approved of the trial court's resolution of the issue against Ford.

12. Two of the declarations presented no specific dates, nor did they state which side was presenting evidence at the time such conduct took place. Two other declarations contained similar general allegations that certain jurors were working crossword puzzles. *Id.* at 410, 650 P.2d at 1184-85, 185 Cal. Rptr. at 668.

were presented wherein the jurors specifically denied engaging in extraneous activity that had diverted their attention from the trial proceedings.¹³

The court noted that section 657(2) of the Code of Civil Procedure¹⁴ authorizes a new trial where juror inattentiveness is prejudicial to the losing party.¹⁵ Although the duty to listen carefully to evidence and testimony is one of the juror's most fundamental obligations, the court recognized that various courts have been reluctant to overturn jury verdicts based upon inattentiveness of the jurors.¹⁶ The courts have uniformly refused to overturn a jury verdict where jurors have slept through part of the trial,¹⁷ become intoxicated prior to hearing evidence or taking part in deliberations¹⁸ or have exhibited an inattentive demeanor.¹⁹ The court, nevertheless, held that Ford had made a prima facie showing through the jurors' declarations that the participating jurors did not pay attention to all of the trial proceedings.²⁰

The plaintiff asserted that the counterdeclarations, which denied that the jurors' activities prevented them from paying attention to the trial proceedings, were admissible to rebut the inference of juror misconduct.²¹ Relying upon *People v. Hutchinson*,²² the court held that the counterdeclarations were not admissible under Evidence Code section 1150(a)²³ because they were

13. The counterdeclarations failed to allege that no misconduct had taken place during trial. The counterdeclarations specifically stated that the jurors had paid attention to the testimony and evidence presented during trial. *Id.*

14. CAL. CIV. PROC. CODE § 657(2) (West 1976).

15. 32 Cal. 3d at 411, 650 P.2d at 1185, 185 Cal. Rptr. at 668.

16. *Id.*

17. The courts will not order a new trial unless there is convincing proof that the jurors were actually sleeping during material portions of the trial. *See, e.g.,* *Callegari v. Maurer*, 4 Cal. App. 2d 178, 40 P.2d 883 (1935); *People v. Ung Sing*, 171 Cal. 83, 151 P. 1145 (1915); *State v. Cuevas*, 281 N.W.2d 627 (Iowa 1979); *State v. Pace*, 527 P.2d 658 (Utah 1974).

18. If the juror's incapacity to perform his duties has not been established, the claim of misconduct will be rejected. *See People v. James*, 62 Cal. App. 3d 399, 132 Cal. Rptr. 888 (1976).

19. *See, e.g.,* *Ferman v. Estwing Mfg. Co.*, 31 Ill. App. 3d 229, 334 N.E.2d 171 (1975); *State v. Williams*, 577 S.W.2d 59 (Mo. App. 1978); *Wofford v. State*, 494 P.2d 672 (Okla. Crim. App. 1972).

20. 32 Cal. 3d at 412, 650 P.2d at 1186, 185 Cal. Rptr. at 669.

21. *Id.* at 412-13, 650 P.2d at 1186, 185 Cal. Rptr. at 669.

22. 71 Cal. 2d 342, 455 P.2d 132, 78 Cal. Rptr. 196 (1969). The court in *Hutchinson* held that "[t]he only improper influences that may be proved under section 1150 to impeach a verdict . . . are those open to sight, hearing, and the other senses and thus subject to corroboration." *Id.* at 350, 455 P.2d at 137, 78 Cal. Rptr. at 201.

23. Section 1150(a) provides:

Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is

related to the subjective mental processes of the jurors.²⁴

Although the court concluded that Ford established the existence of juror misconduct, a new trial was not required unless Ford could establish prejudice to itself resulting from the jurors' inattentiveness.²⁵ The court adopted a rebuttable presumption of prejudice²⁶ over the plaintiff's dual objections that the presumption should not apply in civil cases²⁷ and that the burden of establishing prejudice should be placed upon Ford, the complaining party.²⁸

Based upon this rebuttable presumption, the court stated that there was only the "flimsiest evidence of actual prejudice to Ford."²⁹ Examining the jurors' conduct in light of the factors identified by the court,³⁰ the court held that the presumption of

admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.

CAL. EVID. CODE § 1150(a) (West 1966).

24. 32 Cal. 3d at 414-15, 650 P.2d at 1187-88, 185 Cal. Rptr. at 670-71. Although the court felt that the counterdeclarations could relate both to the objective behavior and the deliberative mental processes of the jurors, the court chose not to admit the counterdeclarations based upon the *Hutchinson* rule which serves to exclude unreliable evidence of jurors' thought processes. *Id.* at 413-14, 650 P.2d at 1187, 185 Cal. Rptr. at 670.

25. *Id.* at 415, 650 P.2d at 1188, 185 Cal. Rptr. at 671. "Prejudice exists if, in the absence of proven misconduct, it is reasonably probable that a result more favorable to the complaining party would have been achieved." *Id.*

26. *Id.* at 416-17, 650 P.2d at 1188-89, 185 Cal. Rptr. at 671-72. *See* *People v. Honeycutt*, 20 Cal. 3d 150, 156, 570 P.2d 1050, 1052, 141 Cal. Rptr. 698, 700 (1977) ("It is well settled that a presumption of prejudice arises from any juror misconduct."). The presumption may be rebutted upon an affirmative evidentiary showing that prejudice does not exist or upon a determination by the reviewing court that the entire record reveals a reasonable probability that actual harm resulting from the misconduct has not occurred to the complaining party. 32 Cal. 3d at 417, 650 P.2d at 1189, 185 Cal. Rptr. at 672.

27. 32 Cal. 3d at 416, 650 P.2d at 1189, 185 Cal. Rptr. at 672. The rebuttable presumption of prejudice has been applied previously in civil cases involving juror misconduct. *See* *Andrews v. County of Orange*, 130 Cal. App. 3d 944, 182 Cal. Rptr. 176 (1982); *Smith v. Covell*, 100 Cal. App. 3d 947, 161 Cal. Rptr. 377 (1980); *Dimmick v. Alvarez*, 196 Cal. App. 2d 211, 16 Cal. Rptr. 308 (1961).

28. The court held that placing the burden of proving prejudice upon the complaining party would be inconsistent with the presumption of prejudice formulated in *Honeycutt* and contrary to the provisions of CAL. CONST. art. VI, § 13. 32 Cal. 3d at 416 n.9, 650 P.2d at 1188 n.9, 185 Cal. Rptr. at 671 n.9.

29. 32 Cal. 3d at 415, 650 P.2d at 1188, 185 Cal. Rptr. at 671.

30. "Some of the factors to be considered when determining whether the presumption is rebutted are the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." *Id.* at 417, 650 P.2d at 1189, 185 Cal. Rptr. at 672.

prejudice had been rebutted.³¹ The proof of Ford's liability had been overwhelming and there had been no specific showing of when the actual misconduct occurred, or that it was in fact prejudicial.³² It was held that such general allegations do not arise to the level of evidence requiring a new trial under Evidence Code section 1150(a).³³

The court in *Hasson* emphasized its unwillingness to overturn jury verdicts based solely upon evidence of jury inattentiveness.³⁴ Although the court did not approve of such conduct, the plaintiff's situation in *Hasson* lent itself to the conclusion reached by the court.³⁵ The tenor of the court's analysis, however, is to more readily allow the burden of prejudice to be implemented where the complaining party establishes serious jury misconduct, but is unable to establish actual prejudice.

B. Civil Procedure Code section 337.15 held inapplicable to personal injury or wrongful death suits:

Martinez v. Traubner.

The California Supreme Court granted a hearing in *Martinez v. Traubner*¹ to resolve a conflict which had developed at the appellate level concerning the applicability of California Code of Civil Procedure section 337.15² to personal injuries. The court, analyz-

31. *Id.*

32. *Id.*

33. *Id.* at 417-18, 650 P.2d at 1189, 185 Cal. Rptr. at 672-73. See *supra* note 23. Justice Richardson dissented, claiming that the majority opinion had misallocated the burden of proof upon Ford to show actual prejudice, instead of requiring Hasson to demonstrate that no prejudice occurred. "It is *not* the task of the *defendant*, who has the benefit of the presumption, to show prejudice." *Id.* at 423, 650 P.2d at 1193, 185 Cal. Rptr. at 676 (Richardson, J., dissenting) (emphasis in original). Justice Richardson further believed that the jury's misconduct was neither neutral or inconsequential. See *id.* at 423-25, 650 P.2d at 1193-94, 185 Cal. Rptr. at 676-77 (Richardson, J., dissenting).

34. *Id.* at 418, 650 P.2d at 1190, 185 Cal. Rptr. at 673.

35. "This plaintiff was seriously and permanently injured in 1970. He has prevailed in two lengthy jury trials, but for *twelve years* has received no recovery. Justice will not be served by a second reversal, yet another lengthy trial, to be followed in all likelihood by further appeals." *Id.* (emphasis in original).

1. 32 Cal. 3d 755, 653 P.2d 1046, 187 Cal. Rptr. 251 (1982). The opinion is by the court, and the case was heard before Chief Justice Bird and Justices Mosk, Richardson, Kaus, Broussard, Reynoso, and Justice Trotter, who was appointed by the Judicial Council.

The court adopted the relevant portions of the court of appeal decision, written by Justice McClosky. 129 Cal. App. 3d 538, 181 Cal. Rptr. 194 (1982).

2. CAL. CIV. PROC. CODE § 337.15(a) (West 1982) provides that:

(a) No action may be brought to recover damages from any person, or the surety of a person, who develops real property or performs or furnishes the design, specifications, surveying, planning, supervision, testing, or observation of construction or construction of an improvement to real

ing the express words and the legislative history of the statute, concluded that the ten year statute of limitations for latent defects only bars actions for damages either to the property itself³ or other damage to real or personal property arising from such deficiency⁴ and does not bar actions for personal injuries.

Petitioner was seriously injured in March of 1978, when he fell from a roof on which he was working. He subsequently filed suit against respondent, who had built the home in July of 1959, alleging that the roof collapsed due to a latent defect.⁵

The court noted that when the legislature was considering the original bill, express language made the statute applicable to personal injury and wrongful death suits arising out of latent defects. This language was subsequently omitted from the final version of the bill and the section was enacted in its present form.⁶ The court also reflected on the specific language of section 337.15 and concluded that personal injuries arising out of such latent defects are not included in the enactment.⁷

C. *Collateral estoppel effect of administrative agency decisions on subsequent criminal proceedings:*
People v. Sims.

I. INTRODUCTION

In *People v. Sims*,¹ the California Supreme Court upheld the collateral estoppel effect of a determination by an administrative

property more than 10 years after the substantial completion of the development or improvement for any of the following:

- (1) Any latent deficiency in the design, specifications, surveying, planning, supervision, or observation of construction or construction of an improvement to, or survey of, real property.
- (2) Injury to property, real or personal, arising out of such latent deficiency.

Id.

3. See CAL. CIV. PROC. CODE § 337.15(a) (West 1982).

4. *Id.*

5. 32 Cal. 3d at 756-57, 653 P.2d at 1047, 187 Cal. Rptr. at 252. The trial court had granted the respondent's motion for judgment on the pleadings.

6. *Id.* at 758, 653 P.2d at 1048, 187 Cal. Rptr. at 253. See also *Wagner v. State*, 86 Cal. App. 3d 922, 930-31, 150 Cal. Rptr. 489, 494 (1978) (Reynoso, J., dissenting).

7. In ruling as it did, the court overruled *Ernest W. Hahn, Inc., v. Superior Court*, 108 Cal. App. 3d 567, 571, 166 Cal. Rptr. 644, 647 (1980) (court maintained that action for personal injuries would be barred unless brought within the 10 year period enunciated in the statute).

1. 32 Cal. 3d 468, 651 P.2d 321, 186 Cal. Rptr. 77 (1982). The majority opinion was written by Chief Justice Bird with Justices Mosk, Richardson, Newman,

agency upon a pending criminal proceeding. Although the court had given binding effect to the determination of some administrative agencies in subsequent administrative or civil proceedings in the past,² *Sims* was a case of first impression: relitigation of issues in a subsequent criminal action.³ The court relied on guidelines espoused by the United States Supreme Court in *United States v. Utah Construction Co.*⁴ to determine that the administrative proceeding should be given collateral estoppel effect. The court analyzed the nature of the proceedings and determined that although they were different in nature, the doctrine of collateral estoppel would still bar relitigation of an issue determined in the first proceeding.

This case arose when the defendant in the criminal action, *Sims*, was notified by the Social Services Department of Sonoma County that she had fraudulently obtained welfare funds and would be required to make restitution. The County filed a "Notice of Action" proposing to reduce future cash grants to compensate for the alleged overpayments.⁵ *Sims* requested a "fair hearing"⁶ to challenge the County's actions. Prior to the hearing, a criminal complaint was filed against *Sims*, based on the allegations made by the County. *Sims* pleaded not guilty to the criminal charges against her.⁷

The fair hearing was held before a hearing officer of the California Department of Social Services (DSS).⁸ The County, claiming that the agency lacked jurisdiction, did not present any evidence of fraud. *Sims* presented evidence disproving the allegation of

Broussard, and Reynoso concurring. A dissenting opinion was written by Justice Kaus.

2. See, e.g., *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control*, 55 Cal. 2d 728, 361 P.2d 712, 13 Cal. Rptr. 104 (1961) (application of collateral estoppel in context of successive administrative proceedings); *City and County of San Francisco v. Ang*, 97 Cal. App. 3d 673, 159 Cal. Rptr. 56 (1979) (collateral estoppel bars relitigation in a civil proceeding of issue previously decided by city board).

3. 32 Cal. 3d at 483, 651 P.2d at 330, 186 Cal. Rptr. at 86. *But see* *People v. Demery*, 102 Cal. App. 3d 548, 163 Cal. Rptr. 814 (1980) (collateral estoppel not a bar to relitigation of an issue determined in prior administrative proceeding).

4. 384 U.S. 394 (1966).

5. The purpose of the Notice of Action was to notify the defendant that her right to future welfare payments may be impaired depending on the determination of fraud. This is the first step required if the defendant is to be accorded procedural due process. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

6. CAL. WELF. & INST. CODE § 10950 (West Supp. 1982).

7. The criminal complaint, charging a violation of CAL. WELF. & INST. CODE § 11483 (West 1980), was based on the same allegation of fraud that was the subject of the County's Notice of Action. 32 Cal. 3d at 473, 651 P.2d at 324, 186 Cal. Rptr. at 80.

8. The DSS was given jurisdiction over these matters by the enactment of CAL. WELF. & INST. CODE § 10909 (West 1980).

fraud. The hearing officer concluded that the court failed to prove Sims' guilt and ordered the County to rescind its "Notice of Action" and refund any payments which Sims had made in restitution.⁹ Sims subsequently moved to dismiss the criminal charges based on the findings of the DSS fair hearing. The trial court granted the motion. The State appealed the dismissal by challenging the application of collateral estoppel to the subsequent criminal proceeding.

II. HISTORICAL ANALYSIS

The doctrine of collateral estoppel precludes:

parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction. Any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies if it is involved in a subsequent lawsuit on a different cause of action.¹⁰

Traditionally, collateral estoppel has been applied only to trial court proceedings. The applicability of the doctrine to administrative agency decisions was not conclusive.¹¹ The California Supreme Court, in an early case, ruled that collateral estoppel was not applicable to administrative agencies because they did not exercise "judicial power" under the California Constitution.¹² In more recent cases, however, the determinative factor used as a guideline for applying the doctrine is not whether the agency was vested with judicial power, but whether the agency was acting in a judicial capacity.¹³ Where "[t]he legislature intended that the

9. 32 Cal. 3d at 474, 651 P.2d at 324, 186 Cal. Rptr. at 80.

10. *Bernhard v. Bank of America*, 19 Cal. 2d 807, 810, 122 P.2d 892, 894 (1942).

11. *See* 2 AM. JUR. 2d Administrative Law § 497, p. 307. The problem with attempting to apply collateral estoppel to all administrative agencies is that their decisions may be characterized as judicial, quasi-judicial or legislative. While decisions classified as judicial may meet standards to preclude relitigation of issues, those classified as legislative may lack factors that are required to accord them collateral estoppel effect. *See also* Comment, *Res Judicata in Administrative Law*, 49 YALE L.J. 1250, 1253 (1940) (decisions deemed "legislative" in nature have been given collateral estoppel effect).

12. *Empire Star Mines Co. v. California Employment Comm'n*, 28 Cal. 2d 33, 168 P.2d 686 (1946). The court in that case applied a narrow reading of the doctrine of collateral estoppel to allow relitigation of issues in a subsequent proceeding. It determined that an administrative agency was not vested with "judicial power" under the constitution and therefore, its decisions were not binding. In *Sims*, the court expressly overruled *Empire* to the extent it conflicted with the analysis of cases requiring action only in a "judicial capacity." 32 Cal. 3d at 479-80 n.8, 651 P.2d at 328 n.8, 186 Cal. Rptr. at 84 n.8.

13. *See United States v. Utah Constr. Co.*, 384 U.S. 394, 422 (1966) (collateral

agency should exercise a continuing jurisdiction with power to modify or alter its orders to conform with changing conditions,'¹⁴ the supreme court has held the doctrine inapplicable. Where the agency's function is "the purely judicial one of reviewing another agency's decision to determine whether the decision conforms to the law and is supported by substantial evidence"¹⁵ collateral estoppel is applicable.

The United States Supreme Court, in *United States v. Utah Construction Co.*,¹⁶ set guidelines that have been followed for giving the decisions of administrative agencies collateral estoppel effect. The guidelines, reflecting the policy of limiting litigation by precluding the relitigation of issues once decided in a fair manner, suggest that collateral estoppel bar relitigation of decisions of administrative agencies "[w]hen an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate. . . ."¹⁷

III. CASE ANALYSIS

A. *The Utah Construction Company Guidelines*

1) Judicial Capacity

The court found that the DSS fair hearing process satisfied the judicial capacity requirement by analyzing the legislative scheme of the statute granting the fair hearing and delineating the procedures to be followed.¹⁸ Although the statute permits the hearing to be conducted in an informal manner and does not require the hearing officer to be bound by rules of procedure or evidence applicable to a full judicial proceeding, it does require the hearing to be impartial with all testimony submitted under oath or affirmation.¹⁹ Moreover, regulations applicable to the DSS in conducting the proceeding allow the parties to call, examine, and cross-examine witnesses, introduce documentary evidence, make oral or written arguments, and request the hearing officer to subpoena

estoppel applied where administrative agency acted in judicial capacity). *See also supra* note 11.

14. *Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control*, 55 Cal. 2d 728, 732, 361 P.2d 712, 715, 13 Cal. Rptr. 104, 107 (1961) (quoting *Olive Proration Comm'n v. Agriculture Comm'n*, 17 Cal. 2d 204, 208, 109 P.2d 918, 921 (1941)). This continuing jurisdiction with power to modify or alter its orders would preclude finality, which is one of the requirements of collateral estoppel.

15. 55 Cal. 2d at 732, 361 P.2d at 715, 13 Cal. Rptr. at 107.

16. 384 U.S. 394 (1966).

17. *Id.* at 422.

18. CAL. WELF. & INST. CODE § 10950 (West 1980).

19. *Id.* at § 10955.

witnesses.²⁰ A verbatim record of testimony and documentary evidence is required.²¹ The court noted that the process of formulating a decision by the hearing officer was adjudicatory in nature inasmuch as it required the officer to apply rules of law to a set of facts determined at the hearing.²² Although the rules of evidence for the proceeding differ from those in a judicial proceeding,²³ the court determined this was not a material factor in defining judicial capacity by examining the proceedings of agencies considered constitutional courts whose decisions have been granted collateral estoppel effect.²⁴ In those instances, where the agency is not subject to the same rules of evidence as in a judicial proceeding, the court held firm to the policy of collateral estoppel. The essential determination is that a party " 'should have been given one opportunity for judicial determination of an issue by a tribunal having requisite authority and proceeding in a manner recognized as due process of law.' " ²⁵

2) Disputed Issues of Fact

The issue of fact at the administrative hearing as well as the criminal proceeding was whether Sims had fraudulently obtained welfare benefits. The court found that the DSS had jurisdiction over this issue based on the statute²⁶ which grants a recipient of public social services a hearing regarding any action relating to the receipt of the services.²⁷

3) Opportunity to Litigate

The court held that both parties to the criminal proceeding action had a full and fair opportunity to litigate the issue of fraud at

20. Department of Social Services, Manual of Policies and Procedures, reg. 22-049.6 (1982).

21. *Id.*, reg. 22-049.3.

22. 32 Cal. 3d at 480, 651 P.2d at 328, 186 Cal. Rptr. at 84 (citing *Strumsky v. San Diego County Employee Retirement Ass'n.*, 11 Cal. 3d 28, 34-35 n.2, 520 P.2d 29, 33 n.2, 112 Cal. Rptr. 805, 809 n.2 (1974)).

23. The rules of evidence applicable to administrative proceedings are not as strict as those in judicial proceedings so that the free flow of information among the parties will be encouraged. CAL. WELF. & INST. CODE § 10955.

24. 32 Cal. 3d at 480-81, 651 P.2d at 329, 186 Cal. Rptr. at 85. See 4 WITKIN CAL. PROCEDURE, *Judgments* § 159, p. 3303.

25. *French v. Riskel*, 40 Cal. 2d 477, 481, 254 P.2d 26, 28 (1953) (quoting 2 FREEMAN ON JUDGMENTS (5th ed.) § 641, p. 1349-50).

26. CAL. WELF. & INST. CODE § 10950 (West 1980).

27. 32 Cal. 3d at 481, 651 P.2d at 329, 186 Cal. Rptr. at 85.

the administrative hearing. The County's failure to present evidence of the asserted charges against Sims did not preclude the application of collateral estoppel.²⁸ The regulations promulgated by the DSS require the County to be represented at the hearing.²⁹ The County had notice and the incentive to produce evidence at the agency hearing. The court compared the County's failure to litigate the issues at the hearing to a judgment of default in a civil proceeding, which is "res judicata as to all issues aptly pleaded in the complaint." The defaulting party is precluded from relitigating any allegations raised in the prior proceeding.³⁰

Based on the above analysis, the court held that the determination of the DSS was final and the proceeding satisfied the requirements of *Utah Construction Co.* for precluding the relitigation of the issue of fraud.

B. The Effect of Collateral Estoppel When the Subsequent Proceeding is Different in Nature

Although collateral estoppel had precluded relitigation of issues when successive proceedings were different in nature, i.e., administrative — civil, an administrative agency's decision had never been given binding effect in a subsequent criminal proceeding.³¹ The court found that this lack of precedent should not preclude the application of collateral estoppel to subsequent criminal proceedings using the traditional test for the doctrine's application. Instead, the court held the determining factors to be: 1) whether the issues to be litigated in both proceedings are identical; 2) whether the first proceeding resulted in a final judgment; and 3) whether the party estopped was a party to or in privity with a party from the prior proceeding.³²

1) Relitigation of Identical Issues

Implicit in deciding an issue is the actual litigation of the is-

28. *See Teitelbaum Furs, Inc., v. Dominion Ins. Co.*, 58 Cal. 2d 601, 607, 375 P.2d 439, 442, 25 Cal. Rptr. 559, 562 (1962) (failure to introduce relevant evidence in criminal proceeding does not prevent application of collateral estoppel). *See also* RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment d (1982) (application of the doctrine may be determined by failure of proof as well as failure to sustain the burden of proof).

29. Department of Social Services, Manual of Policies and Procedures, reg. 22-049.1 (1982).

30. 32 Cal. 3d at 481, 651 P.2d at 329, 186 Cal. Rptr. at 85 (quoting *Fitzgerald v. Herzer*, 78 Cal. App. 2d 127, 132, 177 P.2d 364, 366 (1947)).

31. 32 Cal. 3d at 483, 651 P.2d at 330, 186 Cal. Rptr. at 86. *But see* *People v. Demery*, 104 Cal. App. 3d 548, 163 Cal. Rptr. 814 (1980) (court did not preclude relitigation of issue determined by administrative agency).

32. 32 Cal. 3d at 484, 651 P.2d at 331, 186 Cal. Rptr. at 87.

sue.³³ Although the County did not offer proof of fraud at the agency hearing, the court found that this did not preclude a determination of the issue. Prerequisite to a finding that an issue was actually litigated is a determination that the issue was properly raised, submitted for determination, and a ruling was made.³⁴ The agency's hearing process satisfied these requirements.

2) Final Judgment on the Merits

The policy behind collateral estoppel requires the first judgment to be the "last word" of the rendering court, rather than a tentative action which may be reconsidered in the very action in which it is taken.³⁵ The provisions of the statute granting the fair hearing provided for a rehearing upon the petition of either party.³⁶ A grant of rehearing would preclude finality. When the County failed to file for a rehearing, it had one year to file for mandamus review of the agency's decision.³⁷ Upon failure of the County to file for rehearing and mandamus review, the decision of the agency became its "last word" on the matter and was therefore final.

3) Party or Party in Privity at Prior Proceeding

The privity requirement of collateral estoppel refers to the relationship of the unsuccessful party in the prior proceeding to the party against whom the doctrine is asserted. If the relationship is deemed "sufficiently close," its application is justified in a subsequent proceeding even though it is applied against a person not a party to the prior proceeding.³⁸

The court determined the relationship between the district attorney (representing the party to be estopped), and the County (the unsuccessful party in the prior proceeding), were "sufficiently close" to warrant application of collateral estoppel because they both represented the interests of the state at the

33. *Id.*

34. RESTATEMENT (SECOND) OF JUDGMENTS § 27 comment d (1982).

35. *Id.* at § 13 comment a, p. 132.

36. CAL. WELF. & INST. CODE § 10960 (West 1980).

37. CAL. WELF. & INST. CODE § 10962 (West 1980). This provision allows either party to the hearing process to file for a review in the superior court of the decision of the DSS as to questions of law involved in the case. The County's assertion that the agency lacked jurisdiction to decide the matter would be a question of law reviewable by a court on an appeal from the agency's decision.

38. 32 Cal. 3d at 486-87, 651 P.2d at 333, 186 Cal. Rptr. at 89.

respective proceedings. The court appeared willing to find the closeness required because of the County's relation to law enforcement agencies in bringing the criminal charges.³⁹

In light of the above analysis, the district attorney was estopped from prosecuting Sims because of the determination in the original administrative hearing. The court also considered the statutory scheme governing procedures for prosecuting cases of welfare fraud and found it indicative of legislative intent to provide protection from criminal prosecution for welfare recipients by resolving the cases outside the criminal justice system.⁴⁰

IV. THE DISSENTING OPINION

Justice Kaus filed a dissenting opinion⁴¹ disputing the determination that the issue was actually litigated in the original agency hearing, and the determination that collateral estoppel should bar relitigation of issues when the proceedings involved were different in nature.

A. *Failure to Litigate*

Justice Kaus relied on a much narrower reading of the requirement that a party must "actually litigate" an issue to preclude its relitigation in a subsequent proceeding. The County's inaction at the original hearing, in his opinion, precluded the litigation of any issue raised. While the County was therefore required to repay any restitution that Sims had made, the failure to litigate should have been fatal to the application of collateral estoppel in the subsequent criminal proceeding.⁴²

B. *Nature of the Proceedings Preclude Collateral Estoppel*

The dissent also attacked the majority's decision to give collat-

39. Factors of the interrelationship included: 1) both respective parties were agents of the state in the respective hearings; 2) the joint operation in the investigation and control of welfare fraud; 3) an investigative unit of the county was required to request the issuance of a criminal complaint by the district attorney; and 4) the prerequisite that the County make a request for restitution of illegally obtained benefits before criminal charges could be brought against a defendant by the district attorney. *Id.*

40. The statute authorizing prosecution for welfare fraud, CAL. WELF. & INST. CODE § 11483 (West 1980), requires that the county make a request for restitution of any alleged illegally obtained benefits. This request initiates the process in which the agency hearing is a material factor, reflecting a legislative intent to resolve fraud cases outside the criminal justice system. 32 Cal. 3d at 489, 651 P.2d at 334, 186 Cal. Rptr. at 90. See also *People v. McGee*, 19 Cal. 3d 948, 963-65, 568 P.2d 382, 390-91, 140 Cal. Rptr. 657, 665-66 (1977).

41. 32 Cal. 3d at 490, 651 P.2d at 335, 186 Cal. Rptr. at 91.

42. *Id.* at 491, 651 P.2d at 336, 186 Cal. Rptr. at 92.

eral estoppel effect to an administrative agency's decision in a subsequent criminal proceeding. While the majority said there were no cases in which an administrative determination was held to bar a subsequent criminal proceeding,⁴³ the dissent cited to *People v. Demery*,⁴⁴ wherein an administrative agency's determination absolving a defendant of wrongdoing did not bar a subsequent criminal proceeding on the same charges. The majority distinguished *Demery* by comparing the functions of the administrative agencies in their respective proceedings.⁴⁵ The majority opinion stated that in *Demery*, "[t]he function of the administrative proceeding was merely to police licensing requirements rather than to make determinations of guilt or innocence of criminal charges."⁴⁶ While the majority was of the opinion that the objectives of the DSS proceeding and the criminal proceeding were essentially identical, the dissent interpreted the statutory scheme of the administrative process as intending "to provide an aggrieved welfare recipient with a speedy and informal means to challenge an administrative action which may reduce or terminate vitally needed social service benefits," and not as a conclusive determination of an individual's guilt or innocence on pending criminal charges based on the same alleged incident.⁴⁷

V. CONCLUSION

In furthering the policy behind collateral estoppel, the court has set new precedent by extending the doctrine of collateral estoppel to relitigation of issues in a subsequent criminal proceeding. The far-reaching implications of this extension warrant a narrow reading of the *Sims* decision and a close examination of the determinations which will preclude relitigation. A key factor in this analysis should be the amount of interaction between the party involved at the agency level and the estopped party at the criminal proceeding. It appears that this case turned on the strong interrelationship between the County and the law enforcement agencies in bringing the criminal charges.

43. *Id.* at 483, 651 P.2d at 330, 186 Cal. Rptr. at 86.

44. 104 Cal. App. 3d 548, 163 Cal. Rptr. 814 (1980).

45. 32 Cal. 3d at 483 n.13, 651 P.2d at 330 n.13, 186 Cal. Rptr. at 86 n.13.

46. *Id.*

47. *Id.* at 494, 651 P.2d at 337, 186 Cal. Rptr. at 93 (citations omitted).

D. *Proper venue for injunctive relief against public official is county where cause of action arose:*
Tharp v. Superior Court

Section 955 of the California Government Code provides that the proper venue for actions against the state involving the taking or damaging of private property for public use shall be a court of competent jurisdiction in which the property is situated.¹ It also provides that upon the Attorney General's request, the venue of the action, with certain limited exceptions, will be changed to Sacramento County.² In *Tharp v. Superior Court*,³ the California Supreme Court confronted the issue of whether the venue of an action for writs of prohibition and mandate against the director of a state agency could, in accordance with section 955, be changed from the county in which the petitioner sought the writs to Sacramento County.⁴

The Attorney General, representing the Secretary of the New Motor Vehicles Board, argued that since the action brought by the petitioner (Tharp) was not within the exceptions prohibiting the change of venue under section 955, the trial court was required to change the venue of the action to Sacramento County.⁵ The supreme court concluded differently after thoroughly analyzing the history of the section allowing change of venue in actions against the state.

1. Section 955

The earliest version of section 955 was section 688 of the former

1. CAL. GOV'T CODE § 955 (West 1980).

2. *Id.*

3. 32 Cal. 3d 496, 651 P.2d 1141, 186 Cal. Rptr. 335 (1982). Justice Kaus authored the opinion in which Chief Justice Bird and Justices Mosk, Richardson, Broussard, Reynoso and Scott concurred.

4. The relevant facts are: The New Motor Vehicles Board had issued notice and held a hearing regarding termination of Tharp's automobile franchise. Tharp had been issued a temporary permit to operate the franchise in Tulare County and contended that he had an absolute right to have a permanent license issued. Tharp filed for writs of prohibition and mandate to dismiss the proceedings regarding the termination of his temporary license to sell vehicles. Sam W. Jennings, Secretary of the New Motor Vehicles Board, represented by the Attorney General, moved to change the venue of the action from Tulare County to Sacramento County pursuant to § 955 of the California Government Code. The trial court granted the motion and Tharp sought a peremptory writ of mandate directing the trial court to vacate its change of venue order. 32 Cal. 3d at 498 & n.1, 651 P.2d at 1142 & n.1, 186 Cal. Rptr. at 336 & n.1.

5. The exceptions to CAL. GOV'T CODE § 955 (West 1980), are actions for death or injury to persons or personal property, *id.* at § 955.2, and actions or proceedings by a local agency against the state. *Id.* at § 955.3.

Political Code.⁶ Under that section, change of venue was available upon the Attorney General's request for any claim against the state on express contract or negligence. Through two subsequent revisions, this legislative intent remained intact.⁷

The most recent revision of this area of California law occurred in 1963.⁸ A comprehensive statute governing claims against public entities was enacted. An integral part of that enactment was section 955. The new statute covered claims for money damages for which the filing of a claim was either a statutory prerequisite or was specifically exempted. The court noted that there was no reason to extend the Attorney General's power to change the venue of an action by section 955 outside these enunciated areas.⁹

The only case on point reached the same conclusion. In *Duval v. Contractors State License Board*,¹⁰ Duval filed for a writ of mandate in the county where his business was located to inquire into the revocation of his contractor's license. The trial court's decision to allow a change of venue upon demand by the Attorney General was reversed on appeal.¹¹ The court, in analyzing section 16050 of the Government Code — the predecessor of section 955 — held that the section was applicable only to claims defined in section 16041 which encompassed claims on express contract, negligence and inverse condemnation.¹² The court reasoned that the only actions that were subject to removal upon the Attorney Gen-

6. 1929 Cal. Stat. 891, 892 (codified at CAL. POLITICAL CODE § 688 (repealed 1945)).

7. In 1945, § 688 of the Political Code was repealed and replaced by a more detailed statute concerning claims and actions against the state in § 16050 of the California Government Code. The 1945 enactment prescribed that:

[t]he proper court for trial of actions for the taking or damaging of private property for public use is a court of competent jurisdiction in the county in which the property is situate[d].

Upon written demand of the Attorney General made on or before answering, the place of trial in other actions shall be changed to Sacramento County.

1945 Cal. Stat. 510, 513 (codified at CAL. GOV'T CODE § 16050 (repealed 1959)).

The 1945 enactment was repealed in 1959 and replaced with § 641 of the California Government Code. The new enactment was similar to the repealed § 16050 and, in addition, it specified that it covered claims against the state based on express contract, negligence and inverse condemnation. 1959 Cal. Stat. 4115, 4118 (codified at CAL. GOV'T CODE § 641 (repealed 1963)).

8. 1963 Cal. Stat. 3369, 3387-88 (codified at CAL. GOV'T CODE § 955 (West 1980)).

9. 32 Cal. 3d at 500-01, 651 P.2d at 1143, 186 Cal. Rptr. at 337.

10. 125 Cal. App. 2d 532, 271 P.2d 194 (1954).

11. *Id.*

12. *Id.* at 533, 271 P.2d at 195.

eral's request were those relating to express contract, negligence and inverse condemnation.¹³ Any broader interpretation of section 16050 (now 955) would have had the effect of nullifying that section of the California Code of Civil Procedure which provides that the proper venue in an action against a public official is the county in which the cause of action arises.¹⁴

The court found the reasoning of *Duval* applicable to *Tharp*. The legislature had the opportunity to reject this analysis when it revised relevant portions of the Government Code; however, it chose not to do so.¹⁵

2. Section 395

The Attorney General argued, in the alternative, that section 395 of the Code of Civil Procedure requires that "[e]xcept as otherwise provided by law . . . the county in which the defendants . . . reside at the commencement of the action is the proper county for the trial of the action. . . ."¹⁶ This would apparently allow the Attorney General to change the venue of the action to Sacramento County or any other county where the Attorney General has an office.¹⁷ The court, however, following established precedent, recognized that the application of section 395 was subordinated — by the wording "[e]xcept as otherwise provided by law" — to any specifically applicable statutes.¹⁸ The applicability of section 393 of the Code of Civil Procedure, which regulates venue in actions against public officials, overrides section 395.¹⁹ The county in which *Tharp* carried on his business, and the county in which he would be injured by the action of the state official, was the county where the action arose.

13. Inverse condemnation actions were not subject to removal because they are exempted under § 955.2 of the Government Code.

14. CAL. CIV. PROC. CODE § 393(b)(1) (West 1973).

15. *Duval* was decided in 1954. Subsequent revisions to this area of the Government Code were enacted in 1959 and 1963. See *supra* notes 6 and 7 and accompanying text.

16. CAL. CIV. PROC. CODE § 393(a) (West Supp. 1982).

17. The Attorney General was not limited to transfer of venue to Sacramento County. By virtue of CAL. CIV. PROC. CODE § 401(1) (West 1973), when the Attorney General requests a change of venue to Sacramento County, he can request a change to any other county in which the Attorney General has an office.

18. 32 Cal. 3d at 502, 651 P.2d at 1144, 186 Cal. Rptr. at 338. See also *Delgado v. Superior Court*, 74 Cal. App. 3d 560, 564, 141 Cal. Rptr. 528, 530 (1977) (holding that the phrase "[e]xcept as otherwise by law" meant § 393 was applicable only when no other venue statutes were applicable).

19. CAL. CIV. PROC. CODE § 393(b)(1) (West 1973), applies to the actions of an officer who is charged with carrying out the administrative or enforcement function of a state agency. See, e.g., *Regents of Univ. of Cal. v. Superior Court*, 3 Cal. 3d 529, 538, 476 P.2d 457, 462, 91 Cal. Rptr. 57, 62 (1970). The Department of Motor Vehicles operates by the means of an administrative officer. See CAL. VEH. CODE §§ 1650-51 (West 1971).

There is no escape from the conclusion that where a citizen is singled out by a state agency and proceedings are instituted against him and result in an order, the effect of which is to deprive him absolutely or conditionally of the right to do business, the proper county for redress under section 393, subd. (b), of the Code of Civil Procedure is the county in which he carries on the business and in which he will be hurt by enforcement of the order.²⁰

The final contention of the Attorney General, that section 393 is inapplicable when injunctive relief is sought to prevent the future action of a public official, was dismissed by the court as a confusion of the issues of ripeness and venue. The action for which Tharp was seeking injunctive relief had proceeded beyond the contemplative stage; the Board was in the process of causing him injury by removing his business license. Therefore, section 393 was found applicable to the suit.²¹

V. CONSTITUTIONAL LAW

A. *California Public Records Act construed to permit disclosure unless substantial harm is likely to result: ACLU v. Deukmejian.*

I. INTRODUCTION

In *American Civil Liberties Union Foundation of Northern California, Inc. v. Deukmejian*,¹ the California Supreme Court addressed the scope of the exemptions to the California Public Records Act.² The American Civil Liberties Union Foundation of Northern California (ACLU) had sought to inspect certain records kept by the California Department of Justice. Specifically, it sought disclosure of index cards compiled by the Law Enforcement Intelligence Unit which listed persons suspected of being involved in organized crime³ and computer print-outs from

20. Cecil v. Superior Court, 59 Cal. App. 2d 793, 799, 140 P.2d 125, 129 (1943).

21. The Attorney General relied on the case of Bonestell, Richardson & Co. v. Curry, 153 Cal. 418, 95 P. 887 (1908), which held that § 393 of the Civil Procedure Code applied only to affirmative acts of the officer which interfere with the property or rights of persons. 153 Cal. at 420, 95 P. at 888.

1. 32 Cal. 3d 440, 651 P.2d 822, 186 Cal. Rptr. 235 (1982). Justice Broussard authored the majority opinion in which Justices Mosk, Newman, and Kaus concurred. Separate dissenting and concurring opinions were filed by Chief Justice Bird and Justice Richardson.

2. CAL. GOV'T CODE §§ 6250- 6265 (West 1980 & West Supp. 1982).

3. The index cards listed, among other data, the subject individual's name, alias, occupation, family members, vehicles, associates, arrests, modus operandi,

the Interstate Organized Crime Index which contained information on criminals gathered from public records.⁴ The purposes asserted by the ACLU for disclosure of the records were to find out, generally, what types of information the Department was compiling and whether "the Department of Justice [was] engage[d] in political surveillance under the guise of obtaining information pertaining to law enforcement. . . ."⁵ The Department refused disclosure on the ground that the records were "intelligence information" and, therefore, specifically exempted from disclosure by section 6254(f) of the Government Code.⁶ The Department also claimed the records were exempted from disclosure, using a balancing test set forth in the Act⁷ which precludes disclosure of nonexempt information if the public interest in releasing the information is outweighed by the administrative burden of segregating exempt from nonexempt information contained on the same source.

The trial court found that under the intelligence information exemption⁸ the only information exempt from disclosure was information which might reveal identities of the subjects of the record or the identities of the confidential sources of the information.⁹ The trial court also declined to exempt the unedited information under the balancing test of section 6255 of the Government Code and required the Department to comply with the ACLU's request.¹⁰ On appeal, the supreme court affirmed the decision of the trial court concerning the disclosure of the computer print-outs and reversed the decision as to the disclosure of information on the index cards.

II. THE PUBLIC RECORDS ACT

The Act was passed in 1968 to replace a confusing mass of stat-

and physical traits. The subject of a card can be a person suspected of a specific crime or aiding in organized crime, or a person associated with a specific suspect. Associates might be individuals such as family members, business associates, or attorneys of the specific suspect. 32 Cal. 3d at 444, 651 P.2d at 824, 186 Cal. Rptr. at 237.

4. The computer print-outs were based solely on information that is a matter of public record and contains information such as an individual's name, physical characteristics, criminal record, crime related and noncrime related associates, occupation and residence. *Id.* at 444-45, 651 P.2d at 824, 186 Cal. Rptr. at 237.

5. *Id.* at 459, 651 P.2d at 833, 186 Cal. Rptr. at 246 (Bird, C.J., dissenting).

6. CAL. GOV'T CODE § 6254(f) (West Supp. 1982) exempts from disclosure "[r]ecords of complaints to or investigations conducted by, or records of intelligence information . . . of, the office of the Attorney General and the Department of Justice. . . ."

7. CAL. GOV'T CODE § 6255 (West 1980).

8. CAL. GOV'T CODE § 6254(f) (West Supp. 1982).

9. 32 Cal. 3d at 446, 651 P.2d at 825, 186 Cal. Rptr. at 238.

10. *Id.*

utes and court decisions relating to disclosure of governmental records. Modeled after the Federal Freedom of Information Act,¹¹ the California Act attempts to strike a balance between the public's right of access to governmental records through the disclosure provisions and the individual's right to privacy that may be invaded upon disclosure of such records through the exemption provisions.¹² It is in light of these competing concerns that the court construed the provisions of the California Act to arrive at a proper balance of disclosure.

Both the Federal and California Acts contain exemptions for investigatory records compiled for law enforcement purposes.¹³ The federal exemption had been interpreted broadly at first to exclude from disclosure any information in which there was potential for its use in enforcement proceedings.¹⁴ The California approach narrows this exemption to cases in which enforcement proceedings are definite and concrete, although information regarded as "intelligence information" is independently exempt without regard to whether it related to the prospect of enforcement proceedings.¹⁵

11. 5 U.S.C. § 552 (1976).

12. 32 Cal. 3d at 447, 651 P.2d at 826, 186 Cal. Rptr. at 239.

13. The applicable exemption provisions for the Federal Act are found at 5 U.S.C. § 552(b)(7) which provide exemption from disclosure for:

investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel. . . .

The counterpart to this section in the California Act is found at CAL. GOV'T CODE § 6254(f) (West 1983) which exempts from disclosure:

[r]ecords of complaints to or investigations conducted by, or records of intelligence information or security procedures of, the office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes. . . .

Id.

14. See *Weinberg v. Department of Justice*, 489 F.2d 1195 (D.C. Cir. 1973) (analysis of bullet that killed President Kennedy exempt as part of FBI file compiled for law enforcement purposes); *Aspin v. Department of Defense*, 491 F.2d 24 (D.C. Cir. 1973) (report on cover-up of My-Lai massacre exempt).

15. See *Uribe v. Howie*, 19 Cal. App. 3d 194, 213, 96 Cal. Rptr 493, 505 (1971)

The Federal Act was amended in 1974 to narrow and clarify the exemptions in response to several cases decided in federal courts which held that all information in a law enforcement investigatory file was exempt.¹⁶ The effect of the 1974 amendments to the Federal Act was to narrow the scope of the exemptions involving investigatory files or intelligence information to specific instances in which harm to governmental or individual interests might occur.¹⁷ The California Supreme Court determined that “[s]ince the 1974 amendments were adopted to reinstate the scope of the exemption as intended in the original act, and since the California law was modeled upon the original act . . . [the court] may use the amendments to guide the construction of the California Act.”¹⁸

III. CASE ANALYSIS

The supreme court, with the 1974 amendments to the Federal Act in mind, felt the trial court viewed the exemptions of the Act too narrowly by exempting only personal identifiers of the individual subjects of the records and information that would reveal the identity of confidential sources of information contained in the records. Based on the substance of the records sought, the court felt that the likelihood of substantial harm occurring to someone even tangentially related to the subject matter of the records warranted a broad view of the exemptions relating to personal identifiers.¹⁹ Therefore, although the records would not be exempt *in toto*, names, aliases, addresses, telephone numbers and any other information which might lead someone to infer the identity of the individual in question were required to be deleted. Also exempted, within the ambit of intelligence information, were the names or any information listed which would identify confi-

(pesticide spray reports not compiled for law enforcement or licensing purpose not exempt); *Division of Indust. Safety v. Superior Court*, 43 Cal. App. 3d 778, 784, 117 Cal. Rptr. 726, 729-30 (1974) (subject matter of files of Division not compiled for correctional, law enforcement or licensing purposes not exempt under § 6542(f)).

16. Federal Freedom of Information Act, P.L. 93-502, 88 Stat. 1561 (codified as amended at 5 U.S.C. § 552 (1976)). See *supra* note 14.

17. See *Pratt v. Webster*, 673 F.2d 408, 417 (D.C. Cir. 1982) (FBI Counter Intelligence Program files exempt as investigatory files for law enforcement purposes); *Climax Molybdenum Co. v. NLRB*, 539 F.2d 63, 64 (10th Cir. 1976) (documents of NLRB containing employee statements exempt to prevent interference with enforcement proceedings).

18. 32 Cal. 3d at 449, 651 P.2d at 827, 186 Cal. Rptr. at 240.

19. The index card records and computer print-outs contained the names of family members and associates whether they were related to criminal activity or not. Failure to specifically exempt information related to these people might cause unwarranted harm. See 32 Cal. 3d at 444 n.2, 651 P.2d at 824 n.2, 186 Cal. Rptr. at 237 n.2 (former state senator who rented house to Black Panther Party member listed as associate on party member's card introduced at trial in Chicago).

dential sources or information that was supplied in confidence by its original source.²⁰ This construction of the exemptions brought section 6254(f) of the Government Code into alignment with the Federal Act.²¹

The court also viewed the availability of information under the trial court's narrow interpretation of the exemption as a "dangerous tool" because the Act provides no restrictions as to who may seek the information or how the information may be used.²² The court noted that section 1040 of the Evidence Code,²³ which serves essentially the same purpose as the Act for discovery procedures during a trial, sets forth a balancing test, as "a court will uphold disclosure only if the public interest in the disclosure outweighs the necessity for confidentiality. . . ."²⁴ The court suggested that the determination of whether to allow disclosure of information under the Act should proceed on a case by case basis, and that this determination would weigh the interests of the individuals affected by disclosure against the underlying purpose of the party seeking disclosure.

Section 6255 of the Government Code²⁵ allows the court to weigh the burden of providing the information which is allowed to be disclosed against the public interest in obtaining access to the information. The code defines the burden in terms of the public interest in not having the records disclosed.²⁶ The court, after *in camera* inspection of the records which were sought to be disclosed, determined, in the case of the index cards, that the burden of segregating exempt from nonexempt information exceeded the

20. 32 Cal. 3d at 450, 651 P.2d at 828, 186 Cal. Rptr. at 241.

21. *Id.* By exempting any information which might lead to the identity of the subject of the records, any individuals mentioned in the records, and any confidential information or information that would lead to the disclosure of a confidential source, the court brought the judicial construction of § 6254(f) into alignment with section 552(b)(7) of the Federal Act.

22. 32 Cal. 3d at 451, 651 P.2d at 828, 186 Cal. Rptr. at 241. The court stated that a possible misuse might be made by organized crime members who may seek to discover what police know or don't know about their activities. *Id.*

23. CAL. EVIDENCE CODE § 1040 (West 1966) provides for disclosure of information only if public interest in its disclosure outweighs the need for confidentiality in the interest of justice.

24. 32 Cal. 3d at 451, 651 P.2d at 829, 186 Cal. Rptr. at 242.

25. CAL. GOV'T CODE § 6255 (West 1980) provides in pertinent part: "[t]he agency shall justify withholding any record by demonstrating that . . . on the facts of a particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record."

26. *Id.*

public interest in obtaining any undeleted information.²⁷ In reaching this conclusion, the court used the cost and inconvenience of segregating exempt from nonexempt information as factors of the public interest against disclosure.²⁸ The court determined that the phrase "public interest" . . . encompasses public concern with the cost and efficiency of government."²⁹ As to the computer print-outs, however, the court determined that since all the information was of public record, the information was not confidential.³⁰ Therefore, the only task for the Department was that of removing the personal identifiers, which was a minimal burden.³¹

IV. THE DISSENTING OPINIONS

Justice Richardson dissented³² to the majority's decision allowing the disclosure of the computer print-outs. He felt that the print-outs fell within the "intelligence information" exception and therefore were absolutely privileged from disclosure. He based this broad view of the exemptions on the fact that the information was used exclusively by law enforcement agencies to assist in their investigations.³³ Justice Richardson's interpretation of the Act found that it did not call for segregating exempt from nonexempt information but instead protected the records *in toto* once

27. 32 Cal. 3d at 453, 651 P.2d at 830, 186 Cal. Rptr. at 243.

28. The court noted that the burden of segregating the exempt from nonexempt information stemmed from the difficulty of determining what material would qualify as confidential, what information might reveal a confidential source or identity of the subject individual, and the difficulty of obtaining help from law enforcement agencies which supplied the information. Even for the limited amount of records for which the request was made, one hundred, the court held the cost and inconvenience of supplying the nonexempt information outweighed any benefit to the public from disclosure. *Id.*

29. *Id.* at 453, 651 P.2d at 829, 186 Cal. Rptr. at 242.

30. *Id.* at 454, 651 P.2d at 830, 186 Cal. Rptr. at 243. Although the Department may have labeled the print-outs as confidential, the court noted that information is not confidential unless treated as confidential by its original source. Since the computer print-outs were gleaned from public records, they could not be considered confidential information within the ambit of the act. *Id.* at 450 n.11, 651 P.2d at 828 n.11, 186 Cal. Rptr. at 241 n.11.

31. The court noted that the burdens in each case would depend on the facts and surrounding circumstances, and the required disclosure or nondisclosure would similarly be limited to the facts of each case. *Id.* at 454 n.14, 651 P.2d at 830 n.14, 186 Cal. Rptr. at 243 n.14.

32. *Id.* at 454, 651 P.2d at 831, 186 Cal. Rptr. at 244 (Richardson, J., concurring and dissenting).

33. CAL. GOV'T CODE § 6254(f) (West Supp. 1982) exempts "[r]ecords of . . . intelligence information. . . ." Justice Richardson did not follow the majority's narrow construction of this section and would apparently uphold the government's contention that all information reasonably related to criminal activity should be exempt. It should be noted that this was the interpretation in the federal cases which led to the amendment of the Federal Act. *See supra* note 14.

information on the record qualified for the exemption.³⁴ He followed the reasoning of the court of appeal's Justice Paras who stated:

[The [blank] forms, which [the Department] refused to provide, fully describe the 'type of information' involved. Anything more than that is the information itself, which would add nothing but specific data relating to specific people. . . . [T]he specific data placed into the blank spaces is beyond question 'intelligence information,' expressly excluded by section 6254 subdivision (f). . . .³⁵

Chief Justice Bird strongly dissented³⁶ from both of the above opinions. She felt that the purpose of the Act was to increase the freedom of information by giving the public easier access to information in government records.³⁷ The Act's provisions were to be "construed liberally" in order to further the goal of maximum disclosure in the conduct of governmental operations.³⁸ In turn, this necessitates that the exemptions be viewed strictly so as not to interfere with the basic policy of the Act.³⁹ Federal court cases interpreting the Federal Act (the model for the California Act), stress that the policy of the Act is one of disclosure and, therefore, the exceptions should be narrowly construed.⁴⁰ The Chief Justice agreed with the majority that the trial court viewed the scope of the exemption under section 6254(f) too narrowly by allowing confidential information⁴¹ to be disclosed but declined to concur with the majority's approach to implementing the disclosure.

In determining the public interest in nondisclosure, the majority considered the cost and inconvenience of segregating exempt from nonexempt information. The majority felt that government

34. *But see* CAL. GOV'T CODE § 6257 (West Supp. 1982) (requiring any reasonably segregable portions of records disclosed after deletion of portions exempt by law).

35. 32 Cal. 3d at 455, 651 P.2d at 831, 186 Cal. Rptr. at 244 (quoting *American Civil Liberties Union Found. v. Deukmejian*, 105 Cal. App. 3d 524, 532 (1980)).

36. 32 Cal. 3d at 455, 651 P.2d at 831, 186 Cal. Rptr. at 244 (Bird, C.J., dissenting).

37. 53 Ops. Cal. Atty. Gen. 136, 143 (1970).

38. *Id.*

39. *Id.*

40. *Department of Air Force v. Rose*, 425 U.S. 352, 361 (1976) (basic public policy of act is disclosure, not secrecy); *Vaughn v. Rosen*, 484 F.2d 820, 823 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1973) (exemptions construed narrowly to maximize access to records); *Bristol-Meyers Co. v. FTC*, 424 F.2d 935, 938 (1970), *cert. denied*, 400 U.S. 824 (1970) (primary purpose of Act was to facilitate citizen access to government records).

41. 32 Cal. 3d at 460, 651 P.2d at 834, 186 Cal. Rptr. at 247 (Bird, C.J., concurring and dissenting).

efficiency and costs were within the ambit of the "public interest" as expressed in section 6255.⁴² The Chief Justice believed it inconceivable that such was the intent of the drafters of the Act. Chief Justice Bird viewed instead the concerns articulated by the specific exemptions as more indicative of the "public interest."⁴³ Chief Justice Bird felt that the public interest exception in section 6255 acted as a catch-all for concerns not specifically protected by the Act, such as protection of personal privacy and confidential information.⁴⁴ The Chief Justice noted that the legislature was aware, in passing the Act, that cost and inconvenience would be encountered in requiring the disclosure of information, and that it was for this reason that it granted an extension of time to produce records which required editing.⁴⁵ This was to be the extent of the impact of the burden of administrative cost in a disclosure problem.

Moreover, a logical extension of the majority's analysis (allowing cost and inconvenience to become factors in determining what information would be disclosed) would empower the agency requested to disclose information, rather than the legislature, to determine the extent of disclosure by bureaucratic maneuvers, which would increase the cost of segregating exempt from nonexempt information.⁴⁶ Finally, Chief Justice Bird noted that allowing cost and inconvenience to enter into the balancing test contravenes the established position of the court.⁴⁷

Even assuming that costs and administrative burdens should have a place in the balancing test, Chief Justice Bird felt that the

42. *Id.* at 453, 651 P.2d at 242-43, 186 Cal. Rptr. at 829-30. The majority's concern was for possible requests which would impose limitless obligations on governmental agencies in the event that the exempt and nonexempt information were inextricably intertwined. A reasonable interpretation of the majority opinion would conclude that factors of cost and inconvenience could be considered only once it was determined that the information would not be easily segregated. *Id.* at 453 n.13, 651 P.2d at 830 n.13, 186 Cal. Rptr. at 243 n.13.

43. *Id.* at 462, 651 P.2d at 835-36, 186 Cal. Rptr. at 248-49 (Bird, C.J., concurring and dissenting).

44. *Id.*

45. *Id.* at 463, 651 P.2d at 836, 186 Cal. Rptr. at 249. See CAL. GOV'T CODE § 6256.1 (West Supp. 1982) (granting extension of time for disclosing records due to unusual circumstances).

46. 32 Cal. 3d at 464, 651 P.2d at 836-37, 186 Cal. Rptr. at 249-50 (Bird, C.J., concurring and dissenting).

47. See Northern Cal. Police Practices Project v. Craig, 90 Cal. App. 3d 116, 124, 53 Cal. Rptr. 173 (1979) (policy of Public Records Act requires disclosure in face of tangible burden of segregating exempt from nonexempt information); see also Sears v. Gottschalk, 502 F.2d 122, 126 (4th Cir. 1974) (equitable considerations of cost in time and money for production of records are not excuse for nonproduction); Ferguson v. Kelly, 455 F. Supp. 324, 326 (N.D. Ill. 1978) (time-consuming nature or burden of producing records is not valid excuse for non-production of such as it would undercut the policy of Act).

Department failed to sustain the burden of proving that the cost and inconvenience "clearly" outweighed the public interest in having the records disclosed.⁴⁸

V. CONCLUSION

The California Public Records Act has now received a judicial construction which brings it in harmony with the Federal Freedom of Information Act. A showing that disclosure of a government record may harm an individual or governmental interest may preclude the disclosure of the record. The judicial construction of the California Act still may not emulate the extensive disclosure policy of the Federal Act, for the courts are allowed greater latitude in interpreting the enumerated interest precluding disclosure than under the Federal Act by virtue of the balancing test of section 6255 which has no counterpart in the Federal Act.

B. *The Victim's Bill of Rights held fundamentally constitutional: Brosnahan v. Brown.*

I. INTRODUCTION

In the June, 1982 primary election the voters of California adopted an initiative measure¹ commonly known as "The Victim's Bill of Rights" [hereinafter Proposition 8].² After its adoption,

48. 32 Cal. 3d at 467, 651 P.2d at 838, 186 Cal. Rptr. at 251. The Chief Justice noted that the record was barren of facts which would establish the burdensome nature of segregating the information. In view of this it would be improper to rule as a matter of law that the information was exempt. See *Irons v. Bell*, 596 F.2d 468, 471 (1st Cir. 1979).

1. An initiative measure is submitted to the people in accordance with the provisions of article two, § 8 of the California Constitution. CAL. CONST. art. II, § 8.

2. See 1982 Cal. Legis. Serv. 1164 (West). The measure was designated on the ballot as Proposition 8. The proposition added Section 28 to Article I of the California Constitution and made several additions to the California Penal, and Welfare and Institutions Codes. 1982 Cal. Legis. Serv. 1164-1169 (West).

The preamble to the measure provides:

The People of the State of California find and declare that the enactment of comprehensive provisions and laws ensuring a bill of rights for victims of crime, including safeguards in the criminal justice system to fully protect those rights, is a matter of grave statewide concern.

The rights of victims pervade the criminal justice system, encompassing not only the right to restitution from the wrongdoers for financial losses suffered as a result of criminal acts, but also the more basic expectation that persons who commit felonious acts causing injury to innocent victims will be appropriately detained in custody, tried by the courts, and suffi-

several challenges were made to the initiative's validity. In *Brosnahan v. Brown*,³ the petitioners did not contend that Proposition 8 was substantively unconstitutional, but rather maintained that the manner in which Proposition 8 was submitted to the electorate was constitutionally improper. The petitioners also objected to the use of public funds for its implementation.⁴ Upon filing of the petition in the court of appeal, the Attorney General moved that the case to be transferred to the California Supreme Court. The motion was subsequently granted.⁵

In *Brosnahan*, the California Supreme Court concluded, by a narrow four to three margin,⁶ that the initiative measure known as Proposition 8 was fundamentally constitutional. The court, in making some initial observations, cautioned that the present inquiry, although of sufficient importance to invoke their original jurisdiction,⁷ was limited "only to the principal, fundamental challenges to the validity of [Proposition 8] as a whole."⁸ In this fashion, the court reserved the direct interpretation of specific

ciently punished so that the public safety is protected and encouraged as a goal of highest importance.

Such public safety extends to public primary, elementary, junior high, and senior high school campuses, where students and staff have the right to be safe and secure in their persons.

To accomplish these goals, broad reforms in the procedural treatment of accused persons and the disposition and sentencing of convicted persons are necessary and proper as deterrents to criminal behavior and to serious disruption of people's lives.

CAL. CONST. art. I § 28(a).

3. 32 Cal. 3d 235, 650 P.2d 274, 185 Cal. Rptr. 30 (1982).

4. Petitioners had earlier brought suit seeking to prevent the Secretary of State from instituting measures to place the initiative measure on the ballot. Petitioners established, on the basis of the random sampling set forth in the California Elections Code, that the public petitions needed to place an initiative measure on the ballot contained only 108.76% of the number of signatures required under the CAL. ELEC. CODE § 3520(g) (West Supp. 1982), amended by 1982 Cal. Stat. 102 § 1. At that time, Election Code section 3520(g) required that certificates totalling 110% be received. While the action was pending, the legislature passed an emergency measure amending Election Code § 3520(g) to 105%. See 1982 Cal. Stat. 102 § 1. Because of this legislative action, the California Supreme Court concluded that the initiative measure should be placed on the ballot of the June, 1982 primary elections. See *Brosnahan v. Eu*, 31 Cal. 3d 1, 641 P.2d 200, 181 Cal. Rptr. 100 (1982). See also *The California Supreme Court Survey*, 10 PEPPERDINE L. REV. 186 (1982) for a discussion of the *Eu* case.

5. See Cal. Rules of Court, rule 20.

6. Justice Richardson wrote the majority opinion in which Justices Newman, Kaus, and Reynoso concurred. Chief Justice Bird wrote a dissenting opinion as did Justice Mosk, with whom Justice Broussard joined in dissent.

7. See *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 22 Cal. 3d 201, 219, 583 P.2d 1281, 1283, 149 Cal. Rptr. 2398, 241 (1978); *Clean Air Constituency v. California State Air Resources Bd.*, 11 Cal. 3d 801, 808-09, 523 P.2d 617, 620-21, 114 Cal. Rptr. 577, 580-81 (1974).

8. 32 Cal. 3d at 241, 651 P.2d at 277, 186 Cal. Rptr. at 33 (citing *Amador*, 22 Cal. 3d at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241).

provisions until a later date.⁹ The court also stressed that since the powers of initiative and referendum are vested in the people of the state by the California Constitution,¹⁰ any reasonable doubts should be construed in harmony with that privilege.

II. THE MAJORITY OPINION

The majority addressed each constitutional challenge to the initiative measure individually.¹¹ The first contention addressed was that the initiative embraced more than one subject and thus violated the single-subject requirement of the California Constitution.¹² The court noted that this requirement is satisfied if, "despite its varied collateral effects, all of [the initiative's] parts are 'reasonably germane' to each other."¹³

The court has, in the past, maintained that the single-subject rule should be liberally construed.¹⁴ The court analyzed prior decisions,¹⁵ all of which covered fairly broad topics, and concluded that "Proposition 8 constitute[s] a reform aimed at certain features of the criminal justice system to protect and enhance the

9. Just as the California Supreme Court continued to delineate the constitutional limitations of Proposition 13 in *City and County of San Francisco v. Farrell*, see *The California Supreme Court Survey*, 10 PEPPERDINE L. REV. 979, 980 & nn.3-4, this author believes that the constitutionality of Proposition 8 will be severely undermined in the future.

10. See CAL. CONST. art. IV § 1.

11. The majority began their analysis with a brief synopsis of the individual sections of Proposition 8. 32 Cal. 3d at 242-45, 651 P.2d at 277-79, 186 Cal. Rptr. at 33-35. This article will refer to the actual wording of the different sections as they were addressed.

12. CAL. CONST. art. II § 8(d) provides that: "[a]n initiative measure embracing more than one subject may not be submitted to the electors or have any effect." See *supra* note 8.

13. *Amador*, 22 Cal. 3d at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248. See also *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 38-39, 599 P.2d 46, 48, 157 Cal. Rptr. 855, 857 (1979).

14. *Fair Political Practices Comm'n*, 25 Cal. 3d at 38, 599 P.2d at 48, 157 Cal. Rptr. at 857.

15. The court took notice of *Amador*, 23 Cal. 3d at 231, 583 P.2d at 1291, 149 Cal. Rptr. at 249 (CAL. CONST. art. XIII A §§ 1-4 are reasonably germane, and functionally related to the general subject of property tax relief); *Fair Political Practices Comm'n v. Superior Court*, 25 Cal. 3d 33, 43, 599 P.2d 46, 51, 157 Cal. Rptr. 855, 860 (1979) (provisions of Political Reform Act of 1974 are reasonably germane to the subject of political practices; there is no violation of one subject requirement); *Evans v. Superior Court*, 215 Cal. 58, 61-63, 8 P.2d 467, 468-69 (1932) (seventeen hundred section of an act to establish Probate Code did not embrace more than one subject).

rights of crime victims.”¹⁶ The majority in *Brosnahan* used this premise to answer the specific charges of the petitioners.

The petitioners had pointed to the initiative’s “safe school” provision¹⁷ as encompassing a subject which is completely unrelated to criminal behavior.¹⁸ The court, referring to the preamble of Proposition 8,¹⁹ maintained that the section encompassed the broad subject of safety from criminal behavior.²⁰ The petitioners also contended that language in *Amador Valley Joint Union High School District v. State Board of Equalization*²¹ affixed the further requirement of interdependence to the “reasonably germane” test. The court, recognizing inapposite language in *Amador*,²² rejected the argument and asserted that no California case has suggested that interdependence is a constitutional prerequisite.²³ Finally, the petitioners theorized that the broad scope of Proposition 8 enhanced the danger of election “logrolling,” whereby specific groups voted for the proposition to secure the benefit of one of its severable provisions.²⁴ Any of these groups individually would have constituted a mere minority, but in the aggregate, they constituted the majority which approved the measure, which, in these circumstances, may have lacked genuine popular support.²⁵ The majority rejected this argument on the grounds that the single-subject rule has never required a showing that each provision must be approved by the voters independently of the other provisions.²⁶ Furthermore, once the conclusion was reached that the proposition contained but one subject matter, it became unlikely that “logrolling” actually occurred.²⁷

16. 32 Cal. 3d at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36.

17. See CAL. CONST. art. I § 28(c) which provides: “[a]ll students and staff of public primary, elementary, junior high and senior high schools have the inalienable right to attend campuses which are safe, secure and peaceful.

18. 32 Cal. 3d at 247, 651 P.2d at 280, 186 Cal. Rptr. at 36.

19. See *supra* note 2.

20. 32 Cal. 3d at 248, 651 P.2d at 281, 186 Cal. Rptr. at 37.

21. See 22 Cal. 3d at 231, 583 P.2d at 1290, 149 Cal. Rptr. at 248. Petitioners relied upon the statement “that each of [the sections] is reasonably interrelated and interdependent, forming an interlocking ‘package’ deemed necessary by the initiative’s framers to assure effective real property tax relief.” *Id.*

22. The majority referred to an immediately preceding statement where the *Amador* court noted that the “article[s] satisfy either standard in that they are both reasonably germane to *and* functionally related in furtherance of, a common underlying purpose, namely, effective real property tax relief.” 22 Cal. 3d at 230, 583 P.2d at 1290, 149 Cal. Rptr. at 248.

23. 32 Cal. 3d at 248-49, 651 P.2d at 281, 186 Cal. Rptr. at 37.

24. *Id.* at 250, 651 P.2d at 282, 186 Cal. Rptr. at 38.

25. *Id.*

26. *Id.* at 251, 651 P.2d at 283, 186 Cal. Rptr. at 39.

27. *Id.* The petitioners also contended that the provisions of Proposition 8 were too intricate for the voters to have come to a fully informed decision. This argument was similarly regarded by the majority as being without merit.

Thus, the court concluded that Proposition 8 did not violate the single-subject mandate of the California Constitution.²⁸

The second constitutional challenge to Proposition 8 was based upon the assertion that the initiative failed to disclose all the provisions in the title, in violation of article IV, section 9 of the California Constitution.²⁹ For instance, the petitioners noted that a provision for a new release on bail³⁰ and the provision which was expressly repealed were not textually set out in the initiative.³¹ Furthermore, the petitioners contended that certain provisions of the measure impliedly repealed various statutory provisions not enunciated in the measure.³² In response, the court first noted³³ that the language in article IV, section 9 was inapplicable to constitutional amendments.³⁴ The court also noted the established

28. *But see* *McFadden v. Jordan*, 32 Cal. 2d 330, 196 P.2d 787 (1932) (single-subject rule was violated by initiative which would have added 21,000 words to 15 of 25 constitutional articles on subjects ranging from senate reapportionment to oleomargarine).

29. CAL. CONST. art. IV, § 9 provides:

A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. A statute may not be amended by reference to its title. A section of a statute may not be amended unless the section is re-enacted as amended.

Id.

30. Proposition 8 added section 28, subdivision (e) to article I of the California Constitution. That subdivision provides in relevant part:

Public Safety Bail. A person may be released on bail . . . except for capital crimes when the facts are evident or the presumption great. . . .

A person may be released on his or her own recognizance in the court's discretion, subject to the same factors considered in setting bail. However, no person charged with the commission of any serious felony shall be released on his or her own recognizance.

CAL. CONST. art. I § 28(e).

31. 32 Cal. 3d at 254-55, 651 P.2d at 285, 186 Cal. Rptr. at 41. *See* CAL. CONST. art. I § 12, *repealed by* CAL. CONST. art. I § 28(e) (California Voter Initiative, Proposition 8, approved June 8, 1982).

32. 32 Cal. 3d at 255, 651 P.2d at 285, 186 Cal. Rptr. at 41. The majority only mentioned that petitioners took notice of CAL. CONST. art. I § 28(d). This subdivision provides in pertinent part: "(d) *Right to Truth in Evidence.* Except as provided by statute . . . relevant evidence shall not be excluded in any criminal proceeding. . . ." *Id.*

33. The court initially noted that it was uncontradicted that the proposition complied with CAL. CONST. art. II, § 8(b) which requires that the initiative measure petition set forth "the text of the proposed statutes or amendments." 32 Cal. 3d at 25, 651 P.2d at 284, 186 Cal. Rptr. at 40.

34. The language of CAL. CONST. art. IV, § 9 specifically recites requirements for the reenactment of *statutes*. *See* 32 Cal. 3d at 255, 651 P.2d at 285, 186 Cal. Rptr. at 41.

precedent, which holds that article IV, section 9³⁵ of the California Constitution is specifically limited in scope to apply only to *legislative enactments*.³⁶ Credence was given to the position that article IV, section 9, like its predecessor, was explicitly limited to legislatively enacted statutes and did not control initiative measures. For these reasons, the court concluded that Proposition 8 did not violate article IV, section 9 of the California Constitution.³⁷

The third constitutional challenge advanced, pursuant to the case of *Simpson v. Hite*,³⁸ was that Proposition 8 impermissibly impaired essential governmental functions.³⁹ The court maintained that all of the examples⁴⁰ which the petitioners advanced were merely conjecture and on its face the bill did not constitute an undue impairment of essential governmental functions.⁴¹

The fourth constitutional challenge to Proposition 8 was that its provisions were so extensive that they constituted a "revision" of the constitution and not a mere "amendment."⁴² In *Amador*, the court had recognized that a constitutional revision could not be accomplished by voter initiative.⁴³ The court considered the overall effect of the provisions, both quantitatively and qualitatively, to reach its conclusion. Quantitatively the provisions were not so extensive "as to change directly the 'substantial entirety' of the constitution by the deletion or alteration of numerous existing provisions. . . ."⁴⁴ The court relied upon language from *Amador*

35. CAL. CONST. art. IV § 24 (repealed 1966) contained language similar to the present CAL. CONST. art. IV, § 9. The text of former § 24 is set out in 2 DEERINGS CONSTITUTIONAL ANNOTATIONS 86 (1974).

36. See *Prince v. City and County of San Francisco*, 48 Cal. 2d 472, 275, 311 P.2d 544, 546 (1957), cited with approval in *Brosnahan v. Brown*, 32 Cal. 3d at 256, 651 P.2d at 286, 186 Cal. Rptr. at 42.

37. 32 Cal. 3d at 257, 651 P.2d at 287, 186 Cal. Rptr. at 43.

38. 36 Cal. 2d 125, 222 P.2d 25 (1950). The court in *Simpson* had held that "[t]he initiative or referendum is not applicable where 'the inevitable effect would be greatly to impair or wholly destroy the efficacy of some other governmental power, the practical application of which is essential. . . .'" *Id.* at 134, 222 P.2d 230 (1950) (quoting *Chase v. Kalber*, 28 Cal. App. 561, 569-70, 153 P. 397, 400 (1915)).

39. 32 Cal. 3d at 258, 651 P.2d at 287, 186 Cal. Rptr. at 43.

40. The petitioners had advanced general arguments that the "plea bargaining" provision, CAL. PENAL CODE § 1192.7, would cause a breakdown of the justice system and that the "school safety" provision, CAL. CONST. art. I § 28(c), would "herald the end of public education as we know it." 32 Cal. 3d at 259, 651 P.2d at 288, 186 Cal. Rptr. at 44.

41. 32 Cal. 3d at 260, 651 P.2d at 287-88, 186 Cal. Rptr. at 43-44.

42. *Id.* at 260, 651 P.2d at 288, 186 Cal. Rptr. at 44.

43. The *Amador* court recognized that the "voters may accomplish an amendment by the initiative process, [but] a constitutional revision may be adopted only after the convening of a constitutional convention and popular ratification or by legislative submission to the people." 22 Cal. 3d at 221, 583 P.2d at 1284, 149 Cal. Rptr. at 242.

44. 32 Cal. 3d at 260, 651 P.2d at 288, 186 Cal. Rptr. at 44 (quoting *Amador*, 22

to establish that the qualitative effects of the proposition were simply not so overreaching as to effectuate a constitutional revision.⁴⁵ Although the proposition will inevitably alter the governmental framework to some extent, such transformation will not be extensive enough to invalidate the measure as a "revision" of the constitution within the meaning of Article XVIII.⁴⁶

III. THE DISSENTING OPINIONS

Justice Mosk wrote a dissenting opinion in which Justice Broussard concurred.⁴⁷ Justice Mosk relied extensively on his dissenting opinion in *Brosnahan v. Eu*⁴⁸ and failed to see how the proposal complied with the single-subject rule.⁴⁹ Analyzing the fact that the initiative added "seven separate subdivisions to the Constitution, repeal[ed] one section of the Constitution, add[ed] five new sections to the Penal Code and three more sections to the Welfare and Institutions Code,"⁵⁰ Justice Mosk would have invalidated the proposition pursuant to article II, section 8, subdivision (d) of the constitution.⁵¹ Justice Mosk felt that neither the "reasonably germane" test of *Evans v. Superior Court*⁵² or the "functionally related" test proposed in *Schmitz v. Younger*⁵³ was complied with by the divergent areas of the proposition.⁵⁴

Chief Justice Bird, writing a separate dissenting opinion, emphasized that the single-subject requirement was not a limit upon the people's power to legislate by initiative, but rather "a limit on

Cal. 3d at 223, 583 P.2d at 1286, 149 Cal. Rptr. at 244). See also *Livermore v. Waite*, 102 Cal. 113, 118-19, 36 P. 424, 426 (1894).

45. 32 Cal. 3d at 260, 651 P.2d at 288-89, 186 Cal. Rptr. at 44-45.

46. CAL. CONST. art. XVIII, §§ 1-4 (provides process by which California Constitution may be revised or amended).

47. 32 Cal. 3d at 297, 651 P.2d at 312, 186 Cal. Rptr. at 76. In *Brosnahan v. Eu*, 31 Cal. 3d 1, 4-5, 641 P.2d 200, 201-02, 181 Cal. Rptr. 100, 101-02 (1982), Justice Broussard concurred in the opinion by the court but recognized that such acquiescence did not preclude evaluation of the single-subject rule subsequent to the June 1982 elections. See *The California Supreme Court Survey*, 10 PEPPERDINE L. REV. 186 (1982) for a discussion of the case.

48. 31 Cal. 3d at 5-14, 641 P.2d at 101-07, 181 Cal. Rptr. at 102-07 (Mosk, J., dissenting).

49. 32 Cal. 3d at 298-9, 651 P.2d at 312-13, 186 Cal. Rptr. at 76-77 (Mosk, J., dissenting).

50. *Id.* at 298, 651 P.2d at 312, 186 Cal. Rptr. at 76 (Mosk, J., dissenting).

51. See *supra* note 11.

52. 215 Cal. 28, 8 P.2d 46 (1932).

53. 21 Cal. 3d 90, 577 P.2d 652, 145 Cal. Rptr. 517 (1978) (Manuel, J., dissenting).

54. 32 Cal. 3d at 299, 651 P.2d at 313, 186 Cal. Rptr. at 76.

the *draftsmen of initiative measures*.”⁵⁵ The thrust of her argument was that the provisions of the initiative measure were “so far reaching, yet unrelated” that they conflicted “with the fundamental concerns underlying the single-subject rule.”⁵⁶

C. Amendment to Labor Code section 5500.5 limiting apportionment for insurers' liability does not violate the United States or California contract clauses: City of Torrance v. Workers' Compensation Appeals Board.

In *City of Torrance v. Workers' Compensation Appeals Board*,¹ the court addressed the issue of whether the 1977 amendment to Labor Code section 5500.5 violated the contract clause of the United States² and California Constitutions.³ Kenneth Atkinson was employed as a fireman by the City of Torrance (City) from July 2, 1956 to April 30, 1977. He died on March 12, 1978 from lung cancer. His daughter filed an application for workers' compensation death benefits against the City and the State Compensation Insurance Fund (State Fund), claiming that her father's death was caused by a cumulative injury developed during the course of his employment with the City. For fifteen of the twenty-one years that Atkinson worked for the City, State Fund was the workers' compensation fund for the City. Since July 1, 1971, the City had not carried insurance. The City settled the Atkinson claim and sought a seventy-two percent contribution from State Fund, based upon Labor Code section 5500.5.⁴

55. 32 Cal. 3d at 280, 651 P.2d at 301, 186 Cal. Rptr. at 57 (Bird, C.J., dissenting) (emphasis in original).

56. *Id.* at 275, 651 P.2d at 297, 186 Cal. Rptr. at 53-54 (Bird, C.J., dissenting).

1. 32 Cal. 3d 371, 650 P.2d 1162, 185 Cal. Rptr. 645 (1982). Chief Justice Bird wrote the majority opinion with Justices Richardson, Newman, Kaus, Broussard and Reynoso concurring. Justice Mosk wrote the dissenting opinion.

2. “No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .” U.S. CONST. art. I, § 10, cl. 1.

3. “[A] Law impairing the obligation of contracts may not be passed.” CAL. CONST. art. I, § 9.

4. 32 Cal. 3d at 374, 650 P.2d at 1162, 185 Cal. Rptr. at 646. Labor Code § 5500.5 currently provides in pertinent part:

(a) Except as otherwise provided in Section 5500.6, *liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him to the hazards of such occupational disease or cumulative injury, whichever occurs first.*

CAL. LAB. CODE § 5500.5(a) (West Supp. 1982) (emphasis added). In the contribution proceedings held by the Workers' Compensation Appeals Board (Board) it was undisputed that State Fund would be liable for 72% of the settlement under

Labor Code section 5500.5 was originally enacted in 1951.⁵ It allowed an employee claiming benefits for an occupational disease to recover against any one of his successive employers whose employment contributed to the employee's disease.⁶ In 1973, section 5500.5 was amended⁷ and apportionment of liability was forbidden except where the "single employer exception" applied.⁸ Section 5500.5 was again amended in 1977, and the amendment provided for a stepped up reduction of the five year liability limitation.⁹ The 1977 amendment, applying to all cumulative injury and occupational disease claims filed on or after January 1, 1978, also repealed the "single employer exception."¹⁰

State Fund moved for dismissal of the City's contribution claim on the basis of the 1977 amendment. The City argued that the 1977 amendment, repealing the "single employer exception," abrogated State Fund's preexisting contractual obligation of contribution and therefore violated the state and federal contract clauses.¹¹ The Board granted State Fund's motion.¹²

Beginning with the substantive contract clause analysis, Chief Justice Bird noted that the contract clause does not completely

the provisions of § 5500.5 prior to the 1977 amendment. It was also undisputed that if the 1977 amendment was applied, the City would be solely liable for the settlement. 32 Cal. 3d at 376, 650 P.2d at 1164, 185 Cal. Rptr. at 647.

5. 1951 Cal. Stat. 4154.

6. 32 Cal. 3d at 374-75, 650 P.2d at 1163, 185 Cal. Rptr. at 646. This section also allowed the successive employers' insurance carriers to be held liable. Apportionment among the responsible employers and insurers was allowed but the burden of seeking apportionment was upon the employer or insurer held liable. *Id.* at 375, 650 P.2d at 1163, 185 Cal. Rptr. at 646. *See Flesher v. Workers' Comp. App. Bd.*, 23 Cal. 3d 322, 590 P.2d 35, 152 Cal. Rptr. 459 (1979); *Colonial Ins. Co. v. Indust. Accident Comm'n.*, 29 Cal. 2d 79, 172 P.2d 884 (1946).

7. 1973 Cal. Stat. 2032. Liability for occupational or cumulative injuries was limited to "those employers who employed the employee during a period of time immediately preceding either the date of injury . . . or the last date on which the employee was employed in an occupation exposing him to the hazard of such occupational disease or cumulative injury, whichever occurs first." *Id.*

8. The "single employer exception" provided that no apportionment to years earlier than the five year liability limit was allowed unless the employment exposing the employee to the hazard was for more than five years with the same employer. If the exception applied, liability could be extended to all of the employer's insurers who insured the compensation liability of the employer during the employee's exposure to such hazard. *See* 32 Cal. 3d at 375 & n.3, 650 P.2d at 1163 & n.3, 185 Cal. Rptr. at 646 & n.3.

9. 1977 Cal. Stat. 1334. *See supra* note 4.

10. 32 Cal. 3d at 375-76, 650 P.2d at 1163-64, 185 Cal. Rptr. at 646-47.

11. *Id.* at 376, 650 P.2d at 1164, 185 Cal. Rptr. at 647.

12. *Id.*

neutralize the states' power to impair contractual obligations.¹³ The contract clause does not provide for a per se rule of impairment, but rather, provides that a finding of impairment "is the beginning, not the end of the analysis."¹⁴ The constitutionality of the impairment will be examined only after contractual impairment itself has been established.¹⁵

In determining whether the 1977 repeal of the "single employer exception" impaired the obligations of the City's insurance contracts with State Fund,¹⁶ the court focused upon the precise obligation that State Fund assumed.¹⁷ The court rejected the City's argument that State Fund was obligated to pay benefits for the portion of cumulative injury covered during the period that its policy with the City was in effect.¹⁸ The court held that State Fund's only obligation was to pay what was required under the workers' compensation law.¹⁹

The crucial point, in Chief Justice Bird's opinion, was whether the contractual relationship between State Fund and the City was entered into with the intent to incorporate²⁰ subsequent changes in the law into the insurance agreement.²¹ The court held that the language of the insurance agreements²² between the City and State Fund clearly indicated that both parties intended to incorporate any subsequent changes in the law into their insurance

13. *Id.* at 377, 650 P.2d at 1164-65, 185 Cal. Rptr. at 647-48 (citing *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 241-42 (1978)). The recent use of the contract clause by the United States Supreme Court after a long period of dormancy has prompted numerous commentaries. See, e.g., Comment, *The Contract Clause: A Constitutional Basis for Invalidating State Legislation*, 12 *LOY. L.A.L. REV.* 927 (1979).

14. 32 Cal. 3d at 377, 650 P.2d at 1165, 185 Cal. Rptr. at 648.

15. *Id.*

16. "The obligations of a contract are impaired by a law which renders them invalid, or releases or extinguishes them. . . ." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 431 (1934) (citation and footnote omitted).

17. 32 Cal. 3d at 378, 650 P.2d at 1165, 185 Cal. Rptr. at 648.

18. *Id.* The City argued that the repeal of the "single employer exception" operated to impair State Fund's contractual obligation to pay pursuant to its insurance contract. *Id.*

19. *Id.* See CAL. INS. CODE §§ 11651, 11654 (West 1972).

20. Laws that are enacted subject to a contractual agreement do not become a part of that agreement "unless its language clearly indicates this to have been the intention of the parties." *Swenson v. File*, 3 Cal. 3d 389, 393, 475 P.2d 852, 854-55, 90 Cal. Rptr. 580, 582-83 (1970) (emphasis added). Laws that are in effect at the time the contract is made are deemed to be a part of the contract, whether or not the parties expressly incorporate them. *Id.* at 393, 475 P.2d at 854, 90 Cal. Rptr. at 582 (quoting *Alpha Beta Food Markets v. Retail Clerks Union*, 45 Cal. 2d 764, 771, 291 P.2d 433, 437 (1955)). *Accord* *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 429-30 (1934).

21. 32 Cal. 3d at 378, 650 P.2d at 1165, 185 Cal. Rptr. at 648.

22. The City conceded at oral argument that it was the intention of the parties to incorporate subsequent changes in the law into their insurance agreements. 32 Cal. 3d at 379, 650 P.2d at 1166, 185 Cal. Rptr. at 649.

agreements.²³ The court concluded that the 1977 repeal of the "single employer exception" did not impair State Fund's obligations because the City, anticipating subsequent incorporations, had no other legitimate contractual expectation.²⁴

In an extensive and thorough analysis, Justice Mosk dissented, stating that "we should observe stricter scrutiny because *the contractual impairment is severe and the state is attempting to modify its own obligations.*"²⁵ Justice Mosk further believed that because there was no legislative declaration of emergency,²⁶ or a reason to protect the best interest of the society with reasonable, temporary legislation,²⁷ the 1977 amendment was unconstitutional as an impairment of contractual obligations.²⁸

The majority opinion in *City of Torrance* appears to bypass a detailed contract clause analysis²⁹ in favor of focusing on the intention of the parties to incorporate subsequent changes in the law into their agreement.³⁰ In future cases, where such an intent is not apparent, it is likely that the court would be willing to balance the nature and purpose of the state legislation against the

23. *Id.*

24. *Id.* at 379-80, 650 P.2d at 1166, 185 Cal. Rptr. at 649. *But see* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (invalidation of Minnesota Private Pension Benefits Protection Act as an impairment of Allied's existing pension plan); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977) (invalidation of New York and New Jersey legislation which repealed previous covenant as an impairment of the states' contractual obligations).

25. 32 Cal. 3d at 386, 650 P.2d at 1170, 185 Cal. Rptr. at 653 (Mosk, J., dissenting) (emphasis in original). Basing his dissent upon *Blaisdell*, *Allied Structural Steel* and *United States Trust Co.*, Justice Mosk contended that stricter scrutiny was called for because in measuring the severity of the impairment, the element of reliance was a key ingredient, especially where pension and insurance funds are involved. Justice Mosk further believed that stricter scrutiny was called for because the state, as a direct beneficiary of the legislation through its relationship to State Fund, was attempting to modify its own obligations. *Id.* at 384-85, 650 P.2d at 1169-70, 185 Cal. Rptr. at 652-53.

26. "The first part of the *Blaisdell* test — a legislative declaration of emergency — is a 'threshold' hurdle that the state must overcome." *Id.* at 386, 650 P.2d at 1170, 185 Cal. Rptr. at 653. *See also* Sonoma County Org. of Pub. Employees v. County of Sonoma, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979) (salary limitation for public employees not justified in light of "fiscal crisis" created by passage of Proposition 13).

27. 32 Cal. 3d at 386-87, 650 P.2d at 1170-71, 185 Cal. Rptr. at 653-54 (Mosk, J., dissenting).

28. *Id.*

29. *See id.* at 380-87, 650 P.2d at 1166-71, 185 Cal. Rptr. at 649-54 (Mosk, J., dissenting).

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

severity of the impairment caused by the legislation.³¹

D. *Judicial Construction of an ordinance must be consistent with legislative intent at the time of enactment: Metromedia, Inc. v. City of San Diego.*

I. INTRODUCTION

The California Supreme Court, in *Metromedia, Inc. v. City of San Diego*,¹ was asked to determine whether an ordinance² which had been held unconstitutional by the United States Supreme Court³ could be saved by a limited judicial construction, or by severance of the unconstitutional provisions from the enactment. The court was required to determine the legislative intent behind the ordinance, and attempt to construe it within constitutional bounds consistent with the intent of the city council at the time of the enactment of the ordinance.

The *Metromedia* case arose when the San Diego City Council enacted an ordinance that required the removal of off-site advertising display signs within city limits, and banned the erection of such signs in the future.⁴ The parties previously appeared before

31. See *Sonoma County Org. of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979).

1. 32 Cal. 3d 180, 646 P.2d 902, 185 Cal. Rptr. 260 (1982). The opinion was written by Justice Broussard, with Chief Justice Bird and Justices Mosk, Richardson, and Newman concurring. A separate dissenting opinion was written by Justice Kaus with Justice Reynoso concurring.

2. San Diego, Cal., Ordinance 10,795 (March 14, 1972).

3. *Metromedia, Inc. v. San Diego*, 453 U.S. 490 (1980).

4. The general prohibition of the ordinance reads as follows:

B. OFF-PREMISE OUTDOOR ADVERTISING DISPLAY SIGNS PROHIBITED

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.

2. Any sign identifying a product which is not produced, sold, or manufactured on the premises.

3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

San Diego, Cal., Ordinance 10,795 § 101.0700(B) (March 14, 1972).

The following types of signs shall be exempt from the provisions of these regulations:

1. Any sign erected and maintained pursuant to and in discharge of

the California Supreme Court after appealing the superior court's summary judgment which held the ordinance invalid as an unconstitutional exercise of the city's police power, and an abridgment of free speech.⁵ The supreme court reversed the summary judgment invalidating the ordinance. The court held that the enactment did not exceed the city's police powers because the ordinance was reasonably related to a valid public goal.⁶ To be within the city's police power, the ordinance had to substantially relate to the health, safety, morals or general welfare of the public.⁷ The legislative purposes cited within the enactment, namely, eliminating traffic hazards by removing distractions and improving the aesthetics of the city,⁸ were found to be proper objectives

any governmental function or required by any law, ordinance or governmental regulation.

2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.

3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.

4. Commemorative plaques of recognized historical societies and organizations.

5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.

6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.

7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.

8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.

9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.

10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.

11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.

12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain.

San Diego, Cal., Ordinance 10,795 § 101.0700(F) (March 14, 1972).

5. *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 855, 610 P.2d 407, 409, 164 Cal. Rptr. 510, 512 (1980).

6. *Id.* at 858, 610 P.2d at 411, 164 Cal. Rptr. at 514.

7. *Id.* at 858 n.5, 610 P.2d at 411 n.5, 164 Cal. Rptr. at 514 n.5.

8. The purposes of the ordinance are stated as follows:

of the city.⁹

Relying on certain United States Supreme Court dismissals of similar challenges to the constitutionality of a ban on advertising display signs,¹⁰ the California Supreme Court concluded that the prohibition of off-site advertising did not violate the first amendment of the United States Constitution.¹¹ Moreover, the court found that the enactment, as a whole, imposed valid time, place, and manner restrictions on the medium of billboards because: 1) the enactment did not regulate based on the content of the message but merely the mode in which the message was communicated; 2) the regulation served an important governmental interest by promoting traffic safety and the appearance of the community; and, 3) the restriction did not foreclose alternative modes of communication by which the information could be displayed.¹²

The United States Supreme Court promptly reversed the Cali-

It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare.

San Diego, Cal., Ordinance 10,795 § 101.0700(A) (March 14, 1972).

9. 26 Cal. 3d at 865, 610 P.2d at 416, 164 Cal. Rptr. at 519.

10. *Lotze v. Washington*, 444 U.S. 921 (1979) (challenge to ordinance prohibiting noncommercial billboards where commercial billboards would be allowed dismissed on first amendment grounds as not presenting substantial federal question); *Newman Signs, Inc. v. Hjelle*, 440 U.S. 901 (1979) (restrictions on billboards on certain designated roadways upheld by summary disposition of Supreme Court); *Suffold Outdoor Advertising Co. v. Hulse*, 439 U.S. 808 (1978) (municipal ordinance prohibiting offsite but permitting onsite billboard advertising dismissed as not presenting a substantial federal question).

11. *Id.* at 867, 610 P.2d at 417, 164 Cal. Rptr. at 520.

12. *Id.* at 868-69, 610 P.2d at 418, 164 Cal. Rptr. at 521. The Supreme Court, addressing the California Supreme Court's reliance on the dismissals, stated:

Insofar as our holdings were pertinent, the California Supreme Court was quite right in relying on our summary decisions as authority for sustaining the San Diego ordinance against First Amendment attack. As we have pointed out, however, summary actions do not have the same authority in this Court as do decisions rendered after plenary consideration. They do not present the same justification for declining to reconsider a prior decision as do decisions rendered after argument and with full opinion. "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action. . . ."

453 U.S. at 500 (citations omitted).

ifornia court's decision.¹³ While agreeing that the city had a substantial interest in the proclaimed goals and that the noncommunicative aspects of the ordinance did not impinge on the first amendment guarantees so far as it regulated commercial speech,¹⁴ the Court stated that by banning all noncommercial speech, the ordinance effectively inverted the judgments of cases which accord noncommercial speech a greater degree of protection than commercial speech.¹⁵

Justice White's plurality opinion concluded that the ordinance as written was unconstitutional because it precluded noncommercial messages where commercial messages were permitted, without explaining how noncommercial messages would detract more from driver's safety or aesthetic beauty of the city.¹⁶ The ordinance also was found to be an improper time, place, and manner restriction because its exceptions for on-site commercial advertising were inherently based on the content of the message.¹⁷ The promulgation of specific exceptions to the ban on noncommercial messages aided the Court in its decision. Justice White stated: "With respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse: 'To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth.'"¹⁸

In light of the United States Supreme Court's ruling, the City of San Diego enacted an interim ordinance which, rather than prohibiting, merely placed limits on off-site advertising displays.¹⁹ On remand, the California Supreme Court was required to determine if the ordinance could be saved by limiting the reach of the ordinance to commercial messages.²⁰ However, after attempting to limit the ordinance by judicial construction and severance, the

13. 453 U.S. 490 (1980).

14. *Id.* at 507-12.

15. *Id.* at 513. The Court stated that although recent cases allowed commercial speech a substantial degree of first amendment protection, those decisions did not equate commercial speech and noncommercial speech. *Id.* at 505.

16. *Id.* at 512-13.

17. *Id.* at 515-17. See *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) (holding regulations based on content to be invalid time, place, and manner restriction).

18. 453 U.S. at 515 (quoting *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 538 (1980)).

19. San Diego, Cal., Ordinance 15,551 (March 14, 1972).

20. 453 U.S. at 521-22 n.26.

court was unable to provide an interpretation of the ordinance consistent with the city council's intent at the time of the enactment.²¹

II. CASE ANALYSIS

The fundamental problem with the San Diego ordinance was that it reached "too far into the realm of protected speech."²² By construing the ordinance so as not to prohibit noncommercial messages where commercial messages were allowed, the court attempted to bring the ordinance within the bounds of constitutionality.

A function of the courts is to interpret statutes.²³ While a statute should be construed, if at all possible, to preserve its constitutionality,²⁴ the court must first determine and give effect to the intent of the legislature in enacting the statute.²⁵ The court does not have the right to emasculate a statute's application under the guise of judicial interpretation for the purpose of giving effect to the statute.²⁶ In light of these legal maxims, the court assumed its task.

The San Diego ordinance specifically permitted signs if the sign either designated the name of the owner or occupant of the premises, identified the premises, or advertised the services rendered on the premises.²⁷ Additionally, messages for specified purposes were exempted from the ordinance.²⁸ The ordinance also contained specific prohibitions, of which the most relevant to the Supreme Court's ruling precluded: "3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business . . . which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located."²⁹

In order to prevent the unconstitutional implications of the statute, the court was presented with two possible constructions. First, the court could construe the prohibition of signs and outdoor advertising displays as limited to only those bearing a com-

21. 32 Cal. 3d at 182-83, 649 P.2d at 903, 185 Cal. Rptr. at 261.

22. 453 U.S. at 521.

23. See *Pacific Legal Found. v. California Unemployment Ins. App. Bd.*, 29 Cal. 3d 101, 624 P.2d 244, 172 Cal. Rptr. 194 (1981).

24. 32 Cal. 3d at 186, 649 P.2d at 906, 185 Cal. Rptr. at 264.

25. *Id.* at 187, 649 P.2d at 906, 185 Cal. Rptr. at 264.

26. *Id.*

27. San Diego, Cal., Ordinance 10,795 § 101.0700(B) (March 14, 1972). See *supra* note 4 for text.

28. San Diego, Cal., Ordinance 10,795 § 101.0700(F) (March 14, 1972). See *supra* note 4 for text.

29. San Diego, Cal., Ordinance 10,795 § 101.0700(B)(3) (March 14, 1972).

mercial message. This construction would remove the discriminatory effect of banning noncommercial billboards. Second, the court could sever the prohibition on noncommercial speech by eliminating the words "activity, event, person, [and] institution" from the specific prohibitions of the ordinance in section three with the result of only prohibiting off-site commercial advertising displays.³⁰

The limiting factor in judicial interpretation of a statute to bring it within the bounds of constitutionality requires that the interpretation be in accord with legislative intent.³¹ The issue presented in this case, therefore, was whether the limiting constructions placed on the statute were consistent with the city council's intent.

In light of this limitation, the court attempted to reconcile the proposed limitations with the ascertained legislative intent. While construing the wording of the ordinance prohibiting signs and outdoor advertising displays as applicable only to commercial signs would make the ordinance constitutionally viable, the court determined that such a construction was not consistent with the legislative intent.³² The intent gleaned from the ordinance was that the ban was not based on the display, but on the structure itself.³³ To determine this intent, the court examined the wording of the statute focusing on the term "outdoor advertising display signs."³⁴ Established rules of statutory interpretation require that words be construed "according to the usual, ordinary import of the language employed in framing them."³⁵ The court took note that an outdoor advertising display is defined in the Revenue and Taxation Code as "[a] rigidly assembled sign, display, or device . . . used for the display of a commercial or other advertisement to the public."³⁶ The court recognized that "advertising," in its

30. 32 Cal. 3d at 185-86, 649 P.2d at 905, 185 Cal. Rptr. at 263. The ordinance in question contains a severability clause which would normally call for the severance of any invalid part of the ordinance if mechanically possible and the remainder of the ordinance is consistent with legislative intent. *Id.* at 190, 649 P.2d at 908, 185 Cal. Rptr. at 266.

31. *Id.* at 187, 649 P.2d at 906, 185 Cal. Rptr. at 264.

32. *Id.* at 185, 649 P.2d at 905, 185 Cal. Rptr. at 263.

33. *Id.* at 187, 649 P.2d at 906, 185 Cal. Rptr. at 264.

34. *Id.* at 186, 649 P.2d at 906, 185 Cal. Rptr. at 264.

35. *Id.* at 188, 649 P.2d at 907, 185 Cal. Rptr. at 265 (quoting *In re Alpine*, 203 Cal. 731, 737, 265 P. 947 (1928)).

36. *Id.* at 188, 649 P.2d at 907, 185 Cal. Rptr. at 265 (quoting CAL. REV. & TAX CODE § 18090.2 (West Supp. 1982)).

common usage, takes into account not only commercial but also noncommercial messages.³⁷ The court also viewed the exemptions of specific types of noncommercial messages as further evidence of legislative intent that all nonexempt types of noncommercial messages should be subject to the ordinance.³⁸ Therefore, the court deemed that in order to interpret the ordinance to bring it within the bounds of constitutionality, it would be required to allow billboards carrying any noncommercial messages contrary to the city council's stated intent.³⁹

The same analysis was applied to the alternative of severing the unconstitutional provisions of the ordinance. Although severance was mechanically feasible, the court held that the resulting ordinance would be unmanageable and not indicative of the city's intent.⁴⁰ In essence, any judicial construction would not necessarily serve the city's goal of removing the advertising display structures.

The court suggested that a regulation based on location, size, and appearance of the structure would qualify as a valid time, place and manner restriction and could possibly serve the intent of the city by limiting the number of structures in the city.⁴¹ This alternative type of regulation was specifically the type that the city enacted as an interim ordinance during the foregoing litigation.⁴² Although the court took only cursory notice of the interim ordinance, a dissenting opinion filed by Justice Kaus relied on the ordinance as an indicia of legislative intent.⁴³

The interim ordinance provided that if the original ordinance was " 'held valid and constitutional in whole or in part the provisions of [the original ordinance] shall prevail.' " ⁴⁴ This ordinance was apparently enacted as a stopgap measure in the event that the judicial limitations placed on the original ordinance would render it ineffective in attaining the city's goal in limiting off-site advertising displays.

The essence of the dissenting opinion is that by refusing to adopt a limiting construction to bring the original ordinance

37. 32 Cal. 3d at 188, 649 P.2d at 907, 185 Cal. Rptr. at 265 (citing WEBSTER'S NEW INT'L DICTIONARY 31 (3d ed. 1961)).

38. 32 Cal. 3d at 188-89, 649 P.2d at 907, 185 Cal. Rptr. at 265; *see supra* note 4 for list of exemptions.

39. 32 Cal. 3d at 189, 649 P.2d at 907, 185 Cal. Rptr. at 265.

40. *Id.* at 190, 649 P.2d at 908, 185 Cal. Rptr. at 266.

41. *Id.* at 191, 649 P.2d at 908-09, 185 Cal. Rptr. at 266-67.

42. *Id.* at 182 n.2, 649 P.2d at 903 n.2, 185 Cal. Rptr. at 261 n.2. San Diego, Cal., Ordinance 15,551 (March 14, 1972), regulated offsite advertising displays but did not totally prohibit such signs.

43. 32 Cal. 3d at 191, 649 P.2d at 909, 185 Cal. Rptr. at 267 (Kaus, J., dissenting).

44. 32 Cal. 3d at 182 n.2, 649 P.2d at 903 n.2, 185 Cal. Rptr. at 261 n.2 (quoting San Diego, Cal., Ordinance 15,551 (March 14, 1972)).

within the bounds of constitutionality, the majority is sidestepping the intent of the city, to have the original ordinance effective even if only in part, as reflected in the interim ordinance. Justice Kaus proffered a number of examples where the court undertook "precisely this kind of constitutionally compelled editing and interpreting in order to uphold a legislative scheme insofar as it is constitutionally permissible."⁴⁵ A specific principle applicable when a legislature amends a statute that has been the subject of judicial construction is that the legislature is presumed to have been fully cognizant of that construction and the lawmakers intended to alter the law in the particulars affected by such changes.⁴⁶ The dissent concludes that the majority, in relying on its own evaluation of the effectiveness between a judicially limited construction of the original ordinance and an alternative time, place, and manner regulation interjects its own policy judgment that is proper for the city to decide.⁴⁷

III. CONCLUSION

The final word in *Metromedia, Inc. v. City of San Diego* appears to be that a regulation of advertising display signs which allows commercial messages to be displayed in some instances and non-commercial messages to be displayed in others will be invalidated by the court. This type of ordinance would require the city to regulate on the content of the message based on the distinction between commercial and noncommercial speech which raises the issues of governmental discretion over what may be displayed.⁴⁸ The most reasonable alternative is that suggested by the California Supreme Court⁴⁹ and the interim ordinance⁵⁰ of a reasonable

45. 32 Cal. 3d at 192-94, 649 P.2d at 909-11, 185 Cal. Rptr. at 267-69. See *Pryor v. Municipal Court*, 25 Cal. 3d 238, 599 P.2d 636, 158 Cal. Rptr. 330 (1979) (narrowly construing statute determined unconstitutionally vague to make it constitutional); *In re Edgar M.*, 14 Cal. 3d 727, 537 P.2d 406, 122 Cal. Rptr. 574 (1975) (construing statute to eliminate invalid application while preserving that which does not violate constitutional provisions); *In re Kay*, 1 Cal. 3d 930, 464 P.2d 142, 83 Cal. Rptr. 686 (1970) (adding limiting test to overbroad statute).

46. See *Palos Verdes Faculty Ass'n v. Palos Verdes Peninsula Unified School Dist.*, 21 Cal. 3d 650, 659, 580 P.2d 1155, 1159, 147 Cal. Rptr. 359, 363 (1978).

47. 32 Cal. 3d at 195, 649 P.2d at 911-12, 185 Cal. Rptr. at 269-70.

48. See *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 536-40 (1980) (Brennan, J., concurring).

49. 32 Cal. 3d at 191, 649 P.2d at 908-09, 185 Cal. Rptr. at 266-67.

50. San Diego, Cal., Ordinance 15,551 (March 14, 1972).

time, place, and manner regulation applied against all outdoor advertising displays.

E. *County ordinance prohibiting nude entertainment in establishments that do not serve alcoholic beverages held to be overbroad: Morris v. Municipal Court.*

In *Morris v. Municipal Court*,¹ the California Supreme Court struck down a county ordinance² which prohibited nude entertainment on the grounds that the ordinance was overbroad³ and, as such, infringed upon freedom of expression protected by the United States⁴ and California Constitutions.⁵ The court, in overruling *Crownover v. Musick*,⁶ concluded that “[a] ban on nude dancing cannot be sustained on the theory that it regulates only conduct and does not impinge upon protected speech.”⁷

In establishing why this area of communication is protected by

1. 32 Cal. 3d 553, 652 P.2d 51, 186 Cal. Rptr. 494 (1982).

2. Santa Clara Ordinance No. B13-14(a)(3) provided:

Every person . . . who acts as a waiter, waitress or entertainer in any establishment which serves food, beverages, or food and beverages, including, but not limited to alcoholic beverages . . . or . . . participat[es] in any live act, demonstration or exhibition in any public place, place open to the public or place open to public view, and who performs such activity in the nude . . . is guilty of a misdemeanor.

Id. (emphasis supplied). The ordinance specifically exempted performances in theaters, concert halls, and similar establishments. This section of the ordinance was also attacked as being unconstitutionally vague. However, the California Supreme Court found it unnecessary to reach that issue since the ordinance was unconstitutionally overbroad on other grounds. 32 Cal. 3d at 557 & n.2, 652 P.2d at 52 & n.2, 186 Cal. Rptr. at 495 & n.2.

3. The Supreme Court in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 933 (1975) stated:

[E]ven though a statute or ordinance may be constitutionally applied to the activities of a particular defendant, that defendant may challenge it on the basis of overbreadth if it is so drawn as to sweep within its ambit protected speech or expression of other persons not before the Court.

Id. In this respect, the California Supreme Court noted that the specific conduct of the petitioner was not in issue and did not establish the perimeter of the inquiry. *Accord* *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972).

4. U.S. CONST. amend. I.

5. CAL. CONST. art. I, §§ 2, 3.

6. 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973).

7. 32 Cal. 3d at 564, 652 P.2d at 57, 186 Cal. Rptr. at 500. The petitioner, Debra Jean Morris, was arrested for having exposed her buttocks in violation of the county ordinance. The municipal court originally sustained Morris' demurrer without leave to amend on the grounds that the ordinance was unconstitutionally vague. Subsequently, the Superior Court of Santa Clara County, relying on *Crownover*, directed the municipal court to vacate its order. The court of appeal affirmed the action and the California Supreme Court denied a hearing. Morris then filed a notice of appeal to the United States Supreme Court which was dismissed for want of jurisdiction. Morris initiated the present petition seeking a writ of prohibition directed to the municipal court, barring her prosecution. 32 Cal. 3d at 556, 652 P.2d at 51-52, 186 Cal. Rptr. at 494-95.

the first amendment and thus, why the ordinance was presumptively overbroad, the court began by analyzing the *Crownover*⁸ decision and the evolution of the law since that time. The *Crownover* court not only concluded that the disputed ordinance regulated conduct *exclusively*,⁹ it also contended that even if the conduct was comprised of some communicative element, the regulations were constitutional, under the rationale of *United States v. O'Brien*,¹⁰ as furthering the substantial governmental interest of promoting public morals.¹¹

8. The factual situation in *Crownover* is strikingly similar to the facts in the present case. In *Crownover*, the plaintiffs were employees of an establishment which served food and alcoholic beverages and featured nude entertainment. They were arrested pursuant to Orange County Ordinance No. 2356, which made it a misdemeanor for an individual to appear nude "while participating in any live act, demonstration or exhibition in any public place, place open to the public, or place open to public view." The ordinance under review in *Crownover*, like the Santa Clara ordinance, exempted "theatre, concert hall, or similar establishment[s] which [are] primarily devoted to theatrical performances." *Crownover v. Musick*, 9 Cal. 3d 405, 410-12, 509 P.2d 497, 499-501, 107 Cal. Rptr. 681, 683-83 (1973) (quoting Orange County Ordinance No. 2356).

Both ordinances were also adopted pursuant to CAL. PENAL CODE §§ 318.5, 318.6 (West 1970). However, "[t]hese statutes perform no active role in the adoption of the designated kind of ordinance: they merely permit cities and counties to adopt such an ordinance if they so desire." *Crownover v. Musick*, 9 Cal. 3d at 416, 509 P.2d at 416, 107 Cal. Rptr. at 688 (cited in *Morris v. Municipal Court*, 32 Cal. 3d at 557-58, 652 P.2d at 52-53, 186 Cal. Rptr. at 495-96).

9. The *Crownover* court noted:

It is clear that these provisions of the ordinances are directed at conduct - topless and bottomless exposure - and not at speech or at conduct which is "in essence" speech or "closely akin to speech". . . . They do not prohibit entertainment but merely enjoin that if the entertainer or performer offers it, he or she must have some clothes on. In a word the ordinances regulate conduct.

9 Cal. 3d at 425, 509 P.2d at 510, 107 Cal. Rptr. at 694.

10. 391 U.S. 367 (1968). Justice Tobriner, dissenting in *Crownover*, noted the distinction between the nudity being regulated in that case and the burning of draft cards in *O'Brien*. "*O'Brien* involved a law which prohibited burning of draft cards wherever that conduct occurred, and which did not on its face aim at regulation of protected speech; the ordinances at bar proscribe nudity only when it occurs in the context of protected communicative entertainment." 9 Cal. 3d at 439, 509 P.2d at 520, 107 Cal. Rptr. at 704 (Tobriner, J., dissenting) (cited with approval in *Morris v. Municipal Court*, 32 Cal. 3d at 559-60, 652 P.2d at 54, 186 Cal. Rptr. at 497).

11. Justice Tobriner, dissenting in *Crownover*, mentions that simply because the majority of voters conclude that certain behavior is immoral does not, *ipso facto*, denote that the behavior is immoral or that its regulation furthers an important governmental interest. 9 Cal. 3d at 442-43, 509 P.2d at 522-23, 107 Cal. Rptr. at 706-07 (Tobriner, J., dissenting). The majority in *Morris* recognized that "[t]ime has proven [Justice Tobriner] correct." 32 Cal. 3d at 559 n.5, 652 P.2d at 54 n.5, 186 Cal. Rptr. at 497 n.5. See *infra* note 27.

While the *Crownover* case was pending before the California Supreme Court, the United States Supreme Court upheld regulations on nude entertainment promulgated by the California Alcoholic Beverages Control Board.¹² The majority in *Crownover* erroneously determined that the constitutional protection mandated by *La Rue*¹³ extended only to motion pictures and theatrical productions.¹⁴ Cases decided subsequent to *Crownover* demonstrate the significance of the distinction between establishments which serve alcohol and those which do not. These cases also demonstrate that nudity in dance can contain expression which is protected by the first amendment and that public opposition to such entertainment may not satisfy the substantial state interest criteria of *O'Brien*.¹⁵

In *Doran v. Salem Inn, Inc.*,¹⁶ the United States Supreme Court struck down a similar ordinance, not only because nude dancing involves protected expression, but because the ordinance was too broad to be considered a constitutional regulation of the sale of liquor¹⁷ under the twenty-first amendment.¹⁸ The Ninth Circuit in *Chase v. Davelaar*¹⁹ similarly struck down an ordinance comparable to the one at issue in *Morris*, noting that if the ordinance had "applied only to establishments [which sold] alcoholic beverages it would apparently have been constitutional"²⁰ Finally, the *Morris* court analyzed *New York State Liquor Authority v. Bellanca*²¹ where the United States Supreme Court, distinguishing *Doran*, concluded that if the nude entertainment is regulated within the strictures of the twenty-first amendment, then the constitutional prerequisites are fulfilled.²²

12. *California v. LaRue*, 409 U.S. 109 (1972). The court noted that "the critical fact is that California has not forbidden these performances across the board. It has merely proscribed such performances in establishments that it licenses to sell liquor by the drink." *Id.* at 118.

13. *See supra* note 12.

14. 32 Cal. 3d at 560, 652 P.2d at 54-55, 186 Cal. Rptr. at 497-98 (citing *Crownover v. Musick*, 9 Cal. 3d at 428 n.15, 509 P.2d at 512 n.15, 107 Cal. Rptr. at 696 n.15 (1973)).

15. 32 Cal. 3d at 560, 652 P.2d at 55, 186 Cal. Rptr. at 498.

16. 422 U.S. 922 (1975).

17. *Id.* at 932-33. The Court points out in *Doran* that in *La Rue*, "the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing. . . ." The downfall of the ordinance, however, was that it applied to establishments other than those which sold liquor. *Id.* *See also* Comment, *Topless Dancing and the Constitution: a New York Town's Experience*, 25 BUFFALO L. REV. 753 (1976).

18. U.S. CONST. amend. XXI.

19. 645 F.2d 735 (9th Cir. 1981).

20. *Id.* at 738, cited with approval in *Morris v. Municipal Court*, 32 Cal. 3d at 562, 652 P.2d at 56, 186 Cal. Rptr. at 499.

21. 452 U.S. 714 (1981).

22. *Id.* The California Supreme Court noted that in *Bellanca* "[t]he court's explicit reliance on the Twenty-first Amendment confirms the holding of earlier

The conclusion seems inescapable that not only does nude dancing enjoy some protection as a form of expression,²³ but also that an ordinance which establishes restraints on such forms of expression is presumptively overbroad and cannot extend beyond establishments serving alcohol.²⁴ The California Supreme Court observed, however, that merely because the ordinance affects a protected liberty does not conclusively require that it be invalidated.²⁵ Rather, if it is "narrowly drawn," furthers a "substantial governmental interest," and less intrusive means are not available by which the governmental interest can be served,²⁶ then the ordinance may still be sustained.

The county argued that the promotion of public morals was adequate to satisfy the substantial state interest requirement. The court, in rejecting this contention, noted that "the belief of a majority of the community that nude dancing is immoral is not in itself a sufficiently substantial state interest to justify a total prohibition of that form of entertainment in establishments which do not serve alcohol."²⁷

Finally, the very language of the statute²⁸ demonstrates that the ordinance affects establishments which do not serve alcohol. As

cases [sic] that a prohibition on nude dancing which extends beyond the reach of the Twenty-first Amendment to encompass establishments which do not serve liquor is overbroad." 32 Cal. 3d at 563, 652 P.2d at 57, 186 Cal. Rptr. at 500.

23. 32 Cal. 3d at 564, 652 P.2d at 57-58, 186 Cal. Rptr. at 500-01. *See also* *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975).

24. Even though the nude dancing establishment at which Morris was employed served alcohol, the petitioner still has standing to attack, on overbreadth grounds, an ordinance which bans nude dancing in establishments that do not serve alcohol. *See* *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 634 (1980). *See supra* note 3.

The court in *Morris* recognized that this conclusion not only discredits *Crown-over* but also several appellate court decisions: *People v. Conway*, 103 Cal. App. 3d Supp. 7, 162 Cal. Rptr. 877 (1979); *Theresa Enterprises, Inc. v. Davis*, 81 Cal. App. 3d 940, 146 Cal. Rptr. 802 (1978); *Renba Lil v. Kortz*, 65 Cal. App. 3d 467, 135 Cal. Rptr. 287 (1976). *See* 32 Cal. 3d at 564-65 & n.13, 652 P.2d at 58 & n.13, 186 Cal. Rptr. at 501 & n.13.

25. 32 Cal. 3d at 565 & n.14, 652 P.2d at 58 & n.14, 186 Cal. Rptr. at 501 & n.14.

26. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68-70 (1981).

27. 32 Cal. 3d at 566-67, 652 P.2d at 59, 186 Cal. Rptr. at 502. *See also* *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975) (United States Supreme Court rejected the argument that public morals alone may justify a prohibition on outdoor movies depicting nudity).

The court found the argument advanced by the county, that the ordinance was a means of protecting the health of its citizens, equally unpersuasive. 32 Cal. 3d at 567-68, 652 P.2d at 60, 186 Cal. Rptr. at 503.

28. *See supra* note 2.

such, the ordinance cannot be upheld as a valid exercise of the state's power to regulate the sale of liquor under the twenty-first amendment and the *Doran*,²⁹ *Chase*,³⁰ and *Bellanca*³¹ line of cases.³²

Justice Richardson, in a dissenting opinion, maintained that the rationale of *Crownover* is as valid today as it was in 1973.³³ Justice Richardson would uphold the constitutionality of the ordinance under the *O'Brien* test³⁴ and merely quoted the *Crownover* opinion as being totally applicable to the present case.³⁵ He also contended that since the present ordinance is more narrow in its application than was the ordinance which was invalidated in *Erznoznik v. City of Jacksonville*,³⁶ the court's reliance on *Erznoznik* was unfounded.³⁷ He also maintained, at least impliedly, that nude dancing is not a form of expression and thus is not afforded constitutional protection.³⁸

29. See *supra* notes 16-17 and accompanying text.

30. See *supra* notes 19-20 and accompanying text.

31. See *supra* notes 21-22 and accompanying text.

32. Justice Newman wrote a concurring opinion. However, he would invalidate the ordinance based solely on the CAL. CONST., art. I, § 2(a).

He also expressed concern that the majority opinion would be read so broadly as to protect obscene entertainment. He therefore found it necessary to reestablish the California guidelines regarding obscenity. These include:

(1) "expert testimony should be introduced to establish [contemporary] community standards" . . . ; (2) "the relevant 'community' is the entire State of California" . . . ; and (3) "the prosecution must [also] introduce evidence that, applying contemporary community standards, the questioned dance appealed to the prurient interest of the audience and affronted the standards of decency accepted in the community. . . ."

Morris v. Municipal Court, 32 Cal. 3d at 569-70, 652 P.2d at 61, 186 Cal. Rptr. at 504 (citations omitted) (Newman, J., concurring) (quoting *In re Giannini*, 69 Cal. 2d 563, 574, 577, 567, 446 P.2d 535, 543, 545, 538, 72 Cal. Rptr. 655, 663, 665, 658 (1968)).

33. 32 Cal. 3d at 579, 652 P.2d at 67, 186 Cal. Rptr. at 510 (Richardson, J., dissenting).

34. See *supra* note 10 and accompanying text.

35. 32 Cal. 3d at 571-72, 652 P.2d at 62-63, 186 Cal. Rptr. at 505-06 (Richardson, J., dissenting).

36. 422 U.S. 205 (1975).

37. Justice Richardson maintained that since the Santa Clara ordinance exempts "theatres, concert halls or similar establishments, the ordinance in *Erznoznik*, which prohibited all films containing nudity, is inapposite." 32 Cal. 3d at 573, 652 P.2d at 63-64. 186 Cal. Rptr. at 506-07 (Richardson, J., dissenting).

This analysis is faulty in the respect that it misses the issue. The issue does not concern which establishments the ordinance exempts, but the overbreadth argument concerns the fact that the ordinance *includes* establishments which it cannot constitutionally include. See *supra* notes 2, 12, 21.

38. 32 Cal. 3d at 575, 652 P.2d at 65, 186 Cal. Rptr. at 508 (Richardson, J., dissenting).

VI. CRIMINAL LAW

A. *Mistake regarding legal status as a felon does not constitute a defense to a firearm possession charge: People v. Snyder*

The California Supreme Court, in *People v. Snyder*,¹ addressed the issue of whether a conviction for possession of a concealable firearm pursuant to California Penal Code section 12021² requires knowledge of one's legal status as a convicted felon.³ Appellant Snyder was convicted for possession of a concealable firearm by a convicted felon⁴ and contended that the trial court erred in refusing to admit the testimony concerning her mistaken belief that her prior conviction was merely a misdemeanor.⁵ The court also rejected proposed instructions which would have required knowledge of a prior felony conviction as an element of the offense.⁶

The court recognized that only two elements must be established to support a conviction under section 12021:⁷ first, conviction of a felony⁸ and second, ownership, possession, custody, or

1. 32 Cal. 3d 590, 652 P.2d 42, 186 Cal. Rptr. 485 (1982). Justice Richardson wrote the majority opinion with Chief Justice Bird and Justices Mosk and Kaus concurring. Justice Broussard wrote a dissenting opinion in which Justices Newman and Reynoso concurred.

2. CAL. PENAL CODE § 12021(a) (West 1982), provides in pertinent part: "(a) Any person who has been convicted of a felony . . . who owns or has in his possession or under his custody or control any pistol, revolver, or other firearm capable of being concealed upon the person is guilty of a public offense. . . ." *Id.*

3. A felony is a crime which is punishable "with death or by imprisonment in the state prison." CAL. PENAL CODE § 17(a) (West 1970).

4. Appellant and her husband were convicted in 1973 for sale of marijuana, a felony as a matter of law, under former CAL. HEALTH & SAFETY CODE § 11531 (West 1975) (repealed 1972, now CAL. HEALTH & SAFETY CODE § 11360 (West Supp. 1982)).

5. Appellant sought to testify that the following factors led to her mistaken belief: her prior conviction had resulted in no jail or prison sentence; her attorney had assured her during plea bargaining proceedings that she was pleading guilty to a misdemeanor; believing she was not a felon, she had registered to vote and had voted; and, that on a prior occasion, although police officers found a pistol in her home, no charges were filed against either her or her husband (the gun being registered in his name) who had also been convicted in 1973 of the same offense. 32 Cal. 3d at 596, 652 P.2d at 46, 186 Cal. Rptr. at 489 (Broussard, J., dissenting).

6. The specific instructions which the court refused to accept were CALJIC Nos. 1.21 ("Knowingly" — Defined); 3.31.5 (Concurrence of Act and Mental State); 4.35 (Ignorance or Mistake of Fact) (4th ed. 1979); 32 Cal. 3d at 596, 652 P.2d at 46, 186 Cal. Rptr. at 489 (Broussard, J., dissenting).

7. 32 Cal. 3d at 592, 652 P.2d at 43-44, 186 Cal. Rptr. at 486-87 (citing *People v. Bray*, 52 Cal. App. 3d 494, 497, 124 Cal. Rptr. 913 (1975); *People v. Neese*, 272 Cal. App. 2d 235, 245, 77 Cal. Rptr. 314 (1969); *People v. Nieto*, 247 Cal. App. 2d 364, 368, 55 Cal. Rptr. 546 (1966)).

8. Whether a defendant's misconception regarding his legal status as a felon

control of a firearm capable of being concealed on the person.⁹ Furthermore, while Penal Code section 26¹⁰ establishes that a person is incapable of committing an offense when he or she acted under "ignorance or mistake of fact,"¹¹ the former element of the present offense concerned a matter of law and as such required no specific knowledge on the part of the defendant as to her legal status.¹²

California has long recognized the legal maxim that ignorance of the law does not constitute a defense.¹³ In this respect the court contended that not only was the appellant presumed to know that a convicted felon cannot possess a concealable firearm, she was also "charged with [the] knowledge that the offense of which she was convicted (former Health & Safety Code, § 11531) was, *as a matter of law*, a felony."¹⁴

The appellant had primarily relied upon *People v. Bray*¹⁵ for the proposition that a defendant who is unaware that a prior conviction was of felony status lacks the requisite knowledge of the facts necessary for a conviction under section 12021.¹⁶ The court, however, distinguished *Bray* because of its unusual circumstances¹⁷ and appellant Snyder's failure to confirm or seek in-

is a mistake of fact or a mistake of law is specifically directed toward this element of the offense. 32 Cal. 3d at 592, 652 P.2d at 44, 186 Cal. Rptr. at 487.

9. With respect to this element of the offense, possession has been held to include the additional element of knowledge. See *People v. Burch*, 196 Cal. App. 2d 754, 771, 17 Cal. Rptr. 102, 112 (1961); *People v. Gonzales*, 72 Cal. App. 626, 630, 237 P. 812, 814 (1925).

10. CAL. PENAL CODE § 26 (West Supp. 1982), provides in pertinent part: "[a]ll persons are capable of committing crimes except those belonging to the following classes: . . . Three — Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent." *Id.*

11. *Id.*

12. 32 Cal. 3d at 593, 652 P.2d at 44, 186 Cal. Rptr. at 487.

13. See *People v. O'Brien*, 96 Cal. 171, 176, 31 P. 45, 46-47 (1892); see also *Brown v. State Dep't of Health*, 86 Cal. App. 3d 548, 554, 150 Cal. Rptr. 344, 347 (1978) and cases cited therein.

14. 32 Cal. 3d at 593, 652 P.2d at 44, 186 Cal. Rptr. at 487 (emphasis in original).

15. 52 Cal. App. 3d 494, 124 Cal. Rptr. 913 (1975).

16. *Id.* at 499, 124 Cal. Rptr. at 916-17. The appellate court in *Bray* found that it was reversible error for the trial court not to give two jury instructions which appellant Snyder in the present case had also requested. See CALJIC Nos. 1.21; 4.35 (4th ed. 1979). See also *supra* note 6.

17. The appellate court in *Bray* succinctly pointed out that:

[t]his decision should not be interpreted to mean instructions on mistake or ignorance of fact and knowledge of the facts are required every time a defendant claims he did not know he was a felon. Here Bray had been convicted in Kansas of what for California is an unusual crime, "accessory after the fact" and even the prosecutor claimed difficulty in knowing whether it was a felony. In addition, Bray on more than one occasion had been led to believe by state regulatory agencies he was not a felon: he was allowed to vote, he was registered in an occupation allowing him to carry a gun, and he was allowed to buy and register the gun.

struction from governmental officials regarding her legal status.¹⁸

Justice Broussard, writing in dissent,¹⁹ charged the majority with adopting a "strict liability rule"²⁰ which failed to reconcile section 12021 with other Penal Code sections²¹ and the general mens rea requirement that establishes culpability. He felt that California Penal Code section 20,²² requiring a simultaneous union of act and intent, should be addressed to both elements of the proscribed act, particularly in the absence of legislative intent or policy to the contrary.²³ If one accepts this postulate as a correct statement of the law, it becomes axiomatic that a mistaken impression as to one's legal status may negate any criminal intent.²⁴ The dissent further maintained that where a defendant

52 Cal. App. 3d at 499, 124 Cal. Rptr. at 917.

18. 32 Cal. 3d at 595, 652 P.2d at 45, 186 Cal. Rptr. at 488. The court also noted that the *Snyder* opinion was in accord with federal cases which have interpreted 18 U.S.C.A. § 1202(a) (West Supp. 1982), a federal statute similar to CAL. PENAL CODE § 12021 (West 1982). See *United States v. Locke*, 542 F.2d 800, 801 (9th Cir. 1976) (court emphasized that since no specific intent was required under the statute, the fact that appellant was advised by a public defender that he was not a convicted felon was of no relevance); *United States v. Crow*, 439 F.2d 1193, 1196 (9th Cir. 1971).

19. See *supra* note 1.

20. 32 Cal. 3d at 595, 652 P.2d at 46, 186 Cal. Rptr. at 489 (Broussard, J., dissenting).

21. Specifically, CAL. PENAL CODE §§ 20, 26 (West 1972 & Supp. 1982). Justice Broussard cited *People v. King*, 22 Cal. 3d 12, 528 P.2d 1000, 148 Cal. Rptr. 409 (1978), for the proposition that the court had found it necessary to reconcile CAL. PENAL CODE § 12021(a) (West 1982), with other provisions of the CAL. CIV. CODE in the past. 32 Cal. 3d at 596-97, 652 P.2d at 47, 186 Cal. Rptr. at 490 (Broussard, J., dissenting).

22. CAL. PENAL CODE § 20 (West 1972), provides: "In every crime or public offense there must exist a union, or joint operation of act and intent, or criminal negligence." *Id.*

23. Justice Broussard advanced the contention that:

[t]he language of section 12021 sets forth both elements of the offense in parallel construction, and there is no basis in the language or grammatical construction of the statute warranting a distinction between the two elements with respect to the mens rea requirement. In the absence of any provision reflecting legislative intent or policy to establish strict liability, the mens rea requirement is applicable to the felony conviction element of the offense as well as the possession and custody element.

32 Cal. 3d at 598, 652 P.2d at 47-48, 186 Cal. Rptr. at 490-91 (Broussard, J., dissenting) (citations omitted).

24. Both the majority and the dissent maintained that the "crucial question is whether the defendant was aware that he was engaging in the conduct proscribed by [the] section." 32 Cal. 3d at 593, 599, 652 P.2d at 44, 48, 186 Cal. Rptr. at 487, 491. The majority maintained that a defendant is presumed, under the law, to possess the requisite awareness as to legal status. Thus, a general intent to possess a concealable firearm, i.e., the proscribed act, was sufficient to sustain a conviction. 32 Cal. 3d at 592, 652 P.2d at 44, 186 Cal. Rptr. at 487 (citing *People v. Neese*, 272 Cal.

possesses a reasonable belief that he does not fall under the auspices of the statute, a mistake of fact exists "even though the matter as to which the defendant is mistaken is a question of law."²⁵

B. *Sua sponte instructions are required if the defendant is relying on a particular defense, evidence supports such a defense, and the defense is not inconsistent with the defendant's case: People v. Wickersham.*

In *People v. Wickersham*,¹ the California Supreme Court addressed two distinct yet interrelated issues. The court initially delineated the standard to be applied by trial courts when instructing *sua sponte* on necessarily included offenses in criminal cases. That standard, emanating from *People v. Sedeno*,² mandates that a *sua sponte* instruction be given on necessarily included offenses when the "defendant is relying on [a particular] defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case."³ Supplementary to this issue, the court reiterated that, pursuant to *People v. Graham*,⁴ "counsel must *express a deliberate tactical purpose* in objecting to a particular instruction," before the tribunal's failure to present the instruction will be considered "invited error."⁵

Wickersham was convicted of the shooting death of her husband.⁶ At the trial, conflicting evidence was presented concerning

App. 2d 235, 245, 77 Cal. Rptr. 314, 321 (1969)); *People v. McCullough*, 222 Cal. App. 2d 712, 718, 35 Cal. Rptr. 591, 595 (1963).

The dissent, on the other hand, contended that a *general* criminal intent was required, and as such, a mistaken belief concerning legal status would negate any awareness that a defendant was engaging in conduct proscribed by the statute. 32 Cal. 3d at 599, 600, 652 P.2d at 49, 186 Cal. Rptr. at 492.

25. 32 Cal. 3d at 601, 652 P.2d at 49, 186 Cal. Rptr. at 492 (Broussard, J., dissenting). Justice Broussard maintained that the majority's analysis of *Bray* incorrectly limited the case to situations where a state agency has misled the defendant. "The *source* of the reasonable and good faith mistake does not affect the existence of criminal intent." *Id.* at 602, 652 P.2d at 50, 186 Cal. Rptr. at 493 (Broussard, J., dissenting) (emphasis in original).

1. 32 Cal. 3d 307, 650 P.2d 311, 185 Cal. Rptr. 436 (1982). Chief Justice Bird wrote for a unanimous court with Justices Mosk, Newman, Kaus, Broussard, and Reynoso concurring. Justice Richardson wrote a separate concurring opinion.

2. 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974).

3. *Id.* at 716, 518 P.2d at 921, 112 Cal. Rptr. at 9-10.

4. 71 Cal. 2d 303, 455 P.2d 153, 78 Cal. Rptr. 217 (1969).

5. 32 Cal. 3d at 333, 650 P.2d at 325, 185 Cal. Rptr. at 450 (emphasis added).

6. Appellant was convicted pursuant to CAL. PENAL CODE § 187 (West Supp. 1982) ("[m]urder is the unlawful killing of a human being . . . with malice aforethought"), and CAL. PENAL CODE § 189 (West Supp. 1982) (first degree murder defined). She was also found guilty of using a firearm within the meaning of CAL.

provocation, heat of passion, and premeditation and deliberation.⁷ Before final argument to the jury, the court discussed the proposed jury instructions and, receiving no objections, instructed the jury on specific items⁸ but did not instruct *sua sponte* on second degree murder and involuntary manslaughter. The appellant contended it was reversible error for the court not to give the latter two instructions.⁹

The court began its analysis by taking notice of the fact that the trial court has an obligation not only to instruct on all relevant issues presented by the evidence¹⁰ but also has an obligation to give instructions on lesser included offenses if evidence is presented to rebut the elements of the charged offense.¹¹ In *Wickersham*, the appellant advanced heat of passion¹² and unreasonable self-defense¹³ as theories in support of voluntary manslaughter. The court made two determinations. First, even taken in the light most favorable to appellant, there was no evi-

PENAL CODE § 12022.5 (West 1982). This finding was subsequently struck by the trial court.

7. The testimony which was presented at the trial comprised approximately 11 pages of the court's opinion. For a complete disposition of the testimony, the reader is referred to 32 Cal. 3d at 313-23, 650 P.2d at 313-19, 185 Cal. Rptr. at 438-44.

8. The following instructions were given: (1) excusable homicide, CALJIC No. 5.00 (West 1979); (2) murder, CALJIC No. 8.10 (West 1979); (3) malice aforethought, CALJIC No. 8.11 (West 1979); (4) first degree premeditated and deliberate murder, CALJIC No. 8.20 (West 1979); and (5) involuntary manslaughter as a necessarily included offense, CALJIC Nos. 17.10, 8.45, 8.46, 3.32, 8.74, & 8.72 (West 1979).

9. 32 Cal. 3d at 323, 650 P.2d at 319, 185 Cal. Rptr. at 444.

10. See *People v. St. Martin*, 1 Cal. 3d 524, 531, 463 P.2d 390, 393, 83 Cal. Rptr. 166, 169 (1970).

11. See *People v. Hood*, 1 Cal. 3d 444, 449-50, 462 P.2d 370, 372, 82 Cal. Rptr. 618, 620 (1969). However, it is well established that the duty to instruct on lesser included offenses does not arise where there is no evidence that the offense which was committed was actually less than that charged. See, e.g., *People v. Sedeno*, 10 Cal. 3d 703, 715, 518 P.2d 913, 921, 112 Cal. Rptr. 1, 9 (1974); *People v. Noah*, 5 Cal. 3d 469, 478-79, 487 P.2d 1009, 1015, 96 Cal. Rptr. 441, 447 (1971). Compare *People v. Ramos*, 30 Cal. 3d 553, 582, 639 P.2d 908, 924, 180 Cal. Rptr. 266, 282 (1982) (trial court did not err by failing to give instructions on lesser included offenses where there was no evidence presented from which jury could find defendant guilty of such offenses).

12. One of the elements of voluntary manslaughter is that the accused's heat of passion must have been induced by sufficient provocation. See *People v. Sedeno*, 10 Cal. 3d at 719, 518 P.2d at 923, 112 Cal. Rptr. at 11.

13. The court in *People v. Flannel*, 25 Cal. 3d 668, 603 P.2d 1, 160 Cal. Rptr. 84 (1979), established the criteria for the theory of unreasonable self-defense. "An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter." *Id.* at 674, 603 P.2d at 4, 160 Cal. Rptr. at 87.

dence presented showing provocation.¹⁴ Secondly, appellant had testified that the shooting was accidental. A defense based upon this testimony is mutually exclusive of a defense based upon unreasonable self-defense.¹⁵ In this respect, the court's failure to instruct on voluntary manslaughter was not mandated by *Sedeno*.¹⁶ The court, addressing the fact that no second degree murder instruction was given, noted that the existence of provocation which is insufficient for manslaughter may still support a finding based on second degree murder.¹⁷ For this reason the court determined that the trial court erred in not instructing *sua sponte* on second degree murder.¹⁸

The court then addressed the issue advanced by the prosecution that reversal was not required because the defense counsel intentionally chose to forego instructions on lesser included offenses.¹⁹ The court has, in the past, established that there must be a deliberate and express waiver to the rendition of an instruction, and such waiver must be a part of trial tactics.²⁰ Even where counsel requests an erroneous charge, invited error is an inapplicable attack unless deliberately done as a trial tactic.²¹ In the present case, not only did the court fail to find a deliberate and express waiver of the second degree murder instruction in the record,²² the court specifically showed why the error was of such magnitude as to require reversal: "no instruction presented the jury with a theory of intentional homicide which was not premeditated and deliberate. Once the jury found that the killing was intentional, it had no choice but to return a verdict of first degree

14. 32 Cal. 3d at 327, 650 P.2d at 322, 185 Cal. Rptr. at 447.

15. *Id.* at 329, 650 P.2d at 323, 185 Cal. Rptr. at 448.

16. *See supra* note 2 and accompanying text. The court did recognize that if appellant had requested an instruction based on the unreasonable self-defense theory it should have been given. 32 Cal. 3d at 328, 650 P.2d at 322, 185 Cal. Rptr. at 447.

17. 32 Cal. 3d at 329, 650 P.2d at 323, 185 Cal. Rptr. at 448 (citing *People v. Valentine*, 28 Cal. 2d 121, 132, 169 P.2d 1, 8 (1946)).

18. 32 Cal. 3d at 330, 650 P.2d at 323, 185 Cal. Rptr. at 448.

19. *Id.*

20. *See People v. Graham*, 71 Cal. 2d at 318, 455 P.2d at 162-63, 78 Cal. Rptr. at 226-27 (1969).

21. *See People v. Watts*, 59 Cal. App. 3d 80, 85-86 n.2, 130 Cal. Rptr. 601, 604-05 n.2 (1976). The court noted, in pertinent part:

Accordingly, if defense counsel suggests or accedes to the erroneous instruction because of neglect or mistake we do not find "invited error"; *only if counsel expresses a deliberate tactical purpose in suggesting, resisting, or acceding to an instruction*, do we deem it to nullify the trial court's obligation to instruct in the cause.

Id. (emphasis in original).

22. The court even concluded that if counsel had remained silent because of a tactical decision, invited error still could not be found. 32 Cal. 3d at 334-35, 650 P.2d at 326, 185 Cal. Rptr. at 451

murder."²³

C. *Special circumstances allegation barred by Penal Code section 1387 when such special circumstances allegation has twice been dismissed by a magistrate: Ramos v. Superior Court.*

In *Ramos v. Superior Court*,¹ the California Supreme Court was given the opportunity to interpret California Penal Code section 1387² as barring the prosecution of a special circumstances allegation when that allegation had twice been dismissed by a magistrate.³

Petitioner Ramos was charged on April 3, 1981, with one count of murder and one special circumstances allegation pursuant to Penal Code section 190.2(a)(1).⁴ Following the preliminary hearing, a municipal court judge, sitting as a magistrate, dismissed all proceedings under Penal Code section 871.⁵ Five days later, the

23. *Id.* at 336, 650 P.2d at 327, 185 Cal. Rptr. at 452.

Justice Richardson concurred because of *Graham*, but maintained that *Graham* should be reconsidered. He would allow invited error to be found based upon reasonable inferences drawn from the record. 32 Cal. 3d at 36-37, 650 P.2d at 328, 185 Cal. Rptr. at 453 (Richardson, J., concurring) (citing *People v. Tidwell*, 3 Cal. 3d 82, 87, 473 P.2d 762, 764, 89 Cal. Rptr. 58, 60 (1970)).

1. 32 Cal. 3d 26, 648 P.2d 589, 184 Cal. Rptr. 622 (1982). Justice Kaus wrote the unanimous opinion in which Chief Justice Bird, Justices Mosk, Richardson, Newman, Broussard, and Reynoso concurred.

2. CAL. PENAL CODE § 1387 (West Supp. 1982), provides in pertinent part:

An order terminating an action pursuant to this chapter, or Section 859(b) 861, 871, or 995, is a bar to any other prosecution for the same offense if it is a felony or it is a misdemeanor charged together with a felony and the action has been previously terminated pursuant to this chapter, or Section 859(b), 861, 871, or 995 or if it is a misdemeanor not charged together with a felony, except in those felony cases, or those cases where a misdemeanor is charged with a felony, where subsequent to the dismissal of the felony or misdemeanor the judge or magistrate finds that substantial new evidence has been discovered by the prosecution which would not have been known through the exercise of due diligence at or prior to the time of termination of the action.

Id.

3. The petitioner had also claimed that the evidence presented was insufficient. The court found it unnecessary to reach this issue. 32 Cal. 3d at 28, 648 P.2d at 590, 184 Cal. Rptr. at 623.

4. CAL. PENAL CODE § 190.2(a)(1) (West Supp. 1982) (death penalty or confinement without parole is mandated where murder was intentional and carried out for financial gain).

5. CAL. PENAL CODE § 871 (West Supp. 1982) provides in part: "[i]f, after hearing the proofs, it appears either that no public offense has been committed or that there is not sufficient cause to believe the defendant guilty of a public offense,

district attorney filed a new complaint with identical charges. Again, the magistrate dismissed the special circumstances allegation. Two weeks later, without seeking reinstatement of the dismissed special circumstances allegation before the magistrate,⁶ the district attorney filed an information in superior court under section 739 of the Penal Code.⁷ The charge included the same special circumstances allegation.⁸

The prosecution, attempting to avoid the application of Penal Code section 1387, advanced the argument that a magistrate's dismissal of the special circumstances allegation pursuant to section 871 was not "an order terminating an action" under section 1387.⁹ The prosecution suggested collaterally that a magistrate may not dismiss the special circumstances allegation since such an allegation is not a "public offense."¹⁰ Responding to this argument, the court, analogizing to a similar issue which had been presented in *Ghent v. Superior Court*,¹¹ concluded that a magistrate may dismiss or strike a special circumstances allegation pursuant to section 871.¹² The court then noted that "[i]n light of the direct reference to section 871 in section 1387, we also conclude that a dismissal of a special circumstances allegation under section 871 is 'an order terminating an action' under section 1387."¹³

The final argument advanced by the prosecution was that the

the magistrate . . . shall order the complaint dismissed and the defendant to be discharged. . . ." *Id.*

6. See CAL. PENAL CODE § 871.5 (West Supp. 1982); see also *infra* note 18.

7. CAL. PENAL CODE § 739 (West 1970), provides in part:

When a defendant has been examined and committed, as provided in Section 872, it shall be the duty of the district attorney . . . to file in the superior court . . . an information against the defendant which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed.

Id. See 32 Cal. 3d at 34-35 & n.9, 648 P.2d at 594 & n.9, 184 Cal. Rptr. at 627 & n.9.

8. 32 Cal. 3d at 29, 648 P.2d at 590, 184 Cal. Rptr. at 623.

9. *Id.* at 31, 648 P.2d at 592, 184 Cal. Rptr. at 624. See *supra* notes 2 & 5.

10. 32 Cal. 3d at 31, 648 P.2d at 592, 184 Cal. Rptr. at 624.

11. 90 Cal. App. 3d 944, 153 Cal. Rptr. 720 (1979). At issue in *Ghent* was the question of whether a defendant could challenge the sufficiency of the evidence by a motion brought under CAL. PENAL CODE § 995 (West 1970). The prosecution had advocated that the section only applied to offenses, and, as such, was inapplicable to a special circumstances allegation. 90 Cal. App. 3d at 952, 153 Cal. Rptr. at 725-26. The court there concluded that the sufficiency of the evidence may be challenged pursuant to section 995 when the underlying allegation is one of special circumstances. *Id.* at 954-55, 153 Cal. Rptr. at 727.

12. 32 Cal. 3d at 34, 648 P.2d at 594, 184 Cal. Rptr. at 627.

13. *Id.* The superior court had taken notice of *Ghent* but maintained that the analogy was faulty as the rationale was only applicable in cases where the death penalty was sought. The *Ramos* court concluded that neither the legislative history nor the statutory language of the current death penalty statutes indicated that review of special circumstances allegations are to be limited in a particular manner. *Id.* at 33, 648 P.2d at 593, 184 Cal. Rptr. at 626.

language of section 1387, which provides that a second termination order "is a bar to *any other prosecution for the same offense*,"¹⁴ was inapplicable to the present case, where the district attorney had filed an information pursuant to section 739 of the Penal Code.¹⁵ Although Ramos disagreed with this argument, he conceded that after a *first* dismissal by the magistrate, the district attorney may either refile a new complaint, file an information under section 739 charging the matter dismissed,¹⁶ or directly challenge the first dismissal pursuant to section 871.5.¹⁷ Ramos claimed, however, that after the special circumstances allegation was twice dismissed, those three options were foreclosed. The court concluded that the reinstatement of the special circumstances allegation by the filing of the information pursuant to section 739 constituted "[another] prosecution for the same offense" within the meaning of section 1387, and was therefore barred, as the allegation had twice been dismissed under section 871.¹⁸

14. CAL. PENAL CODE § 1387 (West Supp. 1982) (emphasis added).

15. 32 Cal. 3d at 34, 648 P.2d at 594, 184 Cal. Rptr. at 627. See *supra* note 7.

16. See *People v. Encerti*, 130 Cal. App. 3d 791, 795-98, 182 Cal. Rptr. 139, 141-42 (1982).

17. See *Chism v. Superior Court*, 123 Cal. App. 3d 1053, 1061, 176 Cal. Rptr. 909, 913 (1981). This method eliminates the effect of the first dismissal for purposes of section 1387. *Id.* See also *supra* note 6 and accompanying text.

18. 32 Cal. 3d at 36, 648 P.2d at 595, 184 Cal. Rptr. at 628. The court noted, however, that the prosecution was not without recourse to obtain a review of the second order of the magistrate dismissing the allegation. The court referred to the provisions of CAL. PENAL CODE § 871.5 (West 1980). The section provides in relevant part:

If an action, or a portion thereof, is dismissed by a magistrate pursuant to Sections 859(b), 861, 871, or 1385, the prosecutor may make a motion, with notice to the defendant and magistrate, in the superior court within 10 days after the dismissal to compel the magistrate to reinstate the complaint or a portion thereof . . . on the ground that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof.

The superior court shall hear and determine the motion on the basis of the record of the proceedings before the magistrate. If the motion is litigated to decision by the people, they shall be prohibited from refiling the action, or the portion thereof, which was dismissed.

Id. See 32 Cal. 3d at 36 & n.11, 648 P.2d at 595 & n.11, 184 Cal. Rptr. at 628 & n.11.

The court specifically stated that *Ramos*:

did not present the question of the application of section 1387 to a case in which (1) a magistrate dismisses a charge one time under section 871, (2) the prosecution files an information recharging the dismissed matter under section 739, and (3) the superior court dismisses the refiled charge under section 955.

Id. at 37 n.12, 648 P.2d at 595-96 n.12, 184 Cal. Rptr. at 628 n.12. See *supra* note 17.

VII. CRIMINAL PROCEDURE

A. *Penal Code special circumstances allegation held unconstitutionally vague: People v. Superior Court (Engert); People v. Superior Court (Gamble).*

I. INTRODUCTION

In the companion cases of *People v. Superior Court (Engert)*¹ and *People v. Superior Court (Gamble)*² [hereinafter referred to as *Engert*] the California Supreme Court confronted the issue of whether Penal Code section 190.2³ was unconstitutionally vague and therefore violative of due process.⁴ In separate prosecutions for murder, both defendants challenged the special circumstances allegations embodied in section 190.2(a)(14) as unconstitutionally vague.⁵ The supreme court held that section 190.2(a)(14) was violative of due process and void for vagueness.⁶

II. THE MAJORITY OPINION

In *Engert*, the prosecution contended that section 190.2(a)(14) was not constitutionally defective on vagueness or due process grounds.⁷ The prosecution also claimed that the decision in *Engert* could not be based upon the California Constitution because

1. 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982). Justice Kaus wrote the majority opinion with Chief Justice Bird and Justices Mosk and Broussard concurring. Justice Newman concurred separately. Justice Richardson dissented.

2. *Id.*

3. CAL. PENAL CODE § 190.2(a)(14) (West Supp. 1982) provides in pertinent part:

(a) The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the following special circumstances has been charged and specially found under Section 190.4 . . .

(14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity, as utilized in this section, the phrase especially heinous, atrocious or cruel manifesting exceptional depravity means a conscienceless, or pitiless crime which is unnecessarily torturous to the victim.

Id.

4. 31 Cal. 3d at 800, 647 P.2d at 77, 183 Cal. Rptr. at 801.

5. *Id.* Both respondent courts held that § 190.2(a)(14) was "unconstitutionally vague and violative of due process in failing to 'provide an ascertainable standard of conduct or workable standard of guilt'" and ordered the allegation stricken. The appeal to the California Supreme Court was based upon CAL. PENAL CODE § 1238(a)(1) (West 1982) (appeal by the people from "[a]n order setting aside the indictment, information, or complaint").

6. 31 Cal. 3d at 806, 647 P.2d at 81, 183 Cal. Rptr. at 805. The court based its holding on the due process clause of the fourteenth amendment of the United States Constitution and article I, §§ 7(a) and 15 of the California Constitution. *Id.*

7. *Id.* at 801, 647 P.2d at 77, 183 Cal. Rptr. at 801.

article I, section 27 insulated the death penalty against any state constitutional defect.⁸ The court rejected both of these challenges.

A. *Vagueness and due process*

The court began its analysis of section 190.2(a)(14) with a discussion of the policy supporting the constitutional prohibition of vaguely worded criminal statutes.⁹ The general test as to whether or not a criminal statute is constitutionally defective for vagueness is "whether the terms of the challenged statute are 'so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.'"¹⁰

In holding that the terms employed in section 190.2(a)(14) were unconstitutionally vague, the court relied upon dictionary definitions¹¹ and stated that the terms addressed "emotions and subjective, idiosyncratic values."¹² The court felt that the addition of the word "especially" added nothing to the intrinsic content of the words.¹³ The court rejected the definition of terms contained in the statute itself¹⁴ on the basis that the definition of vague statutory language by equally vague language does not cure a constitutional defect.¹⁵ In light of these defects, the court held that section 190.2(a)(14) was invalid because it did not provide a standard for the determination of the truth of the special circumstances allegation.¹⁶

The court then rejected the argument advanced by the prosecution, that because the jury is exercising a sentencing function when it determines the truth of the charged special circum-

8. *Id.* at 807, 647 P.2d at 81, 183 Cal. Rptr. at 805.

9. *Id.* at 801, 647 P.2d at 77, 183 Cal. Rptr. at 801. The policy behind the prohibition against vaguely worded criminal statutes is that a person should not have to speculate as to what the state forbids, or commands where life, liberty or property is involved. *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1938).

10. 31 Cal. 3d at 801, 647 P.2d at 77, 183 Cal. Rptr. at 801-02 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)). See *People v. McCaughan*, 49 Cal. 2d 409, 414, 317 P.2d 974, 977 (1957).

11. The court defined "heinous," "atrocious," "cruel," and "depravity" according to the given meanings in *WEBSTER'S NEW INTERNATIONAL DICTIONARY* (2d ed. 1961) and stated that as defined, the words themselves contained no directive content. 31 Cal. 3d at 801-02, 647 P.2d at 78, 183 Cal. Rptr. at 802.

12. *Id.* at 802, 647 P.2d at 78, 183 Cal. Rptr. at 802.

13. *Id.*

14. See *supra* note 3.

15. 31 Cal. 3d at 803, 647 P.2d at 78, 183 Cal. Rptr. at 802.

16. *Id.* at 803, 647 P.2d at 78, 183 Cal. Rptr. at 802-03.

stances, due process does not require the usual narrowness and clarity.¹⁷ Under the California Penal Code, the sentencing phase for a defendant convicted of first-degree murder does not take place until after the defendant is convicted of first-degree murder “and the special circumstance is found to be true.”¹⁸ Because the special circumstances allegation must be found beyond a reasonable doubt by a unanimous verdict,¹⁹ the court concluded that due process requires the same specificity in defining the special circumstances allegation that is required in defining the crime itself.²⁰

B. Special Circumstance v. Aggravating Circumstance: Proffitt v. Florida

In *Engert* the People claimed that the validity of section 190.2(a)(14) had already been addressed by the United States Supreme Court in *Proffitt v. Florida*,²¹ which upheld the validity of Florida’s death penalty statute against a constitutional challenge to its sentencing procedure.²² Relying upon *Gregg v. Georgia*,²³ the United States Supreme Court held that the Florida sentencing procedure involved in *Proffitt* was not unconstitutional because it did not result in inadequate guidelines for “those charged with the duty of recommending or imposing sentences in capital cases.”²⁴

The California Supreme Court distinguished *Proffitt* on the ground that the standards of review in *Engert*²⁵ and *Proffitt*²⁶ were different. The court held that because the inquiry in *Proffitt*

17. The prosecution relied upon *People v. Thomas*, 87 Cal. App. 3d 1014, 151 Cal. Rptr. 483 (1979) for the proposition that rules relating to the sentencing function need not be drafted with the narrowness and precision required in statutes which define criminal offenses. *Id.* at 1022-24, 151 Cal. Rptr. at 488-89.

18. 31 Cal. 3d at 803, 647 P.2d at 78-79, 183 Cal. Rptr. at 803 (emphasis in original). See CAL. PENAL CODE §§ 190.1 and 190.2 (West Supp. 1982).

19. CAL. PENAL CODE § 190.4 (West Supp. 1982).

20. 31 Cal. 3d at 803, 647 P.2d at 79, 183 Cal. Rptr. at 803. Under CAL. PENAL CODE § 190.3 the jury may also consider the existence of any special circumstances in the penalty determination. CAL. PENAL CODE § 190.3(a) (West Supp. 1982).

21. 428 U.S. 242 (1976).

22. Under FLA. STAT. ANN. § 921.141 (West Supp. 1982) the consideration of a capital felony as “especially heinous, atrocious, or cruel, manifesting exceptional depravity” is an aggravating circumstance to be considered by the trial judge in the sentencing procedure. See 31 Cal. 3d at 804, 647 P.2d at 79, 183 Cal. Rptr. at 803. According to the California Penal Code the jury must find the alleged special circumstance by a unanimous vote as a part of the guilt phase of the trial. *Id.* at n.4, 647 P.2d at 79 n.4, 183 Cal. Rptr. at 803 n.4.

23. 428 U.S. 153 (1976).

24. *Id.* at 255-56.

25. See *supra* note 6.

26. In *Proffitt*, the Supreme Court reviewed the Florida statute to determine whether “the imposition of the sentence of death for the crime of murder under

was limited to the eighth and fourteenth amendments, the decision did not bind the California Supreme Court as to its review of section 190.2(a)(14) under the fundamental principles of due process.²⁷ The court further held that a lower federal court decision²⁸ upholding the Florida sentencing procedure against a due process challenge was not binding.²⁹

C. *Insulation of Death Penalty Statutes Under the California Constitution*

The prosecution also challenged the court's decision to base its holding in *Engert* on provisions of the California Constitution.³⁰ The prosecution claimed that article I, section 27³¹ insulates the

the law of Florida violated the Eighth and Fourteenth Amendments." 428 U.S. at 244.

27. 31 Cal. 3d at 805-06, 647 P.2d at 79, 183 Cal. Rptr. at 803-04. The court also concluded that because the decision in *Proffitt* was limited to the Florida sentencing procedure, the constitutionality of § 190.2(a)(14) in "defining an offense or a special circumstance" was an open question. *Id.* at 805, 647 P.2d at 80, 183 Cal. Rptr. at 804 (emphasis in original).

28. *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). In *Spinkellink* the court of appeal held that the challenged aggravating circumstance provided "adequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." 578 F.2d at 611.

29. 31 Cal. 3d at 806, n.7, 647 P.2d at 80-81, n.7, 183 Cal. Rptr. at 804-05, n.7. The court rejected the cases cited by Justice Richardson, in dissent, stating that the holdings in those cases referred to aggravating circumstances as part of the sentencing procedure. *Id.* See *infra* notes 38-40 and accompanying text. Compare *State v. Payton*, 361 So. 2d 866 (La. 1978) wherein the Supreme Court of Louisiana held that the use of "especially heinous, atrocious or cruel manner" in the definition of a criminal offense violated the Louisiana state constitutional guarantees of due process and fair trial. *Id.* at 871-72 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976) and *Proffitt v. Florida*, 428 U.S. 242 (1976)). The court also disapproved the decision in *Allen v. Superior Court*, 113 Cal. App. 3d 42, 53, 169 Cal. Rptr. 608, 615 (1980) wherein the court of appeal held, based upon the *Proffitt* and *Spinkellink* decisions, that CAL. PENAL CODE § 1902(a)(14) was not unconstitutionally vague on federal due process grounds. 31 Cal. 3d at 806 n.8, 647 P.2d at 81 n.8, 183 Cal. Rptr. at 805 n.8.

30. 31 Cal. 3d at 806, 647 P.2d at 81, 183 Cal. Rptr. at 805. See *supra* note 6.

31. Article I, § 27 provides:

All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative, or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6 nor shall such punishments for such offenses be deemed to contravene any other provision of this constitution.

CAL. CONST. art. I, § 27. Section 27 was enacted as an initiative measure after the court's decision in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152

death penalty against any state constitutional defects.³² The court rejected this argument, stating that neither the statute itself,³³ nor its legislative history³⁴ supported the prosecution's argument. The court concluded that section twenty-seven was enacted simply to cancel the holding in *People v. Anderson*³⁵ and was not intended to insulate potential capital cases from complying with the due process requirements of the state constitution.³⁶

III. THE DISSENTING OPINION

Justice Richardson disagreed with the majority opinion for two reasons: (1) its holding in the face of overwhelming contrary authority and (2) a lack of deference to the constitutional presumption of validity. Justice Richardson believed that the alleged vagueness problem was discovered solely by the *Engert* majority.³⁷ Justice Richardson criticized the California provision in light of the almost unanimous agreement among other courts³⁸

(1972), which held that the death penalty was unconstitutionally cruel and unusual punishment.

32. 31 Cal. 3d at 807, 647 P.2d at 81, 183 Cal. Rptr. at 805. The prosecution argued that *all* statutes relating to the death penalty were shielded from review on state due process grounds. *Id.*

33. The court reasoned that the purpose of § 27 was to prevent the punishment of death itself from challenges based upon the state constitution. Because the decision in *Engert* dealt with the potential loss of life or liberty on the basis of vague statutory language, § 27 did not, on its face, bar review on state due process grounds. *Id.*

34. Relying upon the ballot pamphlet distributed to voters prior to the enactment of § 27 and *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979), the court concluded that § 27 was not enacted to insulate death penalty statutes from state constitutional review. 31 Cal. 3d at 807-08, 647 P.2d at 81-82., 183 Cal. Rptr. at 805-06.

35. 6 Cal. 3d 328, 493 P.2d 880, 100 Cal. Rptr. 152 (1972) (death constitutes impermissibly cruel punishment).

36. 31 Cal. 3d at 809, 647 P.2d at 82, 183 Cal. Rptr. at 806. The court concluded its assessment of the People's argument with the following passage:

We are also driven to it by the realization that the logical extension of the People's interpretation would produce absurd results. One example will suffice: We determined in *In re Newbern* (1960) 53 Cal. 2d 786 [3 Cal. Rptr. 364, 350 P.2d 116], that the "common drunk" provision of the vagrancy law was void for vagueness, precluding imposition of a county jail term. Logically, it follows from the People's submission that under section 27 of article I the same statute would be immune from state constitutional review if the penalty for being a common drunk were death.

Id. The court denied the People's petition for a writ of mandate compelling the trial court to set aside the order striking the special circumstance allegations. *Id.*

37. It is significant that if an insurmountable "vagueness problem" truly exists, we are the only court to discern it. My research discloses that *all other courts which have considered the issue, including the United States Supreme Court, have uniformly upheld identical or substantially identical language defining special or aggravating circumstances in state death penalty legislation* as against similar vagueness attacks.

Id. at 810, 647 P.2d at 83, 183 Cal. Rptr. at 807 (emphasis in original).

38. See *Proffitt v. Florida*, 428 U.S. 424 (1976); *Spinkellink v. Wainwright*, 578

that language similar to that embodied in section 190(a)(14) is not unconstitutionally vague.³⁹

Justice Richardson accused the majority of searching for possible conflicts with the statutory language rather than construing the language in such a manner as to uphold the validity of the statute.⁴⁰ In addition, Justice Richardson criticized the *Engert* majority for their failure to recognize that a statute such as section 190.2(a)(14) is accorded a strong constitutional presumption of validity.⁴¹ Dismissing the majority's reliance on *Proffitt v. Florida*,⁴² Justice Richardson concluded that section 190.2(a)(14) was constitutional under federal law.⁴³

F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); *State v. Ortiz*, 131 Ariz. 195, 639 P.2d 1020 (1981); *Allen v. Superior Court*, 113 Cal. App. 3d 42, 169 Cal. Rptr. 608 (1980); *State v. Dixon*, 293 So. 2d 1 (Fla. 1973), *cert. denied*, 416 U.S. 943; *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1971); *State v. Clark*, 387 So. 2d 1124 (La. 1980); *Coleman v. State*, 378 So. 2d (Miss. 1979); *State v. Simants*, 197 Neb. 549, 250 N.W.2d 881 (1977), *cert. denied*, 434 U.S. 878; *Burrows v. State*, 640 P.2d 533 (Okla. App. 1981); *State v. Goodman*, 298 N.C. 1, 257 S.E.2d 569 (1979); *State v. Dicks*, 615 S.W.2d 126 (Tenn. 1981), *cert. denied*, 454 U.S. 933; *Hopkinson v. State*, 632 P.2d 79 (Wyo. 1981), *cert. denied*, 455 U.S. 922 (1982).

39. 31 Cal. 3d at 811-12, 647 P.2d at 83-84, 183 Cal. Rptr. at 807-08. Justice Richardson noted that in *State v. Osborn*, 102 Idaho 405, 631 P.2d 187 (1981), and *Hopkinson v. State*, 632 P.2d 79, 153 (Wyo. 1981), *cert. denied*, 455 U.S. 922 (1982), the "aggravating circumstances" were in fact statutory prerequisites to an imposition of the death penalty. Justice Richardson believed that these were "functionally equivalent to the 'special circumstances' of the California statute." 31 Cal. 3d at 811, 647 P.2d at 83-84, 183 Cal. Rptr. at 807-08. Justice Richardson also stated that the majority's reliance on *State v. Payton*, 361 So. 2d 866 (La. 1978) was misplaced because the "aggravating circumstances" held unconstitutionally vague for the purpose of defining the criminal offense of murder were upheld concerning whether the death penalty was authorized. 31 Cal. 3d at 811, 647 P.2d at 84, 183 Cal. Rptr. at 808.

40. 31 Cal. 3d at 811, 647 P.2d at 84, 183 Cal. Rptr. at 808. See *State v. Ortiz*, 131 Ariz. 195, 206, 639 P.2d 1020, 1031 (1981); *State v. Goodman*, 298 N.C. 1, 25, 257 S.E.2d 569, 585 (1979).

41. 31 Cal. 3d at 812-13, 647 P.2d at 85, 183 Cal. Rptr. at 809. See *Pryor v. Municipal Court*, 25 Cal. 3d 238, 253, 599 P.2d 636, 645, 158 Cal. Rptr. 330, 339 (1979); *In re Dennis M.*, 70 Cal. 2d 444, 453, 450 P.2d 296, 301, 75 Cal. Rptr. 1, 6 (1969) (citing *Lockheed Aircraft Corp. v. Superior Court (Los Angeles)*, 28 Cal. 2d 481, 484, 171 P.2d 21, 23 (1946)).

42. 31 Cal. 3d at 814, 647 P.2d at 85-86, 183 Cal. Rptr. at 809. Justice Richardson saw no significant differences between the California and Florida laws. See *supra* note 22.

43. 31 Cal. 3d at 814, 647 P.2d at 86, 183 Cal. Rptr. at 810. By basing its conclusion on both the United States and California Constitution, thereby precluding federal review, Justice Richardson believed that the majority opinion frustrated the letter and spirit of article I, § 27 of the California Constitution. *Id.* Justice Richardson also expressed his agreement with the dissenting opinion by Justice Poche in the court of appeal *Engert* opinion. *People v. Superior Court (Engert)* was deleted from the official reports on direction of the supreme court by order

IV. CONCLUSION

The court in *Engert* took a bold stance in the face of various court decisions to the contrary, including the *Profitt* opinion by the United States Supreme Court. By construing section 190.2(a)(14) as a special circumstance, the court has required that substantive due process standards applicable to the definition of the crime itself be imposed where a vagueness claim is alleged against a statutory prerequisite to the imposition of the death penalty.⁴⁴ Further application of a statute similar to section 190.2(a)(14) is doubtful⁴⁵ because the special circumstances allegations in a trial for first degree murder must be determined at the guilt phase, not the sentencing phase. The tenor of the *Engert* opinion, while holding that the death penalty does not constitute cruel and unusual punishment, expresses the intention that vaguely worded special circumstances requiring the imposition of the death penalty will be strictly construed.⁴⁶

B. *Implied promises of leniency and psychological coercion render incriminating statements involuntary and inadmissible: People v. Hogan.*

In *People v. Hogan*,¹ the supreme court held that implied promises of leniency by the police which constitute a motivating cause of a confession render the confession involuntary and inadmissible.² Appellant, Carl David Hogan, was convicted of the first degree murders³ of Theresa Holland and her four year old son, Jeremy Montoya.⁴ Hogan was also convicted of assault with in-

dated January 20, 1982. For the text of this opinion see 164 Cal. Rptr. 210, 210-16 (1980).

44. See *supra* note 20 and accompanying text.

45. As mandated by § 109.2, however, the trier of fact plays the primary role in the imposition of either a life sentence or the death penalty upon a finding by unanimous vote (if by a jury) of both the crime of first degree murder and the special circumstances allegation.

46. The other special circumstance allegations in § 190.2 are fairly specific and refer to either the method used in the homicide or the status of the victim of the homicide. See CAL. PENAL CODE § 190.2 (West Supp. 1982).

1. 31 Cal. 3d 815, 647 P.2d 93, 183 Cal. Rptr. 817 (1982). Chief Justice Bird wrote the majority opinion with Justice Broussard concurring. Justice Kaus wrote a separate concurring opinion with Justice Newman concurring. Justice Richardson wrote the dissenting opinion with Justice Mosk concurring.

2. *Id.* at 841, 647 P.2d at 108, 183 Cal. Rptr. at 832. In conjunction with this holding, the court found that Hogan's statements were involuntary due to psychological coercion. See *infra* notes 24-27 and accompanying text.

3. CAL. PENAL CODE §§ 187, 189 (West Supp. 1982).

4. Hogan was also convicted under a special circumstance (former CAL. PENAL CODE § 190.2(c)(5)) alleging that Hogan was personally present and intended

tent to commit murder upon Theresa Holland's infant son, Adam Holland, and the jury fixed the penalty at death.⁵ Hogan challenged the admission of his third statement to the police and the subsequent statements which he made to his wife on the ground that the third statement was involuntarily made, thus tainting his subsequent statements.⁶

Hogan contended that the third statement made to the police was the product of promises of help by the police and was therefore involuntarily made.⁷ The third interview occurred less than an hour after a recorded telephone conversation with his wife in which Hogan continued to deny his guilt, but was uncertain about whether he committed the homicides.⁸ During this conversation, Hogan repeatedly mentioned previous suggestions by the police that he seek mental help.⁹

Chief Justice Bird noted that the validity of the admission of

to cause two murders, thereby committing more than one offense of murder. 31 Cal. 3d at 820, 647 P.2d at 95, 183 Cal. Rptr. at 819.

5. *Id.*

6. The facts leading up to Hogan's statements are long and complex. Hogan and Dennis Holland, husband of Theresa Holland, became acquainted at their place of work. Hogan purchased a motorcycle from Holland and visited the Hollands' home several times. On May 16, the day of the homicides, two neighbors saw Hogan approach the Hollands' home. Dennis Holland testified that when he arrived home, Hogan swung a hammer at him. Holland then called the police but when he returned, Hogan was gone. Hogan was apprehended while walking down a nearby street. In the meantime, Holland discovered his wife and son, Jeremy, dead and his son, Adam, seriously injured. The coroner testified that the deaths of Theresa and Jeremy, and the injuries to Adam, were caused by stab wounds and bludgeoning.

At trial, the prosecution introduced a series of statements which Hogan made after his arrest. The police interviewed Hogan three times and portions of all three sessions were surreptitiously recorded. Until the third interview, Hogan maintained that he was innocent and denied having harmed the victims. The third interview took place on the day after the homicides. During this interview, and in the two subsequent conversations with his wife, Hogan made various incriminating statements which he later repudiated at trial. *See* 31 Cal. 3d at 820-34, 647 P.2d at 95-104, 183 Cal. Rptr. at 819-28.

7. *Id.* at 834, 647 P.2d at 104, 183 Cal. Rptr. at 828. After the second interview, conducted on the night of the homicides, Hogan was permitted to see his wife. During this conversation, which was secretly recorded, Hogan told his wife that the police officers conducting this interview had told Hogan that if he would confess, they would "get help" for him. *Id.* at 836, 647 P.2d at 105, 183 Cal. Rptr. at 829.

8. *Id.* at 837-38, 647 P.2d at 105-06, 183 Cal. Rptr. at 829-30.

9. *See id.* at 837 n.7, 647 P.2d at 105 n.7, 183 Cal. Rptr. at 829 n.7 (transcript of Hogan's telephone conversation with his wife). Hogan's voice during this conversation was highly emotional and at times he began sobbing. Hogan also mentioned to his wife that "[y]ou gotta be crazy to kill somebody." *Id.* at 837, 647 P.2d at 105-06, 183 Cal. Rptr. at 829-30.

Hogan's third interview¹⁰ would depend upon whether the prosecution had sustained its burden of proving beyond a reasonable doubt that the statements were voluntary.¹¹ An express or implied promise of leniency which constitutes a motivating cause of a confession renders the confession involuntary and inadmissible.¹² The court held that comments made by the police in unrecorded portions of the first¹³ and third¹⁴ interviews "clearly implied an advantage to [Hogan] if he talked."¹⁵ Although an exhortation to tell the truth is not improper, the court stated that the conduct of the police, as manifested by Hogan's telephone conversation with his wife, constituted an implied promise of leniency to Hogan if he confessed.¹⁶

The prosecution contended that the statements were admissible because Hogan did not admit to being mentally ill when he made the incriminating statements to the police.¹⁷ The court rejected this argument, stating that the failure of Hogan to verbalize that he had a mental problem did not support the inference that he made the statement voluntarily.¹⁸

The prosecution also argued that the promises of help by the police did not constitute the "primary motivating factor" behind the incriminating statements made by Hogan.¹⁹ The court dismissed this argument based upon the deceptive tactics used by the police to convince Hogan that he had committed the murders.²⁰ While the use of deceptive tactics by the police in obtaining a confession does not by itself render the statement

10. In the third interview, Hogan made incriminating statements which he later repudiated at trial. *Id.* at 838, 647 P.2d at 106, 183 Cal. Rptr. at 830.

11. *Id.*

12. *See* *People v. Brommel*, 56 Cal. 2d 629, 632, 364 P.2d 845, 846-47, 15 Cal. Rptr. 909, 910-11 (1961).

13. In the first interview one of the investigating officers, Officer Orman, admitted that he told Hogan that if Hogan would tell the officer about his mental problem "we would see what we could do to help him." 31 Cal. 3d at 835, 647 P.2d at 104, 183 Cal. Rptr. at 828.

14. Officer Orman repeated the same statement that he made in the first interview but added that Hogan should tell him "or you know what might happen." *Id.* at 838, 647 P.2d at 106, 183 Cal. Rptr. at 830.

15. *Id.* *See* *People v. Hill*, 66 Cal. 2d 536, 426 P.2d 908, 58 Cal. Rptr. 340 (1967).

16. 31 Cal. 3d at 838-39, 647 P.2d at 106-07, 183 Cal. Rptr. at 830-31.

17. *Id.* at 839, 647 P.2d at 107, 183 Cal. Rptr. at 831.

18. *Id.* at 839-40, 647 P.2d at 107, 183 Cal. Rptr. at 831.

19. The prosecution relied upon statements made by Hogan at the voluntariness hearing to the effect that he confessed because the police convinced him that he had committed the homicides. *Id.* at 840, 647 P.2d at 107, 183 Cal. Rptr. at 831.

20. Hogan testified that during an unrecorded portion of the second interview one of the police officers, Officer Clendenon, told Hogan that the two little girls who were present in the Holland home saw him commit the homicides. *Id.* at 835-36, 647 P.2d at 104-05, 183 Cal. Rptr. at 828-29.

involuntary,²¹ the use of deceptive tactics does weigh against a finding of voluntariness.²² Applying this standard, the court found that the false information about the eyewitnesses caused Hogan to doubt his own sanity, thus rendering the police offer of help more genuine.²³

Hogan additionally claimed that the incriminating statements made in the third interview were the product of psychological coercion.²⁴ Examining the conduct of Hogan during the third interview and the subsequent conversation with his wife,²⁵ the court concluded that Hogan's statements were not freely given.²⁶ The police officers and Hogan's wife repeatedly raised questions of both his mental illness and his guilt, thus rendering the incriminating statements involuntary as a product of psychological coercion.²⁷

Hogan's subsequent statements to his wife were also held to be inadmissible because there appeared to be no break in the causative chain between Hogan's incriminating statements to the police and his subsequent conversations with his wife.²⁸ The court concluded that Hogan's conviction must be reversed because the statements were at least admissions, and under either the *Chapman*²⁹ test of prejudice or the per se rule of prejudice,³⁰ it could

21. See *People v. Arguello*, 65 Cal. 2d 768, 423 P.2d 202, 56 Cal. Rptr. 274 (1967).

22. See, e.g., *Atchley v. Wilson*, 300 F. Supp. 68, 71 (N.D. Cal. 1968) (citing *Spano v. New York*, 360 U.S. 315 (1959)) (evidence that friend feigned sympathy for defendant in order to extract confession is material to issue of voluntariness).

23. 31 Cal. 3d at 841, 647 P.2d at 108, 183 Cal. Rptr. at 832.

24. *Id.*

25. See *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973) (in determining whether defendant's free will was overborne, an examination of all circumstances surrounding confession is required, including characteristics of accused and details of interrogation); *Rogers v. Richmond*, 365 U.S. 534, 544 (1961) (duty of trial court is to focus upon whether behavior of law enforcement officials "was such as to overbear petitioner's will to resist and bring about confessions not freely self-determined. . .").

26. Hogan's wife had also told him in the telephone conversation that the police had proof that he had raped Theresa Holland. 31 Cal. 3d at 837, 647 P.2d at 105-06, 183 Cal. Rptr. at 829-30. See also *People v. Alfieri*, 95 Cal. App. 3d 533, 157 Cal. Rptr. 304 (1979) (evidence of psychological coercion established where sheriff's office tells family members that defendant has confessed and then allows family members to visit defendant, who has not actually confessed).

27. 31 Cal. 3d at 843, 647 P.2d at 109, 183 Cal. Rptr. at 833.

28. *Id.*

29. *Chapman v. California*, 386 U.S. 18, 24 (1967) ("Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

30. *People v. Powell*, 67 Cal. 2d 32, 51-52, 429 P.2d 137, 148, 59 Cal. Rptr. 817, 828

not be shown beyond a reasonable doubt that the statements did not influence the verdict.³¹

Justice Kaus, concurring in the result, found that the conduct of the officers created a situation which was likely to initiate a false confession that was not the product of free will, even though he felt that there was no implied promise of leniency given these facts.³² In dissent, Justice Richardson argued that the majority usurped the responsibility of the trial court in resolving the conflicting evidence on the issue of "motivating cause."³³ Justice Richardson also believed that no coercion of any kind had occurred and that the deceptive tactics used by the police were permissible.³⁴

The approach taken by the court in *Hogan* to determine voluntariness is purely a case-by-case approach.³⁵ The *Hogan* majority, however, indicates a willingness to more readily find involuntariness where the record below is conflicting and the factual situation is complex.³⁶

C. *Involuntary testimony from suspect-witness is insufficiently attenuated to be admissible: People v. Superior Court (Sosa).*

In *People v. Superior Court (Sosa)*,¹ the court addressed the issue of whether statements made by one of petitioner Sosa's co-defendants, Eddie Gonzales, were sufficiently attenuated from an illegal search and seizure to make them admissible.² Sosa was indicted and arrested as a result of grand jury testimony given by Gonzales, whose testimony was the product of an illegal arrest

(1967) ("The introduction in evidence of a *confession* obtained from the defendant in violation of constitutional guarantees is prejudicial per se and compels reversal regardless of other evidence of guilt.") (emphasis in original).

31. 31 Cal. 3d at 844, 647 P.2d at 110, 183 Cal. Rptr. at 834. The court further held that the jury's consideration of a portion of a tape dealing with Hogan's unwillingness to take a lie detector test, which had not been admitted into evidence, was prejudicial error and could not be cured by admonition. *Id.* at 844-48, 647 P.2d at 110-12, 183 Cal. Rptr. at 834-36.

32. *See id.* at 855-59, 647 P.2d at 116-19, 183 Cal. Rptr. at 840-43.

33. *Id.* at 860-62, 647 P.2d at 119-21, 183 Cal. Rptr. at 843-45.

34. *Id.* at 862-63, 647 P.2d at 121-22, 183 Cal. Rptr. at 845-46.

35. *See supra* notes 12 & 25.

36. 31 Cal. 3d at 860-62, 647 P.2d at 119-21, 183 Cal. Rptr. at 843-45 (Richardson, J., dissenting).

1. 31 Cal. 3d 883, 649 P.2d 696, 185 Cal. Rptr. 113 (1982). Justice Broussard wrote the opinion expressing the unanimous opinion of the court. Justice Reynoso did not participate in the decision.

2. Real party in interest, Alfred Richard Sosa, was indicted for conspiracy to murder and the murder of Ellen Delia. Sosa's co-defendants included Michael Delia, Armando Varela, and Eddie Gonzales.

and interrogation of Armando Varela.³ The supreme court affirmed the ruling of the trial court and ordered suppression of Gonzales' statements and anticipated testimony.⁴

In affirming the trial court order, the supreme court noted that the original detentions and arrests of Sosa and Varela were illegal because they were made for investigatory purposes only.⁵ The trial court recognized that because Varela's statements to the police implicating Gonzales were the product of an unlawful detention and arrest, the statements had to be voluntarily made in order to dissipate the original taint.⁶ The trial court held, and the supreme court affirmed, that Varela's statements were not voluntary because they were the product of intense police interrogation⁷ and obtained in violation of his *Miranda* rights.⁸ The trial court concluded that the warrant and search of Gonzales' home were illegal because they were based upon Valera's statements,⁹ and that the statements made by Gonzales to the police were involuntary and therefore tainted.¹⁰

3. The Monterey Park Police Department had suspected Michael Delia and other members of the Mexican Mafia prison gang of involvement in the killing of Ellen Delia. Armando Varela and Sosa were arrested pursuant to a surveillance operation which the People conceded was illegal. Varela was interrogated over a period of five days in violation of his *Miranda* rights by officers of the Prison Gang Task Force. Varela agreed to provide information to the police only after a former gang member told Varela that the gang planned to kill him.

The Monterey Park police prepared a search warrant for Gonzales' house based upon statements by Varela which implicated Gonzales in the killing of Ellen Delia. Pursuant to the warrant, Gonzales was arrested and agreed to assist the police after an interrogation in violation of his *Miranda* rights. 31 Cal. 3d at 886-87, 649 P.2d at 697, 185 Cal. Rptr. at 114.

4. *Id.* at 887, 649 P.2d at 697, 185 Cal. Rptr. at 114.

5. The detention and arrest of Varela and Sosa occurred during the Monterey Park police surveillance of Michael Delia's home. Valera and Sosa were detained for making an illegal left turn. Sosa was arrested for failing to provide identification. The arresting officer saw a revolver in the car and arrested Varela and Sosa for robbery. The prosecution conceded that this was an illegal detention and arrest. 31 Cal. 3d at 886, 649 P.2d at 697, 185 Cal. Rptr. at 114.

6. *Id.* at 891, 649 P.2d at 699-700, 185 Cal. Rptr. at 116-17.

7. Varela was interrogated for five consecutive days by officers of the Monterey Park Police Department, the Sacramento Police Department, the California Department of Corrections, and the Prison Gang Task Force. *Id.* at 888-89, 649 P.2d at 698-99, 185 Cal. Rptr. at 115-16.

8. *Miranda v. Arizona*, 384 U.S. 436 (1966). Varela was questioned a number of times after he had invoked his right to remain silent until he could consult counsel. Such statements are characterized as involuntary. See *People v. Pettin-gill*, 21 Cal. 3d 231, 578 P.2d 108, 145 Cal. Rptr. 861 (1978); *People v. Randall*, 1 Cal. 3d 948, 464 P.2d 114, 83 Cal. Rptr. 658 (1970).

9. 31 Cal. 3d at 891, 649 P.2d at 700, 185 Cal. Rptr. at 117.

10. Gonzales was arrested in his home by Sergeant John Helvin of the Prison

The prosecution contended that the decision of the United States Supreme Court in *United States v. Ceccolini*¹¹ required the admission of the Gonzales statements and grand jury testimony. In *Ceccolini*, the Supreme Court stated that the exclusionary rule should not be as readily invoked where the evidence sought to be excluded is live-witness testimony, rather than an inanimate object.¹² In determining whether witness testimony should be suppressed, the United States Supreme Court stated that one of the factors to be considered was the degree of free will exercised by the witness.¹³ The Court also required a closer, more direct link between the illegal conduct of the officials and the testimony sought to be suppressed because the cost of excluding live witness testimony is prohibitive.¹⁴

The California Supreme Court held that nothing in *Ceccolini* required a reversal of the trial court's suppression of the Gonzales testimony.¹⁵ The prosecution had failed in its burden of proving attenuation and the voluntariness of the Gonzales statements.¹⁶ Unlike the shop employee witness in *Ceccolini*, Gonzales' testimony was given involuntarily.¹⁷ The court concluded that the police investigation in *Sosa* further distinguished it from *Cec-*

Gang Task Force. Helvin kicked down the door of Gonzales' house after he received no response from his announced presence. Gonzales was arrested after Helvin observed him carrying balloons into the bathroom which he assumed contained heroin. On the way to the Los Angeles County Jail, one officer asked Gonzales if he wanted this situation to happen every three months; Gonzales replied, "I'll have to do the time." Gonzales was not advised of his *Miranda* rights until approximately 30 hours after the arrest, during which time Helvin attempted to obtain statements from Gonzales. 31 Cal. 3d at 890, 649 P.2d at 699, 185 Cal. Rptr. at 116.

11. 435 U.S. 268 (1978).

12. *Id.* at 280. In *Ceccolini*, a police officer was on a break in a flower shop talking to a shop employee and discovered betting slips and money in an envelope by the cash register. The officer reported this to his superiors, who relayed the information to an FBI agent investigating suspected gambling operations in the flower shop. Four months later the shop employee testified against the defendant, the owner of the flower shop. The Supreme Court reversed an order suppressing the employee's testimony holding that the connection between the illegal search by the police officer and the employee's testimony was sufficiently attenuated to dissipate the taint of the illegal search. *Id.* at 279-80.

13. *Id.* at 276-78.

14. *Id.* at 278.

15. 31 Cal. 3d at 894, 649 P.2d at 701, 185 Cal. Rptr. at 118.

16. *Id.* The prosecution has the burden of proving attenuation. See *People v. DeVaughn*, 18 Cal. 3d 889, 897, 558 P.2d 872, 876, 135 Cal. Rptr. 786, 790 (1977) (citing *Brown v. Illinois*, 422 U.S. 590, 604 (1975)).

17. In *Sosa*, Gonzales was arrested, charged, held in police custody, and interrogated. The shop employee in *Ceccolini* was only a witness in a grand jury hearing. See *United States v. Humphries*, 600 F.2d 1238, 1247 (1979), where the Ninth Circuit Court of Appeals stated that the Court in *Ceccolini* distinguished between live-witness testimony of a potential co-defendant, and that of an unarrested or unimplicated witness. The court considered the free will of the former witness but not the latter.

colini stating that “[c]ompared with the egregious conduct here of Sergeant Helvin, the lead and arresting officer, *Ceccolini* is a tame case. . . .”¹⁸

The supreme court in *Sosa* appears to accept the distinction announced in *Ceccolini* between live-witness testimony and inanimate objects for purposes of invoking the exclusionary rule.¹⁹ The application of this distinction, however, will depend upon whether the live-witness testimony is that of a suspect in custody or an unimplicated witness in the criminal activities at issue, such as the shop employee in *Ceccolini*. In future cases, the court will carefully examine the free will of the suspect/witness and the nature of the police conduct where attenuation of an illegal taint is an issue.

VIII. DAMAGES

A. Punitive damages allowable in private civil action brought under Fair Employment and Housing Act: *Commodore Home Systems, Inc. v. Superior Court*.

In *Commodore Home Systems, Inc. v. Superior Court*,¹ the California Supreme Court determined the extent of damages allowed in a private civil action charging employment discrimination under the California Fair Employment and Housing Act (FEHA).² The court concluded that the remedies specified by the FEHA that may be granted under a determination by the Fair Employment and Housing Commission did not limit the remedies which

18. 31 Cal. 3d at 894, 649 P.2d at 702, 185 Cal. Rptr. at 119 (quoting *People v. Superior Court (Sosa)*, 118 Cal. App. 3d 390, 405, 173 Cal. Rptr. 481, 489 (1981) (Jones, J., concurring in part). The supreme court further held that the People's request to make an additional showing of attenuation must be made pursuant to Penal Code § 1538.5(j) which allows either the reopening of a suppression ruling at trial upon a showing of good cause or appellate review under § 1538.5(o). Since the People sought review pursuant to § 1538.5(o), the order was binding. The court expressed no view as to whether a suppression ruling may be reopened under § 1538.5(j) where the appellate court has upheld the ruling at a § 1538.5 hearing. 31 Cal. 3d at 894-96 & n.8, 649 P.2d at 702-03 & n.8, 185 Cal. Rptr. at 119-20 & n.8.

19. See *supra* note 12 and accompanying text.

1. 32 Cal. 3d 211, 649 P.2d 912, 185 Cal. Rptr. 270 (1982). The majority opinion was authored by Justice Newman, with Chief Justice Bird and Justices Broussard and Reynoso concurring. A separate concurring opinion was written by Justice Mosk in which Justice Reynoso also concurred. A separate dissenting opinion was written by Justice Richardson in which Justice Kaus concurred.

2. CAL. GOV'T CODE §§ 12900-12966 (West 1980).

may be granted by a court in a subsequent civil action.³

Commodore Home Systems, Inc. (Commodore) petitioned the supreme court to issue a writ of mandate ordering the trial court to strike a prayer for punitive damages in a complaint brought against them for alleged violations of the FEHA.⁴ Commodore contended that the remedies provided by the FEHA for the determination of the Fair Employment and Housing Commission (Commission) were the exclusive remedies which the court would be allowed to grant in the event Commodore was found to have violated the FEHA. The basis for this contention, and also for Justice Richardson's dissent, was that the civil action was brought under the FEHA.⁵ The court, however, viewed the civil

3. The structure of the Fair Employment and Housing Act was explained by the court as follows:

The statute creates a Department of Fair Employment and Housing (Department) (§ 12901), whose function is to investigate, conciliate, and seek redress of claimed discrimination (§ 12930). Aggrieved persons may file complaints with the Department (§ 12960), which must promptly investigate (§12963). If it deems a claim valid it seeks to resolve the matter—in confidence—by conference, conciliation, and persuasion. (§12963.7) If that fails or seems inappropriate the Department may issue an accusation to be heard by the Fair Employment and Housing Commission (Commission). (§§ 12965, subd. (a), 12969; see too § 12903.)

The Commission determines whether an accused employer, union, or employment agency has violated the act. If it finds a violation it must 'issue . . . an order requiring such [violation] to cease and desist from such unlawful practice and to take such action, including, but not limited to, hiring, reinstatement or upgrading of employees, with or without back pay, restoration to membership in any respondent labor organization, as, in the judgment of the commission, will effectuate the purpose of this part . . .' (§ 12970, subd.(a)).

If no accusation is issued within 150 days after the filing of the complaint and the matter is not otherwise resolved, the Department must give complainant a right-to-sue letter. Only then may that person sue in the superior court 'under this part' (§12965 subd. (b)).

32 Cal. 3d at 213-14, 649 P.2d at 913, 185 Cal. Rptr. at 271. All statutory references are to the California Government Code.

4. The complaint, filed by two discharged employees, alleged that they were discharged solely because of race under Commodore's policy of denying supervisory and management positions to blacks. They also alleged that Commodore fired all blacks with aptitude for advancement to those positions. As directed by CAL. GOV'T CODE § 12965(b) (West 1980), the Department notified them that they had the right to sue Commodore in a private civil action because the administrative process would not lead to an accusation of violation within 150 days of the initial filing of the complaint.

5. Commodore contended that the wording of CAL. GOV'T CODE § 12965(b) (West 1980), which allows the aggrieved party to bring a "civil action under this part," indicated that the court, in the civil action, could not grant any remedies which were not specifically expressed in the code. 32 Cal. 3d at 215-16, 649 P.2d at 914-15, 185 Cal. Rptr. at 272-73. California courts recognize that remedies in statutes creating new causes of action are deemed exclusive of remedies not expressly stated. See *Orloff v. Los Angeles Turf Club*, 30 Cal. 2d 110, 113, 180 P.2d 321, 322-23 (1947). The court determined that the rule was not applicable here as the remedies applied to the administrative process and not to the subsequent court proceeding. 32 Cal. 3d at 216, 649 P.2d at 915, 185 Cal. Rptr. at 273.

action as an independent right granted by the FEHA which therefore was not limited by the specified administrative remedies.⁶ The court recognized that the applicable rule in California was that "[w]hen a statute recognizes a cause of action for violation of a right, all forms of relief . . . including appropriate punitive damages are available unless a contrary legislative intent appears."⁷ The remedies stipulated by the FEHA concern the remedial powers of the Commission.⁸ The allowance of reasonable attorneys' fees and costs for the civil action was not found to be exclusive of other remedies that may be provided since the FEHA merely evinced a legislative intent to "contravene the general rule in California that, absent a contrary agreement, litigants are not entitled to fees."⁹

The court refused to interpret the provisions of the FEHA in light of other federal statutes which, with similar language, have denied awards of either general compensatory or punitive damages.¹⁰ Section 10(c) of the National Labor Relations Act (NLRA)¹¹ and section 706(g) of Title VII of the Civil Rights Act of 1964¹² both provide remedies for unfair and unlawful labor practices and preclude awards of damages beyond the types enumerated.¹³ The court determined that certain distinguishing features

6. 32 Cal. 3d at 216, 649 P.2d at 915, 185 Cal. Rptr. at 273.

7. *Id.* at 215, 649 P.2d at 914, 185 Cal. Rptr. at 272.

8. See CAL. GOV'T CODE § 12970 (West 1980) (addressing remedies which may be granted by the commission upon finding that employer engaged in unlawful employment practice).

9. 32 Cal. 3d at 216, 649 P.2d at 915, 185 Cal. Rptr. at 273. CAL. CIV. PROC. CODE § 1021 (West 1980) provides that:

Except as attorney's fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided.

Id.

10. National Labor Relations Act § 10(c), 29 U.S.C. § 160(c) (1976) (providing remedies for unfair labor practices of cease and desist orders, and reinstatement of discharged employees with or without back pay as will effectuate policies of the Act); Civil Rights Act of 1964, Title VII § 706(g), 42 U.S.C. § 2000e-5(g) (1976) (providing remedies for intentional unlawful employment practice of affirmative action, including but not limited to reinstatement or hiring of employees with or without back pay, or any other equitable relief as the court deems appropriate).

11. 29 U.S.C. § 160(c) (1976).

12. 42 U.S.C. § 2000e-5(g) (1976).

13. See *Edison Co. v. Labor Bd.*, 305 U.S. 197, 235-36 (1938) (29 U.S.C. § 160(c) (1976) precludes the grant of punitive damages for interfering with right of workers to join labor union); *Van Hooissen v. Xerox Corp.*, 368 F. Supp. 829, 837-38

between the California and the federal acts precluded parallel constructions. While the FEHA provided that an administrative process was a prerequisite to a private court action,¹⁴ the NLRA does not provide for a private court action under its auspices. The sole forum for unfair labor practices under the statute is the National Labor Relations Board.¹⁵ While Title VII of the Civil Rights Act of 1964 provides for "judicial handling of federal discrimination claims in civil actions . . . , [t]he federal statute expressly describes the remedies that courts may assess."¹⁶

The preclusion of the award of compensatory or punitive damages by the federal acts reflects the general policy of encouraging settlement of the disputes at the agency level rather than in a court proceeding.¹⁷ It was suggested by Commodore, therefore, that to allow punitive damages in a civil action under the FEHA would violate the Act's policy encouraging settlement at the agency level.¹⁸ Commodore argued that "claimants, aware of their chance for a large court recovery, [would] decline fair settlements under Department auspices."¹⁹ For a number of reasons, the court was not persuaded that allowing punitive damages would upset that policy. First, the claimant has no right to sue in a private civil action until he has exhausted his claim through the administrative process.²⁰ Second, the court noted that the compliance structure of the FEHA encouraged cooperation in the administrative process because under the auspices of the Department, the aggrieved party's cost of pursuing his claim is absorbed by the Department.²¹ The outcome of a private civil action is not only speculative, but the cost of such an action is the claimant's sole responsibility. Third, a possibility of punitive damages being awarded to the claimant may encourage the persons charged with the violation to settle during the conciliation process.²²

(N.D. Cal. 1973) (holding punitive damages not provided for under § 2000e-5(g) of Title VII of Civil Rights Act of 1964).

14. *See supra* note 3.

15. 2 Cal. 3d at 217, 649 P.2d at 915, 185 Cal. Rptr. at 273.

16. *Id.* (citations omitted).

17. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1973) (intent of legislation was to settle disputes through conference, conciliation, and persuasion by equal employment opportunity agencies before aggrieved party was entitled to file suit).

18. 32 Cal. 3d at 218, 649 P.2d at 916, 185 Cal. Rptr. at 274.

19. *Id.*

20. CAL. GOV'T CODE § 12965(b) (West 1980) provides that the claimant will not be issued a right-to-sue letter until it is determined that the Department will not take action in the matter. In this sense, the Department controls the right of the claimant to proceed in a private civil action. 32 Cal. 3d at 218, 649 P.2d at 916, 185 Cal. Rptr. at 274.

21. 32 Cal. 3d at 218, 649 P.2d at 916, 185 Cal. Rptr. at 274.

22. *Id.*

The court rejected the proposition that the legislative history of the FEHA reflected an intent to preclude punitive damages in a private cause of action. References that the cause of action was "limited" were not determined to be indicative of an intent to preclude punitive damages, but rather were seen as reflective of the need to exhaust administrative procedures before instituting a private cause of action.²³ Moreover, language in committee reports, memoranda, and letters written by the authors of the statute concerning the similarity between the state and federal causes of action were determined to be indicative of the requirement of exhausting the administrative process and were not seen as limiting the relief that the courts may grant.²⁴ The court considered these propositions as "too general and cursory to dispel the California presumption that punitive damages *are* available in noncontractual court actions."²⁵

Justice Richardson, in his dissenting opinion,²⁶ felt that the legislative intent of allowing a private civil action under the auspices of the FEHA precluded any remedies not granted by the Act.²⁷ This intent was reinforced by the legislature's express provision for punitive damages in housing discrimination situations which are governed by the FEHA but not included in the unfair labor practice provision.²⁸ Concluding that "[t]he remedy language of the employment and housing sections seems consciously parallel," Justice Richardson believed that "punitive damages were excluded intentionally from Government Code Section 12970, subdivision (a)."²⁹

23. *Id.* at 219, 649 P.2d at 917, 185 Cal. Rptr. at 275.

24. *Id.* Justice Mosk, concurring in the decision, took exception to the court considering memoranda and private letters being used as an indication of legislative intent by the majority. He stated: "[i]n construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it." *Id.* at 221, 649 P.2d at 918, 185 Cal. Rptr. at 276 (quoting *In re Marriage of Bouquet*, 16 Cal. 3d 583, 589, 546 P.2d 1371, 1374, 128 Cal. Rptr. 427, 430 (1976)).

25. 32 Cal. 3d at 219, 649 P.2d at 917, 185 Cal. Rptr. at 275 (emphasis in original).

26. *Id.* at 222, 649 P.2d at 918, 185 Cal. Rptr. at 276 (Richardson, J., dissenting).

27. Justice Richardson viewed the language of CAL. GOV'T CODE § 12965(b) (West 1980) providing that "the person claiming to be aggrieved may bring a civil action *under this part* [i.e., under FEHA] . . ." required that "the remedies available in such an action are those . . . which are specified in FEHA." 32 Cal. 3d at 222, 649 P.2d at 919, 185 Cal. Rptr. at 277 (emphasis in original).

28. CAL. GOV'T CODE § 12987(2) (West Supp. 1982) (allowing Commission to award punitive damages in cases of discriminatory housing practices).

29. 32 Cal. 3d at 227, 649 P.2d at 921, 185 Cal. Rptr. at 279.

IX. EMPLOYEE BENEFIT LAW

- A. *Vacation pay is vested on a pro rata basis and is not subject to forfeiture for failure to meet conditions of employment on a particular date: Suastez v. Plastic Dress-Up Co.*

In *Suastez v. Plastic Dress-Up Co.*,¹ the California Supreme Court, for the first time, addressed the question of when vacation pay vests under section 227.3 of the Labor Code.² *Suastez*, an employee of the Plastic Dress-Up Company, was relieved from employment in mid-year. He claimed that he was entitled to a pro rata share of vacation pay for the portion of the year worked. The Company contended that payment of vacation pay was conditioned upon the employee working for the full year.³

The court noted that “[s]ection 227.3 provides, in part, that whenever an employee is discharged ‘without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with . . . [the] employer policy respecting eligibility or time served. . . .’”⁴ The determinative factor for a payment of a pro rata share of vacation pay depends on whether the right to receive the vacation pay accrues daily as the employee renders services or upon meeting the condition precedent by being employed on the last day of the year.

The supreme court has embraced the position that vacation pay is within the broad definition of wages, as defined in section 200 of the Labor Code.⁵ The form of the compensation consists of a deferred fringe benefit offered for constant and continuous service.⁶ The court noted that the deferral feature of vacation pay is similar to pension or retirement benefits which, although payable only after employment terminates, are considered part of the compensation for the services rendered by an employee.⁷

The question of when the right to receive the vacation pay vests is not as easily answered. Continuing the analogy to pension ben-

1. 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982). The opinion was authored by Chief Justice Bird expressing the unanimous view of the court.

2. CAL. LAB. CODE § 227.3 (West Supp. 1982).

3. The company policy was that the employee would become eligible for paid vacation on the date of his anniversary of employment with the company. This policy was explained to all employees. 31 Cal. 3d at 776 n.1, 647 P.2d at 123 n.1, 183 Cal. Rptr. at 847 n.1.

4. *Id.* at 778, 647 P.2d at 124, 183 Cal. Rptr. at 848.

5. *Id.* at 779, 647 P.2d at 125, 183 Cal. Rptr. at 849. See *People v. Bishop*, 56 Cal. App. 3d 8, 11 (1976); *In re Wil-Low Cafeterias*, 111 F.2d 429, 432 (2d Cir. 1940).

6. 31 Cal. 3d at 779, 647 P.2d at 125, 183 Cal. Rptr. at 849. See also *Local 186, Packinghouse F. & A. Workers v. Armour & Co.*, 446 F.2d 610, 612 (6th Cir.), cert. denied, 405 U.S. 955 (1971).

7. 31 Cal. 3d at 780-81, 647 P.2d at 126, 183 Cal. Rptr. at 850.

efits, the court noted that "the right to pension benefits vests upon the acceptance of employment, even though the right to immediate payment of a *full* pension does not mature until certain conditions are satisfied."⁸ Thus, although the right to receive a full pension may be conditioned upon the employee completing a prescribed period of service, he has earned the right to receive some benefits upon performance of substantial services for the employer. The court applied the same analysis to vacation pay. Although the employee's right to full vacation benefits may not mature until he satisfies the condition prescribed by the employment contract, the right to some vacation benefits vest as soon as the employee performs substantial service for the employer.⁹ "If some share of vacation pay is earned daily, it would be both inconsistent and inequitable to hold that employment on an arbitrary date is condition precedent to the vesting of the right to such pay."¹⁰

The court noted that, in other jurisdictions, it is uniformly held that discharged or striking employees have earned a vested right to receive a pro rata share of vacation pay as compensation for services performed.¹¹ Assuming the right to vacation pay is vested as it is earned, once substantial services are performed a condition precedent to the receipt of any vacation pay is an attempt to effect a forfeiture of that compensation. This is prohibited by section 227.3 of the Labor Code.¹²

8. *Id.* at 780, 647 P.2d at 125, 183 Cal. Rptr. at 849 (quoting *Miller v. State*, 18 Cal. 3d 808, 815, 557 P.2d 970, 974, 135 Cal. Rptr. 386, 390 (1977) (emphasis added) (citations omitted)).

9. 31 Cal. 3d at 780, 647 P.2d at 126, 183 Cal. Rptr. at 850.

10. *Id.* at 782, 647 P.2d at 127, 183 Cal. Rptr. at 851 (citations omitted). See *Brookfield Mills v. Textile Workers Union of Am.*, 28 Lab. Arb. 838, 841 (1957) (Jaffe, Arb.) (employees discharged as result of plant shutdown entitled to pro rata vacation pay because fractional share of vacation pay is earned daily).

11. 31 Cal. 3d at 781, 647 P.2d at 126, 183 Cal. Rptr. at 850. See *Amalgamated Butcher Workmen Local 641 v. Capitol Parking Co.*, 413 F.2d 668, 672 n.5 (10th Cir. 1969) (discussion of trend to grant vacation pay on pro rata basis to laid-off employees).

12. CAL. LAB. CODE § 227.3 (West Supp. 1982) provides in part that "an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination."

X. FAMILY LAW

- A. *California courts have no authority to modify another state's child custody decree so long as that state has jurisdiction and does not decline to exercise it: Kumar v. Superior Court.*

I. INTRODUCTION

In *Kumar v. Superior Court*,¹ the California Supreme Court interpreted the Uniform Child Custody Jurisdiction Act² (hereinafter Uniform Act) as prohibiting modification of an out-of-state custody decree where the state which rendered the initial decree continues to have jurisdiction and does not decline the exercise of such jurisdiction. The court, in determining that New York³ had continuing jurisdiction to modify its custody decree, emphasized that the California appellate courts had “perpetuat[ed] the myth of concurrent modification jurisdiction”⁴ by failing to differentiate between initial and modification jurisdiction under the Uniform Act.⁵ The demarcation between the two types of jurisdiction thus becomes essential if interstate stability in custody is to be achieved.⁶

1. 32 Cal. 3d 689, 652 P.2d 1003, 186 Cal. Rptr. 772 (1982). The opinion was written by Justice Kaus with Chief Justice Bird and Justices Mosk, Richardson, Newman, Broussard, and Reynoso concurring.

2. UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 116 (1979). The Uniform Act adopted by California in 1973 is codified at CAL. CIV. CODE §§ 5150-5174 (West Supp. 1982).

3. New York, as will become apparent, was the state which rendered the initial child custody decree and had also adopted the Uniform Child Custody Jurisdiction Act. See N.Y. DOM. REL. LAW §§ 75-a-z (McKinney Supp. 1982).

4. 32 Cal. 3d at 699, 652 P.2d at 1009, 186 Cal. Rptr. at 778 (footnote omitted).

5. See *infra* note 34 and accompanying text for a more complete discussion and delineation of specific California appellate decisions which have either: (a) proceeded under the erroneous assumption that the Uniform Act allows concurrent modification jurisdiction; or (b) failed to distinguish between initial and modification jurisdiction.

6. The Commissioner's Prefatory Note to the UNIFORM CHILD CUSTODY JURISDICTION ACT, 9 U.L.A. 11 (1979 & Supp. 1983) provides:

Underlying the entire Act is the idea that to avoid the jurisdictional conflicts and confusions . . . a court in one state must assume major responsibility to determine who is to have custody of a particular child; that this court must reach out for the help of courts in other states in order to arrive at a fully informed judgment which transcends state lines and considers all claimants, residents and nonresidents, on an equal basis and from the standpoint of the welfare of the child. If this can be achieved, it will be less important *which* court exercises jurisdiction. . . .

Id. at 114 (emphasis in original). The Commissioner's Note, placing considerable emphasis on interstate cooperation, at least impliedly contends that eventually jurisdictional issues under the Uniform Act will cease to exist.

II. FACTUAL BACKGROUND

The controversy began in 1974 when Yvonne and Jitendra Kumar were granted an uncontested judgment of divorce by the Supreme Court of New York. At that time Yvonne received custody of Sunjay, their only child, and Jitendra was granted visitation rights. In 1977 Yvonne obtained a modification of the 1974 support provisions from a New York court. The parties remained in New York until April 1979, at which time Yvonne removed Sunjay to California without notifying Jitendra until they had left New York.⁷

Jitendra subsequently registered the New York custody decree with the clerk of the respondent court in 1980, and procured a writ of habeas corpus enforcing his visitation rights.⁸ Jitendra soon afterward asked the New York court to modify its initial decree concerning the custody and visitation proceedings. Yvonne thereafter sought an order to show cause in California to modify the New York order, to determine spousal support arrearages and

7. The New York custody decree had placed no restrictions on Yvonne's choice of residence. However, New York requires, even absent an express judicial mandate, that the custodial parent reside in a location reasonably conducive to the exercise of visitation privileges. See *Weiss v. Weiss*, 52 N.Y.2d 170, 418 N.E.2d 377, 436 N.Y.S.2d 862 (1981) (where custodial parent was not allowed to remove the child from New York for residency purposes although the residency clause of the separation agreement, when read in isolation, would ostensibly allow her to live wherever she chose); *Sipos v. Sipos*, 73 A.D.2d 1055, 425 N.Y.S.2d 414 (1980) (where divorce decree expressly provided for Sunday visitation privileges, custodial parent was impliedly prohibited from removing the child to a location which would frustrate regular visitation); *Application of Denberg*, 34 Misc. 2d 980, 229 N.Y.S.2d 831 (1962). See *infra* notes 12 & 13 where the New York court, relying upon the above cited cases, ruled that Yvonne was "impliedly prohibited" from removing Sunjay to California. 32 Cal. 3d at 692 n.2, 652 P.2d at 1004 n.2, 186 Cal. Rptr. at 773 n.2.

8. The Act provides for the enforcement of custody decrees of another state. The section reads:

(1) A certified copy of a custody decree of another state may be filed in the office of the clerk of any superior court of this state. The clerk shall treat the decree in the same manner as a custody decree of the superior court of this state. A custody decree so filed has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this state.

(2) A person violating a custody decree of another state which makes it necessary to enforce the decree in this state may be required to pay necessary travel and other expenses, including attorneys' fees, incurred by the party entitled to the custody or his witnesses.

CAL. CIV. CODE § 5164 (West Supp. 1982); see also UNIFORM CHILD CUSTODY JURISDICTION ACT § 15, 9 U.L.A. 158 (1979 & Supp. 1983) and N.Y. DOM. REL. LAW § 75-p (McKinney Supp. 1982) which include identical provisions.

award attorneys' fees.⁹ Jitendra attacked the California proceeding on the grounds that the court lacked subject matter jurisdiction and in personam jurisdiction.¹⁰

On January 19, 1981, the trial court found the service of process sufficient to support the in personam challenge and furthermore denied the dismissal motion based on lack of subject matter jurisdiction.¹¹ Two days later, the New York court, determining that it still retained jurisdiction, entered an ex parte order to show cause and subsequently presented a memorandum decision on March 25, 1981,¹² followed by a formal order on May 7, 1981.¹³

Several of Jitendra's contentions were reviewed by the California Supreme Court. He maintained that California lacked jurisdiction to modify the New York decree because his son was wrongfully removed from New York.¹⁴ He also maintained that

9. 32 Cal. 3d at 692, 652 P.2d at 1004, 186 Cal. Rptr. at 773.

10. *Id.*

11. The court based its actions on the following reasons:

1. The closest contact with the child's present and future living environment, present and predictable development, as well as available witnesses are in the State of California.

2. Respondent has sought and received assistance with enforcement of visitation rights by [the California court] having accepted and enforced the foreign New York decree. [The California court] can fairly adjudicate further similar issues as they arise.

3. The best interests of the child can best be gauged by the jurisdiction with the closest contacts with the child. The relative convenience of either party should not be a paramount consideration.

Id. at 693, 652 P.2d at 1005, 186 Cal. Rptr. at 774.

12. The initial decision provided in part:

It appears that from the date of the divorce decree until April 10, 1979, the defendant [Jitendra] fulfilled his support and alimony obligations as well as taking advantage of his visitation rights with his infant son. However, on or about April 10, 1979, the plaintiff [Yvonne], with her infant son, without warning or justification, left New York and set up residence in California. Defendant made numerous efforts to contact his ex-wife and determine the whereabouts of his son

The Court clearly has jurisdiction to hear this matter and render a decision on the merits. The Court is satisfied that the plaintiff wrongfully interfered with and withheld visitation rights provided by the judgment of this Court dated October 2, 1974 and will cancel any arrears that have occurred from April 11, 1979 until the present date and will suspend any future payments of alimony and child support until the plaintiff allows the defendant the opportunity to avail himself of his judicially decreed visitation rights.

It is clear that the plaintiff herein is obligated to reside with the child in a location reasonably conducive to the exercise of visitation privileges, and the plaintiff is therefore impliedly prohibited from removing the child to a distant place which would frustrate visitation.

Id. at 693-94 n.3, 652 P.2d at 1005-06 n.3, 186 Cal. Rptr. at 774-75 n.3 (emphasis in original) (citations omitted).

13. See 32 Cal. 3d at 694 n.4, 652 P.2d at 1006 n.4, 186 Cal. Rptr. at 775 n.4 for a recitation of the formal order.

14. *Id.* at 694, 652 P.2d at 1006, 186 Cal. Rptr. at 775. Jitendra advanced the argument pursuant to CAL. CIV. CODE § 5157(2) (West Supp. 1982), which provides that:

not only should California decline jurisdiction because of the pending matter in New York,¹⁵ but also that California completely lacked the authority to modify the original New York decree unless and until that state declines to exercise its jurisdiction.¹⁶ Furthermore, Jitendra claimed that the trial court lacked in personam jurisdiction over him because, pursuant to *Kulko v. California Superior Court*,¹⁷ the habeas corpus proceedings were not sufficient contacts to secure personal jurisdiction.¹⁸

III. CASE ANALYSIS: SUBJECT MATTER JURISDICTION

The court began its analysis by indicating that both parties had misconstrued the essential issue. The controversy did not center around the fact that either New York or California *lacked* jurisdiction, but rather, the actual inquiry was whether the Uniform Act allowed the *exercise* of jurisdiction.¹⁹

The criteria which must be met in order to confer jurisdictional grounds in making the initial child custody determination are set forth in section 5152 of the Civil Code.²⁰ New York obtained juris-

(2) Unless required in the interest of the child, the court shall not exercise its jurisdiction to modify a custody decree of another state if the petitioner, without consent of the person entitled to custody has improperly removed the child from the physical custody of the person entitled to custody or has improperly retained the child after a visit or other temporary relinquishment of physical custody. If the petitioner has violated any other provision of a custody decree of another state the court may decline to exercise its jurisdiction if this is just and proper under the circumstances.

Id.

15. See CAL. CIV. CODE § 5155 (West Supp. 1982).

16. The court eventually concluded that this ground is the proper one for the determination of the case. CAL. CIV. CODE § 5163 (West Supp. 1982) provides in full:

(1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this title or has declined to assume jurisdiction to modify the decree and (b) the court of this state has jurisdiction.

(2) If a court of this state is authorized under subdivision (1) and Section 5157 to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with Section 5157.

Id.

17. 436 U.S. 84 (1978).

18. 32 Cal. 3d at 694, 652 P.2d at 1006, 186 Cal. Rptr. at 775.

19. *Id.* at 695, 652 P.2d at 106, 186 Cal. Rptr. at 775.

20. See CAL. CIV. CODE § 5152 (West Supp. 1982). See *infra* notes 21 & 25.

diction for the original child custody decree as the "home state" of the child.²¹ The Commissioner's Notes to section six of the Uniform Act, however, specify that "once a custody decree has been rendered in one state, jurisdiction is determined by sections 8²² and 14."²³ The seminal question then becomes whether New York had nevertheless retained jurisdiction under the "jurisdictional prerequisites" pursuant to section 5163.²⁴ If it had, then California would not be allowed to modify the New York decree unless that state expressly waived jurisdiction over the parties. The examination must once again center upon section 5152. That section provides that if the child and at least one parent have a significant connection with the state, then the state may retain jurisdiction to modify the decree.²⁵

The court indicated that the trial court had proceeded on the erroneous assumption that the custody matter should be disposed of in the same manner as an initial custody dispute, with California and New York claiming concurrent jurisdiction.²⁶ What the respondent court failed to consider was the applicability of section 5163. Under that section, New York retains exclusive author-

21. CAL. CIV. CODE § 5152(1)(a) (West Supp. 1982) provides:

(1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if the conditions as set forth in any of the following paragraphs are met:

(a) This state (i) is the home state of the child at the time of commencement of the proceeding

Id.

A child's home state is then defined in CAL. CIV. CODE § 5151(5) (West Supp. 1982) as: "[T]he state in which the child immediately preceding the time involved lived with his parents, a parent, or a person acting as parent, for at least six consecutive months" *Id.* By adopting the Uniform Act, New York has provisions exactly similar to the California sections. *See* N.Y. DOM. REL. LAW §§ 75-d, 75-b (McKinney Supp. 1982).

22. Section 8 of the Act is codified at CAL. CIV. CODE § 5157 (West Supp. 1982).

23. UNIFORM CHILD CUSTODY JURISDICTION ACT § 6, 9 U.L.A. 135 (1979) (Commissioner's Notes). Section 14 is codified at CAL. CIV. CODE § 5163 (West Supp. 1982); *see supra* note 16.

24. *See supra* note 16.

25. CAL. CIV. CODE § 5152(1)(b) (West Supp. 1982) provides that a court of this state has jurisdiction over the proceedings if:

(b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training, and personal relationships.

Id. *See also* N.Y. DOM. REL. LAW § 75-d (McKinney Supp. 1982).

26. 32 Cal. 3d at 697, 652 P.2d at 1008, 186 Cal. Rptr. at 777. If the present case was an initial child custody determination, then California might possibly be in the position to proceed on the merits as the state having the closest connection with the child pursuant to CAL. CIV. CODE § 5150(c) (West Supp. 1982). *See* 32 Cal. 3d at 697 n.9, 652 P.2d at 1008 n.9, 186 Cal. Rptr. at 777 n.9.

ity to modify its initial decree,²⁷ as long as the child and one parent maintain significant connections with that state.²⁸ The court found the conclusion inescapable that, pursuant to section 5163, New York retains exclusive jurisdiction to modify the initial decree,²⁹ and all petitions concerning such modification should have been directed to the New York courts.³⁰

The court established that the flaw in the argument advanced by Yvonne, and adopted by the respondent court, is that they accepted the assumption that concurrent modification jurisdiction

27. See Bodenheimer, *Interstate Custody: Initial Jurisdiction and Continuing Jurisdiction Under the UCCJA*, 14 FAM. L.Q. 203, 214-15 (1981). Professor Bodenheimer explained that:

[T]he continuing jurisdiction of the prior court is exclusive. Other states do not have jurisdiction to modify the decree. They must respect and defer to the prior state's continuing jurisdiction. Section 14 [codified as CAL. CIV. CODE § 5163 (West Supp. 1982)] is the key provision which carries out the Act's two objectives of (1) preventing the harm done to children by shifting them from state to state to relitigate custody, and (2) preventing jurisdictional conflict between states after a custody decree has been rendered. . . .

Exclusive continuing jurisdiction is not affected by the child's residence in another state for six months or more. Although the new state [California, in this instance] becomes the child's home state, significant connection jurisdiction continues in the state of the prior decree where the court record and other evidence exists and where one parent or another contestant continues to reside. Only when the child and all parties have moved away is deference to another state's continuing jurisdiction no longer required.

Id. This explanation was cited with approval in *Kumar*, 32 Cal. 3d at 696, 652 P.2d at 1007. 186 Cal. Rptr. at 776.

28. 32 Cal. 3d at 697, 652 P.2d at 1008, 186 Cal. Rptr. at 777.

29. See Bodenheimer, *The Uniform Child Custody Jurisdiction Act: A Legislative Remedy for Children Caught in the Conflicts of Laws*, 22 VAND. L. REV. 1207 (1969). The author gives an example identical to the *Kumar* situation.

A typical example is the case of the couple who are divorced in state A, their matrimonial home state and whose children are awarded to the wife, subject to visitation of the husband. Wife and children move to state B, with or without permission of the court to remove the children. State A has continuing jurisdiction and the courts in state B may not hear the wife's petition to make her the sole custodian, eliminate visitation rights, or make any other modification of the decree, even though state B has in the meantime become the 'home state' under section 3 [CAL. CIV. CODE § 5152 (West Supp. 1982)]. The jurisdiction of state A continues *and is exclusive* as long as the husband lives in state A unless he loses contact with the children, for example, by not using his visitation privileges for three years.

Id. at 1237 (emphasis added).

30. See *Palm v. Superior Court*, 97 Cal. App. 3d 456, 468, 158 Cal. Rptr. 786, 792-93 (1979); *In re Marriage of Schwander*, 79 Cal. App. 3d 1013, 1019, 145 Cal. Rptr. 325, 328 (1978).

exists under the Uniform Act.³¹ The courts which have proceeded along this route began under section 5152,³² rather than 5163.³³ They then made an appraisal as to which state had the greater association with the child and proceeded accordingly.³⁴

Two observations were made by the *Kumar* court. First, only "initial jurisdiction is determined by the guidelines of section 5152" and second, modification jurisdiction is entirely controlled by section 5163.³⁵

The final contingency which must be met under section 5163 in order for the respondent court to exercise modification jurisdiction is that New York must decline to exercise its jurisdiction. The court, observing the prior orders of the New York court,³⁶ concluded that New York had not abrogated its jurisdictional rights.³⁷

XI. INSURANCE LAW

A. *Actual claim payments made by employer under plan of self-insurance are attributed to gross premiums for purposes of computing tax liability of insurance company: Metropolitan Life Insurance Co. v. State Board of Equalization.*

31. 32 Cal. 3d at 696, 652 P.2d at 1009, 186 Cal. Rptr. at 778. *See also* Bodenheimer, *supra* note 27, at 216-29.

32. CAL. CIV. CODE § 5152 (West Supp. 1982); *see supra* notes 20, 21, & 25.

33. *See supra* note 16.

34. Under this analysis it is easy to see how presence of the child becomes a disproportionately controlling factor. 32 Cal. 3d at 697 n.10, 652 P.2d at 1009 n.10, 186 Cal. Rptr. at 778 n.10.

The California appellate courts have perpetuated the myth of concurrent modification jurisdiction. *See In re Marriage of Leonard*, 122 Cal. App. 3d 433, 449, 461-63, 175 Cal. Rptr. 903, 906, 913-14 (1981); *Schlumpf v. Superior Court*, 79 Cal. App. 3d 892, 145 Cal. Rptr. 190 (1978); *Clark v. Superior Court*, 73 Cal. App. 3d 298, 307, 140 Cal. Rptr. 709, 714 (1977). *See also* 32 Cal. 3d at 699 n.12, 652 P.2d at 1009 n.12, 186 Cal. Rptr. at 778 n.12.

35. 32 Cal. 3d at 699, 652 P.2d at 1009, 186 Cal. Rptr. at 778.

36. *See supra* notes 12 & 13 and accompanying text.

37. The court noted that the *Kumar* decision complied with the recently enacted Parental Kidnapping Prevention Act of 1980, 28 U.S.C.A. § 1738A (West Supp. 1982). That act gives full faith and credit to child custody determinations.

The final issue raised in the case was whether or not California obtained in personam jurisdiction of Jitendra through his use of the California courts to secure a habeas corpus order. The court, relying on the general principles of *Kulko v. California Super. Ct.*, 436 U.S. 84 (1978), concluded that such personal jurisdiction did not exist. The court, pointing to language in *Titus v. Superior Court*, 23 Cal. App. 3d 792, 802, 100 Cal. Rptr. 477, 485 (1972), claimed that "fairness preclude[s] the exercise of personal jurisdiction where connection with the state resulted from an effort to encourage visitation with the noncustodial parent." 32 Cal. 3d at 703, 652 P.2d at 1012, 186 Cal. Rptr. at 781.

I. INTRODUCTION

The case of *Metropolitan Life Insurance Co. v. State Board of Equalization*¹ required the California Supreme Court to determine whether a plan created by the Metropolitan Life Insurance Company to set up its clients as limited self-insurers would decrease the gross premium tax liability owed by Metropolitan to the state. Holding that the insurance company's clients acted as mere agents of Metropolitan for the collection of premiums and distribution of claims, the court concluded that the entire cost of the plan, and therefore, Metropolitan's gross premium tax liability, included the cost of the employer's self-insurance plan, in addition to the amount paid by the employers directly to Metropolitan for administrative expenses and excess risk coverage.

II. THE STATUTE

Every insurer in California is required by law to pay to the state a tax based on the amount of gross premiums received, less any premium payments returned, for insurance business done in the state.² This tax is imposed in lieu of all other taxes and licenses—state, county, and municipal—except for taxes on real estate, ocean marine insurance and other exceptions stated in the statute.³

III. THE PLAN

Metropolitan provides employee group medical benefit insurance plans to employers who, in turn, offer these benefits to certain employees. Generally, the standard plans are financed through the payment of monthly premiums paid to Metropolitan by the employers. For large employers, these premiums can have a very substantial cost.⁴ In addition, Metropolitan must pay a

1. 32 Cal. 3d 649, 652 P.2d 426, 186 Cal. Rptr. 578 (1982). The majority opinion was authored by Justice Mosk with Chief Justice Bird and Justices Broussard and Miller concurring. A dissenting opinion was filed by Justice Kaus with Justices Reynoso and Barry-Deal concurring.

2. CAL. REV. & TAX CODE § 12201 (West Supp. 1982). The basis on which the tax liability is determined is set by CAL. REV. & TAX CODE § 12221 (West 1970). The rate at which the tax liability is set is specified by CAL. REV. & TAX CODE § 12202 (West Supp. 1982).

3. CAL. REV. & TAX CODE § 12204 (West Supp. 1982).

4. The dissent pointed out that the fifteen participants in the plan paid out

gross premiums tax on the amount of premiums received.⁵ Metropolitan, in an effort to provide its clients with a more cost-effective method of supplying medical benefit insurance to their employees, and also to limit its own tax liability on gross premiums, devised a special plan of insurance called a Mini - Met Rider.⁶ The plan was designed to shift certain cash flow advantages to the clients, and, incident to that, reduce Metropolitan's gross premium tax liability.⁷

The Mini - Met plan was set up to require the employers to become self-insurers. The plan worked so that each employer, rather than paying Metropolitan the full premium required under the standard plan coverage, assumed responsibility to pay all employee medical benefit claims that would normally be paid by Metropolitan up to a pre-arranged trigger-point. The employer, in essence, would become the primary insurer. The trigger-point figure was determined by estimating the average monthly level of employee claims. The function of the rider was to obligate Metropolitan to pay all employee medical benefit claims over the trigger-point and to administer the employer's self-insurer obligations. Metropolitan, in essence, became the secondary insurer by being responsible for claims over the pre-arranged trigger-point.

The result of the plan was to shift cash flow advantages from Metropolitan to the employers in the guise of the "float"—the use of the premium funds from the time of payment until the funds were disbursed to satisfy claims."⁸ The employers would then be able to use the funds that were previously payable to Metropolitan as premiums. The plan was also to have eliminated the tax liability on the amount of premiums that would have been paid by the employers to Metropolitan but for the plan.

over \$33 million in claims and two of the participants alone paid out over \$24 million in claims to their employees. 32 Cal. 3d at 664-65, 652 P.2d at 435, 186 Cal. Rptr. at 587 (Kaus, J., dissenting).

5. See *supra* note 2.

6. The dissent noted that the trial court found that the impetus for devising the plan came from the employers seeking more economical approaches to providing their employees with medical benefits. Some employers had considered providing no insurance. 32 Cal. 3d at 663, 652 P.2d at 434, 186 Cal. Rptr. at 586 (Kaus, J., dissenting).

7. In fact, Metropolitan claimed that under the plan, its premiums were reduced 90% of the normal standard coverage. *Id.* at 653, 652 P.2d at 427, 186 Cal. Rptr. at 579.

8. *Id.* The float would benefit the employers by allowing them to earn a return on the investment of any unpaid claims. See, e.g., *Rubin v. Manufacturers Hanover Trust Co.*, 661 F.2d 979, 982-83 (2d Cir. 1981) (float was ability to use and invest proceeds of money order sales between time of purchase and time when money orders were presented for collection).

IV. THE CASE

The California Insurance Commissioner did not adhere to the form of this plan in determining Metropolitan's tax liability. Looking at the substance of the plan rather than its form, the Commissioner determined that the combination of the pre-trigger-point obligation of the employer and the rider was not materially different from the previous standard insurance coverage requiring the payment of monthly premiums to Metropolitan. The Commissioner therefore attributed the aggregate claims paid to employees by the employers to Metropolitan's gross premiums and assessed the gross premiums tax based on this amount plus the amount of premium paid to Metropolitan on the rider.⁹ The California Supreme Court upheld this position.

Justice Mosk's opinion analyzed the case in two parts. It first determined that the employers did not act as self-insurers but as agents of Metropolitan in paying the pretrigger-point claims, and second, that the pretrigger-point payments to employees were a part of the gross premiums and, therefore, includable in determining Metropolitan's tax liability.

A. Employers as Agents of Metropolitan

The court dismissed the argument that the employers were self-insurers to the extent of the claims that they paid, and held that under the arrangement of the rider, the employers acted as mere agents of Metropolitan.¹⁰ The basis of this conclusion was that the employers, in subjecting themselves to a liability to pay claims only to the trigger-point, or expected level of claims, did not assume the risk inherent in being an insurer.¹¹ Metropolitan, on the other hand, bore the risk that the actual level of claims

9. 32 Cal. 3d at 653, 652 P.2d at 428, 186 Cal. Rptr. at 580.

10. *Id.* at 657, 652 P.2d at 430, 186 Cal. Rptr. at 582. The court reasoned that the employers acted as agents in providing ministerial assistance to Metropolitan by disbursing pretrigger-point claims to employees. *Id.* See also *Elfstrom v. New York Life Ins. Co.*, 67 Cal. 2d 503, 512, 432 P.2d 731, 737, 63 Cal. Rptr. 35, 41 (1967) (employer is agent of insurer in performing the duties of administering group insurance policies); *California Physicians Service v. Garrison*, 28 Cal. 2d 790, 179 P.2d 412 (1946) (corporation which assumed no risk but merely distributed funds collected for medical benefits is not insurer but agent).

11. 32 Cal. 3d at 654, 652 P.2d at 428, 186 Cal. Rptr. at 580. The court determined that the employers were not insurers by applying the definitions of insurance to the specifics of the plan. Insurance is defined as "a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event." CAL. INS. CODE § 22 (West 1972). Since the employers'

would exceed the trigger-point, thereby increasing its liability for payment of the claims.¹² Although the formal labels affixed to the parties—the employers as primary insurers and Metropolitan as secondary insurer—would suffice for the purpose of the rider, the court determined that when looking past these labels, the substance of the transactions between the employers and Metropolitan was truly indicative of their relationship as principal and agent.¹³ As support for this analysis, the majority opinion relied on *Elfstrom v. New York Life Insurance Co.*,¹⁴ where it was “held as a matter of law that ‘the employer is the agent of the insurer in performing the duties of administering group insurance policies.’”¹⁵

The court noted that Metropolitan retained extensive control of the employers’ pretrigger-point obligations:

Metropolitan determined the amount of all benefits to be paid in satisfaction of employee claims, both above and below the trigger-point, with the obligation to defend and the right to settle suits contesting rejection of claims. As to 13 of the 15 employers covered by the Mini-Met package, Metropolitan actually paid claims from the special accounts of the employers pursuant to authorization by the employers. Rather than paying the cost of group insurance directly to Metropolitan, these employers deposited the money into accounts under Metropolitan’s control. The payments to employees from such accounts constituted an element of overall cost of the insurance package in the same manner as if those amounts had been paid to Metropolitan as “premiums” then forwarded to the employees by Metropolitan in satisfaction of the employee claims. . . .

If an employer failed to make funds available for payment of pre-trigger-point claims in any month, Metropolitan remained obligated to cover the unpaid claims, subject to reimbursement from the delinquent employer. The Mini-Met arrangement would then automatically terminate and the standard Metropolitan coverage would revert into effect at the end of the month in question. The employer would then be liable to Metropolitan for a termination premium, equal to the total premiums which would have been payable to Metropolitan from the employer in the current policy year had the standard group policies remained in effect, less the sum of the Mini-Met premiums paid to Metropolitan in that year plus the claims actually paid to employees from employer funds in that year.¹⁶

The court determined that given this highly entangled and symbiotic relationship, the employers could not be labeled independent self-insurers.¹⁷ The facts demonstrated that under the

liability was limited, they were not subject to the inherent risk involved in being an insurer.

12. The risk of excess claims over the average aggregate claims was a factor in calculating the cost of the Mini - Met rider. 32 Cal. 3d at 660, 652 P.2d at 432, 186 Cal. Rptr. at 584.

13. *Id.* at 656-57, 652 P.2d at 430, 186 Cal. Rptr. at 582.

14. 67 Cal. 2d 503, 432 P.2d 731, 63 Cal. Rptr. 35 (1967).

15. 32 Cal. 3d at 659, 652 P.2d at 431, 186 Cal. Rptr. at 583 (quoting *Elfstrom v. New York Life Ins. Co.*, 67 Cal. 2d at 512, 432 P.2d at 737, 63 Cal. Rptr. at 41) (emphasis in original).

16. 32 Cal. 3d at 657-58, 652 P.2d at 430, 186 Cal. Rptr. at 582 (footnote omitted).

17. *Id.* at 658, 652 P.2d at 431, 186 Cal. Rptr. at 583.

rider, the employer's function was the extremely limited one of an agent engaged in the ministerial duties of establishing and funding bank accounts out of which insurance claims were paid.¹⁸

B. Pre-trigger-Point Payments on Claims Includable in Gross Premiums

The remaining issue to be decided in the case was the determination of the amounts that would be includable in calculating gross premiums. In deciding this issue, the court analyzed older cases in which miscellaneous fees paid to the insurer by the insured were includable in the gross premium.¹⁹

The general rule derived from these cases was that "the insurer is to be assessed a tax based on *the total cost of the insurance coverage provided to the insured.*"²⁰ Although Metropolitan argued that the employers paid the expense of the plan, the court determined that the ultimate insureds were the employees, and that as a practical matter, the employees bore the full cost of the insurance coverage. This conclusion was based on the premise that an employee medical benefit plan is a bargained-for fringe benefit and is a part of an employee's benefit package.²¹ It was logical to conclude in such a case that there would be no difference if the employer were to give an employee a pay raise for the amount of the insurance coverage and then deduct the amount and pay it to the insurer, or instead to pay the amount directly to the insurer.²² In either case, the employee is entitled to receive the benefits in exchange for his labor. Because of this right, the court concluded that the employers should be considered to be in constructive receipt of the insurance premium on behalf of the employee.²³

The court determined that the total cost of the insurance to the employee included two elements, the "net premium" and the

18. *Id.* at 659, 652 P.2d at 431, 186 Cal. Rptr. at 583.

19. *See, e.g.,* *Indiana Idem. Exch. v. State Bd. of Equal.*, 26 Cal. 2d 772, 161 P.2d 222 (1945) (attorney fees paid by subscriber to insurance exchange included in meaning of gross premium); *Groves v. City of Los Angeles*, 40 Cal. 2d 751, 256 P.2d 309 (1953) (commissions received by agent of bail bond company included in gross premium); *Allstate Ins. Co. v. State Bd. of Equal.*, 169 Cal. App. 2d 165, 336 P.2d 961 (1959) (installment payment fee included in measure of gross premium).

20. 32 Cal. 3d at 660, 652 P.2d at 432, 186 Cal. Rptr. at 584 (emphasis added).

21. *Id.* at 661, 652 P.2d at 433, 186 Cal. Rptr. at 585. *See also* *Insurance Co. of N. Am. v. Bechtel*, 36 Cal. App. 3d 310, 317, 111 Cal. Rptr. 507, 512 (1973) (employer's contribution to premium on employee insurance is fringe benefit).

22. 36 Cal. App. 3d at 317, 111 Cal. Rptr. at 512.

23. 32 Cal. 3d at 661 n.5, 652 P.2d at 433 n.5, 186 Cal. Rptr. at 585 n.5.

“loading.”²⁴ The “net premium” under a standard policy is the expected level of claims payments. The “net premium” is analogous to the trigger-point amount at which the employers were obligated to pay directly to the employees upon the approval of a claim.²⁵ The “loading” is usually composed of the administrative costs of the insurer plus a charge for assuming the risk that claims will exceed the net premium.²⁶ The loading is analogous to the rider under the plan. Given these assumptions, the court determined that the cost of insurance to the employee include the amount actually paid out in employee claims up to the trigger-point amount, plus the cost of the rider. It was this amount which Metropolitan was required to claim as gross premiums.²⁷

V. THE DISSENT

Justice Kaus’ dissent²⁸ focused on the purpose of the insurance plan. While the majority considered the insurance arrangement merely a change in form,²⁹ the dissent focused on the business purposes of the plan. Kaus noted that the change in insurance form also changed the parties’ financial, contractual, economic, and legal relationships and evidenced an awareness by the employers of the importance of cash flow management.³⁰ The plan was not implemented solely as a tax avoidance device but was “‘compelled by business realities’ and ‘imbued with tax-independent considerations.’”³¹

The dissent expressed the view that the majority improperly considered the relationship of the parties under the plan as one of principal-agent by mistakenly relying on an inapposite case.³² Justice Kaus noted that in *Elfstrom*, the court found that the employer was the agent of the insurer *only* when it was administering the group insurance policies for the benefit of the insurer.³³

24. *Id.* at 660, 652 P.2d at 432, 186 Cal. Rptr. at 584.

25. *Id.*

26. *Id.* See also *Allstate Ins. Co.*, 169 Cal. App. 2d at 168, 336 P.2d at 964 (loading is arbitrary figure added to net premium to cover expenses of insurance company).

27. 32 Cal. 3d at 662, 652 P.2d at 433, 186 Cal. Rptr. at 585. The court apparently used the figure of the actual claims paid by the employer rather than the trigger-point amount of premium attributable to Metropolitan since everytime actual claim payments were less than the trigger-point, the unused portion of the trigger-point amount was rolled over to the next month to increase the next trigger-point. *Id.* at 653, 652 P.2d at 427, 186 Cal. Rptr. at 579.

28. 32 Cal. 3d at 662, 652 P.2d at 433, 186 Cal. Rptr. at 585 (Kaus, J., dissenting).

29. *Id.* at 656-57, 652 P.2d at 430, 186 Cal. Rptr. at 582.

30. *Id.* at 663, 652 P.2d at 434, 186 Cal. Rptr. at 586 (Kaus, J., dissenting).

31. *Id.* (quoting trial court decision).

32. *Id.* at 664, 652 P.2d at 435, 186 Cal. Rptr. at 587.

33. 67 Cal. 2d at 512, 432 P.2d at 737, 63 Cal. Rptr. at 41.

He pointed out that *Elfstrom*, which should be limited by its facts, did not hold that the employer, whose employees are covered by a medical benefit plan, is an agent of the insurer for all purposes.³⁴

The dissent defined the "symbiotic relationship" between Metropolitan and the employers as a debtor-creditor relationship and not one of agency.³⁵ Metropolitan's obligation to pay pre-trigger-point claims, in the event of a failure of an employer to pay, was subject to reimbursement. An employer's failure to reimburse Metropolitan would merely be a business risk with that employer which would be covered by the rider.³⁶ Moreover, the obligations which Metropolitan incurred in regard to the pre-trigger-point claims amounted to no more than the supply of administrative services which were included in the overall cost of the rider.³⁷

Justice Kaus also disagreed with the majority's computation of the gross premium so as to include actual claims paid plus the cost of the rider. The majority's calculation assumed that whenever an employer paid a pre-trigger-point claim, Metropolitan constructively received a premium calculable in the gross premium.³⁸ The majority, however, did not cite case authority to support this assumption.³⁹ Moreover, Justice Kaus noted that attempting to attribute a receipt of the premium by the employer to Metropolitan on the basis of an agent-principal relationship failed the test of the taxable event (the receipt of the premium),⁴⁰ for neither

34. 32 Cal. 3d at 664, 652 P.2d at 435, 186 Cal. Rptr. at 587.

35. *Id.* at 667, 652 P.2d at 437, 186 Cal. Rptr. at 589.

36. *Id.*

37. *Id.* The dissent also pointed out that Metropolitan offered a service to employers who had no insurance where the employer would "rent" the use of the claims service. This service was similar to that provided the employers on pre-trigger-point claims. This service was known as "ASO" — administrative services only — and presumably would not fall into the category of taxable gross premiums. *Id.* at 665 n.5, 652 P.2d at 435 n.5, 186 Cal. Rptr. at 587 n.5.

38. *Id.* at 666, 652 P.2d at 436, 186 Cal. Rptr. at 588.

39. The cases cited by the majority merely held that miscellaneous fees associated with the insurance paid to the insurance company were includable in gross premiums. *See supra* note 19.

40. *See supra* note 2 and accompanying text. The majority determined that the true source of the premiums was the labor of the employees based on the premise that the insurance coverage constituted a fringe benefit. 32 Cal. 3d at 661, 652 P.2d at 443, 186 Cal. Rptr. at 585. This is contrary to the calculation of gross premiums as the amount of claims paid to employees. Value of labor and actual claims paid bear little relation to each other. If the theory that the Mini - Met rider was merely a change in form rather than in substance of the insurance coverage, then gross premiums should have included as an element the trigger-point

the employer nor Metropolitan collected premiums.⁴¹ Purporting to attribute the receipt of the premium to the receipt of the employees' labor would not satisfy the majority's calculation of gross premiums based on actual claims paid by the employer, for there was nothing of record to show that the value of the labor had any relation to the actual claims paid.⁴²

VI. CONCLUSION

The majority's reliance on the interrelationship between Metropolitan and the employers appeared to be the main justification for attributing the claims paid by the employers to Metropolitan's gross premiums. This interrelationship allowed for the change in insurance coverage, from the standard coverage to the Mini - Met rider plan. The plan, therefore, was a change in form rather than substance. The import of the dissent's conclusions raise the issue of how far an insurer is required to disassociate itself from a client before it may be relieved of liability for offering tangential services to a self-insurer. The answer from the majority may require a complete severance.

XII. JUVENILE LAW

A. *Informal probation cannot be denied solely on a minor's financial inability to make restitution to the victim: Charles S. v. Superior Court.*

The California Supreme Court, in *Charles S. v. Superior Court*,¹ held that a minor may not be denied informal probation pursuant to the California Welfare and Institutions Code section 654²

amount rather than actual claims paid as the trigger-point amount is more indicative of the net premium used in calculating gross premiums. 32 Cal. 3d at 666 n.7, 652 P.2d at 436 n.7, 186 Cal. Rptr. at 588 n.7.

41. 32 Cal. 3d at 666, 652 P.2d at 436, 186 Cal. Rptr. at 588.

42. *Id.*

1. 32 Cal. 3d 741, 653 P.2d 648, 187 Cal. Rptr. 144 (1982). Justice Broussard wrote the majority opinion in which Chief Justice Bird and Justices Mosk, Newman, and Lui, who was assigned to the court by the Judicial Council, concurred. Justice Richardson wrote a dissenting opinion with Justice Reynoso concurring.

2. CAL. WELF. & INST. CODE § 654 (West Supp. 1982) provides in part:

In any case in which a probation officer, after investigation of an application for petition or other investigation he is authorized to make concludes that a minor is within the jurisdiction of the juvenile court or will probably soon be within such jurisdiction, he may, in lieu of filing a petition to declare a minor a dependent child of the court under Section 601 or requesting that a petition be filed by the prosecuting attorney to declare a minor a ward of the court under Section 602 or subsequent to dismissal of a petition already filed, and with the consent of the minor and the minor's parent or guardian, delineate specific programs of supervision for the mi-

merely because he is unable to remit restitution to his victim.

The present controversy arose when a petition was filed under California Welfare and Institutions Code section 602,³ charging Charles S., a minor, with violations of several sections of the California Penal Code.⁴ At his arraignment, Charles had been referred to a probation officer who, finding Charles a proper individual for voluntary informal probation,⁵ investigated and endeavored to establish a program whereby he could pay restitution to his victim.⁶ When it was determined by the probation department that neither Charles nor his parents would be able to make the initial payment, the department recommended that formal proceedings against Charles begin and the aforementioned petition was filed.⁷ The juvenile court, expressing doubt as to its authority to require the probation department to reconsider its recommendation, set the case for a hearing on the merits.⁸

The first issue which confronted the court was whether or not a juvenile court has the authority to instruct a probation officer to place a minor on informal probation. The court recognized that initially, the probation officer has the authority under section 654 to either institute informal probation⁹ or file court proceedings.¹⁰

nor, for not to exceed six months, and attempt thereby to adjust the situation which brings the minor within the jurisdiction of the court or creates the probability that he will soon be within such jurisdiction.

Id. All statutory references in the text are to the California Welfare and Institutions Code unless indicated otherwise.

3. CAL. WELF. & INST. CODE § 602 (West Supp. 1982).

4. Petitioner was charged with violating CAL. PENAL CODE § 459 (West Supp. 1982) (burglary) and CAL. PENAL CODE § 496 (West Supp. 1982) (receiving stolen property).

5. *See infra* note 9.

6. The amount of restitution to be paid is normally based upon the damage or injury which the victim has sustained. However, the probation officer may authorize payment at less than full restitution after taking into consideration both the offender's ability to pay and the department's responsibility to the community. The probation officer originally determined that Charles would be required to pay \$833 in order to the effectuate full restitution. Determining that Charles would require one year to make this payment, and recognizing that the informal probation period was limited to six months under § 654, the probation officer reduced the amount to \$550. 32 Cal. 3d at 744, 653 P.2d at 650, 187 Cal. Rptr. at 146; *see supra* note 2.

7. 32 Cal. 3d at 744-45, 653 P.2d at 650, 187 Cal. Rptr. at 146.

8. The hearing date was then continued pending the decision of the California Supreme Court. *Id.* at 745 & n.3, 653 P.2d at 650 & n.3, 187 Cal. Rptr. at 146 & n.3.

9. CAL. WELF. & INST. CODE § 654 (West Supp. 1982) does not specify any particular factor which the probation officer should consider in determining whether a minor is a suitable candidate for informal probation. However, Rule 1307(e) of the California Rules of Court provides nine criteria which the probation officer should

However, section 654¹¹ makes it evident that once a petition has been filed pursuant to section 602, the institution of informal probation is no longer the responsibility of the probation officer but, rather, is delegated to the authority of the juvenile court.¹² Under section 654, therefore, if the court determines that the section 602 proceeding should be dismissed and informal probation instituted, it may do so without abusing its discretion.¹³

The second issue before the court was whether or not restitution could properly be invoked as a prerequisite to informal probation. The court, while noting that nothing in section 654 expressly enumerates that restitution is mandatory for the initiation of the informal program,¹⁴ declared that several California code sections recognize restitution as an integral part of probation.¹⁵ Furthermore, restitution not only compensates the victims of crime but also serves a rehabilitative function.¹⁶ Thus, the

consider in determining whether a program of informal supervision of the minor should be undertaken. Included in this list is the seriousness of the offense, the age, maturity, and mentality of the minor, the attitudes of the minor and the parents, and the protection of the public.

The reader should note that at least one appellate court has maintained that the Rule does not impose a duty to investigate, but that duty is imposed by CAL. WELF. & INST. CODE § 653 (West Supp. 1982) ("The probation officer shall immediately make such investigation as he . . . deems necessary. . ."). See *Alsavon M. v. Superior Court*, 124 Cal. App. 3d 586, 594, 177 Cal. Rptr. 434, 439 (1981).

10. This determination is solely within the province of the probation officer and may not be delegated to the prosecuting attorney. *Raymond B. v. Superior Court*, 102 Cal. App. 3d 272, 277, 162 Cal. Rptr. 506, 508 (1980); *Marvin F. v. Superior Court*, 75 Cal. App. 3d 281, 289, 142 Cal. Rptr. 78, 82 (1977).

11. See *supra* note 2.

12. CAL. WELF. & INST. CODE § 654 (West Supp. 1982), provides that the probation officer may "in lieu of filing a petition . . . or subsequent to dismissal of a petition already filed. . . ." establish the informal probation program. . . . This language implies that once the petition is filed and "court proceedings are commenced, informal probation is to be based on a court determination." 32 Cal. 3d at 747, 653 P.2d at 652, 187 Cal. Rptr. at 148.

13. 32 Cal. 3d at 747, 653 P.2d at 652, 187 Cal. Rptr. at 148.

14. See *supra* note 2.

15. CAL. PENAL CODE § 1203(b) (West Supp. 1982) ("[t]he probation officer shall also include in his . . . report for the court's consideration whether the court shall require, as a condition of probation, restitution to the victim. . ."); CAL. WELF. & INST. CODE § 731 (West Supp. 1982) ("[w]hen a minor is adjudged a ward of the court . . . the court may order . . . the ward to make restitution. . ."); CAL. WELF. & INST. CODE § 729 (West Supp. 1982):

If a minor is found to be a person described in Section 602 by reason of the commission of a battery . . . and the court does not remove the minor from the physical custody of the parent or guardian, the court as a condition of probation, except in any case in which the court makes a finding and states on the record its reasons that such condition would be inappropriate, shall require the minor to make restitution to the victim of the battery.

Id.

16. See *In re Ricardo M.*, 52 Cal. App. 3d 744, 748, 125 Cal. Rptr. 291, 293-94 (1975); see also *People v. Richards*, 17 Cal. 3d 614, 622, 552 P.2d 97, 102, 131 Cal.

court found that restitution to the victim may properly be mandated by the juvenile court.¹⁷

Finally, the court directed its attention to the crux of the case: that Charles' informal probation was denied solely because of his inability to pay the amount of restitution which the parole officer had determined was proper.¹⁸ The court, analyzing the rationale of several equal protection cases,¹⁹ concluded that the rehabilitative purposes of restitution cannot be accomplished when the minor and his family are unable to pay. "Although [the minor] may have no vested right to receive informal probation, he cannot be denied such treatment because of his poverty."²⁰

B. Repudiated extrajudicial accusations of a self-declared accomplice are insufficient to sustain the adjudication of a wardship: In re Miguel L

Miguel L., a minor, was convicted of committing a burglary¹ and was subsequently adjudged a ward of the juvenile court pursuant

Rptr. 537, 542 (1976); *People v. Miller*, 256 Cal. App. 2d 348, 356, 64 Cal. Rptr. 20, 25 (1967).

17. 32 Cal. 3d at 748, 653 P.2d at 653, 187 Cal. Rptr. at 149.

18. *See supra* note 6. Petitioner had advanced two arguments. First, he argued that the juvenile court had abused its discretion when it denied informal probation. Secondly, Charles contended that the amount of restitution required by the probation officer denied equal protection. Since the court concluded that the juvenile court had abused its discretion, it found it unnecessary to reach the constitutional issue. 32 Cal. 3d at 749, 653 P.2d at 653, 187 Cal. Rptr. at 149.

19. The court relied on *Williams v. Illinois*, 399 U.S. 235, 243 (1970), in which the United States Supreme Court held that "a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine." The court further relied on *In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970), in which the court held that imprisonment solely because of an individual's financial inability to pay a fine imposed as a condition of probation offends equal protection. 32 Cal. 3d at 749-50, 653 P.2d at 653-54, 187 Cal. Rptr. at 149-50.

20. 32 Cal. 3d at 751, 653 P.2d at 654-55, 187 Cal. Rptr. at 150. The court also extended this rationale to formal probation granted pursuant to CAL. WELF. & INST. CODE § 725 (West Supp. 1982).

Justice Richardson concurred with the majority's conclusions that "(1) the juvenile court has the power to place a minor on Welfare and Institutions Code section 654 probation, (2) restitution may be required in proper instances, and (3) an abuse of discretion occurs when a minor is denied informal probation solely because of inability to pay restitution" However, he felt that the record indicated "valid reasons, other than the minor's indigency" which would satisfy the rejection of informal probation, and thus no abuse of the court's discretion existed. 32 Cal. 3d at 751, 653 P.2d at 655, 187 Cal. Rptr. at 151 (Richardson, J., dissenting).

1. *See* CAL. PENAL CODE § 459 (West Supp. 1982).

to the California Welfare and Institutions Code section 602.² The California Supreme Court in *In Re Miguel L.*³ reversed the order on the grounds that a juvenile, whose conviction is based solely on repudiated extrajudicial statements made by a self-declared accomplice,⁴ may not be classified as a ward of the court.

The court took notice of the well-established Gould rule which denounces the insufficiency of extrajudicial statements to sustain a conviction in the absence of other evidence tending to implicate the defendant with the crime.⁵ The California Supreme Court, however, has recognized the inapplicability of the Gould rule when the extrajudicial statement was reiterated by the witness under oath at a preliminary examination or other judicial proceeding, *and* other evidence exists which would allow the factfinder to give more credence to the witness' prior testimony over his or her failure to confirm the extrajudicial statement at trial.⁶ This exception, enunciated in *Chavez* and *Ford*,⁷ is based on two grounds. First, the traditional indicia of reliability is satisfied when the identification is extracted under oath at a judicial proceeding which allows for cross examination.⁸ Second, a basis

2. CAL. WELF. & INST. CODE § 602 (West Supp. 1982) provides in pertinent part that:

Any person who is under the age of 18 years when he violates any law of this state or of the United States . . . is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court.

Id.

3. 32 Cal. 3d 100, 649 P.2d 903, 185 Cal. Rptr. 120 (1982). The unanimous opinion was written by Chief Justice Bird with Justices Mosk, Richardson, Broussard, Reynoso, Rattigan and Feinburg concurring. Justices Rattigan and Feinburg were assigned by the Judicial Council to sit on the court.

4. The accomplice was interviewed twice while in custody, both times incriminating appellant as being involved in the particular burglary. The second such interview was tape recorded and conducted in the presence of an attorney. At trial, however, the accomplice not only denied the veracity of his earlier statements but also specifically denied that Miguel was a participant in the burglaries. 32 Cal. 3d at 102-04, 649 P.2d at 704-05, 185 Cal. Rptr. at 121-22.

5. The Gould rule was enunciated by Justice Traynor in *People v. Gould*, 54 Cal. 2d 621, 631, 354 P.2d 865, 870, 7 Cal. Rptr. 273, 278 (1960). (The reader should note that the California Supreme Court is misquoted in the Pacific Reporter and the California Reporter, each of which cites the word "insufficient" as "sufficient.") The principle has been reaffirmed in several recent decisions. *See, e.g., In re Johnny G.*, 25 Cal. 3d 543, 547, 601 P.2d 196, 197, 159 Cal. Rptr. 180, 181 (1979); *People v. Belton*, 23 Cal. 3d 516, 535-37, 591 P.2d 485, 497-98, 153 Cal. Rptr. 195, 207-08 (1979) (Jefferson, J., concurring); *Vukman v. Superior Court*, 116 Cal. App. 3d 341, 345, 172 Cal. Rptr. 44, 46 (1981).

6. *See People v. Ford*, 30 Cal. 3d 209, 214-15, 635 P.2d 1176, 1178-79, 178 Cal. Rptr. 196, 198-99 (1981); *People v. Chavez*, 26 Cal. 3d 334, 364, 605 P.2d 401, 420, 161 Cal. Rptr. 762, 781 (1980). For a synopsis of the *Ford* decision see *The California Supreme Court Survey*, 9 PEPPERDINE L. REV. 939, 999 (1982).

7. The case was once remanded back to the appellate court to reconsider in light of *People v. Ford*. 129 Cal. App. 3d 208, 180 Cal. Rptr. 883 (1982).

8. On remand the appellate court erroneously held: "nothing in *Chavez* and *Ford* . . . narrowly limit[ed] their application to cases involving prior testi-

exists by which the jury can discredit the witness' trial testimony in favor of the testimony given at the preliminary hearing.⁹

The court advocated that neither of these requirements was sufficiently satisfied to place the case within the Chavez-Ford exception to the Gould Rule.¹⁰ Furthermore, additional circumstances were present in *In Re Miguel L.* that tended to discredit the extrajudicial statement being relied upon. As a self-declared accomplice, the witness' statements were inherently tainted.¹¹

To uphold the wardship adjudication, the court would not only have to recognize that criminal conduct¹² may be based solely upon an accusation which was tainted by a lack of trustworthiness, but also upon accusations which come from an unreliable source.¹³ "Constitutional requirements of due process preclude[d] [the] court from reaching such a holding."¹⁴

mony. . . . The [California Supreme] court did not say that only prior in-court testimony can qualify as having been given under circumstances indicating the trustworthiness of the prior statements." *Id.* at 215, 180 Cal. Rptr. at 887 (1982) (emphasis original).

Acting Presiding Justice Stephens, in dissent, recognized that since "the statements by [the witness] were not made under oath and they were not subject to cross-examination . . . *People v. Ford* . . . requires reversal." *Id.* at 219, 180 Cal. Rptr. at 889.

9. The prosecution maintained that this requirement was fulfilled because the witness testified at trial that he did not want to "put the rap on somebody else." 32 Cal. 3d at 103, 649 P.2d at 704, 185 Cal. Rptr. at 121.

10. *Id.* at 107, 649 P.2d at 707, 185 Cal. Rptr. at 124.

11. Even *sworn* testimony of an accomplice is considered suspect because such testimony may be influenced by self-serving motives. See *People v. Belton*, 23 Cal. 3d at 526, 591 P.2d at 492, 153 Cal. Rptr. at 202 (1980); *People v. Tewksbury*, 15 Cal. 3d 953, 967, 544 P.2d 1335, 1346, 127 Cal. Rptr. 135, 146 (1976).

12. The court points out that CAL. PENAL CODE § 1111 (West 1970) prohibits a conviction from being based solely on uncorroborated testimony of an accomplice. Had appellant been an adult offender, the charged offense could not lie. However, *In re Mitchell P.*, 22 Cal. 3d 946, 587 P.2d 1144, 151 Cal. Rptr. 330 (1978), held that a finding of a wardship in a juvenile court proceeding does not constitute a "conviction" within the meaning of the Penal Code § 1111. 32 Cal. 3d at 109 n.5, 649 P.2d at 708 n.5, 185 Cal. Rptr. at 125 n.5.

13. 32 Cal. 3d at 110, 649 P.2d at 709, 185 Cal. Rptr. at 126. Compare *In re Richard W.*, 136 Cal. App. 3d 733, 186 Cal. Rptr. 409 (1982).

14. 32 Cal. 3d at 110, 649 P.2d at 709, 185 Cal. Rptr. at 126.

C. *Court must remand minor to California Youth Authority for evaluation before sentencing individual to state prison although the minor has attained the age of 18 at the time of sentencing: People v. Black.*

The charges against Jeffrey Black,¹ which were originally filed under juvenile court proceedings, were remanded to the adult court system after a determination that he was not a "fit and proper subject to be dealt with under. . . juvenile court law. . ."² Black subsequently pleaded nolo contendere to several counts. The sentencing date was set for February 15, 1980.³ Upon the motion of the prosecutor, and the acquiescence of Black's lawyer, this sentencing date was vacated and reset for February 22, 1980. Jeffrey Black's eighteenth birthday was February 19, 1980.⁴

At the final sentencing, the trial judge rejected Black's contention that, pursuant to California Welfare and Institutions Code section 707.2,⁵ he was entitled to an evaluation and report from

1. Black was charged with two counts of violating CAL. PENAL CODE § 245(a) (West Supp. 1982) (assault with a deadly weapon or force likely to produce great bodily injury), plus an enhancement pursuant to CAL. PENAL CODE § 12022.7 (West 1982) (infliction of great bodily injury).

2. This determination is made pursuant to CAL. WELF. & INST. CODE § 707 (West Supp. 1982), which provides in part:

Following submission and consideration of [a] report, and of any other relevant evidence which the petitioner or the minor may wish to submit, the juvenile court may find that the minor is not a fit and proper subject to be dealt with under the juvenile court law if it concludes that the minor would not be amenable to the care, treatment, and training program available through the facilities of the juvenile court. . . .

Id.

3. 32 Cal. 3d 2, 4, 648 P.2d 104, 105, 184 Cal. Rptr. 454, 455 (1982). Black plead nolo contendere to a single violation of CAL. PENAL CODE § 236 (West 1970) (false imprisonment), a single violation of CAL. PENAL CODE § 245(a) (West Supp. 1982) (assault with a deadly weapon), and certain enhancement allegations pursuant to CAL. PENAL CODE § 12022.7 (West 1982) (infliction of great bodily injury) and CAL. PENAL CODE § 12022(b) (West 1982) (use of a deadly weapon in commission of a felony) on the condition that the sentences would run concurrently. The Penal Code § 12022(b) allegation was subsequently dismissed when Black agreed to consecutive sentences. 32 Cal. 3d at 4, 648 P.2d at 105, 184 Cal. Rptr. at 455.

4. 32 Cal. 3d at 4, 648 P.2d at 105, 184 Cal. Rptr. at 455.

5. CAL. WELF. & INST. CODE § 707.2 (West Supp. 1982) established:

Prior to sentence, the court of criminal jurisdiction may remand the minor to the custody of the California Youth Authority for not to exceed 90 days for the purpose of evaluation and report concerning his amenability to training and treatment offered by the Youth Authority. *No minor who was under the age of 18 years when he committed any criminal offense* and who has been found not a fit and proper subject to be dealt with under the juvenile court law shall be sentenced to the state prison unless he has first been remanded to the custody of the California Youth Authority for evaluation and report pursuant to this section and the court finds after having read and considered the report submitted by the Youth Authority that the minor is not a suitable subject for commitment to the Youth Authority.

the California Youth Authority [hereinafter Youth Authority]. Instead, the trial judge sentenced Black under the adult court system to three years and eight months in the state penitentiary.⁶

The California Supreme Court in *People v. Black*⁷ held that the trial judge erred in refusing to send Jeffrey Black to the Youth Authority for evaluation. The court determined that pursuant to the California Welfare and Institutions Code, section 707.2, a "minor who was under the age of eighteen years when he committed any criminal offense"⁸ includes not only those offenders who are sentenced prior to their eighteenth birthday but also those sentenced after such date and are still within the age of persons subject for commitment to the Youth Authority.⁹

The court initially examined the language of the statute¹⁰ and recognized that the word "minor" appears in the same phrase as the language "who was under the age of eighteen years when he committed [the] criminal offense."¹¹ If the word "minor" is narrowly construed to mean only those persons under the age of eighteen years of age,¹² then the latter portion of the passage is redundant. A person who is under the age of eighteen when sentenced must have been, a fortiori, under eighteen years when he committed the offense.¹³ The court, in construing the word "minor" as being applicable to persons who are within the jurisdiction of the Youth Authority, avoids any tautological result. This

Id. (emphasis added).

6. 32 Cal. 3d at 4, 648 P.2d at 105, 184 Cal. Rptr. at 455.

7. *Id.* at 1, 648 P.2d at 104, 184 Cal. Rptr. at 454. Justice Broussard wrote the opinion with Chief Justice Bird and Justices Mosk, Richardson, Newman and Kaus concurring. (Justice Reynoso did not participate in the case).

8. *See supra* note 5 (emphasized portion).

9. 32 Cal. 3d at 4, 648 P.2d at 105, 184 Cal. Rptr. at 455. CAL. WELF. & INST. CODE §§ 1731, 1731.5 (West 1972 & Supp. 1982) both provide that an individual must be less than 21 years of age at the time of the apprehension from which the criminal proceeding resulted. *See People v. Olivas*, 17 Cal. 3d 236, 239, 551 P.2d 375, 376, 131 Cal. Rptr. 55, 56 (1976).

10. The court has long recognized that to perceive the legislative intent concerning a particular statute the analysis should begin with "the words themselves for the answer." *People v. Knowles*, 35 Cal. 2d 175, 182, 217 P.2d 1, 5 (1950).

11. *See supra* note 5.

12. CAL. CIV. CODE § 25 (West 1982) defines a minor as any person under the age of 18. CAL. CIV. CODE § 27 (West 1982) defines an adult as all other persons. The court, however, maintained that such an interpretation or application of those definitions to the situation presented in *Black* would defeat the legislative purpose of CAL. WELF. & INST. CODE § 707.2 (West Supp. 1982). 32 Cal. 3d at 5, 648 P.2d at 106, 184 Cal. Rptr. at 456. *See infra* notes 22-26 and accompanying text.

13. 32 Cal. 3d at 5-6, 648 P.2d at 106, 184 Cal. Rptr. at 456.

interpretation is also supported by appellate court decisions which have either committed a person to the Youth Authority despite the fact that they have reached their eighteenth birthday at the time of sentencing¹⁴ or have required a preliminary Youth Authority evaluation whether or not the minor is eligible for commitment.¹⁵

Furthermore, as the court recognized, the first sentence of section 707.2 authorizes the court to remand the "minor" for a Youth Authority evaluation before sentencing.¹⁶ However, if "minor" were restricted to those under the age of eighteen, the section would be inconsistent with California Welfare and Institutions Code section 1731.5.¹⁷ Section 1731.5 confers upon the trial court the option of committing an offender to the Youth Authority although such offender was apprehended after he had attained the age of eighteen.¹⁸ The California Supreme Court agreed with the

14. See *People v. Olivas*, 17 Cal. 3d 236, 239, 551 P.2d 375, 376, 131 Cal. Rptr. 55, 56 (1976). The court in *Olivas*, while recognizing the authority of a trial court to commit a person over the age of 18 to the Youth Authority [pursuant to CAL. WELF. & INST. CODE § 1731.5 (West Supp. 1982) (*see infra* note 17)], held that equal protection precluded the person from being incarcerated in the Youth Authority for a longer period of time than he would be imprisoned under the adult court system.

15. See *People v. Grisso*, 104 Cal. App. 3d 380, 386, 163 Cal. Rptr. 547, 550 (1980). The appellate court, although finding the defendant could not be committed to the Youth Authority because of the exclusionary language of CAL. WELF. & INST. CODE § 1731.5 (West Supp. 1982) (*see infra* note 17), held that the defendant's ineligibility did not preclude the trial court from requesting an evaluation from the Youth Authority. See also *People v. Eaker*, 100 Cal. App. 3d 1007, 1014-16, 161 Cal. Rptr. 417, 421-22 (1980) (*see infra* note 32).

16. See *supra* note 5. The presumption arises that the legislature intended the word "minor" to have the same meaning in the second sentence of § 707.5 as it does in the first. *Golden Gate Scenic Steamship Lines v. Public Util. Comm'n*, 57 Cal. 2d 373, 378, 369 P.2d 257, 260, 19 Cal. Rptr. 657, 660 (1962).

17. CAL. WELF. & INST. CODE § 1731.5 (West Supp. 1982), provides in relevant part:

(a) After certification to the Governor as provided in this article a court may commit to the authority any person convicted of a public offense who comes within paragraphs (1), (2), and (3), or paragraphs (1), (2), and (4), below:

(1) Is found to be less than 21 years of age at the time of apprehension.

(2) Is not convicted of first-degree murder, committed when such person was 18 years of age or older, or sentenced to death, imprisonment, imprisonment for life, imprisonment for 90 days or less, or the payment of a fine, or after having been directed to pay a fine, defaults in the payment thereof, and is subject to imprisonment for more than 90 days under the judgment.

(3) Is not granted probation.

(4) Was granted probation and probation is revoked and terminated.

Id. See 32 Cal. 3d at 6-7 & n.2, 648 P.2d at 106 & n.2, 184 Cal. Rptr. at 456-57 & n.2.

18. The appellate court in *People v. Eaker*, 100 Cal. App. 3d 1007, 1016, 161 Cal. Rptr. 417, 422 (1980), clarified the relationship between §§ 707.2 and 1713.2 as follows:

In a jurisdictional sense section 1731.5 is the statute that confers power on the adult sentencing court to send youthful offenders to the Youth Au-

appellate court analysis¹⁹ that the possibility existed whereby the trial court could commit a defendant directly to the Youth Authority without an evaluation pursuant to section 1731.5. The same court, however, could not procure an evaluation pursuant to section 707.2 prior to sentencing to assist in its determination, because the defendant was eighteen years old at the time of the sentence.²⁰ However, if "minor" in section 707.2 is interpreted to mean any person within the age of those subject to training by the Youth Authority, the two sections become consistent with one another.²¹

The court then established that the legislative history of section 707.2 supported the conclusion that the term "minor" should *not* be construed as applicable only to persons under the age of eighteen. Prior to the 1976 amendment, section 707.2²² provided that a "minor" could not be sentenced to the state prison except upon a petition filed pursuant to article 5.²³ This petition, formerly filed

thority. Although the judge must comply with section 707.2 before sentencing a minor to prison, he must look to section 1731.5 and its qualifications before committing a minor to the Youth Authority.

Id.

19. *People v. Black*, 120 Cal. App. 3d 922, 929, 174 Cal. Rptr. 830, 834 (1981) (opinion omitted from Cal. App. 3d).

20. 32 Cal. 3d at 7, 652 P.2d at 107, 186 Cal. Rptr. at 457. The court's analysis by way of example would proceed as follows: If Jeffrey Black were 19 when apprehended for a crime committed two years earlier, the trial court would not have the authority, under § 707.2, to commit him to the Youth Authority *prior* to sentencing, for evaluation of his amenability to training and treatment at the Youth Authority. "Obviously, no such absurd result was intended by the legislature when it provided for a discretionary remand of a 'minor' in the first sentence of section 707.2." *Id.*

21. *Id.* From the example discussed in *supra* note 20, it becomes apparent that when the term "minor" connotes any individual who might be subject to commitment, the trial judge can remand the person to the Youth Authority for evaluation and make his determination on a completely informed basis.

22. CAL. WELF. & INST. CODE § 707.2 (West 1975) originally read in pertinent part:

Except as provided in Sections 1731 and 1737, no minor who was under the age of 18 years when he committed any criminal offense, and who has been found not a fit and proper subject to be dealt with under the juvenile court law pursuant to Section 707, shall be sentenced to the state prison, *except upon petition filed pursuant to article 5* (commencing with Section 1780) of Division 2.5.

Act of October 1, 1975, ch. 1266, § 6, 1975 Cal. Stat. 3326 (amended 1976) (emphasis added).

23. Article 5 is codified in CAL. WELF. & INST. CODE §§ 1780-1783 (West 1972) (§ 1780 was amended in 1979; § 1781 was amended in 1981; § 1782 was amended in 1979).

by the Youth Authority,²⁴ basically sought to show that a person being discharged (before the expiration of a period of control equal to the maximum term prescribed by law), "would be dangerous to the public."²⁵ The court was then authorized to commit the individual to the state prison for a "period equal to the maximum term prescribed by law for the offense. . . less the period during which he was under the control of the Youth Authority."²⁶ The court noted that under the original code section a "minor" could be approaching his twenty-third or twenty-fifth birthday.²⁷ In this respect, section 707.2 was not limited to persons under the age of eighteen and there is no indication that the legislature, by amendment, intended such a limitation.²⁸

In addition, the court recognized that "the arbitrariness of a rule requiring that the 'minor' be under 18 at the time of sentencing" would present serious due process questions.²⁹ The court hypothesized that the situation may arise where an individual may elect to forego a jury trial rather than risk turning eighteen years of age before sentencing and subsequently being incarcerated in the state penitentiary.³⁰

This case presents the ideal factual setting for the court to interpret the language of section 707.2. The appellant had turned eighteen years of age only three days before sentencing and the trial court deemed this sufficient to overlook the policy reasons for remanding a younger individual to the Youth Authority before sentencing.³¹ The opinion held that the word "minor" in section 707.2 comprises all individuals who are members of the age group subject to training by the Youth Authority. Prior to sentencing such an individual to state prison, the courts will now be required to obtain an evaluation and report from the Youth Authority.³²

24. See CAL. WELF. & INST. CODE § 1780 (West 1972) (amended 1979). Currently, the petition is filed by the Youthful Offender Parole Board. See CAL. WELF. & INST. CODE § 1780 (West Supp. 1982).

25. CAL. WELF. & INST. CODE § 1780 (West 1972) (amended 1979).

26. CAL. WELF. & INST. CODE § 1782 (West 1972) (amended 1979).

27. The court substantiated the point by referring to CAL. WELF. & INST. CODE §§ 1770, 1771 (West 1972). See 32 Cal. 3d at 9 & n.6, 648 P.2d at 108 & n.6, 184 Cal. Rptr. at 458 & n.6.

28. 32 Cal. 3d at 9, 648 P.2d at 108, 184 Cal. Rptr. at 458.

29. *Id.* at 10, 648 P.2d at 109, 184 Cal. Rptr. at 459.

30. See *In re Lewallen*, 23 Cal. 3d 274, 278, 590 P.2d 383, 386, 152 Cal. Rptr. 528, 531 (1979) (holding that denial of a constitutional right to trial by jury violates due process).

31. See *supra* notes 5 & 6.

32. The court took notice that this case did not present the issue of whether a minor who is statutorily ineligible for Youth Authority commitment must, nevertheless, be remanded for evaluation by the Youth Authority prior to being sen-

XIII. LABOR LAW

A. *OSHA jurisdiction over workplace is not divested unless another agency has jurisdiction and actively exercises that jurisdiction:***United Airlines v. Occupational Safety and Health Appeals Board**

In *United Airlines, Inc. v. Occupational Safety and Health Appeals Board*,¹ the California Supreme Court addressed the issue of who had jurisdiction over the occupational safety of ground maintenance employees. United Airlines, Inc. (United) contended that pursuant to an exception in the Labor Code,² the occupational safety of its employees was under the jurisdiction of the Federal Aviation Administration (FAA). The FAA requires airlines to develop and submit for its approval maintenance manuals for flight and ground operations personnel.³ The court held that the FAA's lack of a specific mandate to protect the health and safety of the workers and its failure to promulgate and enforce health and safety rules prevented it from exercising occupational safety jurisdiction to fit the exception to the Division of Occupational Safety and Health (Division) jurisdiction.

The jurisdiction granted to the Division as set by the Labor Code is extremely broad so as to "enforce regulations to protect the health and safety of employees throughout the state."⁴ A limited exemption is granted "if two prerequisites are satisfied: (1) the place of employment is one over which the health and safety jurisdiction is vested by law in another agency, and (2) that juris-

tenced to the state prison. See CAL. WELF. & INST. CODE § 1731 (West Supp. 1982); *supra* note 17.

This issue was specifically left open by the California Supreme Court in *In re Jeanice D.*, 28 Cal. 3d 210, 214, 617 P.2d 1087, 1089, 168 Cal. Rptr. 455, 457 (1980). At least one court has held that an individual, who is ineligible for Youth Authority commitment because of failure to meet the requirements of § 1731.5, is still entitled to an evaluation by the Youth Authority prior to being sentenced. *People v. Grisso*, 104 Cal. App. 3d 380, 386, 163 Cal. Rptr. 547, 550 (1980); compare *People v. Eaker*, 100 Cal. App. 3d 1007, 161 Cal. Rptr. 417 (1980).

1. 32 Cal. 3d 762, 654 P.2d 157, 187 Cal. Rptr. 387 (1982). The opinion of the court was written by Justice Kaus with all other Justices concurring.

2. CAL. LAB. CODE § 6303(a) (West Supp. 1982).

3. Air Carriers, Air Travel Clubs, and Operators, for Compensation or Hire: Certified and Operations, 14 C.F.R. § 121.133(a) (1982) (current manual requirements for flight and ground personnel); *Id.* § 121.135(a) (1982) (requires instructions and information to allow personnel to perform their duties safely).

4. 32 Cal. 3d at 767, 654 P.2d at 159-60, 187 Cal. Rptr. at 389-90.

diction is being 'actively exercised' by the other agency."⁵

The court noted that the authorities which have interpreted the statute have espoused a narrow reading of the exception.⁶ Thus, the court found it clear that the agency regulating safety in the workplace must have been specifically mandated to protect worker safety in order to divest the Division's jurisdiction.⁷

The court found that the Federal Aviation Act,⁸ which authorized the FAA to promulgate rules, regulations, and minimum standards which the administrator finds necessary "in the interest of safety," primarily governed inflight safety and not ground personnel.⁹ Although the FAA had the authority to issue regulations affecting the health and safety of ground personnel,¹⁰ the court noted that this would not trigger the exemption precluding jurisdiction of the Division;

the exemption of section 6303, subdivision (a) does not come into play simply because there is another agency that has the power or discretion to enact some regulations affecting employee health or safety. . . . [T]he exemption applies . . . when the other agency . . . has been *specifically mandated* to regulate the working environment . . . for the protection of employees' health and safety.¹¹

If the other agency has been established for a different purpose and merely has tangential responsibility in the area regulated, it may not have the expertise to implement safeguards for employees in that area.¹²

The court stated that the Labor Code has been and should be liberally construed to prevent potential gaps in provisions for a safe working environment that may occur as a result of two agencies allocating health and safety jurisdiction over one's work place.¹³ Allowing the mention of safety in an agency's enabling legislation to divest the Division of control would contravene the liberal construction of the statute and the narrow construction of

5. *Id.*

6. *Id.* at 769, 654 P.2d at 161, 187 Cal. Rptr. at 391. *See also* Lehmann v. Los Angeles City Bd. of Educ., 154 Cal. App. 2d 256, 316 P.2d 55 (1957) (school's discretionary safety jurisdiction does not relieve them of duty to conform to regulations of division); San Francisco Port Authority, 32 Ops. Cal. Atty. Gen. 282 (1959) (Division has safety jurisdiction over properties under jurisdiction of Port Authority).

7. 32 Cal. 3d at 768, 654 P.2d at 160-61, 187 Cal. Rptr. at 390-91.

8. 49 U.S.C. §§ 1421-1432 (1976).

9. 32 Cal. 3d at 770, 654 P.2d at 162, 187 Cal. Rptr. at 392. "A common sense reading of [section 1421(a)] . . . must be interpreted as a means of accomplishing the sole directive in subdivision (a): the promotion of 'safety of flight.'" *Id.*

10. 49 U.S.C. § 1421(a)(3), (5), (6) (1976) (rules governing ground personnel and their activities which impact on inflight safety).

11. 32 Cal. 3d at 770, 654 P.2d at 162, 187 Cal. Rptr. at 392.

12. *Id.* at 771, 654 P.2d at 162, 187 Cal. Rptr. at 392.

13. *Id.* *See also* Industrial Welfare Comm'n v. Superior Court, 27 Cal. 3d 690, 724, 613 P.2d 579, 598-99, 166 Cal. Rptr. 331, 350-51 (1980); Carmona v. Division of Indus. Safety, 13 Cal. 3d 303, 313, 530 P.2d 161, 167, 118 Cal. Rptr. 473, 479 (1975).

the exemption.¹⁴

United contended that the Division, an agency of the State of California, draws its authority from the Federal Occupational Safety and Health Act and, therefore, cannot exceed the jurisdictional limits stipulated by the Act.¹⁵ The strategy for relying on this contention was the result of a similar case, *Secretary of Labor v. Northwest Airlines*,¹⁶ which was decided under the federal act and held that "the Federal Occupational Safety and Health Administration (OSHA) was exempted from regulating a working condition . . . when a safety provision relating to that working condition was included in an airline maintenance manual."¹⁷ The federal act exempted workplaces where federal agencies "exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health."¹⁸ The state statute is not preempted by OSHA if the state has adopted a federally approved occupational safety and health plan.¹⁹ The court noted that OSHA does not prohibit states with an approved plan from establishing more stringent standards than OSHA, nor does it grant more extensive jurisdiction to its own occupational safety and health agency than to OSHA.²⁰ Since the suit is based on state law, the more stringent requirements promulgated by the Labor Code control.²¹

United's contention that *Northwest* should be persuasive as an authoritative interpretation of the federal statute upon which the state's exemption was modeled was dismissed by the court on the grounds that the exception was not modeled on the exemption provision of the federal act, but was derived from previous California statutes.²² Nor would joint jurisdiction by the FAA and the Division create chronic uncertainty over which regulations would

14. 32 Cal. 3d at 771, 654 P.2d at 162-63, 187 Cal. Rptr. at 392-93.

15. *Id.* at 771, 654 P.2d at 163, 187 Cal. Rptr. at 393.

16. 1980 O.S.H. Cas. (BNA) ¶ 4,751.

17. 32 Cal. 3d at 771, 654 P.2d at 163, 187 Cal. Rptr. at 394.

18. 29 U.S.C. § 653(b)(1) (1979).

19. 32 Cal. 3d at 772, 654 P.2d at 164, 187 Cal. Rptr. at 394. *See also* American Fed'n of Labor, Etc. v. Marshall, 570 F.2d 1030 (D.C. Cir. 1975) (state may reassume responsibility for occupational safety and health by submitting acceptable plan to Secretary of Labor); *Green Mt. Power v. Commissioner of Labor and Indust.*, 136 Vt. 15, 383 A.2d 1046 (1978) (state plan required to be as effective as the federal program).

20. 32 Cal. 3d at 772-73, 654 P.2d at 164, 187 Cal. Rptr. at 394.

21. 32 Cal. 3d at 772 n.9, 654 P.2d at 163 n.9, 187 Cal. Rptr. at 393 n.9.

22. *Id.* at 773, 654 P.2d at 164, 187 Cal. Rptr. at 394. For legislative history of CAL. LAB. CODE § 6303(a), see 32 Cal. 3d at 765, 654 P.2d at 160, 187 Cal. Rptr. at 390.

command compliance for a particular procedure or hazard. “[W]hen inflight safety *is* directly involved . . . any safety regulation promulgated by the FAA would . . . take precedence over a conflicting division regulation.”²³ The court noted that in other areas, if conflicts arose, the affected agencies could resolve them by mutual accomodation.²⁴

The court stated that even if the FAA meets the requirements of jurisdiction to satisfy the first requirement of the exemption, the FAA’s limited action with respect to promulgating standards and regulations would not satisfy the requirement that such jurisdiction be “actively exercised.”²⁵ This requirement was added to the statute to insure that the Division would not be divested of jurisdiction by the existence of unused authority in another agency.²⁶

The lack of specific guidelines in the FAA regulation requiring the airlines to develop comprehensive manuals, and the FAA’s passive approval of any safety manuals submitted by its failure to object, were factors in the court’s decision that the FAA’s jurisdiction was not actively exercised.²⁷ An exemption provided on the basis of self-developed regulations would leave the airlines in the enviable position of being self-regulators. Moreover, the failure of the FAA to undertake any systematic enforcement of the measures in effect convinced the court that the agency did not “actively exercise” its jurisdiction.²⁸

XIV. MUNICIPAL LAW

A. *In matters of statewide concern, state law will prevail over conflicting municipal law:*
Bagget v. Gates.

In *Bagget v. Gates*,¹ the California Supreme Court determined

23. 32 Cal. 3d at 774, 654 P.2d at 165, 187 Cal. Rptr. at 395 (emphasis original).

24. *Id.* Cf. *Pacific Legal Found. v. Brown*, 29 Cal. 3d 168, 196-200, 624 P.2d 1215, 1231-34, 172 Cal. Rptr. 487, 503-06 (1981). The court held that a conflict in jurisdiction between two agencies with responsibility affecting civil service employees was not grounds for divesting one agency of its jurisdiction. Harmonizing the jurisdictions so that each agency would control areas that the functions principally encompassed was held to be the appropriate remedy. *See also Vargas v. Municipal Court*, 22 Cal. 3d 902, 910-13, 587 P.2d 714, 719-21, 150 Cal. Rptr. 918, 923-25 (1978).

25. 32 Cal. 3d at 775, 654 P.2d at 165, 187 Cal. Rptr. at 395.

26. *Id.* at 776, 654 P.2d at 166, 187 Cal. Rptr. at 396.

27. *Id.*

28. *Id.* at 777, 654 P.2d at 167, 187 Cal. Rptr. at 397. Although a United engineer testified that the FAA had conducted inspections and cited United for violation of United’s safety procedures, these violations concerned only procedures affecting inflight safety. *Id.* at 765, 654 P.2d at 158, 187 Cal. Rptr. at 388.

1. 32 Cal. 3d 128, 649 P.2d 874, 185 Cal. Rptr. 232 (1982). Chief Justice Bird au-

that a Bill of Rights Act² which provided certain protections for all peace officers did not violate the home rule provisions of the California Constitution.

The case arose as a result of the demotion of certain police officers pursuant to departmental findings that their performance had been negligent and unsatisfactory. The officers claimed that denying them an administrative appeal violated their rights under the Public Safety Officer's Procedural Bill of Rights Act. They requested a writ of mandate to enjoin the police department from demoting them until they had the opportunity to appeal the Department's findings.³

The Bill of Rights Act "gives officers the right to an administrative appeal when any punitive action is taken against them. . . ."⁴ The home rule provision of the California Constitution⁵ gives chartered cities the power to "make and enforce all ordinances and regulations in respect to municipal affairs. . . ."⁶ The court noted that when cities enact regulations which relate to purely municipal affairs, those regulations prevail over state laws governing the same subject unless the subject matter of the regulation is a statewide concern.⁷ Although the courts are the ultimate arbiters as to what constitutes a statewide concern that will allow an impingement of the home rule provision, it "will accord 'great weight' to the Legislature's evaluation of this question."⁸ The court found it "significant that the Legislature ha[d] expressly declared that the rights and protections provided to peace officers [by the bill of Rights Act] constitute a matter of statewide

thored the majority opinion with Justices Mosk, Newman, Broussard and Reynoso concurring. Justice Kaus filed a separate opinion, concurring and dissenting. Justice Richardson filed a separate dissenting opinion.

2. Public Safety Officer's Procedural Bill of Rights Act, 1976 Cal. Stat. 1202-05 (codified at CAL. GOV'T CODE §§ 3300-11 (West 1980)).

3. 32 Cal. 3d at 133, 649 P.2d at 976, 185 Cal. Rptr. at 234.

4. CAL. GOV'T CODE § 3304(b) (West 1980) provides that "[n]o punitive action . . . shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal."

5. CAL. CONST. art. XI, § 5(a).

6. *Id.*

7. 32 Cal. 3d at 136, 649 P.2d at 878, 185 Cal. Rptr. at 236. *See also* Baron v. City of Los Angeles, 2 Cal. 3d 535, 539, 469 P.2d 353, 355, 86 Cal. Rptr. 673, 675 (1970); Bishop v. City of San Jose, 1 Cal. 3d 56, 61, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969).

8. 32 Cal. 3d at 136, 649 P.2d at 878, 185 Cal. Rptr. at 236. *See also* Bishop, 1 Cal. 3d at 63, 460 P.2d at 141, 81 Cal. Rptr. at 469.

concern."⁹

The court determined that the act had only minimally impinged on other areas of constitutional grants of power to the cities.¹⁰ In this matter, the court found that the Bill of Rights Act impinged on the city's implied power to determine the manner of removal of officers from their current positions.¹¹ The Act required an opportunity for an administrative appeal from punitive actions by the city. The city had previously granted this opportunity. Since the objective of the Bill of Rights Act was to effect a statewide concern for uniform fair labor practices, the court determined that the Act should prevail over the conflicting municipal regulation.¹²

The court reinforced the Legislature's evaluation of the Act's qualification of meeting a statewide concern by stating several policy reasons. Citing the need for stable employment relations between police officers and employers and the far reaching consequences of a breakdown in such relations on the health, safety and welfare of the citizens, the court determined that the result of labor unrest would extend far beyond the local boundaries of the municipalities concerned and into the realm of the state's provinces. Grievance systems, such as administrative appeal, are very successful in maintaining labor peace.¹³

Furthermore, the court determined that the officers should be awarded attorneys' fees under the private attorney general doctrine, as their action resulted in securing for themselves and many others the basic rights and protections of the Act.¹⁴ The litigation conferred a significant benefit on the general public by encouraging the maintenance of stable relations between peace officers and their employers. The court determined that the financial burden of the suit placed upon the officers was out of proportion to their personal stake in the case because while the litigation secured the enforcement of basic procedural rights for

9. 32 Cal. 3d at 136, 649 P.2d at 878, 185 Cal. Rptr. at 236 (quoting CAL. GOV'T CODE § 3301 (West 1980)).

10. CAL. CONST. art. XI, §5(b)(4) provides that the city is granted power to provide for "the manner by which, the method by which, the times at which, and the terms for which the several municipal officers and employees whose compensation is paid by the city shall be . . . appointed, and for their removal, and for their compensation . . . and for the compensation, method of appointment, qualifications, tenure of office and removal of such deputies, clerks and other employees."

11. 32 Cal. 3d at 138, 649 P.2d at 879, 185 Cal. Rptr. at 237. The Act impinges on the method of removing peace officers by requiring an administrative appeal prior to any action taken.

12. *Id.* at 139, 649 P.2d at 880, 185 Cal. Rptr. at 238.

13. *Id.* at 139-40, 649 P.2d at 880, 185 Cal. Rptr. at 238.

14. *Id.* at 143, 649 P.2d at 882, 185 Cal. Rptr. at 240. See CAL. CIV. PROC. CODE § 1021 (West 1980).

officers throughout the state, enforcement of the procedural rights might not result in any pecuniary benefits to the officers themselves.¹⁵

Justice Richardson dissented¹⁶ to the state's preemption of the municipalities "plenary authority" granted by the constitution.¹⁷ He considered the grant of power for "the organization, maintenance and operation of a police and fire department by a chartered city . . . a municipal affair and as such not subject to the control of the legislature."¹⁸

In effect, the court's decision does not deprive local governments of the right to control their police departments. The decision merely insured that police department employees will be granted the basic rights and protections of the Act. The court's decision alleviates the local and statewide concerns that would be prevalent, absent the Act's preemptive effect.

XV. TAXATION

- A. *"Special taxes" apply only to taxes imposed for a specific purpose; taxes deposited in city's general fund are exempt from Proposition 13 two-thirds requirement: City and County of San Francisco v. Farrell.*

15. *Id.* Justice Kaus dissented to the attorneys' fees award for several reasons. First, he noted that the award totaled about \$8,400.00. *Id.* at 145, 649 P.2d at 883, 185 Cal. Rptr. at 241. The threatened sanctions would have reduced the four officers salaries by \$5,000 a year. Therefore, the interest of the parties of \$20,000 a year would constitute a substantial financial incentive to pursue the litigation. Second, the record disclosed the fact that the attorneys' fees had not been paid by the individual plaintiffs but were financed by the Los Angeles Police Protection League. *Id.* at 146, 649 P.2d at 884, 185 Cal. Rptr. at 242. Justice Kaus reasoned that if a "private attorney general fee award is needed to insure that lawsuits will be brought to enforce a particular statutory policy," the existence of an organization that will sue to enforce the enactment should be a relevant factor in determining if attorney fees are necessary. *Id.* For a thorough discussion of the private attorney general doctrine, see *The California Supreme Court Survey, A Review of Decisions*, 10 PEPPERDINE L. REV. 835, 849-65 (1983).

16. 32 Cal. 3d at 146, 649 P.2d at 885, 185 Cal. Rptr. at 243 (Richardson, J., dissenting).

17. CAL. CONST. art. XI, § 5(b)(4).

18. 32 Cal. 3d at 148, 649 P.2d at 885-86, 185 Cal. Rptr. at 243-44 (quoting *Brown v. City of Berkeley*, 57 Cal. App. 3d 223, 236, 129 Cal. Rptr. 1, 7 (1976)).

I. INTRODUCTION

With the decision of *City and County of San Francisco v. Farrell*,¹ judicial interpretations continued to restrict the provisions of Proposition 13.² The California Supreme Court, deciding the issue which was specifically left open in *Los Angeles County Transportation Commission v. Richmond*,³ once again eroded the limitations that Proposition 13 has placed upon the taxation powers of state and local governments.⁴ The court construed the term "special taxes," which is contained in section four⁵ of article thirteen A of the California Constitution,⁶ as meaning those taxes which are levied for a specific purpose, rather than those taxes which are placed in a general fund to be utilized for general governmental purposes.⁷

1. 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713 (1982). Justice Mosk wrote for the majority with Chief Justice Bird and Justices Newman, Broussard and Reynoso concurring. Justices Richardson and Kaus wrote separate dissenting opinions.

2. CAL. CONST. art. XIII A. Proposition 13, an initiative measure in the June 1978 primary elections, was accorded 64.8% of the vote. *Los Angeles County Transportation Comm'n v. Richmond*, 31 Cal. 3d 197, 203 n.6, 643 P.2d 941, 944 n.6, 182 Cal. Rptr. 324, 327 n.6 (1982).

3. In *Richmond*, the court addressed the propriety of a sales tax which was enacted by the Los Angeles County Transportation Commission [hereinafter LACTC] and approved by 54% of the county voters in November of 1980. The LACTC was authorized, pursuant to CAL. PUB. UTIL. CODE §§ 130350-130355 (West Supp. 1982), to adopt a retail transaction and use tax. Interpreting the ambiguous language contained in § 4 of Proposition 13 (*see infra* notes 15, 24 and accompanying text) the California Supreme Court concluded that LACTC, as an entity which is not empowered to levy a property tax, was not a "special district" within the scope of § 4. In this respect, the court noted that the two-thirds requirement was inapplicable to the sales tax in issue and thus foreclosed the necessity of determining the scope of the term "special taxes." 31 Cal. 3d at 212, 643 P.2d at 943, 182 Cal. Rptr. at 326.

4. The constitutionality of Proposition 13 was upheld in *Amador Valley Joint Union High School Dist. v. State Bd. of Equal.*, 22 Cal. 3d 208, 582 P.2d 1281, 149 Cal. Rptr. 239 (1978). The court noted, however:

We . . . examine only those principal, fundamental challenges to the validity of article XIII A as a whole. In doing so we reaffirm and readopt an analytical technique . . . in which 'Analysis [sic] of the problems which may arise respecting the interpretation or application of particular provisions of the act should be deferred for future cases in which those provisions are more directly challenged.'

Id. at 219, 583 P.2d at 1283, 149 Cal. Rptr. at 241 (quoting *County of Nevada v. MacMillen*, 11 Cal. 3d 662, 666, 522 P.2d 1345, 1347, 114 Cal. Rptr. 345, 347 (1974)).

5. CAL. CONST. art. XIII A § 4 mandates that:

Cities, Counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Id.

6. References to Proposition 13 and CAL. CONST. art. XIII will be used interchangeably in the article.

7. 32 Cal. 3d at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

The controversy arose when the Board of Supervisors for the City and County of San Francisco, in an effort to prolong a city tax on payrolls and gross receipts,⁸ sought to extend the expiration date of the tax levy by an initiative proposal.⁹ The measure received a favorable vote of approximately fifty-five percent. Proceeds from the tax began to flow into the city's general fund at an annual rate of seventeen million dollars.¹⁰ Subsequently, when the funds were appropriated for a specific project,¹¹ Farrell, the city controller, refused to certify that the funds were available for appropriation. Farrell's contention was based solely on the fact that the taxes constituted "special taxes" within the meaning of section four of article thirteen A,¹² and had not been approved by the necessary two-thirds majority vote.

II. THE MAJORITY OPINION

The city argued alternatively that either section four did not apply to charter cities¹³ or that the term "special taxes" only applied to taxes designated for a specific purpose, and that the taxes under scrutiny were not subjected to the two-thirds vote requirement as they were deposited in a general fund.¹⁴ The court's analysis focused entirely on the second contention.

In *Richmond*, the court had previously recognized that, while constitutional in scope, article thirteen A was "imprecise and ambiguous" and "[n]owhere is this impression more evident than in

8. The tax initially required businesses in San Francisco to pay the greater of a payroll expense tax of 1.5% or an equivalent percentage of gross receipts. A 4% rate increase ensued for a three month period, the continuance of which was contingent upon the passage of the initiative. See *City and County of San Francisco v. Farrell*, 116 Cal. App. 3d 350, 353, 172 Cal. Rptr. 116, 118 (1982). The petitioner had initially sought mandamus from the California Supreme Court, who transferred the petition to the appellate court with orders to issue an alternate writ of mandamus. *Id.* at 354, 172 Cal. Rptr. at 119.

9. *Id.* at 353, 172 Cal. Rptr. at 118.

10. *Id.* See also 32 Cal. 3d at 51, 648 P.2d at 936-37, 184 Cal. Rptr. at 714-15 for a more comprehensive disposition of the factual background.

11. The funds were earmarked to improve an elevator system in the municipally owned Laguna Honda Hospital.

12. See *supra* note 5.

13. The appellate court had maintained that article XIII A, by the very nature of its objectives, applied to charter cities as well as general law communities. 116 Cal. App. 3d at 359-60, 172 Cal. Rptr. at 121-22. See *supra* note 8 for an explanation of the California Appellate citation.

14. 32 Cal. 3d at 51, 648 P.2d at 937, 184 Cal. Rptr. at 715.

the language of section 4.”¹⁵ Furthermore, the ambiguity of “special taxes,” as the term appears in section four, is exacerbated by the fact that it has been used in a variety of contexts.¹⁶ As a result of this varied application, the city urged on the one hand that special taxes are those which are used for a special purpose, while on the other, Farrell claimed the term “special” referred to “additional” or “extra” charges levied for any public purpose.¹⁷

The court, in supporting the city’s position, set forth two supporting rationales. Initially, the court noted that California case and statutory law has repeatedly interpreted “special taxes” as those which are acquisitioned for a special purpose, and not deposited in a general fund.¹⁸

The court noted that when interpreting statutory or constitutional provisions, it has consistently endeavored to avoid construction which would render words meaningless.¹⁹ Yet, if Farrell’s contention were adopted, the word “special” would be rendered entirely inane since *any* new tax imposed by a local entity would clearly be “‘additional’ or ‘extra’ or ‘supplemental.’”²⁰

15. 31 Cal. 3d 197, 201, 643 P.2d 941, 943, 182 Cal. Rptr. 324, 326 (1982).

16. See *First Am. Title Ins. & Trust Co. v. Franchise Tax Bd.*, 15 Cal. App. 3d 343, 346, 93 Cal. Rptr. 177, 178 (1971) (special tax imposed in lieu of all taxes); *County of Ventura v. Channel Islands State Bank*, 251 Cal. App. 2d 240, 246, 59 Cal. Rptr. 404, 408 (1967) (banks assessed special tax in lieu of all other taxes except real property taxes); *City of Oceanside v. Pacific Telephone & Telegraph Co.*, 134 Cal. App. 2d 361, 362, 285 P.2d 704, 705 (1955) (special tax imposed on the telephone company). The California Supreme Court took notice of the inappropriateness of these meanings, as well as others, when they are applied to the term “special taxes” as it is used in § 4. 32 Cal. 3d at 53 n.3, 648 P.2d at 938 n.3, 184 Cal. Rptr. at 706 n.3.

17. 32 Cal. 3d at 53, 54, 648 P.2d at 938, 184 Cal. Rptr. at 716. The court noted that Farrell had simply relied upon dictionary definitions of the term “special” and the definitions he relied upon were neither the only nor the first definitions which were listed. Both dictionaries relied upon set forth the first definition of “special” as a “thing which is distinguished by some unusual or distinguishing quality or characteristic.” *Id.* at 54 n.4, 648 P.2d at 938 n.4, 184 Cal. Rptr. at 716 n.4. Analytically speaking, it is easy to see that this latter definition actually supports the city’s argument.

18. See *County of Fresno v. Malmstrom*, 94 Cal. App. 3d 974, 983, 156 Cal. Rptr. 777 (1979). The case specifically dealt with the interpretation of § 4 of Proposition 13 and the court concluded that the section did not require the issuance of bonds to be approved by the two-thirds vote because such special assessments [within the purview of the Municipal Improvement Act of 1913 and the Improvement Act of 1911] were not within the definition of “special taxes.” See also, *Ruane v. City of San Diego*, 267 Cal. App. 2d 548, 551, 73 Cal. Rptr. 316, 318 (1968); *City of San Diego v. Atlas Hotels, Inc.*, 252 Cal. App. 2d 591, 592-93, 60 Cal. Rptr. 644, 645 (1967); CAL. GOV’T CODE § 26100 (West Supp. 1982); CAL STS. & HWY. CODE § 8809 (West 1969).

19. *Gay Law Students Ass’n v. Pacific Co.*, 24 Cal. 3d 458, 478, 595 P.2d 592, 604, 156 Cal. Rptr. 14, 26 (1979); *People v. Gilbert*, 1 Cal. 3d 475, 480, 462 P.2d 580, 584, 82 Cal. Rptr. 724, 728 (1969); *Morro Hills Community Servs. Dist. v. Board of Supervisors*, 78 Cal. App. 3d 765, 773, 144 Cal. Rptr. 778, 782 (1978).

20. 32 Cal. 3d at 54, 648 P.2d at 938-39, 184 Cal. Rptr. at 717.

Furthermore, when section four is read in conjunction²¹ with section three²² of article thirteen A the city's assertions are given additional support. If section four was intended to impose the two-thirds vote requirement on additional or extra taxes it more than likely would have provided, like section three, that "any" taxes would be subject to the requirement.²³

The city controller, Farrell, also relied upon material which the Legislative Analyst had prepared and presented to the voters.²⁴ The court recognized that the statement, "new taxes would . . . have to be approved by two-thirds of the local voters," which appeared in the pamphlet, would tend to support Farrell's argument.²⁵ The court once more rejected the controller's analysis by revealing several ambiguities in the pamphlet itself, and disclosing a general uncertainty as to which section of the pamphlets the voters relied on when Proposition 13 was approved.²⁶

The court ultimately scrutinized both legislative enactments following the adoption of Proposition 13²⁷ and the prior decision in

21. See *supra* note 19. The courts will also strive to read different sections of a statute or constitutional provision together in order to effectuate its overall purpose.

22. CAL. CONST. art. XIII A § 3 provides:

From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

Id. (emphasis added).

23. 32 Cal. 3d at 54, 648 P.2d at 939, 184 Cal. Rptr. at 717.

24. The court has relied upon such materials in the past to determine the meaning and purpose of uncertain language. See *Richmond*, 31 Cal. 3d at 215, 643 P.2d at 952, 182 Cal. Rptr. at 335 (Richardson, J., dissenting) (citing *Board of Supervisors v. Lonegan*, 27 Cal. 3d 855, 866, 616 P.2d 802, 808, 167 Cal. Rptr. 820, 826 (1980)); *Amador*, 22 Cal. 3d at 246, 583 P.2d at 1300, 149 Cal. Rptr. at 258.

25. 32 Cal. 3d at 54, 648 P.2d at 939, 184 Cal. Rptr. at 717 (citing *Ballot Pamphlet, Proposed Amendments to CAL. CONST. with arguments to voters, Primary Elec. 60* (June 6, 1978)).

26. Some sections of the pamphlet used the language "other unspecified taxes" in a context which would seem to indicate not all new taxes need be approved by a two-thirds vote. Other sections simply maintained that "other tax raises [must] be approved by the people" without mentioning the two-thirds requirement. See 32 Cal. 3d at 55 n.5, 648 P.2d at 939 n.5, 184 Cal. Rptr. at 717 n.5 and accompanying text.

27. The court specifically mentions CAL. GOV'T CODE § 50076 (West Supp. 1982) which was enacted in 1978 and is specifically directed toward article XIII A. The section provides:

As used in this article, "special tax" shall not include any fee which does

*Amador Valley Joint Union High School District v. State Board of Equalization*²⁸ for indications of the purported purpose and intended effect of the initiative measure. The majority, however, found the statutory sections either inapplicable or unpersuasive.²⁹ They also placed great emphasis upon the fact that the issue in the *Farrell* case was not directly before the court in *Amador*.³⁰ Utilizing this analysis, the majority reasoned that the "term 'special taxes' in section 4 mean[s] taxes which are levied for a specific purpose rather than, as in the present case, a levy placed in the general fund to be utilized for general governmental purposes."³¹

III. THE DISSENTING OPINIONS

Justice Richardson's dissent is based entirely on views which he expressed in his *Richmond* dissent.³² His argument in *Richmond* focused on the notion that to narrowly interpret the term "special taxes" would be to deny the effective "real property tax relief" which is mandated by Proposition 13.³³ Sections one and two of article thirteen A³⁴ were enacted to specifically reduce real property taxes. Section four, by imposing limitations on the local government's power to impose substitute taxes, preserves this reduction.³⁵

not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes.

The court, recognizing that this section deals with services, concluded that it provided no basis for the controller's contention that an exaction for general revenue purposes, by implication, is a special tax. 32 Cal. 3d at 55-56, 648 P.2d at 939, 940, 184 Cal. Rptr. at 717-18.

28. The majority in *Amador* stated:

[S]ince any tax savings resulting from the operation of sections 1 and 2 could be withdrawn or depleted by additional or increased state or local levies other than property taxes, sections 3 and 4 combine to place restrictions upon the imposition of such taxes.

Id. at 231, 583 P.2d at 1291, 149 Cal. Rptr. at 249.

29. *See supra* note 27.

30. 32 Cal. 3d at 56, 648 P.2d at 940, 184 Cal. Rptr. at 718.

31. *Id.* at 57, 648 P.2d at 940, 184 Cal. Rptr. at 718.

32. 31 Cal. 3d at 209, 643 P.2d at 948, 182 Cal. Rptr. at 331. Since Justice Richardson concluded in *Richmond* that the LACTC was a "special district" within the meaning of § 4, it became necessary for him, unlike the majority, to address the issue of whether or not the sales tax which was imposed constituted a "special tax." *See supra* note 3.

33. 31 Cal. 3d at 214, 215, 643 P.2d at 951, 182 Cal. Rptr. at 334 (Richardson, J., dissenting). Justice Richardson alternatively showed that in order to preserve the home rule principles entailed in the two-thirds vote requirement, the term "special taxes" must be construed in a "broad and comprehensive manner." *Id.* at 217, 643 P.2d at 953, 182 Cal. Rptr. at 336 (Richardson, J., dissenting).

34. CAL. CONST. art. XIII A §§ 1, 2.

35. *See supra* note 33.

Justice Richardson reiterated these arguments in *Farrell* by showing that the limitations of section four are circumvented by allowing the city to replace general revenues, which were lost by the imposition of Proposition 13, with the funds from the payroll and gross receipts tax.³⁶ The *purpose* of the newly imposed tax is identical to that of the taxes which the voters decided to limit with the enactment of the two-thirds vote requirement, i.e., to enhance the general revenues of the city.³⁷ In this respect, the intent of the voters is nullified by the interpretation the majority gave to the section.³⁸

Justice Kaus, who had written a concurring opinion in *Richmond*,³⁹ maintained that if the design of section four⁴⁰ was to restrict the ability to restore revenues lost by Proposition 13, then the position taken by the majority in the present case was incorrect.⁴¹

Rather, Justice Kaus would uphold the argument advanced by Farrell that "new" or "additional" taxes are "special taxes" subject to two-thirds voter approval.⁴² He reached this conclusion by maintaining that the word "special" only clarified that local taxing bodies would be permitted to retain any pre-Proposition 13 non-property taxes without an endorsement of two-thirds of the voters.⁴³

IV. CONCLUSION

In *Farrell*, the court continued to erode the specific design and

36. 32 Cal. 3d at 58, 648 P.2d at 914, 184 Cal. Rptr. at 719 (Richardson, J., dissenting).

37. *Id.*

38. Justice Richardson, relying on statements which were printed by the Legislative Analyst, attempted to clarify the intent of the voters in his *Richmond* dissent. See 31 Cal. 3d at 215-16, 643 P.2d at 952, 182 Cal. Rptr. at 335 (Richardson, J., dissenting).

39. 31 Cal. 3d 197, 643 P.2d 941, 182 Cal. Rptr. 324 (1982) (Kaus, J., concurring). Justice Kaus, addressing only the special districts issue, held that the term applied only to those districts which could impose property taxes. This was necessarily so because the purpose of § 4 was to limit the authority of local entities to replace property tax revenues and the only entities which could suffer loss of property tax revenues were those entities which could impose such taxes in the first place. *Id.* at 208-09, 643 P.2d at 948, 182 Cal. Rptr. at 331 (Kaus, J., dissenting).

40. See *supra* note 5.

41. 32 Cal. 3d at 58, 648 P.2d at 941, 184 Cal. Rptr. at 719 (Kaus, J., dissenting).

42. *Id.* at 59, 648 P.2d at 941-42, 184 Cal. Rptr. at 719-20 (Kaus, J., dissenting).

43. *Id.*

intent of Proposition 13, continuing a trend that was noted in their earlier *Richmond* decision. Through the device of judicial interpretation, it has been decided that "special taxes" will receive a very narrow construction, which, as noted by Justice Richardson in his dissent, will deny the real property tax relief which lies at the heart of Proposition 13. This trend of narrow construction and application will very likely become the majority's position in future Proposition 13 cases.

XVI. TORTS

A. *Privileges to defamatory communication are limited by legislative enactments: Slaughter v. Friedman*

The case of *Slaughter v. Friedman*¹ allowed the California Supreme Court to fully explain the defenses available to a charge of libel. The court held that section 47 of the California Civil Code² limited the available defenses, and any extension of this area of law should come from the legislature, and not from the courts.

The plaintiff, an oral surgeon, sued the defendant, an insurance corporation, for libel and interference with prospective business advantage when, after the plaintiff had submitted to the defendant's claims for dental services, the defendant sent out letters to the patients which stated that payment on the claims would be denied. The letters stated that payment was denied because the plaintiff performed unnecessary dental work and overcharged for his services. The defendant also stated that it would no longer process plaintiff's claims and would report him to the California Dental Association for disciplinary proceedings.³ The defendant denied that plaintiff had pled a valid cause of action and, in the alternative, argued that the publication was justified and privileged.⁴

Section 47 of the California Civil Code provides for specific privileged publications which may be exempt from charges of defamation. These privileges are recognized in part as:

- (1) [An *absolute* privilege for a publication or broadcast made] in the proper discharge of an official duty . . .
- (2) [An *absolute* privilege for a publication made] in any (1) legislative or

1. 32 Cal. 3d 149, 649 P.2d 886, 185 Cal. Rptr. 244 (1982). Justice Richardson authored the majority opinion in which Justices Mosk, Newman, Kaus, and Reynoso concurred. A separate concurring and dissenting opinion was written by Justice Broussard.

2. CAL. CIV. CODE § 47 (West 1982).

3. 32 Cal. 3d at 153, 649 P.2d at 888, 185 Cal. Rptr. at 246.

4. *Id.* at 155, 649 P.2d at 889, 185 Cal. Rptr. at 247.

(2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable [by a mandate action] . . .

(3) [A *qualified* privilege for a publication made] in a communication, without malice, to a person interested therein, (1) by one who is also interested . . .⁵

Subdivisions one and two have generally been held to apply only to high-ranking state and federal officials⁶ and to official governmental proceedings which might necessarily lead to judicial review.⁷ None of the cases which have invoked either of these privileges has involved communications between private parties. Therefore, the court held the cases inapplicable to the present situation.⁸

The court noted that subdivision three might have a possible application to the case.⁹ The plaintiff had, however, sufficiently pled facts which would prove that the communications were made with malice. Therefore, the defendant would not be able to avail itself of this privilege on demurrer. The court also noted that although privileges specifically applicable to certain communications which contained evaluations of professional medical care providers were available,¹⁰ these privileges did not extend beyond the scope of protecting peer review committee members who evaluated medical¹¹ or dental services and private communications to medical agencies evaluating "practitioners of the healing arts."¹²

The main issue which the court was forced to confront was whether it should go beyond the bounds of these statutory limits and adopt section 592A of the Restatement (Second) of Torts.¹³

5. CAL. CIV. CODE § 47 (1),(2),(3) (West 1982).

6. 32 Cal. 3d at 155-56, 649 P.2d at 889-90, 185 Cal. Rptr. at 247-48. *See also* Kilgore v. Younger, 30 Cal. 3d 770, 778, 640 P.2d 793, 798, 180 Cal. Rptr. 657, 662 (1980) (privilege extends to high-ranking state and federal officials acting in official capacity).

7. 32 Cal. 3d at 156, 649 P.2d at 890, 185 Cal. Rptr. at 248. *See also* Hackethal v. Weissbein, 24 Cal. 3d 55, 60, 592 P.2d 1175, 1178, 154 Cal. Rptr. 423, 426 (1979) (word "official" probably intended to deny application of absolute privilege to nongovernmental proceeding).

8. 32 Cal. 3d at 156, 649 P.2d at 890, 185 Cal. Rptr. at 248.

9. *Id.*

10. *Id.* at 157, 649 P.2d at 890, 185 Cal. Rptr. at 248. *See* CAL. CIV. CODE §§43.7, 43.8 (West 1982) (special immunities regarding communications evaluating health care providers).

11. CAL. CIV. CODE § 43.7 (West 1982).

12. CAL. CIV. CODE § 43.8 (West 1982).

13. RESTATEMENT (SECOND) OF TORTS § 592A (1977). Section 592A provides:

This section allows a privilege to publish defamatory matter if one is required by law to publish it.¹⁴ The defendant was required by law to provide to the insureds "a reasonable explanation of the basis relied on in the insurance policy, in relation to the facts or applicable law, for the denial of a claim or for the offer of a compromise settlement."¹⁵ The court noted, however, that the legislature had not adopted section 592A. Therefore, the court was limited to applying the privileges prescribed by section 47 of the California Civil Code.¹⁶ The court felt that any extension of the privileges beyond the existing statutes involved a matter of public policy which the court should defer to the legislature.¹⁷

Moreover, the court noted that the application of section 592A to this set of facts might be beyond the scope of the section as contemplated by the authors of the Restatement.¹⁸ The Restatement authors noted that

[t]he chief present application of the Section [592A] is in the case of radio and television broadcasting stations, which are required . . . to afford to political candidates equal opportunity to be heard, without any power of censorship over the matter broadcast. A station may, therefore, be unable . . . to control in any way what he or [a candidate] says. The station is therefore absolutely privileged as to the publication.¹⁹

The application is not necessarily limited to this situation but should apply whenever "the one who publishes the defamatory matter acts under legal compulsion in so doing."²⁰

The court, however, felt that if an application of section 592A were to be made, it should be limited to circumstances where the communicator has no control over the content of the communication.²¹ The court felt that this position was warranted by the analysis of a similar case²² which held that extending an absolute privilege where the communication between private parties was required by law and the communicator was able to control the content of his speech "would not serve the same public purpose [i.e., promoting full disclosure between citizens and governmental

"One who is required by law to publish a defamatory matter is absolutely privileged to publish it." *Id.*

14. *Id.*

15. CAL. INS. CODE § 790.03(h)(13) (West Supp. 1982).

16. 32 Cal. 3d at 158, 649 P.2d at 891, 185 Cal. Rptr. at 249.

17. *Id.* The court relied on the case of *Kachig v. Boothe*, 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 (1971) for this position. They felt that an extension of the privileges inherently was an edict of public policy in which they should defer to the legislature.

18. 32 Cal. 3d at 158, 649 P.2d at 891, 185 Cal. Rptr. at 249.

19. RESTATEMENT (SECOND) OF TORTS § 592A comment a (1977).

20. *Id.* at comment b.

21. 32 Cal. 3d at 158, 649 P.2d at 891, 185 Cal. Rptr. at 249.

22. *Moore and Assoc. v. Metropolitan Life Ins. Co.*, 604 S.W.2d 487 (Tex. Civ. App. 1980).

agencies] as is served by the general rule regarding privilege. . . .'²³ Moreover, in granting an absolute privilege to a public official carrying out his duty or to a governmental agency performing its functions, safeguards exist in that offensive matters can be struck from the proceedings and the individual can be punished for contempt. These safeguards do not exist between private parties.²⁴ The court felt that section 47(3) of the Civil Code, which recognized a qualified privilege for communication between persons with an interest in the communication, provided it was made without malice, sufficiently protected the defendants.²⁵

Justice Broussard dissented²⁶ to the majority's reluctance to extend the privileges to include section 592A which was based solely on the legislature's failure to enact the Restatement position as a part of the statutory scheme of section 47 of the Civil Code. He viewed the law of defamation as a common law crucible which has been developed over the years in the courts as well as in the legislature.²⁷ By limiting the construction of section 47 of the Civil Code to preclude judicial expansion, he felt that the majority was, in effect, requiring the court to "cease and desist from examining new problems in the light of our modern society."²⁸ The essence of Justice Broussard's reasoning was summarized up in the following paragraph:

Given the traditional experience of court adoption of privilege in defamation cases and judicial definition, followed by legislative codification, today's decision determining that legislative enumeration of privileges is exhaustive must be viewed as a radical departure from the long-settled relationship between common law evolution and legislative determination. I find nothing in the current version of section 47 to warrant the departure.²⁹

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23. 32 Cal. 3d at 159, 649 P.2d at 892, 185 Cal. Rptr. at 250 (quoting Moore & Assoc. v. Metropolitan Life Ins. Co., 604 S.W.2d at 490). The public purpose, of course, is the promotion of full disclosure between citizens and government agencies.

24. 604 S.W.2d at 489-90.

25. 32 Cal. 3d at 159, 649 P.2d at 892, 185 Cal. Rptr. at 250.

26. *Id.*

27. *Id.* at 160, 649 P.2d at 892, 185 Cal. Rptr. at 250.

28. *Id.*

29. *Id.* at 162, 649 P.2d at 893, 185 Cal. Rptr. at 251.

