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The California Supreme Court Survey - A Review of Decisions: June 1981-August 1981

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The California Supreme Court Survey

A Review of Decisions: June 1981-August 1981

In a continuing effort to provide the legal community with an analytical examination of recent California Supreme Court cases, the Pepperdine Law Review surveys the following decisions as indicative of current court activity. The following is designated to briefly expose the practitioner to recent decisions which are anticipated to significantly impact California law.

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I. CONSTITUTIONAL LAW

A. CRIMINAL PROCEDURE

1. *Specific Performance as a Remedy for Broken Plea Agreements: People v. Calloway*

Failing to follow the trend in the federal courts, the California Supreme Court denied specific performance as a remedy for breached plea bargain agreements. Although the defendant had detrimentally relied on the agreement, the court was very reluctant to enforce agreements that restricted the sentencing discretion of trial courts.

I. INTRODUCTION

In *People v. Calloway*,¹ defendant Willie Calloway entered into a plea bargain agreement approved by a judge.² The terms of the agreement were not fulfilled, and the defendant sought specific performance as a remedy for the breach.³ As it was reluctant to limit the sentencing discretion of a trial court, the California Supreme Court denied the use of specific performance as a remedy for broken plea bargain agreements.⁴

In this case, the plea bargain agreement consisted of the defendant's plea of guilty to violating probation and allowing himself to be committed for no longer than ninety days to the Department of Corrections for a diagnostic study, in exchange for the judge's agreement not to sentence the defendant to state prison.⁵ Following the diagnostic study, however, the staff report unanimously recommended that a prison sentence for Calloway was the most appropriate alternative. Superior Court Judge London considered the staff report, as well as other supplemental probation reports, in his decision to sentence Calloway to state prison in violation of the plea agreement.⁶

II. FACTS OF THE CASE

An in depth examination of the history of *People v. Calloway* reveals that defendant Calloway had had much contact with the probation authorities. In 1976, the defendant pleaded guilty to en-

1. 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981). Justices Tobriner, Richardson, Mosk and Stephens constituted the majority; Chief Justice Bird wrote the dissenting opinion in which Justices Newman and Woods concurred.

2. *Id.* at 669, 631 P.2d at 31, 175 Cal. Rptr. at 597.

3. *Id.* at 668, 631 P.2d at 30, 175 Cal. Rptr. at 596.

4. *Id.* at 671-72, 631 P.2d at 32-33, 175 Cal. Rptr. at 598-99.

5. The diagnostic study was to be completed pursuant to CAL. PENAL CODE § 1203.03 (West Supp. 1981) (order placing defendant in diagnostic facility for cases in which defendant is convicted of an offense punished by confinement in state prison).

6. 29 Cal. 3d at 670, 631 P.2d at 31, 175 Cal. Rptr. at 597.

dangering the life or health of a child.⁷ The proceedings against the defendant were suspended and he was placed on probation. Fifteen months later, a desertion hearing was held. The defendant failed to appear. Probation was then revoked and a bench warrant was issued for Calloway's arrest. Within eight months, he was arraigned on a misdemeanor battery charge.⁸ Shortly thereafter, the bench warrant was recalled and probation was reinstated, at which point a supplemental probation report was ordered. The supplemental report was written and filed on December 21, 1978, and Calloway's probation was again revoked. Again the defendant failed to appear at his hearing, and another bench warrant was issued. Subsequently, Calloway pleaded nolo contendere to the battery charges, which were then suspended. Calloway was again placed on probation. On March 14, 1979, the warrant of December 21 was recalled and another supplemental probation report was ordered. During the next four months, two additional supplemental reports were ordered, each recommending that probation remain revoked and that sentence be pronounced against Calloway.⁹

On August 9, 1979, pursuant to the plea bargain agreement approved by Judge London, the defendant admitted violating the terms of his probation.¹⁰ In return, it was agreed that Calloway would undergo a diagnostic study, but that he would not be sentenced to state prison.¹¹

The Department of Corrections' diagnostic report was filed forty-five days later, and two months after that, having considered this and all other supplemental reports, Judge London ordered

7. *Id.* at 669, 631 P.2d at 31, 175 Cal. Rptr. at 597. CAL. PENAL CODE §273(a) (West Supp. 1981) provides that wilful cruelty, or unjustifiable punishment of a child, or endangering the life or health of a child is punishable by imprisonment in either the county jail or state prison.

8. 29 Cal. 3d at 669, 631 P.2d at 31, 175 Cal. Rptr. at 597. The battery charge was made pursuant to CAL. PENAL CODE § 242 (West 1970). Battery is punishable by fine or imprisonment in county jail not to exceed six months, or both.

9. This recommendation was based on Calloway's "drug and alcohol abuse, serious psychiatric problems, continued assaultive behavior, lack of cooperation with the probation officer, repeated failures to report to probation officer, and desertion from probation." 29 Cal. 3d at 669, 631 P.2d at 31, 175 Cal. Rptr. at 597.

10. *Id.* The plea bargain was made with respect to the battery conviction, as Calloway could be sentenced to county jail rather than state prison. See note 13 *infra*.

11. 29 Cal. 3d at 669-70, 631 P.2d at 31, 175 Cal. Rptr. at 597. For a transcript recording the trial judge's statements, see *id.* at 675, 631 P.2d at 34, 175 Cal. Rptr. at 600.

Calloway's probation to remain revoked, and sentenced him to state prison.¹² The judge awarded Calloway a credit of 374 days both for time already served and for good conduct.¹³ Judge London was not reminded of the prior agreement until after sentencing, when Calloway himself wrote the judge a letter requesting a new sentencing hearing. The letter was treated as an *ex parte* request for a rehearing and was denied.¹⁴

On May 27, 1980, after spending approximately six months in state prison, Calloway was released on bail pending his appeal to the California Supreme Court. The court denied specific performance as a remedy, and limited its relief to merely allowing Calloway to withdraw his guilty plea.¹⁵ The court's denial of specific performance as a remedy under these circumstances severely limits the contexts in which specific performance may be granted as a remedy in cases involving a defendant who is denied the benefit of his bargain, regardless of whether the breach is by the People, or by the court itself.

III. HISTORY

Plea bargaining is an accepted practice in the American criminal process,¹⁶ but only recently have courts specifically upheld guilty pleas derived through plea bargaining as not being constitutionally suspect.¹⁷ In 1970, the United States Supreme Court clarified the issue in *Brady v. United States*,¹⁸ where it was stated

12. *Id.* at 670, 631 P.2d at 31, 175 Cal. Rptr. at 597.

13. *Id.* Calloway was awarded 281 days for time actually served and 93 days for good conduct. The dissent argued that Calloway "has already served a longer period of imprisonment than was called for by the terms of his plea bargain." *Id.* at 679, 631 P.2d at 37, 175 Cal. Rptr. at 603. The defendant's plea required him to admit to the misdemeanor battery charge. Such sentence could not exceed six months in county jail. *See* note 8 *supra*. Calloway's agreement included submission to a diagnostic test at the Chino State Prison. The dissent further pointed to CAL. PENAL CODE § 19(a) (West 1970) which states that as a condition of probation a defendant cannot be sentenced to serve more than one year in confinement. 29 Cal. 3d at 679-80, 631 P.2d at 37, 175 Cal. Rptr. at 603.

14. 29 Cal. 3d at 670, 631 P.2d at 31, 175 Cal. Rptr. at 597.

15. *Id.* at 673, 631 P.2d at 33-34, 175 Cal. Rptr. 599-600.

16. *People v. West*, 3 Cal. 3d 595, 604, 477 P.2d 409, 413, 91 Cal. Rptr. 385, 389 (1970); *e.g.*, *Barber v. Gladden*, 220 F. Supp. 308, 314 (D. Or. 1963) ("In many courts, particularly State courts, a defendant's lawyer and the prosecutor may bargain not only on the offense, but also on the length of the sentence which the prosecutor will recommend. It is an integral part of the administration of justice in the United States."); *In re Hawley*, 67 Cal. 2d 824, 828, 433 P.2d 919, 921, 63 Cal. Rptr. 831, 833 (1967) ("Bargaining for pleas is an important factor in the administration of the criminal law."); *People v. Williams*, 269 Cal. App. 2d 879, 884, 75 Cal. Rptr. 348, 351 (1969) (plea bargaining is "essential to the expeditious and fair administration of justice.")

17. *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

18. 397 U.S. 742, 751-52 (1970).

that guilty pleas entered based on plea bargains were "not constitutionally forbidden." Prior to *Brady*, the California Supreme Court had upheld the use of plea bargaining as long as due process rights were not infringed upon.¹⁹

Plea bargaining allows for promises by the prosecutor or judge in the nature of lighter sentences, early paroles and suspended sentences, in exchange for certain promises by the defendant. These promises are usually in the nature of entering a guilty plea to lesser criminal charges than those actually committed, or promising to testify or disclose information sought by the prosecution.²⁰ The process works well in expediting cases in the criminal courts; however, problems arise when the promises entered into during the plea bargaining process are broken. This is especially true when a particular party has relied to his detriment on the other party's promises.²¹ Both federal and state courts have granted some type of relief to the party deprived of his bargain in this situation, such party usually being the defendant.²² However, it was not until the United States Supreme Court, in *Santobello v. New York*,²³ addressed the issue as to whether there is a constitutional right to a remedy for broken plea agreements. The Court held that there was a constitutional right to relief, but left the particular form of relief to be decided by each individual state.²⁴

The remedy that the federal courts have traditionally granted has been to allow the defendant the privilege of withdrawing his guilty plea.²⁵ Frequently, however, the courts have found the remedy of withdrawal to be insufficient to return the situation to

19. *In re Hawley*, 67 Cal. 2d at 828, 433 P.2d at 322, 63 Cal. Rptr. at 834 (plea bargains cannot be a substitute for due process).

20. *See People v. West*, 3 Cal. 3d at 607-08, 477 P.2d at 416-17, 91 Cal. Rptr. at 392-93.

21. 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981).

22. *Kercheval v. United States*, 274 U.S. 220, 223 (1927) (first Supreme Court case to require guilty pleas to be voluntarily made, and to allow vacating cases where guilty plea is obtained through other means); *People v. Delles*, 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968) (court allowed withdrawal of plea bargained guilty plea); *People v. Williams*, 269 Cal. App. 2d 879, 75 Cal. Rptr. 348 (1969) (uncoerced bargain made, must be carried out by the court or withdrawal of the guilty plea must be allowed).

23. 404 U.S. 257 (1971).

24. *See id.* at 262-63.

25. *United States ex rel. Leeson v. Damon*, 496 F.2d 718 (2nd Cir. 1974), cert. denied, *Leeson v. Damon*, 419 U.S. 954 (1974) (defendant entitled to withdraw guilty plea entered under advice by counsel that the maximum sentence was 1.3 to 2.6 years in prison, but was subject to an indefinite five year term).

the status quo ante, in which case federal courts have willingly granted specific performance of the plea bargain.²⁶

California courts have not been as liberal in granting specific performance. Prior to *Santobello*, the California Supreme Court had never granted specific performance of a plea bargain.²⁷ Following *Santobello*, the courts in California allowed specific performance in only one case,²⁸ and although they make mention of it as a possible remedy, they are very reluctant to grant specific performance "absent very special circumstances."²⁹

26. *United States ex rel. Ferris v. Finkbeiner*, 551 F.2d 185 (7th Cir. 1977) (defendant sought habeas corpus on the grounds that he was substantially prejudiced by the imposition of a mandatory five year parole term, contrary to his agreed plea bargain; the court held that fundamental fairness required the sentence to conform to the agreement); *United States ex rel. Baker v. Finkbeiner*, 551 F.2d 180 (7th Cir. 1977) (defendant plea bargained for a specific sentence of one to two years and was not informed of a mandatory two year parole term; defendant sought writ of habeas corpus. The court held that it would be unjust to vacate the guilty plea and ruled that fundamental fairness demanded that the state adhere to its agreement); *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286 (2nd Cir. 1976) (defendant sought immediate release from prison based on breach by prosecutor to the terms of agreed upon plea bargain. Defendant substantially completed his bargain by returning \$4,000,000 worth of stolen jewelry. The prosecution reneged on their commitment to use best efforts to get the defendant both parole and a suspended sentence. The court upheld the district court's granting of specific performance.); *Correale v. United States*, 479 F.2d 944 (1st Cir. 1973) (defendant had just begun serving time in state prison when indicted on a federal charge of being an accomplice to a bank robbery. The prosecutor entered into a plea bargain agreement with the defendant to recommend concurrent sentence to the defendant's state sentence of four to eight years, enabling the defendant to be eligible for parole at the same time. The prosecutor's recommendation of a four to eight year sentence was deemed "worthless" because it was contrary to federal law. The court required the prosecution to be aware of penalty terms. Considering the unusual nature of the agreed upon recommendation, the time served initially, and the time served contrary to the agreement, the court adopted what they termed as "approximate specific performance" by making the federal sentence the same as the state sentence, which had already been served at this point, suspending the sentence, and placing the defendant on probation).

27. California courts favor allowing the defendant to withdraw his guilty plea. *People v. Kaanehe*, 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977) (contrary to his agreement to make no comment, the prosecutor discussed the case in the judge's chambers and sent a letter suggesting the proper disposition of the defendant); *People v. Johnson*, 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974) (court rescinded acceptance of entered guilty plea because of material misrepresentations made by the defendant as to his identity and prior criminal record); *People v. Delles*, 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968) (changed circumstances between the entering of the guilty plea and the time of sentencing).

28. *People v. Flores*, 6 Cal. 3d 305, 491 P.2d 406, 98 Cal. Rptr. 822 (1971).

29. *People v. Kaanehe*, 19 Cal. 3d at 13, 559 P.2d at 1035, 136 Cal. Rptr. 417 ("absent very special circumstances"). In discussing the remedy of specific performance, the same court stated that:

Specific enforcement of a plea bargain agreement is actually a broad term covering several different types of relief. The remedy differs depending upon the nature of the breach and which party is seeking specific enforcement. When the breach is a refusal by the prosecutor to comply with the agreement, specific enforcement would consist of an order directing the

The California legislature has also provided for the remedy of "withdrawal" of the guilty plea by statute in cases where the court approves of an entered plea bargain, and then rescinds its prior acceptance.³⁰ The statute providing for the withdrawal of guilty pleas, Penal Code section 1192.5, was enacted in 1970 and replaced section 1192.5, which had been enacted in 1957. Neither section fully encompasses all aspects of plea bargaining, but the enactment of these sections demonstrates the legislature's approval of plea bargaining.³¹ Penal Code section 1192.5 states in effect that a court approved plea bargain agreement is not binding on the court, and such approval may be withdrawn.³²

Penal Code section 1192.5 specifically applies to guilty pleas entered in cases involving felonies, but California courts have applied it in other contexts where a defendant is deprived of his bargain, or where the court withdraws its approval of the prior accepted plea, basing part of their authority and rationale on this section.³³ The character of the bargain's nonbinding effect, together with the corresponding power of the court to withdraw its

prosecutor to fulfill the bargain. When the breach is a refusal by the court to sentence in accord with the agreed upon recommendation, specific enforcement would entail an order directing the judge to resentence the defendant in accord with the agreement. The People as well as a defendant may seek such specific enforcements. The effect is to limit the remedy to an order directing fulfillment of the bargain.

Id.

30. CAL. PENAL CODE § 1192.5 (West Supp. 1981).

31. 3 Cal. at 607-08, 477 P.2d at 416, 91 Cal. Rptr. at 392.

32. CAL. PENAL CODE § 1192.5 (West Supp. 1981). Penal Code § 1192.5 reads in pertinent part:

[I]f the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in such case, the defendant shall be permitted to withdraw his plea if he desires to do so. The court shall also cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made

Id.

33. *People v. Calloway*, 29 Cal. 3d at 672, 631 P.2d at 32-33, 175 Cal. Rptr. at 598-99 (applies principles of the statute to plea bargains involving admission of probation violations). *See also* *People v. Johnson*, 10 Cal. 3d at 872, 519 P.2d at 606, 112 Cal. Rptr. at 558 (§ 1192.5 formalizes the procedure to be followed by trial courts dealing with plea bargaining, defendant entered guilty plea to misdemeanor as his part of bargain); *People v. West*, 3 Cal. 3d at 608, 477 P.2d at 416-17, 91 Cal. Rptr. at 392-93 (procedure in §§ 1192.3, 1192.5 provides guidelines that trial court can utilize in receiving and considering cases where plea bargains have been used); *People v. Smith*, 22 Cal. App. 3d 25, 99 Cal. Rptr. 171 (1971) (the procedure for plea bargains is set out in § 1192.5 of the Penal Code).

prior acceptance of a guilty plea, has been held by the Supreme Court of California as a reason to deny specific performance of a plea bargain initially accepted by the court.³⁴ The effect of the statute is to grant to the court the power to bargain with a defendant, and then not be bound by the bargain.

The other major support for strictly limiting specific enforcement of plea bargains is the California Supreme Court's own decisions that oppose allowing any court to be bound in its discretionary power, regardless of whether such attempted limits are sought by agreements entered into between a prosecutor and defendant, or between the judge and the defendant. The importance placed on maintaining a court's discretionary power seems to outweigh any other considerations.³⁵ This view is illustrated in the recent *Calloway* decision.³⁶

IV. ANALYSIS

The majority, in denying specific performance as a remedy to the defendant, relied primarily on two earlier California Supreme Court cases. The first case relied on by the court was *People v. Johnson*,³⁷ wherein the court had initially granted the defendant probation in a court approved plea bargain. After suspending the misdemeanor sentence and granting parole in accordance with the approved bargain made by the court, the court discovered that the defendant had misrepresented his name and concealed his past criminal record.³⁸ The court revoked the defendant's probation and sentenced him to state prison.³⁹ The basis of Johnson's appeal was the court's failure to advise the defendant of his right to withdraw his guilty plea under section 1192.5. In reference to the lower court's failure to advise the defendant of his right to withdraw his plea, the supreme court stressed its "reluctance to create a right to specific performance of a plea bargain . . ."⁴⁰ The second case relied on by the majority was *People v.*

34. *People v. Johnson*, 10 Cal. 3d at 872, 519 P.2d at 606, 112 Cal. Rptr. at 558 (court approval of plea bargain is non-binding, quoting CAL. PENAL CODE § 1192.5); *Id.* at 873, 519 P.2d at 607, 112 Cal. Rptr. at 558 (nothing in the language of CAL. PENAL CODE § 1192.5 compels any further relief than allowing defendant to withdraw his guilty plea).

35. *See* 29 Cal. 3d at 671, 631 P.2d at 32, 175 Cal. Rptr. at 598 (court stated rationale of *Johnson* as quoted in *Kaanehe*; it is not intended that defendant and prosecutor be able to bind a trial court in exercising its sentencing discretion); *see also* note 45 *infra*.

36. 29 Cal. 3d at 671, 631 P.2d at 32, 175 Cal. Rptr. at 598.

37. 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974).

38. *Id.* at 870-71, 519 P.2d at 605, 112 Cal. Rptr. at 557.

39. *Id.*

40. *Id.* at 873, 519 P.2d at 607, 112 Cal. Rptr. at 559.

Kaanehe,⁴¹ where the People sought specific performance of a plea bargain, and it was the prosecutor who failed to complete his aspect of the bargain.⁴² The court denied specific performance in *Kaanehe* based on its judgment that specific performance would not substantially repair the harm done to the defendant, and because the breach by the prosecutor was wilful and deliberate in nature.⁴³

The majority gave a greater expansion to the holding and rationale initially set forth in *Johnson*.⁴⁴ The court interpreted the holding in *Johnson*, quoting not from *Johnson* but from *Kaanehe*, to be, "a defendant should not be entitled to enforce an agreement between himself and the prosecutor calling for a particular disposition against the trial court absent very special circumstances."⁴⁵ The court further interpreted the rationale of *Johnson* to be that "[s]pecific enforcement of a particular agreed upon

41. 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977).

42. *Id.* at 11-14, 559 P.2d 1035-36, 136 Cal. Rptr. 416-17.

The prosecutor promised not to make a recommendation or to argue the disposition of the case. The People contended the agreement prohibited the prosecutor from making a statement only at the final sentencing hearing. The court found the prosecutor's arguments to the judge in his private chambers to be in violation of the agreement, holding that there is no significant distinction between discussion in chambers and the hearing in this particular case. The agreement also allowed for the prosecutor to make comments to the Department of Corrections only with respect to assisting them in attaining the factual basis of the case. The prosecutor wrote a letter to the Department of Corrections, who were making an evaluative report. The prosecutor made a subjective argument that the defendant should be severely punished, and urged the department to give more weight to what he felt was the under-emphasized harm to the victims. *Id.*

Allowing enforcement of the plea bargain from the time of the breach forward would not infringe on the court's sentencing discretion. The reports and the judge may have been subjectively affected, but the ultimate sentencing power of the court would not be constrained.

43. *Id.* at 14, 559 P.2d at 1037, 136 Cal. Rptr. at 418.

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

45. 29 Cal. 3d at 671, 631 P.2d at 32, 175 Cal. Rptr. at 598; 19 Cal. 3d at 13-14, 559 P.2d at 1036, 136 Cal. Rptr. at 417. The language quoted in *Kaanehe*, "absent very special circumstances" was not used in *Johnson*. The *Kaanehe* court has extended *Johnson* to hold just that, and *Calloway* supports this expansion and distills it to apply to any situation where a trial court's discretion is bound. *Kaanehe* notes that the preferred remedy in the context they deduce the "absent very special circumstance" exception from, is to allow the defendant to withdraw his guilty plea. The "context" however, was referring to *Johnson* and specifically addressed to mean in a situation where a court fails to notify a defendant of his right to withdraw his guilty plea upon a change in acceptance of a plea bargain agreement. Further, the *Kaanehe* court found *Johnson* not to be controlling in the context of *Kaanehe*. See also note 71 *infra.*, where the dissent addresses the majorities espoused "very special circumstances" as being the "*Kaanehe* Rule."

disposition must be strictly limited because it is not intended that a defendant and prosecutor be able to bind a trial court which is required to weigh the presentence report and exercise its customary sentencing discretion.’”⁴⁶ The expanded holding of *Johnson* illustrates the court’s concern with maintaining a court’s sentencing discretion.⁴⁷

Despite key factual distinctions between *Johnson* and *Calloway*, the court found *Johnson* to be controlling in *Calloway*.⁴⁸ First, the expanded interpretation given to *Johnson* in the *Calloway* decision asserts a policy of reluctance by the court to allow an agreement between a prosecutor and a defendant to bind a trial court in its discretionary sentencing power,⁴⁹ yet in *Calloway*, the lower court itself specifically limited its own discretionary power.⁵⁰ The majority and dissent disputed the issue as to whether a personal commitment that would limit the lower court’s discretionary power was made, or whether the court merely approved an agreed upon plea bargain.⁵¹ Regardless of whether the majority of the *Calloway* court desires to address this as an approval of a negotiated plea,⁵² or as a personal commitment to the defendant, the language of the trial judge in the transcript of the court hearing strongly indicates that such a commitment was made to the defendant:

The court: . . . my agreement on the record between the district attorney and your attorney is that I will not sentence you to state prison when you

46. 29 Cal. 3d at 671, 631 P.2d at 32, 175 Cal. Rptr. at 598; 19 Cal. 3d at 14, 559 P.2d at 1036-37, 136 Cal. Rptr. at 417-18. The *Kaanehe* court formalizes policy that was not stated by them in their decision in *Johnson*, and *Calloway* attributes the policy as coming from *Johnson*, solidifying the initial statement of the rationale of the *Johnson* policy in *Kaanehe*. *Kaanehe*, it must be remembered, found *Johnson* inapplicable because the court’s discretion was not infringed by the agreement.

47. The court stated clearly that it applied the principles underlying both *Johnson* and Penal Code § 1192.5. 29 Cal. 3d at 672, 631 P.2d at 32-33, 175 Cal. Rptr. at 598-99.

48. The dissent noted the defendant *Calloway* apparently made no misrepresentations and that it was the serious misrepresentations by the defendant in *Johnson* which “reinforced [the court’s] reluctance to create a right of specific performance of a plea bargain,” and led the court to order that the remedy be limited to plea withdrawal.” 29 Cal. 3d at 678, 631 P.2d at 36, 175 Cal. Rptr. at 602 (quoting *People v. Johnson*, 10 Cal. 3d at 873, 519 P.2d at 607, 112 Cal. Rptr. at 559).

49. See note 48 *supra*.

50. The dissent points this out as well as the fact that the court could have reserved the right to revoke the agreement. 29 Cal. 3d at 678, 631 P.2d at 37, 175 Cal. Rptr. at 603.

51. The majority interpreted the record of the lower court as to the sequence of events to show the plea bargain negotiated between the People and the defendant, and then the court merely approved the agreement. 29 Cal. 3d at 672-73, 631 P.2d at 33, 175 Cal. Rptr. at 599. The dissent claimed that the defendant was “induced to admit that he had violated the conditions of his probation only after the judge made an express personal commitment not to send him to prison.” *Id.* at 673-74, 631 P.2d at 34, 175 Cal. Rptr. at 600.

52. See note 51 *supra*.

return [from the California Department of Corrections at the end of the diagnostic study]. I will either sentence you to county jail, put you back on probation, perhaps terminate the probation completely on this case, [or] allow you to have probation on your municipal court case . . . I am really not telling you what I am going to do, but I am making a commitment that you will not be sentenced to state prison. Do you understand that, sir?

The defendant: Yes.⁵³

The supreme court's reliance on *Johnson* is misplaced for a second reason, in that *Johnson* does not even address itself to the issue of limiting the use of specific performance so that a trial court's discretion in sentencing is not constrained. The California Supreme Court in *Johnson* considered the particular remedy *only* because it was suggested in an oral argument made by defense counsel.⁵⁴ The court stated that its reason for not granting specific performance was "[t]he instant case, involving serious misrepresentations by the defendant, reinforces our reluctance to create a right of specific performance of a plea bargain whenever the court has failed to advise a defendant of his rights under section 1192.5."⁵⁵ The court's reluctance to grant specific performance was therefore based on a situation where the court failed to advise a defendant of his right to withdraw his plea.⁵⁶ However, the defendant in *Calloway* was not contesting that he was not informed of his right to withdraw his guilty plea. The defendant was requesting that the trial court be required to abide by its commitment not to sentence him to state prison,⁵⁷ and remedy the breach of that commitment, on which he detrimentally relied.⁵⁸

Calloway is also distinguishable from *Johnson* in that, unlike *Johnson*, there is no evidence of bad faith in the nature of misrepresentations made by the defendant. It was this bad faith that fostered the *Johnson* court's reluctance to grant specific perform-

53. 29 Cal. 3d at 675, 631 P.2d at 34, 175 Cal. Rptr. at 600.

54. 10 Cal. 3d at 873, 519 P.2d at 607, 112 Cal. Rptr. at 559.

55. *Id.*; but see note 48 *supra*.

56. 10 Cal. 3d at 870, 519 P.2d at 605, 112 Cal. Rptr. at 557 (trial court failed to advise defendant of statutory right to withdraw his plea).

57. 29 Cal. 3d at 666, 631 P.2d at 30, 175 Cal. Rptr. at 596.

58. The dissent pointed out that the defendant had been free on his own recognizance before entering into the plea bargain. Upon entering into the plea bargain, the defendant gave up his liberty as consideration for the court's commitment not to send him to prison. Calloway completed his diagnostic testing and entered his guilty plea, fulfilling his part of the bargain, prior to the court performing its part of the agreement. 29 Cal. 3d at 679, 613 P.2d at 36, 175 Cal. Rptr. at 603.

ance.⁵⁹ Further, the *Johnson* court did not have all the relevant facts in front of it when imposing sentence.⁶⁰ The contrary is true of the *Calloway* court, where the dissent pointed out that the lower court had the opportunity to review the probation reports, all of which had been submitted prior to the acceptance of the defendant's plea.⁶¹ The reports were unanimous in their recommendation that probation be denied and that sentencing be imposed.⁶² Despite the fact that the judge did not know what the conclusion of the Department of Corrections' diagnostic report would be, it would have been reasonable to foresee that a state prison term might be suggested. The *Calloway* dissent suggested that the trial judge could have reserved the right to revoke the agreement, rather than making an apparent unconditional statement that would limit the court's own discretion.⁶³

An amicus brief filed in the case suggested that because the *Johnson* ruling was based on Penal Code section 1192.5, which applies only to pleas of guilty or nolo contendere in felony cases,⁶⁴ the *Johnson* ruling is inapplicable to a case involving the admission of a probation violation.⁶⁵ The *Calloway* court rejected this argument and found importance in the underlying principles of both *Johnson* and the statute aimed at preventing interference with the trial court's sentencing discretion.⁶⁶

While the court acknowledged the defendant's contention that the *Kaanehe* decision was inapplicable because it addressed a situation where the court's discretion was not affected by the plea bargain agreement between the defendant and prosecutor,⁶⁷ *Kaanehe* is nevertheless important as it is primarily responsible for the expanded holding and rationale given to *Johnson*.⁶⁸ Further, *Kaanehe* is of significance as it is one of the few California Supreme Court cases that addressed specific performance as a remedy for a broken plea agreement.⁶⁹ One of the major factors

59. See note 48 *supra*.

60. They were unaware of the defendant's true name and prior criminal record. *People v. Johnson*, 10 Cal. 3d at 870, 519 P.2d at 605, 112 Cal. Rptr. at 557.

61. 29 Cal. 3d at 676, 519 P.2d at 609, 112 Cal. Rptr. at 601. No new information had developed or changed any of the recommendations between the time the plea was entered and the time the defendant was sentenced to prison.

62. *Id.* at 669, 631 P.2d at 31, 175 Cal. Rptr. at 597.

63. 29 Cal. 3d at 678, 631 P.2d at 37, 175 Cal. Rptr. at 603.

64. CAL. PENAL CODE §1192.5 (West Supp. 1981).

65. 29 Cal. 3d at 671-72, 631 P.2d at 32-33, 175 Cal. Rptr. at 598-99.

66. *Id.*

67. *Id.* at 672, 631 P.2d at 33, 175 Cal. Rptr. at 599; see also note 42 *supra*.

68. See note 45 *supra*.

69. 19 Cal. 3d at 13, 559 P.2d at 1036, 136 Cal. Rptr. at 417. Although it was the prosecution who sought specific performance, and it was the prosecution who broke the plea agreement, the court's discussion of the remedy and reasons for not applying it here are applicable to other contexts that might warrant granting

that led the *Kaanehe* court to conclude that specific performance was inappropriate was the probability that such a remedy would not repair the injustice done to the defendant.⁷⁰ An important distinction between the two cases is that it was the prosecution and not the defendant who sought specific performance of the agreement in *Kaanehe*.⁷¹ The court's concern for reparation of the harm done to the defendant suggests that specific performance *may* be a more appropriate remedy in a situation where it would more effectively repair the harm done to the defendant.⁷² Yet, allowing Calloway to simply withdraw his plea with a grant of credit for time already spent in prison will not rectify the injustice the defendant suffered in actually being sent to state prison.⁷³

The majority also rejected the defendant's assertion that this case presented the "very special circumstances" referred to in *Kaanehe* that allow specific performance to be granted as a remedy. The court again relied on *Johnson* to give weight to their decision not to classify *Calloway* as falling under the "special

specific performance. *See also* note 29 *supra* (discussion of application and context of remedy of specific enforcement).

70. 19 Cal. 3d at 14, 559 P.2d at 1037, 136 Cal. Rptr. at 418. The court in *Kaanehe* also addressed the wilful and deliberate breach by the prosecutor as another relevant factor, and it was the prosecutor who sought specific performance. *Id.*

71. *See* 29 Cal. 3d at 679, 631 P.2d at 37, 175 Cal. Rptr. at 603. The dissent asserted that "[i]f the *Kaanehe* rule were applied to the facts of this case specific enforcement of a particular sentence would be granted because there are 'very special circumstances.'" *Id.* The dissent based this assertion on the fact that the defendant was required to "surrender his liberty for a significant period of time." *Id.* The dissent further argued that his incarceration was a change in the status quo and was the basis of Calloway's detrimental reliance on the judge's promise. The dissent further supported the impossibility of returning the situation to status quo, thus demonstrating "very special circumstances" as per *Kaanehe*:

When a plea bargain involves a substantial and immediate performance of a term of the bargain that is detrimental to the defendant before the trial court's final approval, a mere vacation of the plea is inadequate to return the defendant to the status quo ante, the majority's bland assertions to the contrary notwithstanding.

Id. *See also* note 26 *supra*.

72. 19 Cal. 3d at 13, 559 P.2d at 1036, 136 Cal. Rptr. at 417.

73. *See* note 71 *supra*; *see generally* *People v. Calloway*, 29 Cal. 3d at 680-81, 631 P.2d at 38, 175 Cal. Rptr. at 604. The dissent interpreted the trial court's promise not to give a prison sentence as a promise not to impose any further confinement after diagnostic testing. *But see* 29 Cal. 3d at 675, 631 P.2d at 35, 175 Cal. Rptr. at 601, showing that Judge London stated that "[m]y agreement on the record between the district attorney and your attorney is that I will not sentence you to the state prison when you return. I will either sentence you to the county jail . . . [or] . . . put you back on probation" *Id.* at 675, 631 P.2d at 35, 175 Cal. Rptr. at 600.

circumstances" exception. The court noted that the defendant Johnson served more time in prison than the six months Calloway served,⁷⁴ but again noted that Johnson failed to enter the court with "clean hands."⁷⁵ However, it must be remembered that Calloway's deficient performance on probation was a factor considered by the court against finding "special circumstances,"⁷⁶ as well as the court's view that the judge's comments were not a personal commitment, but merely an approval of a negotiated plea.⁷⁷

In its analysis, the dissent criticized the majority for several reasons: for its failure to acknowledge federal case law that supported the defendant's position;⁷⁸ for its convenient dismissal of the earlier case of *People v. Flores*,⁷⁹ in which specific performance was granted; for its reliance on cases with clear factual distinctions;⁸⁰ and for its failure to consider the application of the due process requirements of *Santobello v. New York*.⁸¹

The dissent noted the court's earlier decision in *Flores* wherein the court had granted specific performance as a remedy. The majority dismissed *Flores*, and presumably the federal cases supporting it, as "inapposite."⁸² As the *Flores* court granted specific performance as a remedy, the *Calloway* majority should have considered the rationale of the case. However, it chose to ignore *Flores* simply because *Flores* gave no discussion as to the most

74. 29 Cal. 3d at 672, 631 P.2d at 33, 175 Cal. Rptr. at 599.

75. See note 60 *supra*.

76. 29 Cal. 3d at 672, 631 P.2d at 33, 175 Cal. Rptr. at 599. See generally *id.* at 669, 631 P.2d at 31, 175 Cal. Rptr. at 597. The court discussed the facts of the case, noting that the defendant's probation had been revoked several times, he had been arrested during probation, and he had failed to appear at several hearings.

77. See note 51 *supra* and accompanying text.

78. See note 26 *supra* for discussion. For discussion of plea bargains covered by contract law see *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980) (although plea bargain itself is a matter of criminal jurisprudence, a plea bargain is contractual in nature and governed by standards of contract law). But see *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 295 (2d Cir. 1976) (court rejected the contract principle of estoppel and other contract cases as inapposite).

79. 6 Cal. 3d 305, 491 P.2d 406, 98 Cal. Rptr. 882 (1971); see also note 113 *infra* and accompanying text.

80. 29 Cal. 3d at 674, 631 P.2d at 34, 175 Cal. Rptr. at 600.

81. 404 U.S. 257 (1961).

82. 29 Cal. 3d at 673, 631 P.2d at 33, 175 Cal. Rptr. at 599. The majority dismissed *Flores* on its evaluation that *Flores* was decided without any analysis as to why the remedy of specific performance was not appropriate. *Id.* The *Flores* court could have allowed the defendant to withdraw his plea, and the fact that specific performance was granted illustrates the court's earlier acceptance of that remedy as appropriate.

In this passage, the majority refers to the "authorities" of the dissent as "inapposite." The plural of the term "authorities" must then mean to include the federal cases cited by the dissent that allowed specific performance besides *Flores*. For a discussion of the federal cases relied on by the dissent, see note 21 *supra*.

appropriate remedy under the circumstances. The dissent recognized this failure, and quoted language from the unanimous *Flores* opinion that supported specific performance, or other relief that was not limited to the withdrawal of a guilty plea:

[W]here a defendant's guilty plea has been entered as part of such a [plea] bargain with recognized authorities, and judgment entered contrary to the terms of the bargain, he may have his plea set aside, or the judgment may be modified to conform with the terms of his bargain.⁸³

Federal case law is unanimous in its consideration of the proper relief where the defendant has already served time in prison in detrimental reliance on an accepted plea agreement which is subsequently revoked:⁸⁴ the federal courts have held the withdrawal of a guilty plea under these circumstances to be a "meaningless"⁸⁵ and "hollow"⁸⁶ remedy. Echoing the federal court's analysis, the dissent in *Calloway* argued that it was impossible to restore the status quo ante when a plea bargain agreement calls for immediate and substantial performance prior to the court's final sentencing decision.⁸⁷

The dissent further criticized the majority for their failure to consider whether due process principles require specific performance of the lower court's commitment not to sentence the defendant to state prison,⁸⁸ specifically noting that *Santabello v. New York* requires that due process considerations be made in determining the nature of the remedy in each case.⁸⁹ The dissent in *Calloway* interpreted *Santabello* to hold that no absolute rule can be formulated, and noted that the case by case approach sug-

83. 29 Cal. 3d at 677, 631 P.2d at 36, 175 Cal. Rptr. at 602 (quoting from *People v. Flores*, 6 Cal. 3d at 308-09, 491 P.2d at 406, 98 Cal. Rptr. at 824).

84. 29 Cal. 3d at 680, 631 P.2d at 38, 175 Cal. Rptr. at 604. See note 26 *supra*.

85. *Palermo v. Warden, Green Haven State Prison*, 545 F.2d 286, 296 (2d Cir. 1976) (defendant had been incarcerated beyond the terms of the bargain; the court held the remedy of withdrawal to be meaningless); see note 26 *supra*.

86. *Correale v. United States*, 479 F.2d 944, 950 (1st Cir. 1973); see note 26 *supra*.

87. 29 Cal. 3d at 679, 631 P.2d at 37, 175 Cal. Rptr. at 603; see note 71 *supra*.

88. 29 Cal. 3d at 674, 676-77, 631 P.2d at 34-37, 175 Cal. Rptr. at 600-02.

89. 404 U.S. at 262 (majority opinion). *Id.* at 267 (Douglas, J., concurring), *Id.* at 267-68 (Marshall, J., concurring and dissenting); *United States ex rel. Baker v. Finkbeiner*, 551 F.2d at 184; *Palermo v. Warden, Green Haven State Prison*, 545 F.2d at 296; *Correale v. United States*, 479 F.2d at 949; *People v. Calloway*, 29 Cal. 3d at 676, 631 P.2d at 35, 175 Cal. Rptr. at 601 (Bird, C.J., dissenting). For a discussion of constitutional law principles applied to possible remedies, see Westen and Westin, *A Constitutional Law of Remedies for Broken Plea Agreements*, 66 CAL. L. REV. 471, 473-76 (1978) (discusses *Santobello* as holding a constitutional right to a remedy, and also the vagueness in *Santobello*, and constitutional principles in general.)

gested in Santobello⁹⁰ was “[r]ejected by the majority in favor of the mechanical application of a rule distilled from a partial and superficial analysis of this court’s prior cases.”⁹¹ In a broad view, the dissent was concerned not only with the outcome of this case, but the honor, integrity, and public confidence in the fair administration of justice in all courts.⁹²

V. LEGAL IMPACT

The California Supreme Court’s decision in *People v. Calloway*⁹³ clarifies its preference for maintaining the sentencing discretion of courts, regardless of agreements between prosecutors and defendants, or agreements made by the court itself that operate to limit their own discretion. The decision gives greater depth and support to the narrower construction initially applied to the *Johnson* case. *People v. Johnson*⁹⁴ reflected the court’s reluctance to grant specific performance where a trial court failed to advise a defendant of his right to withdraw his plea.⁹⁵ The court in *People v. Kaanehe*,⁹⁶ although it did not find *Johnson* to be applicable, stated the expanded interpretation of *Johnson*, requiring that “very special circumstances” be shown before an agreement made by a prosecutor and a defendant will be enforced against a trial court.⁹⁷ As stated in *Kaanehe*, the policy of such a rule was to prevent a defendant and a prosecutor from binding a trial court in its sentencing discretion.⁹⁸ In *Calloway*, the court quoted the rule and policy expressed in *Kaanehe* as that being the proper interpretation of *Johnson*.⁹⁹ The court’s use of the *Johnson* holding and principles not only solidifies *Johnson*, but also extends that holding and principles to encompass agreements by judges or the court itself.¹⁰⁰ In effect, judges will be allowed to enter into agreements that bind the other party, but allow the court’s commit-

90. 29 Cal. 3d at 676, 631 P.2d at 35, 175 Cal. Rptr. at 601; *see also* Santobello v. New York, 404 U.S. at 262-63 (discussing proposition that the circumstances of each case will vary, and that the only constant factor is that promises must be fulfilled, and that the court will leave the ultimate remedy of how to fulfill the promise to the state courts mentioning both specific performance and withdrawal as possible remedies).

91. 29 Cal. 3d at 676-77, 631 P.2d at 35-36, 175 Cal. Rptr. at 601-02.

92. *Id.* at 680, 631 P.2d at 38, 175 Cal. Rptr. at 680 (Bird, C.J., dissenting) (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972), reflecting concern over breached plea bargain agreements).

93. 29 Cal. 3d 666, 631 P.2d 30, 175 Cal. Rptr. 596 (1981).

94. 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974).

95. *See* note 40 *supra* and accompanying text.

96. 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977).

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

98. *See* note 46 *supra* and accompanying text.

99. *See* notes 45 and 46 *supra* and accompanying text.

100. *See* notes 45 and 46 *supra* and accompanying text.

ments to be illusory and go unfulfilled, whether or not the other party has detrimentally relied on the agreement. The result is that the sentencing discretion of the court is placed above the integrity of the court and the value of requiring the court to adhere to its promises.

The burden of proving the "very special circumstances" appears to be on the defendant. A more appropriate rule might be to require the court to hold to its commitments, "absent very special circumstances,"¹⁰¹ in light of the very highly respected role the courts have in the judicial system. Such a rule would shift the burden of proof to require the court or the prosecutor to make a showing of "very special circumstances" to allow them to escape meeting their end of a promise.¹⁰² "Special circumstances" could be defined in line with the *Johnson* case, and could be found when a serious misrepresentation occurs,¹⁰³ or possibly some other serious event that deprives the court of all relevant information, provided that such deprivation is through no fault of the court.

The decision itself restricts the situations that "very special circumstances" may arise in, making it more difficult to establish such circumstances to warrant a granting of specific performance. The court has not defined "very special circumstances" in its prior decisions. Delineating the boundaries of this term can only be accomplished through analysis of the facts of prior decisions that either granted specific performance, or refrained from granting it. In view of *People v. Flores*,¹⁰⁴ the interpretive value is discounted to some degree in light of the fact that the court in *People v. Calloway*¹⁰⁵ dismissed *Flores* as not being appropriate, and that it was decided prior to *People v. Johnson*¹⁰⁶ and *People v. Kaanehe*,¹⁰⁷ in which the terms are attributed to in this context. Nevertheless, the *Flores* court granted specific performance in a factual setting where a defendant was sentenced to five years in

101. 29 Cal. 3d at 668, 631 P.2d at 30, 175 Cal. Rptr. at 596.

102. See generally *People v. West*, 91 Cal. 3d at 604, 477 P.2d at 413, 91 Cal. Rptr. at 385 (court quotes a study by the American Bar Association (1967) that suggests a substantial number of guilty pleas are the result of plea bargains, and that a great majority of the criminal cases are disposed of by guilty pleas).

103. See note 63 *supra*.

104. See note 107 *infra*.

105. 29 Cal. 3d at 673, 631 P.2d at 33, 175 Cal. Rptr. at 599.

106. 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974).

107. 19 Cal. 3d 1, 559 P.2d 1028, 136 Cal. Rptr. 409 (1977).

state prison in accordance with his bargain. However, an additional five years was added, contrary to the bargain, based on a statute that required a mandatory non-consecutive sentence for any conviction of a robbery committed with a weapon. This remedy was granted based on the defendant's "continued belief" that his maximum sentence was five to life, not five and then five to life.¹⁰⁸ *Johnson* illustrates that the defendant must enter his bargain in good faith.¹⁰⁹ In *Kaanehe*, the court's concern for a remedy that would substantially repair the harm¹¹⁰ is of significance, considering the circumstances of that case. In the present case, the fact that the defendant voluntarily submitted to a diagnostic study at a state correctional facility, completed the testing, and was sentenced, contrary to his bargain, to a state prison, where he had already spent six months,¹¹¹ was insufficient to require a finding of special circumstances. The court considered his poor performance on probation against him,¹¹² even though the trial court was aware of such facts prior to making their commitment.¹¹³ Therefore it seems that in order to establish "very special circumstances," it appears necessary to show some of the following factors: good behavior, coupled with detrimental reliance similar to if not greater than that suffered by Calloway, reliance on the agreement similar to that found in *Flores*,¹¹⁴ and a showing that other remedies are inadequate to substantially repair the harm suffered.¹¹⁵

The court's decision also narrows the meaning of terms previously used by this court. These terms initially appeared to provide a broad range of applicable remedies, but they have now effectively been limited. Statements such as "the judgment may

108. 6 Cal. 3d at 307-09, 491 P.2d at 407-08, 98 Cal. Rptr. at 823-24.

109. 10 Cal. 3d at 873, 519 P.2d at 607, 112 Cal. Rptr. at 559, "[The] serious misrepresentations by the defendant, reinforces our reluctance to create a right to specific performance of a plea bargain . . ."; see also note 48 *supra*.

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

111. See notes 1-5 *supra* and accompanying text.

112. See note 77 *supra*.

113. See note 61 *supra* and accompanying text.

114. 6 Cal. 3d at 307-09, 491 P.2d at 407-08, 98 Cal. Rptr. at 823-24 (sentence to be five years not five and then mandatory five more to life); see note 108 *supra* and accompanying text.

115. See note 27 *supra* (*Kaanehe*). The dissent in Calloway suggested a rule to be applied in addressing the issue of providing a remedy to balance the competing interests of the state against those of the defendant. The dissent then lists factors which have favored the prosecution's choice of remedy, based on prior cases, (1) fraud by defendant, (2) additional information, and (3) changed circumstances. Factors from prior cases that have favored the defendant's choice of remedy have included: (1) defendant's performance of his portion of the bargain, and (2) the wilful and deliberate breach by the prosecutor. 29 Cal. 3d at 678-79 n.3, 631 P.2d at 37 n.3, 175 Cal. Rptr. at 603 n.3.

be modified to conform with the terms of his bargain,"¹¹⁶ or that "[c]ritical to plea bargaining is the concept of reciprocal benefits. When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made"¹¹⁷ are in effect, severely limited in their scope when the court takes a restrictive approach in interpreting the contexts in which "very special circumstances" may possibly arise. Such restriction tends to make "corresponding relief" or "conforming judgments" mean that "absent very special circumstances," the only remedy available will be to withdraw an entered guilty plea.

VI. CONCLUSION

Plea bargaining has become an accepted part of the criminal justice system, greatly expediting the disposition of cases before criminal courts. For plea bargaining to continue to work effectively, the parties involved must have confidence that the bargains they enter into will be maintained. Whether the party be the court, the prosecutor, or the defendant, such parties need assurances their bargains will be carried through. The establishment of appropriate remedies assist the parties involved in establishing confidence in entering into plea bargains.

A more general result of the court's decision in *People v. Calloway* lies in its potential to destroy the willingness of defendants to enter a guilty plea based on a bargain with a prosecutor or judge. The court, in attempting to maintain the discretionary sentencing power of courts, has given the courts power to accept plea bargains, allow a defendant to detrimentally rely on the agreement, and then provide defendants with the sole remedy of withdrawing their plea. Such a remedy is inadequate in restoring the defendant to the status quo ante once there has been such detrimental reliance.

The California Supreme Court's holding in *People v. Calloway*, denying the use of specific performance as a remedy for broken plea agreements, absent "very special circumstances,"¹¹⁸ could erode the willingness of defendants to enter into plea bargains.

116. 6 Cal. 3d at 309, 491 P.2d at 408, 98 Cal. Rptr. at 824.

117. *People v. Collins*, 21 Cal. 3d 208, 214, 577 P.2d 1026, 1029, 145 Cal. Rptr. 686, 689 (1978).

118. 29 Cal. 3d at 668, 631 P.2d at 30, 175 Cal. Rptr. at 596.

The extent to which defendants will refrain from using plea bargaining is indeterminate, but the restrictions placed on the remedies available do not promote an environment that one could have any assurance in seeing his bargain fulfilled, especially when dealing with a court that is not bound to perform commitments made by it.

2. *Expanding Pre-Trial Discovery: Holman v. Superior Court*

In *Holman v. Superior Court*,¹ the California Supreme Court expanded the availability of pretrial discovery in criminal proceedings by holding that discovery can be granted prior to the preliminary hearing in some cases.² The court also addressed questions raised by prior decisions regarding the jurisdictional powers of a magistrate.

The court noted that the right to seek discovery in a criminal proceeding is a "judicially created doctrine" arising without the guidance of legislation.³ Citing its earlier decision in *People v. Municipal Court*,⁴ the court emphasized that judicial power in criminal discovery must be tempered and restrained so as not to infringe upon areas where the legislature has spoken.⁵ The court in *People v. Municipal Court* refused to expand the pretrial deposition procedure beyond particular situations specified by statute. The *Holman* court found *People v. Municipal Court* distinguishable since *Holman* did not infringe upon an expression by the legislature of an intent to limit discovery prior to the preliminary hearing stage.⁶ The court, using this distinction, rejected an argu-

1. 29 Cal. 3d 480, 629 P.2d 14, 174 Cal. Rptr. 506 (1981). On May 6, 1980 a criminal complaint was filed against the defendants, charging them with violations of CAL. HEALTH & SAFETY CODE § 11350 (West Supp. 1981) (possession of a controlled substance); CAL. HEALTH & SAFETY CODE § 11351 (West Supp. 1981) (possession for sale); CAL. HEALTH & SAFETY CODE § 11352 (West Supp. 1981) (sale); CAL. HEALTH & SAFETY CODE § 11377 (West Supp. 1981) (unauthorized possession); CAL. HEALTH & SAFETY CODE § 11359 (West Supp. 1981) (possession for sale of marijuana); CAL. PENAL CODE § 12025 (West Supp. 1981) (carrying a concealed weapon); CAL. PENAL CODE § 12031 (West Supp. 1981) (carrying a loaded firearm).

2. The court was very careful to note that discovery requests prior to the preliminary examination stage should not be granted routinely as a result of its decision in *Holman*. Rather, the court stated that discovery requests should be granted only when such discovery is "reasonably necessary to prepare for the preliminary examination" and will not "unduly delay or prolong the proceeding." 29 Cal. 3d at 485, 629 P.2d at 16, 174 Cal. Rptr. at 508. In *Holman*, the defendants sought to discover the names and addresses of all witnesses, the names of experts and technicians, as well as any statements made by witnesses, police, experts, and themselves to the prosecution.

3. *Id.* at 483, 629 P.2d at 16, 174 Cal. Rptr. at 508.

4. *People v. Mun. Ct.*, 20 Cal. 3d 523, 143 Cal. Rptr. 609, 574 P.2d 425 (1978).

5. 29 Cal. 3d at 483, 629 P.2d at 16, 174 Cal. Rptr. at 508.

6. *Id.* at 484, 629 P.2d at 16, 174 Cal. Rptr. at 508. In *Holman*, the legislature

ment by the prosecution that the "limited disclosure" offered by California Penal Code section 859⁷ represented legislative intent to limit the discovery available prior to the preliminary hearing stage.

Finally, the court held that since a preliminary hearing is used for the purpose of determining whether there is competent evidence to bring a defendant to trial, and since a defendant may bring forth an affirmative defense⁸ at the preliminary hearing, some discovery is permissible prior to the preliminary hearing.⁹ As a result of the expanded availability of pretrial discovery which *Holman* permits in criminal proceedings, a defendant's right to bring an affirmative defense at the preliminary hearing will become more meaningful due to the increased potential for obtaining information.

The court next addressed the issue of whether a magistrate has jurisdiction to issue discovery orders.¹⁰ The prosecution in *Holman*, relying on *People v. Peters*,¹¹ argued that since a magistrate is not a court, he or she could not exercise power like a court¹² and is thus without jurisdiction to issue pretrial discovery orders. The court distinguished *Peters* on the basis that *Peters* did not purport to decide whether a magistrate has discretion to issue pretrial discovery orders but rather that it decided a more limited issue.¹³ The *Holman* court then concluded that absent

had actually spoken to the limiting factors by saying that it was not its intent to have the California Penal Code § 859 construed in any manner that would limit or impair the rights of discovery in a criminal case. 1975 Cal. Stat. 1825. In *People v. Mun. Ct.*, there was no language by the legislature as to the limits of the statute.

7. California Penal Code § 859 specifically provides for "mandatory disclosure" of police arrest and crime reports at the first court appearance. CAL. PENAL CODE § 859 (West Supp. 1981). The prosecution argued that this "mandatory disclosure" applied only to disclosure of the specified reports.

8. Defendants have a constitutional right to bring an affirmative defense at the preliminary hearing and cross examine the witnesses brought against them. *Jennings v. Super. Ct.*, 66 Cal. 2d 867, 59 Cal. Rptr. 440, 428 P.2d 304 (1967).

9. 29 Cal. 3d at 484, 629 P.2d at 16, 174 Cal. Rptr. at 508.

10. *Id.*

11. 21 Cal. 3d 749, 147 Cal. Rptr. 646, 581 P.2d 651 (1978).

12. 29 Cal. 3d at 484, 629 P.2d at 16, 174 Cal. Rptr. at 508.

13. The court stated that *People v. Peters* decided whether a magistrate constitutes a court within the meaning of California Penal Code § 1385, and could therefore dismiss an action. Justice Bird, concurring in *Holman*, stated that she would have overruled *Peters* and held that the cases authorizing the "courts" to order discovery apply equally to magistrates. *Id.* at 486, 629 P.2d at 17, 174 Cal. Rptr. at 509.

legislation to the contrary, magistrates, like courts, have the inherent power to order appropriate pretrial discovery. The court noted that this power is ancillary to a magistrate's statutory power to determine whether there is probable cause to hold a defendant¹⁴ and also that ordering appropriate pretrial discovery "may well assist him in such a determination." The court thus held that a magistrate has jurisdiction and power to order "reasonable limited discovery."¹⁵

As a result of *Holman*, magistrates have a better understanding of their role in the scenario of criminal proceedings; increased rights will be given to those who have been accused of criminal offenses and their rights to set forth affirmative defenses at preliminary hearings will become more meaningful. As a result, perhaps fewer cases will reach trial.

3. *Excessive Pre-Trial Publicity As it Affects the Right to A Fair Trial: Martinez v. Superior Court*

In *Martinez v. Superior Court*,¹ the Supreme Court of California reversed a court of appeal decision which denied a change of venue for the defendant in a murder trial.² The supreme court directed the superior court to grant the defendant's motion for a change of venue because of the need to allow the defendant a fair and impartial trial. The murder charge against the defendant stemmed from the robberies of two clubs in Placer County, California.³ In the second robbery, the victim was shot when the defendant mistakenly believed the victim to be a police officer.⁴

The issue before the court was whether or not pretrial publicity made it reasonably likely that the defendant would not receive a fair trial. The standard for granting a change of venue in California expressed in *Maine v. Superior Court*,⁵ was that a "motion for change of venue or continuance shall be granted whenever it is

14. Justice Bird suggested that this step is unnecessary and that she would simply overrule *Peters* and hold that magistrates, like "courts," have the same power to issue pretrial discovery orders. *Id.*

15. *Id.* at 485, 629 P.2d at 17, 174 Cal. Rptr. at 509. The court was very careful to note that it did not intend to create the belief that magistrates "should routinely grant discovery requests or authorize time consuming discovery procedures without a showing of reasonable necessity" to prepare for the preliminary hearing.

1. 29 Cal. 3d 574, 629 P.2d 502, 174 Cal. Rptr. 701 (1981).

2. *Martinez v. Super. Ct.*, 108 Cal. App. 3d 664, 166 Cal. Rptr. 756 (1980), *vacated* 29 Cal. 3d 574, 629 P.2d 502, 174 Cal. Rptr. 701 (1981).

3. 29 Cal. 3d at 578, 629 P.2d at 504, 174 Cal. Rptr. at 703.

4. *Id.*

5. 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968). In this case the defendants, strangers to the small community of Ukiah, were charged with assaulting a popular teenage couple under "circumstances that would compel any community's shock and indignation." 68 Cal. 2d at 385, 438 P.2d at 378, 66 Cal. Rptr. at 730.

determined that because of the dissemination of potentially prejudicial material, there is a *reasonable* likelihood that in the absence of such relief, a fair trial cannot be had."⁶ Also, when there is any doubt as to whether or not a fair trial may be had, the issue must be decided in favor of the venue change.⁷ Using these standards, the supreme court held that a change of venue was compelled.⁸ The factors that the court used to reach this decision were the nature and extent of the pretrial publicity, the size of the community, the seriousness and nature of the crime, and the standing in the community of both the defendant and the victim.⁹

In analyzing the first of these factors, the court noted the extensive publicity that the case had received in the area. Petitioner submitted ninety-seven newspaper articles that dealt with the case, including pictures of petitioner in chains and reports of his narcotic addiction.¹⁰ Another important factor was that a co-defendant in the murder had already been convicted in a trial that had also received substantial coverage in the press. Although the publicity in the instant case could not be described as hostile or inflammatory,¹¹ the court said that this "does not negate the adverse effect of the publicity involving petitioner nor obviate our consideration of that factor in our ultimate resolution of the venue issue."¹²

The next factor the court discussed was the size of the community. Again citing *Maine*, the court stated that "[i]n a small town, in contrast to a large metropolitan area, a major crime is likely to be embedded in the public consciousness with greater effect for a

6. *Id.* at 383, 438 P.2d at 378, 66 Cal. Rptr. at 729 (emphasis added).

7. *Id.* at 387-88, 438 P.2d at 378, 66 Cal. Rptr. at 732. See also *Fain v. Super. Ct.*, 2 Cal. 3d 46, 465 P.2d 23, 84 Cal. Rptr. 135 (1970); *Corona v. Super. Ct.*, 24 Cal. App. 3d 872, 101 Cal. Rptr. 411 (1972).

8. 29 Cal. 3d at 578, 629 P.2d at 504, 174 Cal. Rptr. at 703.

9. *Id.*

10. 29 Cal. 3d at 579, 629 P.2d at 504, 174 Cal. Rptr. at 703. The court pointed out that the three newspapers who covered the incident reached at least one half of the potential jurors in the county. *Id.* at 579 n.1, 629 P.2d at 504 n.1, 174 Cal. Rptr. at 703 n.1.

11. "[W]e do not face here an extreme example of an inflammatory and hostile press . . ." *Id.* at 581, 629 P.2d at 505, 174 Cal. Rptr. at 704. Compare *Frazier v. Super. Ct.*, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971) where the press commented on the "cold impersonality," of the crime and the defendant's "mental imbalance" due to the "cult of drug abuse." Also, a chairman for the County Board of Supervisors at a public meeting compared the crime to the murder of Sharon Tate by Charles Manson. *Id.* at 290, 486 P.2d at 696, 95 Cal. Rptr. 800.

12. 29 Cal. 3d at 581, 629 P.2d at 505, 174 Cal. Rptr. at 704.

longer time.”¹³ The court pointed out that Placer County has a population of only 106,500, which makes it only the twenty-ninth largest county (out of fifty-eight) in California.¹⁴ The population was determined to be too small to dissipate the extensive publicity.¹⁵ Although this murder could not be described as bizarre or heinous, the court ruled that murder is a crime of great seriousness, and due to the possibility of the death penalty being imposed, the outcome of the case was of gravest consequence to the defendant.¹⁶ Thus, the nature of the crime compelled a change in venue.¹⁷

Finally, the court stated that it is of importance that the defendant is a member of a minority group and a drug addict, and “unlikely to evoke the sympathy or concern of the community.”¹⁸ In addition, the victim had gained prominence from the status of his employer, Southern Pacific Railroad, the largest employer in Roseville.¹⁹

In conclusion, all these factors left serious doubt as to whether a fair and impartial trial could occur. This doubt, combined with the fact that the accused’s life was at stake, led to the conclusion that the “simple expedient of a change of venue”²⁰ was mandated.

The *Martinez* decision follows California law, and enhances a defendant’s chances of receiving a change in venue, especially when a trial is held in a small community and concerns a capitol offense. This can be contrasted with the recent California Supreme Court decision of *People v. Harris*,²¹ which increases the difficulty of receiving a venue change in large metropolitan areas.

13. *Id.* at 581, 629 P.2d at 506, 174 Cal. Rptr. at 705.

14. *Id.*

15. Other cases reaching this result are *Corona v. Super. Ct.*, 24 Cal. App. 3d 872, 101 Cal. Rptr. 411 (1972); *Fain v. Super. Ct.*, 2 Cal. 3d 46, 465 P.2d 23, 84 Cal. Rptr. 135 (1970) (where Stanislaus County with a population of 184,600 was too small to dissipate the publicity); *Frazier v. Super. Ct.*, 5 Cal. 3d 287, 486 P.2d 694, 95 Cal. Rptr. 798 (1971) (where Santa Cruz County with a 1970 population of 123,700 was too small); *Steffen v. Mun. Ct.*, 80 Cal. App. 3d 623, 145 Cal. Rptr. 782 (1978) (where San Mateo County with a population of 575,000 was too small). Compare *contra* *People v. Harris*, 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981) (San Diego a large enough community to disseminate the news); *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976) *cert. denied* 430 U.S. 986 (1977).

16. 29 Cal. 3d at 582-83, 629 P.2d at 506-07, 174 Cal. Rptr. at 705-06.

17. *Id.* The court rejected an argument that in a capitol case a presumption in favor of a change of venue should arise.

18. 29 Cal. 3d at 584-85, 629 P.2d at 505-08, 174 Cal. Rptr. at 706-07.

19. *Id.*

20. *Id.*

21. 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). See Note, *Excessive Pretrial Publicity as it Affects the Right to a Fair Trial: People v. Harris*, 8 PEP-
PERDINE L. REV. 1115 (1981).

4. *Inquiry Into the Use of Peremptory Challenges: People v. Williams*

In June, 1981, in *People v. Williams*,¹ the California Supreme Court addressed the issue of what questions may serve as grounds for peremptory challenges in the voir dire of criminal jury panels and adopted a rule followed in some other jurisdictions² and in certain California cases.³ The court held that counsel may ask questions of a prospective juror that are reasonably designed to assist in the intelligent exercise of a peremptory challenge even if such questions are not likely to uncover grounds sufficient to sustain a challenge for cause.⁴

California had previously followed a rule which prohibited voir dire from being conducted as a means to uncover grounds for per-

1. 29 Cal. 3d 392, 628 P.2d 869, 174 Cal. Rptr. 317 (1981). The defendant shot and killed the deceased when the deceased came to the defendant's house where his son and one year old grandson were staying. The defendant was charged with murder, entered a plea of self-defense, and was convicted by a jury for manslaughter. The three questions asked by the defense counsel in voir dire were: (1) If the juror was "instructed to apply a 'reasonable man' standard of conduct, 'could he' conceive of a 'hypothetical, reasonable and prudent man,'" (2) give "a brief idea of your feeling about the right of a person to defend himself in his own home;" and (3) would you "willingly follow an instruction to the effect that a person has a right to resist an aggressor by using necessary force and has no duty to retreat." *Id.* at 398, 628 P.2d at 871, 174 Cal. Rptr. at 319 (summarizing questions asked by defense counsel). When the previous standard was applied to these questions by the trial court, the only question excluded which amounted to prejudicial error was that which inquired into the right to use force in self-defense even though an avenue of retreat was available. *Id.* at 410, 628 P.2d at 879, 174 Cal. Rptr. at 327.

2. *See, e.g.,* *Rosales-Lopez v. United States*, 451 U.S. 182 (1981). "There, the Court held that the rejection of requests that the trial court voir dire prospective jurors as to the possibility of racial or ethnic prejudice against the defendant was not reversible error in a federal court unless there were substantial indications of the likelihood of racial prejudices which may have influenced the jury. *See also* *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *Swain v. Ala.*, 380 U.S. 202 (1965); *United States v. Robinson*, 475 F.2d 376 (D.C. Cir. 1973). State courts which apply this rule include, Kentucky, Texas, Georgia, Michigan, and Ohio. *See generally*, 47 *Am. Jur. 2d, Jury*, § 210 (1969).

3. *See, e.g.,* *People v. Terry*, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964). During voir dire at a second penalty hearing, the defendant advanced his theory as to how the murder occurred. The defendant inquired as to whether the jurors would take the theory into consideration regardless of what the prosecution might say. The trial court omitted the theory from jury consideration because it determined it had the tendency to cause the jury to relitigate the issue of defendant's guilt. The California Supreme Court held that the trial court erred in failing to differentiate between total relitigation and doubt of guilt as a mitigating factor thereby limiting and frustrating the defendant's intelligent exercise of peremptory challenges and challenges for cause.

4. 29 Cal. 3d at 407, 628 P.2d at 877, 174 Cal. Rptr. at 325.

emptory challenges.⁵ Accordingly, the supreme court formerly had based many of its decisions when such issues arose on an ad hoc balancing test, comparing the likelihood of eventually challenging for cause with the probability of peremptory challenge. If the latter was likely, the question would be excluded.⁶ The California legislature perceived this practice as too discretionary and responded in 1927 by directing trial judges to allow only "reasonable examination of prospective jurors by counsel"⁷

The new standard announced by the court in *Williams* is that counsel on voir dire should be allowed to inquire into "matters concerning which either the local community or the population at large is commonly known to harbor strong feelings that may stop short of presumptive bias and yet significantly skew deliberations in fact."⁸ The significance of *Williams* is that the court changed the previous rule that questions at voir dire must be designed to lead to challenges for cause only, increasing, within reasonable limits, the discretion granted to a trial judge concerning questions in voir dire examinations.⁹

5. *The Right to Confront Witnesses In Probation Revocation Hearings: People v. Winson*

I. INTRODUCTION

In *People v. Winson*,¹ the California Supreme Court ruled that the

5. *People v. Edwards*, 163 Cal. 752, 753, 127 P. 58 (1912). The court justified its holding with the observation that:

there is an increasing tendency to prolong the proceedings inordinately by allowing counsel on either side to indulge in tedious examinations of jurors, apparently with no definite purpose or object in view, but with the hope of eliciting something indicating the advisability of a peremptory challenge, and . . . the supposed privilege of doing this has been greatly abused.

Id.

6. *See People v. Estorga*, 206 Cal. 81, 273 P. 575 (1928). In a rape case, questions as to marital status and family composition were excluded because the purpose seemed aimed toward possible peremptory challenges.

7. CAL. PENAL CODE § 1078 (West Supp. 1981).

8. 29 Cal. 3d at 408, 628 P.2d at 877, 174 Cal. Rptr. at 325 (1981), (quoting *United States v. Robinson*, 475 F.2d 376, 381 (D.C. Cir. 1973)).

9. 29 Cal. 3d at 410-11, 628 P.2d at 879, 174 Cal. Rptr. at 327 (1981). The dissent, authored by Justice Richardson, took no issue with the broad generality and standard imposed by the majority, but disagreed with the application of the standard to the questions involved in *Williams*. Justice Richardson, citing *People v. Watson*, 46 Cal. 2d 818, 299 P.2d 243 (1956), which held that a miscarriage of justice should be declared only if it is reasonably probable that a result more favorable to the party could have been reached, emphasized that reasonable probability, not mere possibility of a different result, was required for reversal. Therefore, he could not agree with the majority's conclusion that the exclusion by the trial court amounted to prejudicial error. 29 Cal. 3d at 416, 628 P.2d at 882, 174 Cal. Rptr. at 330.

1. 29 Cal. 3d 711, 631 P.2d 55, 175 Cal. Rptr. 621 (1981). The majority opinion

petitioner was denied his right to confront and cross-examine a witness during his probation revocation hearing when the previously recorded testimony of an absent witness was introduced into evidence.

II. FACTS

The petitioner, convicted for assault with a deadly weapon, was placed on probation following a jail term. Three weeks after his release from jail, he was arrested and charged with two new offenses.² At the preliminary hearing on the new criminal charges of attempted robbery and assault with a deadly weapon, the victim's testimony was recorded.³ After the victim, who was the sole witness, had left the state, an evidentiary hearing was held at which the court rejected the use of this transcript in the upcoming criminal trial, basing their decision on the fact that the prosecution had not exercised due diligence in attempting to locate the victim. The new criminal charges were thereafter dismissed.⁴

Subsequent proceedings were brought to consider the revocation of probation. Over petitioner's objection, the transcript was used in the probation revocation hearings. No further information regarding the victim's availability was provided by the prosecutor, who had stated on two occasions that he thought the victim could be found and produced at the hearing. The petitioner contended that the admission and consideration by the trial court of the preliminary transcript would be an error that would deny him due process rights to confront and cross-examine this witness. The trial court, however, allowed the transcript to be introduced, and found that the petitioner had violated his probation. Petitioner was sentenced to four years in prison on the original offense.⁵

III. HISTORY

Prior to the United States Supreme Court decision of *Morrissey*

was written by Justice Richardson with Chief Justice Bird and Justices Tobriner, Mosk, Kingsley, and Klien concurring. Justice Newman wrote a separate concurrence.

2. *Id.* at 714, 631 P.2d at 56, 175 Cal.Rptr. at 622.

3. The victim testified that the defendant Winson cut the victim along the jaw and stabbed him in the back of the head. *Id.*

4. *Id.* at 715, 631 P.2d at 57, 175 Cal. Rptr. at 623.

5. *Id.*

*v. Brewer*⁶ in 1972, probationers' and parolees' constitutional due process rights in revocation of probation⁷ or parole⁸ were not recognized, as probation and parole were viewed as "privileges" or "acts of grace," rather than constitutional rights.⁹ As a practical matter, the difference between parole and probation is primarily procedural. Probation is granted by a trial judge and is a judicial function; parole is granted by an administrative parole board.¹⁰

In *Morrissey*, the United States Supreme Court overruled prior cases that had denied due process to parolees by establishing a two-step procedure for implementing parolees' due process rights.¹¹ The second step of the procedure specifically established minimum due process requirements to include:

- (1) written notice of the claimed violations of parole; (2) disclosure to the parolee of evidence against him; (3) opportunity to be heard in person and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (5) a 'neutral and detached' hearing body such as a traditional parole board and (6) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.¹²

These requirements were specifically extended to probationers a year later in *Gagnon v. Scarpelli*.¹³ In earlier cases, the Califor-

6. 408 U.S. 471 (1972).

7. See *Escoe v. Zerbst*, 295 U.S. 490 (1935); *In re Davis*, 37 Cal. 2d 872, 236 P.2d 579 (1951); see also Note, *The Impossible Dream?: Due Process Guarantees for California Parolees and Probationers*, 25 HASTINGS L.J. 602, 603-19 (1974).

8. *Ugbanks v. Armstrong*, 208 U.S. 481 (1908); see also Note, *supra* note 7 at 602, 603-19 (1974).

9. 295 U.S. at 492-93. In *In re Davis*, 37 Cal. 2d 872, 873-74, 236 P.2d 579, 580-81 (1951), the court stated:

We are satisfied that there is neither a constitutional nor a statutory right to notice and hearing preceding revocation of probation. The federal Constitution does not give such a right [citation omitted]. And we do not believe that section 13 of article I of our state Constitution should be held to give petitioner a greater right in this respect than he is accorded under the federal Constitution, for under our law, as under federal law, probation is not a right but a privilege [citation omitted].

See also Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

10. See 408 U.S. at 480. See Note, *supra* note 7, at 603-04.

11. 408 U.S. at 484-89. The first stage requires an inquiry "[i]n the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Id.* at 485. The second stage requires a hearing not to determine probable cause, but to determine whether parole should be revoked. *Id.* at 488. See also *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (allowing for creative solutions to practical implementation of *Morrissey* requirements); *People v. Vickers*, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972). The court recognized the two distinct stages but commented that *Morrissey* does not preclude holding the two types of proceedings in close or immediate sequence of each other as long as the due process protections of that decision are not infringed.

12. 408 U.S. at 489.

13. 411 U.S. at 786.

nia Supreme Court had acknowledged that it was bound to apply the *Morrissey* provisions to the extent they establish minimum due process requirements. It had also applied the requirements to a probationer on the rationale that in principle, probationers and parolees cannot be distinguished.¹⁴

The United States Supreme Court has placed as much importance on the need for the decision maker to evaluate the demeanor of a witness as it has on the defendant's right to confront the witness.¹⁵ The purpose of the right of confrontation is of particular importance in a situation where a witness is unavailable to testify at trial or a probation revocation hearing. The *Morrissey* provisions were intended to be flexible in this application, especially with regard to what evidence is admissible in place of live testimony.¹⁶ The California Supreme Court in *People v. Winson* weighed the foregoing factors in deciding whether the absent witness's testimony was properly taken into evidence in the petitioner's revocation hearing, especially when the witness was not deemed to be "legally unavailable."¹⁷

14. *People v. Vickers*, 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972).

15. *Mattox v. United States*, 156 U.S. 237 (1895). *Mattox* involved a murder trial where former testimony was admitted at trial because of intervening deaths of two of the witnesses. The Court stated in regard to the right to confront witnesses,

[t]he primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury

Id. at 242-43. See also *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980); *Barber v. Page*, 390 U.S. 719, 721 (1968); *People v. Green*, 70 Cal. 2d 654, 661, 451 P.2d 422, 426, 75 Cal. Rptr. 792, 796 (1969); *People v. Johnson*, 68 Cal. 2d 646, 659, 441 P.2d 111, 120, 68 Cal. Rptr. 599, 608 (1968).

16. *Morrissey v. Brewer*, 408 U.S. at 480. The Court stated "[t]hat the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations." *Id.* Also, the Court emphasized that the second stage of a revocation hearing is not equivalent to a criminal prosecution and therefore should be flexible enough to consider evidence not normally admissible in a criminal proceeding, such as letters, affidavits, and other items.

17. *Id.* at 487. The Court stated "good cause" to deny a parolee the right to confront witnesses exists when the "[h]earing officer determines that an informant would be subjected to risk of harm if his identity were disclosed . . ."; See also *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (requires that in exercising "good faith," the prosecution must effectuate any affirmative measures, "albeit remote," if there is a possibility of procuring the declarant's presence); *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (a witness is not unavailable unless the prosecution has

IV. ANALYSIS

In *People v. Winson*, the court recognized that accurate fact finding furthered both the probationer's and state's interests.¹⁸ The court rejected the prosecution's argument that the petitioner had previously cross-examined the witness at the preliminary hearing and that the admission of hearsay evidence had been judicially approved.¹⁹ Under the *Morrissey* requirements, the court recognized that the "right to confront and cross-examine adverse witnesses except for good cause . . ." was one of the minimum due process rights guaranteed at parole revocation hearings.²⁰ Also, the *Winson* court placed importance on the necessity for decision makers to observe a witness's "demeanor."²¹ This emphasis was based on an early United States Supreme Court case which held that:

the purpose of the right of confrontation is [n]ot only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.²²

Based on the emphasized importance of observing a witness's demeanor and the "minimum due process requirements" of *Morrissey*, the court in *Winson* concluded that "good cause" must be established before a preliminary hearing transcript may be used as evidence in probation revocation hearings.²³ The court empha-

made a "good faith" effort to obtain his presence); CAL. EVID. CODE § 240 (West 1964) (statutory definition of "unavailable").

18. 29 Cal. 3d at 715, 631 P.2d at 57, 175 Cal. Rptr. at 623. See, e.g., *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973); *People v. Coleman*, 13 Cal. 3d 867, 873-74, 533 P.2d 1024, 1031, 120 Cal. Rptr. 384, 391 (1975).

19. The defense relied on *People v. Cambitsis*, 101 Cal. App. 3d 141, 161 Cal. Rptr. 441 (1930) (opportunity to cross-examine an adverse witness is the essential purpose of this right of confrontation). *But cf.* *Barber v. Page*, 390 U.S. 719, 725 (1968); *People v. Green*, 70 Cal. 2d 654, 661, 451 P.2d 422, 426, 75 Cal. Rptr. 782, 786 (1969); *People v. Johnson*, 68 Cal. 2d 646, 659, 441 P.2d 111, 120, 68 Cal. Rptr. 599, 608 (1968) (right to confrontation is a trial right and such right is not satisfied at a preliminary hearing).

20. 29 Cal. 3d at 716, 631 P.2d at 57, 175 Cal. Rptr. at 623.

21. *Id.* at 717, 631 P.2d at 58, 175 Cal. Rptr. at 624.

22. *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

23. 29 Cal. 3d at 718, 631 P.2d at 58-59, 175 Cal. Rptr. at 624-25. The court also briefly discussed several cases, including *In re Bye*, 12 Cal. 3d 96, 524 P.2d 854, 115 Cal. Rptr. 382 (1974), wherein the court extended *Morrissey* due process requirements to a California rehabilitation center [C.R.C.] out patient. The court considered the nature of the liberty interest involved there, as compared to that of a parolee, in determining whether *Morrissey* due process requirements were required. Quoting from *Morrissey*, the court stated:

The liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. [S]ubject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life. [H]e may have been on parole for a number of years and may

sized that while the right to confront witnesses was not absolute, the issue of utilizing preserved testimony to replace the personal appearance of the witness should be resolved carefully on a case-by-case basis.²⁴

V. CONCLUSION

The legal impact of *Winson* is limited to the narrow issue of whether the use of preserved testimony in probation hearings violates a probationer's right to confront a witness. The court did not expand the substance of the due process rights afforded probationers or parolees, but rather only defined to what extent the established due process rights will be upheld.²⁵ Further, while the court did not guarantee that the exclusion of preserved testimony will be upheld consistently, it did hold that decisions regarding the use of such testimony must carefully be made on a case-by-case basis. Finally, the right to confront adverse witnesses in probation revocation and parole hearings may not be denied except for "good cause."²⁶

6. *Limiting the Exclusionary Rule in Searches by Private Citizens: People v. North*

In *People v. North*,¹ the California Supreme Court limited its extension of the exclusionary rule,² and refused to exclude the fruits of the search in cases where evidence is illegally seized by

be living a relatively normal life at the time he is faced with revocation In many cases the parolee faces lengthy incarceration if his parole is revoked.

29 Cal. 3d at 718, 631 P.2d at 58-59, 175 Cal. Rptr. at 624-25.

The court further stated, that "[similar to the parolee], the . . . CRC outpatient may lead a relatively normal life while in his conditional status Upon revocation of 'outpatient status,' [the individual would be confined in a prison rather than at the CRC]." *Id.*

In regard to a patient-inmate, the court cited *People v. Ramirez*, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979), stating that "[i]n sharp contrast to an outpatient or a parolee . . . , a patient-inmate confined in the CRC cannot 'do a wide range of things open to persons who have never been convicted of any crime.' It follows that the liberty interest that justified a *Morrissey*-type hearing in *Bye* does not exist in the present context." *Id.* at 272, 599 P.2d at 629, 158 Cal. Rptr. at 323.

24. 29 Cal. 3d at 719, 631 P.2d at 59, 175 Cal. Rptr. at 625.

25. *Id.* at 717, 631 P.2d at 58, 175 Cal. Rptr. at 624.

26. *Id.* at 719, 631 P.2d at 59, 175 Cal. Rptr. at 625.

1. 29 Cal. 3d 509, 629 P.2d 19, 174 Cal. Rptr. 511 (1981).

2. Under the exclusionary rule, evidence obtained by an illegal search and seizure is inadmissible in court proceedings which are criminal in nature. This

a private citizen. While the rights of individuals to be protected against unreasonable searches and seizures is guaranteed by both the United States Constitution,³ and the California Constitution,⁴ this protection has not traditionally been extended to unlawful searches by private citizens.⁵ Since the purpose of the exclusionary rule is to "deter unconstitutional searches and seizures by law enforcement officials" and to "uphold judicial integrity," extension of the rule has been held generally to be inappropriate when private citizens perform the illegal searches.⁶

One situation which invokes the exclusionary rule is where a private citizen makes an illegal search under color of authority, or where he acts as an agent in conjunction with authorities; in such cases, the evidence will be excluded.⁷ The rule has also been extended where a private citizen conducts a search in the presence of authorities who have knowledge the search is being conducted, yet make no effort to protect the rights of the party being searched.⁸

was applied to the states through the fourteenth amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961).

3. The United States Constitution states in pertinent part that:

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

U.S. CONST. amend. IV.

4. According to the California Constitution:

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

CAL. CONST. art. 1, § 19.

5. *See, e.g., Burdeau v. McDowell*, 256 U.S. 465 (1921); *Stapleton v. Sup. Ct.*, 70 Cal. 2d 97, 100, 447 P.2d 967, 968-69, 73 Cal. Rptr. 575, 576 (1968).

6. The exclusion of evidence obtained by a private citizen's unlawful search, while upholding the integrity of the judiciary, would not serve to deter unconstitutional searches and seizures by law enforcement officials. It cannot be assumed that private citizens are aware of the exclusionary rule, or that they are motivated by a desire to secure a criminal conviction. *Dyas v. Super. Ct.*, 11 Cal. 3d 628, 632, 522 P.2d 674, 677, 114 Cal. Rptr. 114, 117 (1974).

7. In *Stapleton*, credit agents had agreed to meet police at the suspect's home and, upon arrival, the agents were requested by police to enter the suspect's home to assist in conducting the search. 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1968).

8. *Id.* A credit agent asked the police whether anyone had searched the suspect's car and then asked where the keys to the car were. The agent then conducted a search of the car without objection by the police. *See also Moody v. United States*, 164 A.2d 337 (D.C. Cir. 1960), where an officer accompanied the victim to the suspect's apartment and observed the victim enter and remove his property; the evidence was inadmissible since the officer did not protect the suspect's rights.

The *North* court was confronted with the novel question of extending the exclusionary rule to a case where a private citizen conducted an illegal search while authorities were present, but without their knowledge.⁹ In limiting any further extension of the rule, the California Supreme Court refused to exclude evidence obtained where authorities have no knowledge of the private citizen's search.¹⁰ The court concluded that the rationale of the exclusionary rule, which is to prevent illegal searches and seizures by law enforcement and other government officials, rather than private citizens, would not be served by such an extension.

7. *Jurisdiction And Probable Cause to Issue Out of County Search Warrants: People v. Flemming*

In *People v. Flemming*,¹ the California Supreme Court held that a magistrate has jurisdiction to issue an out-of-county warrant when there is probable cause to believe that the evidence sought relates to a crime committed within that magistrate's county, and thus pertains to a present or future prosecution there. Citing to the relevant provisions in the California Penal Code,² the court

9. In *North*, an officer informed a crime victim that although the liquor bottles on the floor of the suspect's car were similar to those stolen from him, it was not a sufficient basis to enter the car. The officer was then told that the suspect had a criminal record and the car may have been stolen. When the officer returned to his patrol car to check the suspect's automobile registration, the victim entered the suspect's car and pulled back a blanket which had been covering other items that had been stolen. The officer was not aware that the victim entered the car because the patrol car was sixty to seventy feet away and was facing in the opposite direction. 29 Cal. 3d at 512, 629 P.2d at 20, 174 Cal. Rptr. at 512.

10. "The mere police consultation with [the victim] did not convert the victim's search into an unconstitutional 'joint operation' thereby invoking the exclusionary rule." 29 Cal. 3d at 516, 629 P.2d at 23, 174 Cal. Rptr. at 515.

1. 29 Cal. 3d 698, 631 P.2d 38, 175 Cal. Rptr. 604 (1981). Defendant Scott Flemming pleaded guilty to one count of sale of cocaine, a violation of CAL. HEALTH & SAFETY CODE § 11352 (West Supp. 1981), after the trial court denied his motion to quash a search warrant under CAL. PENAL CODE § 1538.5 (West Supp. 1981). Defendant appealed pursuant to CAL. PENAL CODE § 1538.5(m) (West Supp. 1981).

2. The court referred to CAL. PENAL CODE § 1524 (West Supp. 1981), which authorizes the issuance of search warrants, providing in section (b) that "[t]he property or things [to be seized] may be taken on the warrant from any place, or from any person in whose possession it may be." Section 1528 specifies that "[i]f the magistrate is . . . satisfied of the existence of the grounds for the application . . . he must issue a search warrant . . . to a peace officer in his county . . ." CAL. PENAL CODE § 1528(a) (West Supp. 1981).

Section 1529 also provides the forum for the warrant and states that the warrants run from "[t]he people of the State of California to any sheriff . . . in the County of . . ." (the form leaves blank the county to which the warrant is issued).

concluded that these sections anticipate that the magistrate will issue the warrant to an officer in the forum county, but that the Code provisions do not specify that the search must be conducted in that same county. The court rejected the defendant's contention that Penal Code section 1541,³ dealing with a magistrate's jurisdiction over criminal offenses, meant that a magistrate with jurisdiction over the criminal offense lacks the authority to issue an out-of-county search warrant. The court also rejected the defendant's second contention that permitting out-of-county search warrants will lead police officers to "forum shop," encouraging officers to select distant magistrates who may be biased or unfamiliar with local conditions. The court stated that such a danger would also be present with out-of-county arrest warrants, but noted that these warrants have been specifically authorized by the California legislature. The court analogized the search and arrest warrant situation as follows:

These asserted dangers [forum shopping] would also be present in the issuance of arrest warrants, yet the Legislature explicitly authorizes out-of-county arrest warrants when the offense is triable within the county, an action which suggests that the Legislature would permit out-of-county search warrants in a similar case.⁴

The court's holding is consistent with the case of *People v. Ruster*,⁵ wherein the court held that because the county in which the warrant was issued was also the most convenient forum to resolve validity issues arising out of that warrant, the magistrate had jurisdiction to issue it.⁶ Because *Ruster* is inconsistent with the prior case of *People v. Grant*,⁷ the court declared that any dicta in *Grant* that was contrary to *Ruster* was disapproved.⁸

Section 830.1(a) provides that "[t]he authority of . . . [a] peace officer extends to any place in the state . . . [a]s to any public offense committed or which there is probable cause to believe has been committed within the political subdivision which employs him." CAL. PENAL CODE § 830.1(a) (West Supp. 1981).

3. CAL. PENAL CODE § 1541 (West 1970) provides in part that when a magistrate "has no power to inquire into the offense in respect to which the warrant was issued, he must at once file such warrant and return and such affidavit, or affidavits, and inventory with the clerk of the court having power to so inquire."

4. 29 Cal. 3d at 705, 631 P.2d at 43, 175 Cal. Rptr. at 609.

5. 16 Cal. 3d 690, 548 P.2d 353, 129 Cal. Rptr. 153 (1976). Here, the defendant was a San Mateo resident whose home in the same county was searched pursuant to a warrant issued by a Santa Clara magistrate. The jurisdiction of the Santa Clara magistrate was upheld.

6. According to the court, the issuing county is the county where trial will probably take place, and is generally a convenient forum for a defendant who challenges the warrant's validity. 29 Cal. 3d at 707, 631 P.2d at 44, 175 Cal. Rptr. at 610.

7. 1 Cal. App. 3d 563, 81 Cal. Rptr. 812 (1969) *cert. denied*, 400 U.S. 849 (1970). Here the search warrant was issued by a San Mateo County magistrate, but the defendants were not arrested until after they crossed into San Francisco County. The court upheld the warrant.

8. The dicta in *Grant* cited by defendant stated, "We find little authority, but nevertheless considerable reason, supporting the theory that the effect of a search

The court also rejected the defendant's contentions that the affidavits supporting the search warrant lacked probable cause. One of the statements included in the affidavit was made by a party to the crime, which the court presumed to be reliable as it was made unknowingly to a police officer. The court's explanation for the reliability of the statements was that:

[U]tterances by a suspected accomplice can be presumed to be reliable . . . since they "were not made for the selfish purpose of currying favor with law enforcement to mitigate punishment of [the individual's] own criminal acts, or with the ulterior motive of causing the arrest of the petitioner upon a false accusation."⁹

In summary, *People v. Flemming* clarified the jurisdictional power of magistrates to issue out-of-county search warrants, relying primarily on analogies to arrest warrants. The court also clarified the reliability of statements made by parties to crimes when the statements are unknowingly made to police officers.

8. *Justifications Necessary for a Criminal Investigative Stop By a Police Officer: People v. Leyba*

In *People v. Leyba*,¹ the California Supreme Court reaffirmed the

warrant should be limited to the county of its origin." 1 Cal. App. 3d at 568, 81 Cal. Rptr. at 815. In *Ruster* the court rejected defendant's claim that *Grant* compelled invalidation of an out of county warrant.

9. To support this reasoning, the court cited *Ming v. Super. Ct.*, 13 Cal. App. 3d 206, 214, 91 Cal. Rptr. 477, 482 (1970). Additionally, the statement in the affidavit was personal knowledge and was corroborated by statements of others with knowledge of the criminal activity. *Id.*

1. 29 Cal. 3d 591, 596-97, 629 P.2d 961, 964, 174 Cal. Rptr. 867, 870 (1981). The defendant was charged with possession of phencyclidine in violation of the CAL. HEALTH AND SAFETY CODE §11377(a) (West Supp. 1981). The charge arose when an officer detained the defendant and two others after observing their suspicious behavior. The initial detention was predicated on the lateness of the hour, the blinking of headlights by two cars as the defendant's passed another vehicle which was parked in a school parking lot, the officer's knowledge of ongoing gang activities, and the occurrence of a number of school burglaries. The trial court dismissed the case after finding that the officer's decision was not based on a "reasonable suspicion." The supreme court reversed and remanded the case after undertaking an independent judgment of the facts and determining the search was reasonably within the meaning of the constitution. The dissent, authored by Justice Mosk, and concurred in by Chief Justice Bird and Justice Feinberg, agreed with the analysis of the proper standard of review for rulings suppressing evidence obtained as a result of an investigative stop, but dissented from the majority's conclusion as to the facts of the case.

The court in *Leyba* relied upon its earlier decision in *People v. Lawler*, 9 Cal. 3d 156, 160, 507 P.2d 621, 623, 107 Cal. Rptr. 13, 15 (1973). There, a uniformed officer detained the defendant on a public sidewalk after observing him trying to solicit a ride. The officer made a routine pat down of a sleeping bag carried by the defend-

requirements necessary to justify a criminal investigative stop or detention by a police officer. The circumstances known or apparent to the officer must include specific and articulable facts causing him to suspect that some activity relating to a crime has taken place or is occurring or about to occur, and that the person he intends to stop or detain is involved in that activity.² In addition, he must not only subjectively entertain such suspicions, but it must be objectively reasonable for him to do so.³

More importantly, the court, in reviewing an officer's testimony that he felt "a strong possibility existed that a school burglary had taken place,"⁴ held that "the reasonableness of a decision does not depend on the precise words which an officer on the stand chooses to describe his state of mind at the scene"⁵ The significance of *Leyba* is that it demonstrates a situation where the court determined factually whether an officer met the

ant because he felt the defendant was acting nervous. The officer felt a hard spot and asked to see what it was. When the defendant complied, the suspected "automatic weapon" turned out to be a utensil kit and several bags of marijuana. The supreme court, in holding the search unlawful, discussed the two-step process which was later used again in *Leyba*. The *Lawler* court stated:

In such a proceeding the power to judge the credibility of the witnesses, resolve any conflicts in the testimony, weigh the evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor the exercise of that power, and the trial court's findings on such matters, whether expressed or implied, must be upheld if they are supported by substantial evidence. The trial court also has the duty to decide whether, on the facts found, the search was unreasonable within the meaning of the Constitution. Although that issue is a question of law, the trial court's conclusion on the point should not lightly be challenged by appeal or by petition for extraordinary writ. Of course, if such review is nevertheless sought, it becomes the ultimate responsibility of the appellate court to measure the facts, as found by the trier, against the constitutional standard of reasonableness.

9 Cal. 3d at 160, 507 P.2d at 623, 107 Cal. Rptr. at 15.

2. *People v. Sup. Ct.*, 3 Cal. 3d 807, 478 P.2d 449, 91 Cal. Rptr. 729 (1970). *See also In re Tony C.*, 21 Cal. 3d 888, 893, 582 P.2d 957, 959, 148 Cal. Rptr. 366, 368 (1978).

3. 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 (1978). The court held that a reasonable suspicion of involvement in criminal activity will justify a temporary stop or detention even if associated with lawful activity. However, the court reversed an order sustaining a petition alleging receipt of stolen property because the fact of two young boys walking along a residential street at noon did not justify an officer in stopping them even though criminal activity had been reported in the area. *See People v. Teresinski*, 26 Cal. 3d 457, 605 P.2d 874, 162 Cal. Rptr. 44 (1980); *People v. McGaughran*, 25 Cal. 3d 577, 601 P.2d 207, 159 Cal. Rptr. 191 (1979); *People v. Brower*, 24 Cal. 3d 638, 597 P.2d 115, 156 Cal. Rptr. 856 (1979).

4. 29 Cal. 3d at 599, 629 P.2d at 965, 174 Cal. Rptr. at 871.

5. *Id.*, quoting *People v. Jones*, 103 Cal. App. 3d 885, 890, 163 Cal. Rptr. 251, 254 (1980). The court relied on appellate court cases in stating that the principle function of an officer's investigation is to resolve any ambiguities and to establish whether the activity being observed is legal or illegal. *People v. McNeal*, 90 Cal. App. 3d 830, 153 Cal. Rptr. 706 (1979); *People v. Remiro*, 89 Cal. App. 3d 809, 153 Cal. Rptr. 89 (1979); *People v. Cowman*, 223 Cal. App. 2d 109, 35 Cal. Rptr. 528 (1963).

legal objective test, rather than strictly construing the particular words uttered by the officer while on the witness stand.⁶

II. CALIFORNIA CONSTITUTIONAL LAW

A. DOCTRINE OF SEPARATION OF POWERS

1. *Court Directed Expenditures of Available State Appropriated Funds: Mandel v. Meyers*

With regard to the situation where appropriations by legislative action are, by judicial authority, utilized for appropriate expenditures, problems involving the doctrine of separation of powers may arise. Mandel v. Meyers has helped to settle many of these problems with its finding that the courts of California may direct expenditures derived from appropriated funds which are generally and reasonably available. The decision also prohibits exclusion of such expenditures by the legislature on the basis of its readjudication of final court judgments.

I. INTRODUCTION

The doctrine of separation of powers precludes one branch of government from exercising a power vested in another branch.¹ Many decisions have held that where the legislature fails to make an appropriation, a court is powerless to remedy any resulting inequities.² With equal force, it has been held that once funds have already been appropriated by legislative action, a court transgresses no constitutional principles by ordering the State Controller or other official to make appropriate expenditures from such

6. 29 Cal. 3d at 597, 629 P.2d at 964, 174 Cal. Rptr. at 870. The dissent however, in reliance upon the holdings in *Brower* and *McGaughran*, wherein the court was reluctant to conclude that a city's crime rate can transform it into an area justifying the seizure of individuals, felt that the officer's reliance on the "high crime area" rationale was no justification for a rational suspicion of criminal conduct.

1. CAL. CONST. art. III, § 3 (1972). This article provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise others except as permitted by this Constitution."

2. *Myers v. English*, 9 Cal. 341 (1858). The court held that the judiciary had a legitimate power to declare the action of the legislature unconstitutional, but the courts had no means or power to avoid the effects of non-action. *Veterans of Foreign Wars v. State of California*, 36 Cal. App. 3d 688, 111 Cal. Rptr. 750 (1974). An otherwise qualified plaintiff was denied relief because he failed to specify an appropriation from which the judgment could be paid; a "judgment against the state, even when authorized by law, may be paid only out of appropriated funds." *Id.* at 697, 111 Cal. Rptr. at 756. *California State Employees' Ass'n v. State of California*, 32 Cal. App. 3d 103, 108 Cal. Rptr. 60 (1973) ("... the courts have no authority to compel a separate and equal branch of state government to make an appropriation of funds"). *Id.* at 108, 108 Cal. Rptr. at 67.

funds.³ Other cases, involving constitutional rights, have held that funds authorized for one purpose may result in expenditures in a manner that the legislature has not contemplated without posing a separation of powers problem.⁴

This note will analyze the California Supreme Court case of *Mandel v. Myers*,⁵ which not only affirmed, but extended these ideas to hold that where appropriated funds are generally and reasonably available, the court may direct the State Controller to make what it deems to be appropriate payments therefrom, without regard to any improper or invalid legislative restriction.⁶ In addition, the court held that the legislature may not validly exclude such expenditures on the basis of its readjudication of the merits of a final court judgment.⁷

II. CASE HISTORY

In 1972, Shelly Mandel instituted the underlying action challenging the Department of Health Services' practice of giving its employees three hours of paid time off on Good Friday.⁸ The trial court held that the practice constituted a violation of the Establishment Clause⁹ and enjoined the controller from paying state

3. *Glendale City Employees Ass'n v. Glendale*, 15 Cal. 3d 328, 540 P.2d 609, 124 Cal. Rptr. 513 (1975) (mandamus issued to compel the performance of a ministerial duty of the city council); *Flora Crane Service v. Rose*, 61 Cal. 2d 199, 390 P.2d 193, 37 Cal. Rptr. 425 (1964) By writ of mandamus the supreme court compelled municipal officers to certify existence of a valid appropriation that could be expended to pay plaintiff for services rendered to the city; *Tevis v. City and County of San Francisco*, 43 Cal. 2d 190, 272 P.2d 757 (1954) The court directed the city officials to certify and approve payrolls showing that petitioners, former municipal railway employees, were entitled to receive vacation pay for the periods enumerated; *Dufton v. Daniels*, 190 Cal. 577 (1923) The court held that it had original jurisdiction to entertain a proceeding in mandamus to compel the State Board of Control to allow petitioner, a state agent, to pursue his claim for traveling expenses incurred in bringing back a fugitive to the state); *California v. McCauley*, 15 Cal. 429(1860) (court ordered the State to comply, in good faith, with a lease it entered into before it would invoke a court of equity to cancel the contract because of breach by the lessee); *Fowler v. Peirce*, 2 Cal. 165 (1852) (court held a mandamus may issue to compel the State Comptroller to account to a member of the Legislature for daily compensation fixed by law).

4. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (one year residency requirement for welfare payments found unconstitutional); *Purdy & Fitzpatrick v. State of California*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) Court need not await an instance of actual conflict to strike down State alienage and immigration law which purported to regulate subject matter which the Congress also aimed to control.

5. 29 Cal. 3d 531, 629 P.2d 935, 174 Cal. Rptr. 841 (1981).

6. *Id.* at 542, 629 P.2d at 941, 174 Cal. Rptr. at 847.

7. *Id.* at 545, 629 P.2d at 943, 174 Cal. Rptr. at 849.

8. Mandel was an employee of the Department of Health Services. *Id.* at 537, 629 P.2d at 938, 174 Cal. Rptr. at 844.

9. The Establishment Clause of the first amendment states that no law shall be made "respecting an establishment of religion." *Mandel v. Hodges*, 54 Cal. App.

employees for the time off. Additionally, the court awarded Mandel \$25,000 in attorney's fees to be paid by the state to her attorneys for rendering a substantial benefit to the public and to the state.¹⁰ The court of appeals affirmed this decision¹¹ and the award became final.

When the award was not paid, due to the legislature's deletion of the item authorizing its payment and failure to appropriate the necessary funds,¹² Mandel refiled her claim for the 1978-79 fiscal year budget. Again the item was deleted.¹³ She tried to enforce its collection on a second appeal, but was not successful.¹⁴

Frustrated in these attempts to obtain her award, Mandel returned to the trial court and secured a court order directing the State Controller to pay \$25,000 from Department of Health Services¹⁵ funds. These funds had been appropriated for the department's general operating expenses and equipment.¹⁶

The state defendants, including Beverlee Myers, the Director of the California Department of Health Services, challenged this order as a violation of the doctrine of separation of powers. The court of appeals agreed and reversed the trial court's order.¹⁷

3d 596, 610, 127 Cal. Rptr. 244, 255 (1976). "[The Establishment Clause] was intended to erect 'a wall of separation between church and state.'" *Id.*

10. Due to the attorneys' efforts in showing that the state could not pay salaries for that time off, the state saved \$2,000,000 in 1973 and further savings were predicted for the future. 29 Cal. 3d at 537, 629 P.2d at 938, 174 Cal. Rptr. at 844.

11. 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976).

12. Mandel had filed a claim with the State Board of Control for payment of the fee which was approved in August of 1976. However, the legislature deleted the item from an Omnibus Claim Bill introduced in 1977. *Id.*

13. This was based upon the Legislative Analyst's recommendation, which was reached by reevaluating the merits of the attorney's fee award from the prior judicial proceedings. 29 Cal. 3d at 537-38, 629 P.2d at 938, 174 Cal. Rptr. at 844.

14. *Mandel v. Lackner*, 92 Cal. App. 3d 747, 155 Cal. Rptr. 269 (1979). The defendants appealed the order "contending that the ruling exceeds the authority of the trial court and violates the constitutional separation of powers doctrine." *Id.* at 535, 629 P.2d at 937, 174 Cal. Rptr. at 843.

15. *Id.* at 535, 629 P.2d at 937, 174 Cal. Rptr. at 843.

16. "Operating expenses and equipment which shall include all expenditures for purchase of materials, supplies, equipment, services (other than services of state officers and employees), and all other proper expenses . . ." 1978 Cal. Stats., ch. 359, § 26(b), p. 1013.

17. The appellate court relied on precedent which indicated that the trial court had no such authority to compel payment of the award. "The general rule is well established that a judgment against the state . . . merely liquidates and establishes the claim against the state, and that, in the absence of an express statute so providing, such judgment cannot be collected by execution against the state or its property, . . . it remains for the state, after such judgment, to provide for the payment thereof in such a manner that it sees fit . . ." *Mandel v. Myers*, 106 Cal. App.

This appeal to the California Supreme Court followed.

III. HISTORICAL BACKGROUND

The doctrine of separation of powers exists in most of the American State Constitutions¹⁸ and is implied in the Constitution of the United States.¹⁹ "The courts have long recognized that its primary purpose is to prevent the combination in the hands of a single person or group of the basic fundamental powers of the government."²⁰ In addition, the doctrine serves the practical function of facilitating the efficient operation of the government.²¹ Thus, in serving this dual purpose, the doctrine operates to protect any one branch of government from overreaching by another branch.²²

Separation of powers principles serve many vital functions and are essential to the operation of the government.²³ However, the doctrine does not draw bold lines among the branches of power.²⁴ A violation of separation of powers has been defined as "an assumption by one branch of powers that are central to the opera-

3d at 390, 165 Cal. Rptr. at 151 (1980) (citing *Westinghouse Electric Co. v. Chambers*, 169 Cal. 131, 135, 145 P. 1025, 1026 (1915)).

18. See note 1 *supra* for the California Constitutional version of the separation of powers doctrine; *Burgoyne v. Board of Supervisors County of San Francisco*, 5 Cal. 9, 19 (1855) "[B]y the third Article of the Constitution, it is provided that the powers of the State government shall be divided into three separate departments—the Legislature, the Executive, and Judicial, and no person charged with the execution of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others . . .".

19. *People v. Provines*, 34 Cal. 520, 537 (1868) The framers of the American Constitution sought to provide a safeguard against abuses which would inevitably occur when one department of the government has the power to both declare and execute the law "by separating the judicial from the executive and the legislative powers"

20. *Parker v. Riley*, 18 Cal. 2d 83, 89, 113 P.2d 873, 879 (1941); *McGovney, D.O., Administration Decisions and Court Review Thereof, In California*, 29 CAL. L. REV. 110, 117-18 (1940-41). Separation of powers "establishes a system of checks and balances to protect any one branch against the overreaching of any other branch." *Bixby v. Pierno*, 4 Cal. 3d 130, 141, 481 P.2d 242, 249, 93 Cal. Rptr. 234, 241 (1971).

21. *Chadha v. Imm. & Naturalization Serv.*, 634 F.2d 408, 423-24 (9th Cir. 1980).

22. *Id.*

23. See notes 18-20 *supra* and accompanying text; *The Federalist* Nos. 47-48 (J. Madison).

24. *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 441-46 (1977) ("In designing the scheme of our Government and dividing and allocating the sovereign power among three coequal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence." *Id.* at 443 (emphasis added by Court) (quoting from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952)); 634 F.2d at 421 ("The separation of powers concept is neither doctrinaire nor rigid"); *The Federalist* 47 (J. Madison) at 324-27 (J. Cooke, ed. 1961) ("If we look into the Constitution of the several states we find that . . . there is not a single instance in which the several departments of power have been kept absolutely separate and distinct").

tion of a coordinate branch, provided also that the assumption disrupts the coordinate branch in the performance of its duties and is unnecessary to implement a legitimate policy of the government."²⁵

An early example of the impact of the doctrine was the case of *Pryor v. Downey*.²⁶ There, the decedent left a will devising one half of the property in question to his wife and one half to his son. Though lacking jurisdiction²⁷ to make such an order,²⁸ the probate court ordered a sale of the son's undivided one half interest in the land in order to meet the debts of the decedent's estate. The trial court held for the plaintiff (son), setting the conveyance aside. Subsequently, the legislature enacted a statute validating the conveyance. The Supreme Court of California found that the legislature had no power to enact law for the purpose of superseding a court's judgment. Such action amounted to an exercise of judicial functions and was thus a violation of the separation of powers doctrine.²⁹

Early cases dealing with the separation of powers doctrine concerned the area of sovereign immunity.³⁰ Today, the concept of

25. 433 U.S. at 443. The separation of powers issue in *Nixon* arose in this manner. After Nixon resigned as President, he made an agreement with the Administrator of General Services whereby his personal documents and tapes were to be housed. Under this agreement, authors could gain access to the materials without consent. Shortly after this agreement, Congress decided to abrogate it and enacted the Presidential Recordings and Materials Preservation Act. This Act ordered the GSA to have the materials screened by the government before allowing access to them. Nixon filed an action challenging the constitutionality of the Act, alleging, inter alia, that on its face it violated the separation of powers doctrine.

634 F.2d at 425. Allen, whose suspension had been vetoed by one house of Congress, sought review of an order of deportation issued by the Immigration and Naturalization Service. The question arose as to whether a statutory provision for one-house disapproval of suspension of an order of deportation violated the doctrine of separation of powers and was thus invalid.

26. 50 Cal. 388 (1875).

27. The administrator of the estate was not duly authorized. Therefore, the court was deprived of jurisdiction. *Id.* at 411; see also *Brydonjack v. State Bar*, 208 Cal. 439, 444 (1929).

28. 50 Cal. at 398.

29. *Id.* In clarifying its holding, the court in *Pryor* stated that "had the legislature gone one step further, and commanded the courts which had rendered a judgment . . . to set it aside and to enter" a contrary judgment, such an act would immediately be recognized "as an abuse not to be tolerated under our free Constitution of government." *Id.* at 405.

30. "The principal of sovereign immunity is not one which allows the sovereign to continue to inflict injury, but rather, one which absolves the sovereign from responding in damages for past injuries." *Shaw v. Salt Lake County*, 119 Utah 50, 56-57, 224 P.2d 1037, 1040 (1950). In *Gilman v. Contra Costa County*, 8 Cal. 52

sovereign immunity is suspect.³¹ However, problems involving separation of powers arise in many other situations. One such situation is the creation of conflict between the legislature and the courts as a result of the exercise of judicial power in the appropriations area, such as is found in *Mandel*. Prior to *Mandel*, the power to collect and appropriate funds had been controlled for over one hundred years by *Myers v. English*.³²

In *Myers*, the plaintiff applied for a writ of mandamus to compel the state treasurer to satisfy warrants drawn by the comptroller to pay the salaries of district judges. Funds had been appropriated for this purpose, but the legislature subsequently passed an act compelling the judges to accept bonds instead of cash.³³ In finding the legislative action constitutional, the court stated:

We think the power to collect and appropriate the revenue of the state is one peculiarly within the discretion of the Legislature. . . .

It is within the legitimate power of the judiciary to declare the action of the Legislature unconstitutional, where that action exceeds the limits of the supreme law; but the courts have no means, and no power, to avoid the effects of *non action*. The Legislature, being the creative element in the system, cannot have its action quickened by the other departments. Therefore, when the Legislature fails to make an appropriation, we cannot remedy that evil.³⁴

(1857), the plaintiff obtained a judgment against the county and levied on county buildings and funds. The court held that the "levy upon the county revenues, in the hands of the treasurer, was illegal and void. These revenues are authorized by law, appropriated to distinct purposes, and are not the subject of seizure upon execution." *Id.* at 58. Thus, by invoking the doctrine of sovereign immunity, the court permitted the legislature to pass an act exempting the debtor county's property from sale on execution. *Id.* at 53; In *Emeric v. Gilman*, 10 Cal. 404 (1858), Gilman sued a resident of the county to secure his judgment. The court held that it was the "duty of the supervisors to apply such funds in the treasury . . . as are not otherwise appropriated." *Id.* at 410. If there are no funds, the legislature may impose a tax to collect them, and if it fails to do so, the creditor may resort to a writ of mandamus. *Id.*

31. *National Bank v. Republic of China*, 348 U.S. 356, 359-61 (1955) (the doctrine of sovereign immunity has "increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment.") *Id.* at 359; *Hall v. University of Nevada*, 8 Cal. 3d 522, 526, 503 P.2d 1363, 1366, 105 Cal. Rptr. 355, 358 (1972) ("finally, it must be pointed out that in a society such as ours, which places such great value on the dignity of the individual and views the government as an instrument to secure individual rights, the doctrine of sovereign immunity must be deemed suspect.") *Id.*; see also, *Muskopf v. Corning Hosp. Dist.*, 55 Cal. 2d 211, 359 P.2d 457, 11 Cal. Rptr. 89 (1961), where the California Supreme Court added to the list of areas from which the Legislature has removed governmental immunity by holding that "the doctrine of governmental immunity for torts for which its agents are liable has no place in our law." *Id.* at 221, 359 P.2d at 463, 11 Cal. Rptr. at 95.

32. 9 Cal. 341 (1858).

33. *Id.* at 341-46. These bonds were payable ten years after the judge's term.

34. *Id.* at 349. For cases following the *Myers* rationale, see generally *Glendale City Employees Ass'n, Inc. v. City of Glendale*, 15 Cal. 3d 328, 540 P.2d 609, 124 Cal. Rptr. 513 (1975) (the supreme court reversed the trial court issuance of writ of mandate compelling the city council to compute and pay city employees in accordance with memorandum of understanding); *Tevis v. City and County of San Fran-*

Thus, under *Myers*, a court has no jurisdiction to compel the legislature to act.³⁵ Further, the judiciary has no authority to interfere with the legislature absent an unconstitutional exercise of power.³⁶

In this vein, where an unconstitutional restriction has been ap-

cisco, 43 Cal. 2d 190, 272 P.2d 757 (1954) (writ of mandamus to compel city officials to allow railway employees two weeks vacation pay denied where proper funds were lacking); *Santa Clara County v. Super. Court*, 33 Cal. 2d 552, 203 P.2d 1 (1949) (preemptory writ to restrain courts from proceeding further in connection with temporary restraining order issued in a cause of action to prevent the Board of Supervisors from certifying to the Legislature a proposed charter granted due to separation of powers doctrine); *Westinghouse Elec. Co. v. Chambers*, 169 Cal. 131 (1915) (mandamus to compel State Controller to issue warrant for plaintiff for amount of judgment recovered for taxes illegally collected denied by supreme court); *Mandel v. Myers*, 106 Cal. App. 3d 384, 165 Cal. Rptr. 148 (1980) (court directing state controller to pay attorney's fees from general operating expenses of Department of Health Services overturned by court of appeals but later reversed by supreme court); *County of Fresno v. Super. Court*, 82 Cal. App. 3d 191, 146 Cal. Rptr. 880 (1978) (writ of mandate to set aside court order directing county to pay attorney's fees and costs of private attorney appointed by court to represent indigent defendant from general funds issued by court); *California State Employees v. State of California*, 32 Cal. App. 3d 103, 108 Cal. Rptr. 60 (1973) (plaintiffs seeking to compel payment of wage increases to civil service employees and employees of California State University and University of California denied writ of mandate); *California State Employees v. Flournoy*, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (1973) (demurrers to complaint seeking writ of mandate to recover personnel salaries approved by regents of University of California and trustees of California State Colleges, but which legislature failed to provide, sustained by trial court without leave to amend and affirmed by court of appeals); *Martin v. Contra Costa County*, 8 Cal. App. 3d 856, 87 Cal. Rptr. 886 (1970) (trial court issued writ compelling county board of supervisors to enact ordinance providing benefits for petitioners reversed by court of appeals); *City Council of Santa Barbara v. Super. Court*, 179 Cal. App. 2d 389, 3 Cal. Rptr. 796 (1960) (court of appeals affirmed trial court order preventing Public Sanitation Service, Inc., from compelling city council to raise residential garbage collection rates); 63 Op. Att'y Gen. Cal. 369 (1980) (there may be no expenditure from treasury absent an appropriation by the legislature; citing *Myers*).

35. 433 U.S. at 441-46; *Buckley v. Valeo*, 424 U.S. 1, 18-24 (1976); 634 F.2d at 420; *Lockard v. City of Los Angeles*, 33 Cal. 2d 453, 461-62, 202 P.2d 38, 43 (1949).

36. *Califano v. Goldfarb*, 430 U.S. 199 (1977) (Supreme Court found unconstitutional an amendment to the Social Security Act dealing with survivor benefits, and not the entire Act itself); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (Supreme Court found unconstitutional residency requirement of at least one year for applicants otherwise eligible to receive welfare); *United States v. Lovett*, 328 U.S. 303 (1946) (Supreme Court found unconstitutional § 304 of the Urgent Deficiency Appropriation Act of 1943 because it violated art. I, § 3, cl. 9 of the U.S. Constitution); *Purdy & Fitzpatrick v. State of California*, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969) (California Supreme Court declared unconstitutional § 1850 of the Labor Code); *State Board of Educ. v. Levit*, 52 Cal. 2d 441, 343 P.2d 8 (1959) ("The declaration that the restrictive provision in item 435 is invalid does not affect the validity of the appropriation itself"). *Id.* at 466, 343 P.2d at 22.

pended to otherwise valid legislation, the judiciary may strike the invalid restriction and ratify the remaining legislation.³⁷ Accordingly, the legislature may achieve a result which it did not necessarily intend. This was the case in *Shapiro v. Thompson*.³⁸ There, statutes in the states of Connecticut, Pennsylvania and in the District of Columbia required that indigents entering the state wait one year before receiving welfare aid. The Supreme Court found that these provisions which were appended to the welfare statutes had a chilling effect on the right to travel and were, therefore, unconstitutional.³⁹ As a result, indigents intended to be excluded from welfare aid were nonetheless benefitted by the statute.

Further illustrative of these unconstitutional restriction cases are *State Board of Education v. Levit*⁴⁰ and *United States v. Lovett*.⁴¹ In *Levit*, a provision prohibiting any appropriated money to be spent on two particular textbooks was appended to an appropriation of funds for school texts. The court noted that “[t]hose matters which the constitution specifically confides to [a specified body or agency] the legislature cannot directly or indirectly take from his control.”⁴² Since the Constitution delegated to the State Board of Education the power of textbook selection,⁴³ the appended provision was invalid insofar as it exercised a power confided to another body or agency.⁴⁴ Accordingly, the California Supreme Court issued an order requiring the Director of Finance to consider printing orders for the two textbooks without regard to the invalid restriction.⁴⁵

*United States v. Lovett*⁴⁶ dealt with the validity of an amendment attached to section 304 of the Urgent Deficiency Appropriation Act of 1943. The appended amendment provided that certain named government employees (those guilty of “subversive activity”) would not be paid out of any money appropriated after November 5, 1943, unless they were reappointed by the President with the advice and consent of the Senate prior to November 5, 1943.⁴⁷ The court of claims entered judgment for the employees

37. 394 U.S. at 631 (1969).

38. *Id.*

39. 52 Cal. 2d 441, 343 P.2d 8 (1959).

40. 328 U.S. 303 (1946).

41. 52 Cal. 2d at 461, 343 P.2d at 19, and cases cited therein.

42. CAL. CONST. art. IX, § 7.

43. 52 Cal. 2d at 463, 343 P.2d at 20-21.

44. *Id.* at 466, 343 P.2d at 22.

45. 328 U.S. 303 (1946); *see* note 35 *supra*.

46. 328 U.S. at 305.

47. *Id.* at 304.

and the United States Supreme Court affirmed.⁴⁸ In so doing, the Court held that the effect of section 304 was to punish the named individuals without a judicial trial.⁴⁹ As such, it was a punitive bill of attainder and could not stand as an obstacle to payment for the government employees.⁵⁰ Therefore, despite the intention of Congress that these individuals not be paid by funds appropriated by the 1943 Act, the Court invalidated the unconstitutional restriction and achieved a result that Congress had not intended.

Concurrent with the limitation that the judiciary may not compel legislative action,⁵¹ the doctrine of separation of powers also precludes the legislature from readjudicating the merits of final court judgments.⁵² The legislature may place reasonable restrictions upon the courts, "provided they do not materially impair the exercise" of the court's functioning.⁵³ However, the exercise of legislative power which contravenes separation of powers principles is unconstitutional.⁵⁴ As is evident from the foregoing, the doctrine of separation of powers has a substantial impact on the operation of the government. It is also clear that in California, prior to *Mandel*, the law was well settled that the judiciary could not compel legislative action,⁵⁵ and could not readjudicate the merits of a final court judgment.⁵⁶

IV. THE SUPREME COURT'S ANALYSIS AND DECISION

The first issue dealt with by Justice Tobriner, in his opinion for the majority in *Mandel v. Myers*, was whether the trial court invaded the province of the legislature by compelling the State Controller to pay Mandel from the general operating expenses of the

48. *Id.* at 316.

49. *Id.* at 318; U.S. CONST. art. I, § 9, cl. 13. This states that no bill of attainder or ex post facto law shall be passed.

50. See notes 20-22 *supra* and accompanying text.

51. *Chadha v. Imm. and Naturalization Serv.*, 634 F.2d 408, 430 (9th Cir. 1980). In *Chadha*, the Executive branch of the government, acting by inquiry officer who conducted an administrative hearing, determined that petitioner should not be deported due to the extreme hardship he would likely suffer. Subsequently, Congress, acting only by the House of Representatives, sought reversal of that administrative determination. This, in effect, would allow Congress to "readjudicate the merits" of the final judicial (administrative) determination. The court found this to be unconstitutional. See also *Pryor v. Downey*, 50 Cal. 388, 405 (1875).

52. *Brydonjack v. State Bar*, 208 Cal. 439, 444 (1929).

53. 433 U.S. at 441-46; 424 U.S. at 18-24; 634 F.2d at 420.

54. See note 20 *supra* and accompanying text.

55. See note 52 *supra* and accompanying text.

56. 29 Cal. 3d at 535, 629 P.2d at 937, 174 Cal. Rptr. at 843; see note 16 *supra*.

Department of Health Services.⁵⁷ The Attorney General, arguing for the Department of Health Services (defendant-appellant), contended that despite any impropriety on behalf of the legislature, the trial court exceeded its authority by entering an order which it had no power to impose under separation of powers principles.⁵⁸ The appellants relied on the well settled principle that the judiciary may not compel the legislature to appropriate funds, nor order payment of funds, that have not been appropriated by the legislature for a specific purpose.⁵⁹

The supreme court disagreed with the appellant's arguments and held that the "trial court order at issue here does not compel the legislature to appropriate funds. Instead, the order simply directs the State Controller to pay the sum in question out of funds that have already been appropriated."⁶⁰ By indicating that the funds used were already appropriated to a particular department for a general purpose, the court avoided a direct confrontation with separation of powers principles.⁶¹

The court based its resolution of this issue upon conclusions drawn from two general premises. First, once funds are appropriated for a specific purpose, a court violates no separation of powers principles when it orders appropriate payments therefrom.⁶² Second, where constitutional rights are violated by a restriction superimposed upon a valid enactment, the court violates no separation of powers principles when it orders the use of appropriated funds for a purpose not contemplated by the legislature.⁶³ From these two premises, the court concluded that absent an invalid restriction in this case, the only remaining question was whether the funds used were reasonably available for payment of the attorney's fees at issue.⁶⁴

In reaching this point in their analysis, the court relied on *State Board of Education v. Levit* and *United States v. Lovett*.⁶⁵ The

57. 29 Cal. 3d at 539, 629 P.2d at 939, 174 Cal. Rptr. at 845; see note *supra*. This was the position taken by Justice Richardson in his dissent.

58. 29 Cal. 3d at 539, 629 P.2d at 939-40, 174 Cal. Rptr. at 845-46. The petitioner relied on *Myers* and its progeny. See notes 32-35 *supra*.

59. 29 Cal. 3d at 542, 629 P.2d at 941, 174 Cal. Rptr. at 847.

60. *Id.* at 559, 629 P.2d at 952, 174 Cal. Rptr. at 858 (Bird, C.J., dissenting); see notes 90-95 *infra* and accompanying text.

61. 29 Cal. 3d at 540, 629 P.2d at 940, 174 Cal. Rptr. at 846. This is a natural corollary to the *Myers* line of cases. See note 35 *supra*. Thus, a writ of mandamus may issue to compel the payment of funds for the purpose for which those funds were appropriated. *Flora Crane Serv. v. Ross*, 61 Cal. 2d 199, 204-07, 390 P.2d 193, 196-97, 37 Cal. Rptr. 425, 428-30 (1964); *People ex rel. McCauley v. Broods*, 16 Cal. 11, 33-35 (1860); *Fowler v. Peirce*, 2 Cal. 165, 167 (1852).

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

63. 29 Cal. 3d at 542, 629 P.2d at 941, 174 Cal. Rptr. at 847.

64. See notes 40-49 *supra* and accompanying text.

65. 29 Cal. 3d at 542, 629 P.2d at 941, 174 Cal. Rptr. at 847.

impact of these two cases was summarized by the court in this manner:

[T]he *Levit* and *Lovett* decisions clearly demonstrate that while the separation of powers doctrine may restrict a court from directly ordering the Legislature to enact an appropriation law, the doctrine does not preclude the judiciary from decreeing that funds that have been appropriated by the Legislature should be paid without regard to an improper or invalid legislative restriction.⁶⁶

Though the relevance of these decisions was seriously questioned,⁶⁷ the court stated that absent such an invalid restriction, whether the action by the judiciary violated separation of powers principles depended on whether the appropriated funds were reasonably available for payment of the attorney's fees in question.⁶⁸ If the funds were not reasonably available for the expenditures ordered, then the trial court violated the separation of powers doctrine by invading the province of the legislature.

The Attorney General contended that although unexhausted specific appropriations were available,⁶⁹ the term "services" ought to have been limited to those services⁷⁰ contracted for by the department.⁷¹ However, the majority held that the trial court prop-

66. *Cal. State Employees Ass'n. v. Flourney*, 32 Cal. App. 3d 219, 108 Cal. Rptr. 251 (1973). The court distinguished *Levit* on the grounds that in *Levit* an invalid restriction had been superimposed upon "an appropriation which had been made whereas in the case at bench it is alleged by petitioners that no appropriation was made rather than that an unlawful condition was imposed on the use of appropriated funds." *Id.* at 235, 108 Cal. Rptr. at 263. The same difficulty surrounding the conditional use of appropriated monies was posed in *Lovett*. *Id.* at 235, n.13, 108 Cal. Rptr. at 263, n.13. This argument is applicable in *Mandel* in that no appropriations for attorney's fees had been made and, in fact, the legislative committee had specifically deleted such from the proposed budget. Since no fees had been appropriated, no invalid restriction upon their use could have been implemented.

The majority in *Mandel*, however, argued that the restriction was upon the general operating expense appropriation which the Attorney General contended was not available for satisfaction of *Mandel's* judgment against the State.

67. *Id.* at 558, 629 P.2d at 951-52, 174 Cal. Rptr. at 857-58 (Richardson, J., dissenting).

68. 29 Cal. 3d at 542, 629 P.2d at 941, 174 Cal. Rptr. at 847. If the court had, in fact, found an invalid restriction, this may be considered dicta. However, there is some controversy about what the court relied upon in reaching their decision. See note 110 *infra* and accompanying text.

69. See CAL. GOV'T CODE § 12440 (West 1980). This section states: "The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the treasury; but a warrant shall not be drawn unless authorized by law, and unless unexhausted specific appropriations provided by law are available to meet it."

70. See note 16 *supra*.

71. The dissent by Justice Richardson stated that "'services' and 'proper expenses' must refer to those routine services voluntarily incurred by, or at the di-

erly concluded that the general operating expenses⁷² appropriated to the Department of Health Services were available for the payment of court-awarded attorney's fees against the Department.⁷³ In addition, in light of the substantial benefit to the Department and other state agencies, the fees reasonably fell within the "services" category.⁷⁴ Further, the court found that the fees also fell into the "all other proper expenses" category, thereby removing any doubt as to the general availability of funds.⁷⁵

Having held that the trial court had the authority to order payment of the attorney's fees and that the general operating expenses were reasonably available for such expenditures, the court was left with one major issue. As stated by the majority, this issue was whether the legislature may "properly disregard the finality of a court judgment and take it upon itself to readjudicate on a case-by-case basis the merits of such a judgment."⁷⁶ In other words, was the exclusion of the award of attorney's fees from the budget a valid exercise of legislative discretion? If not, did the court have any power to remedy the inequities?

In answering the first question, the court again referred to *Levit* and *Lovett* as authority for allowing the court to compel payment without regard to unlawful restrictions appended to an appropria-

rection of, the department itself in its day-to-day operations." 29 Cal. 3d at 555, 629 P.2d at 950, 174 Cal. Rptr. at 856.

"Service" and "employment" generally imply that the employer, or person to whom the service is due, both selects and compensates the employee, or person rendering the service. Black's Law Dictionary 1257 (5th ed. 1979).

72. See note 16 *supra*.

73. 29 Cal. 3d at 543, 629 P.2d at 942, 174 Cal. Rptr. at 848. On this issue, the court took judicial notice of and heavily relied upon documentary evidence furnished by amicus curiae. *Id.* at 544 n.5, 629 P.2d at 942-43 n.5, 174 Cal. Rptr. at 848-49 n.5. This evidence indicated that at several times in the past, awards of attorney's fees have been paid from operating expenses. Since the Attorney General offered no evidence that fee awards could not be paid from general operating expenses, the court concluded that this fund was generally available. *Id.* at 544, 629 P.2d at 942-43, 174 Cal. Rptr. at 848-49.

74. In his dissent, J. Richardson argued that the benefits conferred by the efforts of the attorneys in *Mandel* should be "shared by all state agencies not merely the Department of Health Services." *Id.* at 556, 629 P.2d at 950, 174 Cal. Rptr. at 856 (Richardson, J., dissenting). This, he argued, is the whole thesis of the award of attorney's fees on the substantial benefit basis. *Id.* Cf. *Vandegrift v. Riley*, 220 Cal. 340, 350-55, 30 P.2d 516, 521-23 (1934) (the supreme court issued mandamus to compel the State Controller to transfer money from emergency funds to specific departments because specific appropriations were insufficient).

75. See note 16 *supra*.

76. 29 Cal. 3d at 546, 629 P.2d at 944, 174 Cal. Rptr. at 850. C.J. Bird's dissent frames the issue differently: "[W]hether the Legislature has the constitutional power under the separation of powers doctrine to refuse to appropriate funds to pay for a legitimate legal judgment without any valid reason." *Id.* at 563, 629 P.2d at 954, 174 Cal. Rptr. at 860.

tion measure.⁷⁷ The Attorney General argued that the deletion by the legislative committee of an express line item appropriation constituted "formal action" by the legislature under section 15 of the Budget Act.⁷⁸ The court stated that if the Legislature had no valid reason for excluding the particular fee award in this case and "arbitrarily withheld the benefits which the budget act affords to other similarly situated individuals, the appropriation restriction would, of course, violate elementary equal protection principles and for that reason alone would be invalid."⁷⁹ However, the court failed to decide this issue, leaving open the question of whether or not reliance was placed upon such constitutional principles.⁸⁰

Looking for a legitimate justification for the legislature's deletion of the specific appropriation for attorney's fees, the court found that the legislative analyst's report recommending the deletion was the only apparent basis for the action.⁸¹ This, the court concluded, was essentially a readjudication of the merits of a final court decision and as such was violative of the doctrine of separation of powers embodied in article III, section 3, of the California Constitution.⁸² To hold otherwise would "deprive the judiciary of its most essential prerogative"⁸³ and would render final court judgments mere advisory opinions.⁸⁴

As to the proper remedy, the court stated that:

[i]n sum individual citizens who litigate claims against the government in our state courts are constitutionally entitled to expect that when the government loses, the Legislature will respect the final outcome of such litiga-

77. 29 Cal. 3d at 546, 629 P.2d at 944, 174 Cal. Rptr. at 850; see note 63 *supra*.

78. Cal. Stats. 1978, ch. 359, § 15, p. 1006. "No appropriation made by this act . . . may be . . . used in any manner . . . to achieve any purpose which has been denied by any of the Legislature."

79. 29 Cal. 3d at 546, 629 P.2d at 944, 174 Cal. Rptr. at 850.

80. *Id.* at 551 n.9, 629 P.2d at 947 n.9, 174 Cal. Rptr. at 853 n.9. There is some argument that the court did not rely on this. "To the extent that language in *Myers* can be read to suggest that the Legislature is not constrained by the separation of powers doctrine in exercising its appropriations power, such language conflicts with *Levit* and *Lovett* and must be disapproved." This seems to say that some reliance was placed on these decisions. However, if this were so, the remainder of the decision would be dicta. The argument to the contrary is more persuasive. See notes 40-49 *supra* and accompanying text.

81. 29 Cal. 3d at 538 n.1, 629 P.2d at 939 n.1, 174 Cal. Rptr. at 845 n.1.

82. *Id.* at 546-47, 629 P.2d at 944, 174 Cal. Rptr. 850; see note 1 *supra*.

83. *Id.* at 548, 629 P.2d at 945, 174 Cal. Rptr. at 851 (quoting *Danny v. Mottoon*, 84 Mass. (2 Allen) 361, 378 (1861)).

84. *Chadha v. Immigration and Naturalization Serv.*, 634 F.2d 408, 430 (9th Cir. 1980).

tion. The Legislature is not a supercourt that can pick and choose on a case-by-case basis which final judgments it will pay and which it will reject. If that kind of arbitrary conduct by the Legislature were to be the law, our system of justice would be subordinated to the popular vote of legislators, and our constitutional bedrock principle of separation of powers would become a shattered mass of scattered fragments.⁸⁵

Thus, Mandel was entitled to payment of the attorney's fees as ordered by the trial court.

V. THE DISSENTING OPINIONS IN *MANDEL*

In his dissent, Justice Richardson maintained that where the Legislature fails to make an appropriation, the judiciary cannot remedy any resulting inequity.⁸⁶ In effect, the courts are powerless because the legislature has the sole power of appropriation of taxes and revenues.⁸⁷ In addition, Justice Richardson continued that a claim which has been reduced to a judgment merely liquidates the claim and payment depends upon the action of the legislature, which it is free not to take.⁸⁸ Such a judgment must only be paid from appropriated funds.⁸⁹

In analyzing the majority's opinion and decision in terms of the impact it will have on the doctrine of separation of powers in the appropriations area, Justice Richardson stated that:

[t]he majority's holding . . . will allow courts to compel appropriations, contrary to the best judgment of the Legislature, by the simple device of rearranging the operating or general funds of any state agency. . . . The historic general rule which prevents either the courts or the executive from ordering appropriations is thus entirely swallowed up in the majority's newly invented exception when a court finds that funds have been "already appropriated" . . . and even though the fictitious "appropriation," if any, was unintended and inadvertent.⁹⁰

Thus, the dissent concluded that the majority avoided a separation of powers conflict merely by finding some existing appropriation in some budget of some department and by directing an order to the controller, rather than the legislature, to make payment from that source.⁹¹ Further, by using the general operating expenses of the Department of Health Services the court, according to Justice Richardson, achieved a purpose specifically unin-

85. 29 Cal. 3d at 552, 629 P.2d at 948, 174 Cal. Rptr. at 854.

86. *Id.* at 553, 629 P.2d at 948, 174 Cal. Rptr. at 854 (quoting *Myers*, 9 Cal. at 349).

87. 32 Cal. App. 3d at 234-35, 108 Cal. Rptr. at 262.

88. 29 Cal. 3d at 554, 629 P.2d at 949, 174 Cal. Rptr. at 855 (Richardson J., dissenting).

89. *Id.* See note 2 *supra* and accompanying text. "A judgment against the state, even when authorized by law, may be paid only out of appropriated funds." 36 Cal. App. 3d at 697, 111 Cal. Rptr. at 756.

90. 29 Cal. 3d at 557, 629 P.2d at 951, 174 Cal. Rptr. at 857 (Richardson, J., dissenting).

91. *Id.*

tended by the legislature and, in effect, struck section 15 from the Budget Act.⁹²

In his attack on the majority opinion, Justice Richardson successfully attempted to distinguish *Levit* and *Lovett* from the instant case. He stated that neither case was relevant because neither involved a court-ordered appropriation from general operating expenses.⁹³ These cases, on their facts, involved payments ordered from appropriations already made for the same general purposes for which they were appropriated.⁹⁴ In *Mandel*, the payments were to come from a general operating expense which was appropriated for purposes other than paying the attorney's fees in question. In addition, *Levit* and *Lovett* involved restrictions which were clearly discriminatory and unconstitutional.⁹⁵ No such restrictions were involved in *Mandel*.

Perhaps the most effectively reasoned opinion in this case was the dissent of Chief Justice Bird.⁹⁶ Though not wholly dissatisfied with the final result, Chief Justice Bird disapproved of the means used to achieve it. In the final analysis, Chief Justice Bird's dissent simply amounts to her unwillingness to allow one wrong to be corrected with another wrong.

Although the legislature may place reasonable restraints upon the courts,⁹⁷ the dissent maintained that it may not readjudicate the merits of a final court judgment or exercise judicial functions.⁹⁸ Conversely, the dissent continued, it is impermissible for

92. *Id.* at 556-57, 629 P.2d at 950-51, 174 Cal. Rptr. at 856-57 (Richardson, J., dissenting). What is the effect of such a deletion by the people's elected representatives? Section 15 provides the answer in these words: "No appropriation made by this act . . . may be . . . used in any manner . . . to achieve any purpose which has been denied by any formal action of the Legislature . . ." It is apparently conceded that the deletion of the item from the proposed budget constituted such "formal action." *Id.* at 556, 629 P.2d at 950, 174 Cal. Rptr. at 856.

93. *Id.* at 558, 629 P.2d at 952, 174 Cal. Rptr. at 858; *see* notes 40-50 *supra*.

94. 29 Cal. 3d at 558, 629 P.2d at 952, 174 Cal. Rptr. at 858.

95. *Id.*

96. *Id.* at 559, 629 P.2d at 952, 174 Cal. Rptr. at 858.

97. "[T]he Legislature may put reasonable restrictions upon Constitutional functions of the courts provided they do not defeat or materially impair the exercise of those functions." *Millholen v. Riley*, 211 Cal. 29, 34, 293 P. 69, 71 (1930) (quoting *Brydonjack v. State Bar*, 208 Cal. 439, 444, 281 P. 1018, 1020 (1929)).

98. *Hodges v. Snyder*, 261 U.S. 600 (1923). "[T]he private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation." *Id.* at 603 (citing *United States v. Klein*, 80 U.S. (13 Wall) 128, 145-48); *Chadha v. Immigration & Naturalization Serv.*, 634 F.2d 408 (9th Cir. 1980).

"[In this area of deportation hearings], the Legislative branch has dis-

the courts to “intrude on the legislative power of the purse,” especially when the legislature has not only failed to appropriate funds in a particular case, but has twice refused to do so.⁹⁹ Thus, in the opinion of Chief Justice Bird, both the judiciary and the legislature in *Mandel* overstepped their respective bounds: the legislature, by refusing to pay a valid legal judgment that the claimant had against the state,¹⁰⁰ and the judiciary, by compelling payment of funds appropriated for a different purpose.¹⁰¹

After examining the execution exemption,¹⁰² which permits the Legislature to unconstitutionally veto or annul a court’s final judgment against the state, Chief Justice Bird concluded that this doctrine should follow in the same path as governmental tort immunity and be discarded.¹⁰³ If this would occur, a court could then enforce its orders against the state in the same manner that it would against a private individual, that is, by writ of execution.¹⁰⁴ Chief Justice Bird reasoned that if the State of California expects its citizens to pay their taxes, then the state cannot ignore its obligations to pay its citizens.¹⁰⁵

The Chief Justice went on to propose a method by which both legislative and judicial boundaries could be maintained:

rupted or severed the judiciary’s relation to the alien in a substantial way. Aliens are no longer guaranteed the constraints of articulated reasons and stare decisis in the interpretation of the Immigration & Naturalization Act . . . We are of the view that this departure from the separation of powers norm is not necessary.”

Id. at 431; *Guy v. Hermance*, 5 Cal. 73 (1855). “The Legislature cannot exercise judicial functions . . .” *Id.* at 74; *Denny v. Matoon*, 84 Mass. (2 Allen) 361 (1861). “The right to review, or to try anew facts which have been determined by a verdict or decree, depends on fixed and well settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action.” *Id.* at 379.

99. 29 Cal. 3d at 571, 629 P.2d at 960, 174 Cal. Rptr. at 866 (Bird, C.J., dissenting).

100. *Id.* at 564, 629 P.2d at 955, 174 Cal. Rptr. at 861 (Bird, C.J., dissenting).

101. *Id.* at 572-73, 629 P.2d at 960-61, 174 Cal. Rptr. at 866-67 (Bird, C.J., dissenting).

102. “[A] judgment against the state . . . merely liquidates and establishes the claim against the state, and . . . such judgment cannot be collected by execution against the state or its property . . . it remains for the state, after such judgment, to provide for the payment thereof in such manner as it sees fit, or to refuse to do so at its pleasure . . .” 169 Cal. at 135, 145 P.2d at 1026. This was later codified.

CAL. GOV’T. CODE § 965.5(b) (West 1980).

103. 29 Cal. 3d at 570, 629 P.2d at 959, 174 Cal. Rptr. at 865 (Bird, C.J., dissenting).

104. *Id.* at 571, 629 P.2d at 960, 174 Cal. Rptr. at 866 (Bird, C.J., dissenting). A writ of execution is a writ to put in force the judgment or decree of a court. “The award of execution is a part, and an essential part of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it.” *Id.* (quoting from *Gordon v. United States*, 69 U.S. (2 Wall) 561 (1865)).

105. *Id.* at 560, 629 P.2d at 953, 174 Cal. Rptr. at 859.

The plaintiff should have a valid legal means by which to obtain state compliance with her judgment. The trial court should follow the traditional method courts use to execute valid legal judgments against private parties. In this way, the courts would use inherent judicial power to remedy an unconstitutional act instead of usurping the legislative power of the purpose by deeming that an appropriation was made which, in fact, was refused.¹⁰⁶

In addition, Chief Justice Bird's dissent recognized that where the courts are allowed to usurp the legislative power of the purse, there exists the possibility of conflict between the branches of the government. This conflict could be avoided, however, by abolition of the execution exemption and by recognition that it is a violation of the separation of powers principles for the legislature to deny a remedy to a citizen who possesses a valid legal judgment against the state.¹⁰⁷ If this proposal was followed, Chief Justice Bird asserted that this would eliminate the possibility of this particular problem from plaguing the system in the future by removing its root cause. Further, Chief Justice Bird's method usurps no power of the legislature in that it contrives a novel method of avoiding separation of powers issues.¹⁰⁸

VI. IMPACT OF *MANDEL*

The impact of a case of this nature is difficult to determine with any accuracy. According to the dissent of Justice Richardson, the majority's holding created such an exception to the traditional rule as to "swallow" it up in a newly created exception.¹⁰⁹ However, the majority noted that the courts still have no power to compel the Legislature to enact an appropriation measure or to compel payment absent any available appropriated funds.¹¹⁰

From the majority's opinion it is unclear what the court relied on in reaching its decision. If the court relied on the law regard-

106. *Id.* at 572-73, 629 P.2d at 960-61, 174 Cal. Rptr. at 866-67.

107. *Id.* at 573, 629 P.2d at 961, 174 Cal. Rptr. at 867.

108. "A confrontation between the branches of government would be overt if this court (1) acknowledged that the judicially created common law rule exempting the state from its own execution laws is anachronistic; and (2) recognized that it is a violation of the separation of powers clause for the Legislature effectively to deny a remedy to a citizen with a valid legal judgment against the state."

Id.

"Under the resolution suggested herein, the legislature's constitutional authority to appropriate funds would remain intact, and the courts' power to adjudicate and enforce legal claims would be upheld." *Id.*

109. See note 90 *supra* and accompanying text.

110. 29 Cal. 3d at 551 n.9, 629 P.2d at 947 n.9, 174 Cal. Rptr. at 853 n.9.

ing an unconstitutional restriction appended to an otherwise valid enactment¹¹¹ then the precedent of *Levit* and *Lovett* was followed.¹¹² However, it appears that the court relied on the proposition that the legislature had readjudicated the merits of a final court decision in reaching its conclusion not to appropriate the funds for payment of the attorney's fees. If this was so, then by overriding the separation of powers doctrine that has traditionally been upheld in this area, the court effectively overruled *Myers* and its progeny.¹¹³

In any event, it does not appear that *Mandel* will be the last case involving these issues. Had the majority followed the method proposed by Chief Justice Bird in her dissent, rather than creating a new method of circumventing the separation of powers doctrine, then this area of law may very well have been settled.

VII. CONCLUSION

In *Mandel*, the practical effects of not granting the attorney's fees would have had repercussions. First, *Mandel* would have been denied a substantial recovery to which she was entitled. Having expended funds for representation and having conferred a substantial benefit upon the public and the state, she would have had to absorb the costs herself, something she may not have been able to do. Second, in such a situation, both the state and the public would have received a substantial windfall. It seems that from the \$2,000,000 saved by not paying vacation time on Good Fridays the state could set aside a portion for payment of fees of this nature.

The court apparently took these considerations into account in reaching their decision. However, instead of laying the problem to rest with a definitive ruling, this court has left the door open to further abuses of the system by both the legislature and the judiciary.

B. FREEDOM OF SPEECH

1. *Libel and Slander Actions Limited in Local Government Controversies: Okun v. Superior Court*

In *Okun v. Superior Court*,¹ the California Supreme Court lim-

111. See notes 37-50 *supra*.

112. See note 66 *supra* and accompanying text.

113. See notes 32-36 *supra* and accompanying text.

1. 29 Cal. 3d 442, 629 P.2d 1369, 175 Cal. Rptr. 157 (1981). This action originated when a condominium developer charged libel and slander against certain individuals who launched a successful campaign to repeal an ordinance allowing the developer to construct a large condominium project. The original

ited libel and slander actions brought as a result of political rhetoric during a local land use controversy.² A letter to the editor by the petitioners³ implying that city council members were motivated by personal gain in their dealings with the respondent's condominium development project was held to be well within the bounds of protected political debate.⁴ The court pointed out that the first amendment protects the use of epithets, fiery rhetoric, or hyperbole during public debate, including attacks against public officials.⁵ A second letter, written to the mayor, through a local newspaper editorial page, drew an analogy between a particular novel involving corrupt politicians and a Florida land deal, and the relationship between the respondent and the city council. The letter was determined to be nothing more than opinion under the same constitutional protections.⁶ Finally, an alleged civil conspiracy among the petitioners to discredit and destroy the respon-

complaint alleged ten causes of action against various defendants. Demurrers were sustained as to five, while four others were dealt with by the supreme court in *Okun*. One was granted leave to amend.

2. The respondent purchased 10 acres of Beverly Hills property in 1977 which adjoined city-owned parcels. The respondent initiated discussions with the city council to trade parcels so that each could own contiguous land. The council agreed to the exchange and adopted a zoning ordinance enabling the respondent to construct condominiums on the land. The petitioners responded by circulating and filing a petition to allow a public referendum on the ordinance. In a subsequent election, the ordinance was rejected and repealed by the electorate.

3. The letter stated in pertinent part:

Mysteriously, one week after the voters approved the refurbishing of their water system, the city announced that its cost projections to revitalize the wells were \$5 million short. Amazingly, a year later the claim went up to \$12 million more than the voter-approved bonds. But, without asking the voters again, in December, 1976, the council closed down the wells and sold off the land on which they were located.

29 Cal. 3d at 449, 629 P.2d at 1373, 175 Cal. Rptr. at 161.

The respondent alleged that petitioners intended the letter to mean that there was a conspiracy between the respondent and the council involving bribery and corruption.

4. *Gregory v. McDonnell Douglas Corporation*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976). The statements made in the letter, according to the court, implied nothing more than that the respondent and certain council members were acting in their own "selfish-interest"; therefore, the letter was within the accepted standards of political debate.

5. The court determined that the respondent became a public figure by participating in the controversy voluntarily. *Vegod Corp. v. American Broadcasting Co.*, 25 Cal. 3d 763, 603 P.2d 14, 160 Cal. Rptr. 97 (1979).

6. The open letter to the mayor stated in pertinent part: "The entire industrial zone scenario reads uncomfortably like a John D. MacDonald novel of Florida land wheeler-dealers mired up to their necks in deception of the public." 29 Cal. 3d at 453, 629 P.2d at 1375, 175 Cal. Rptr. at 163.

dent's reputation did not state a cause of action because it failed to specify the commission of a civil wrong causing damages. The court reasoned that since the allegedly slanderous and libelous conduct of the petitioners was insufficient to state a cause of action, the conspiracy allegations must likewise fail.⁷

C. PREEMPTION

1. *Validity of Local Taxation Powers Within A State Regulated Field: Pines v. City of Santa Monica*

In Pines v. City of Santa Monica, the California Supreme Court held that there was no preemption of local tax laws on condominium development even though the state legislature had specifically regulated the field under the Subdivision Map Act.

INTRODUCTION

The City of Santa Monica imposed a one time tax of \$1000 upon each new condominium built, or for the conversion of existing buildings into condominiums.¹ The building of condominiums and matters relating thereto are regulated by comprehensive state statutes as a matter of statewide concern, which preempt conflicting regulations by charter cities.² The California Supreme Court in *Pines v. City of Santa Monica*³ upheld this tax as valid, holding that the imposition of the tax, solely for revenue purposes, was not preempted by the statewide regulations concerning the building of condominiums and matters relating thereto.⁴ The court placed importance on the fact that the preempted area, governed by the Subdivision Map Act,⁵ neither imposed nor prohibited the imposition of taxes,⁶ but rather dealt primarily with methods of construction and the requirements involved in the

7. The respondent alleged that the petitioners were motivated by malice, and ill will and conspired to discredit and destroy the respondent's reputation in the community by doing the acts mentioned in the previous causes of actions. Since the letters were not deemed as such by the court, this claimed cause of action was held insufficient. In *Unruh v. Truck Ins. Exch.*, 7 Cal. 3d 616, 498 P.2d 1063, 102 Cal. Rptr. 815 (1972) a complaint alleging civil conspiracy stated a cause of action when it asserted the commission of a civil wrong caused damages. Here, the respondent failed to state a cause of action, and the civil conspiracy claim was therefore not actionable.

1. *Pines v. City of Santa Monica*, 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

2. *See id.* at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337.

3. 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981). The majority opinion was written by Justice Newman, joined by Chief Justice Bird and Justices Tobriner, Mosk, Richardson and Murphy. Justice Marshall concurred in the conclusion but wrote a separate opinion.

4. 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336.

5. CAL. GOV'T CODE §§ 66410 et. seq. (West Supp. 1980).

6. 29 Cal. 3d at 659, 630 P.2d at 522, 175 Cal. Rptr. at 337.

creation of subdivisions.⁷

The respondents in this case consisted of eight condominium developers, who were seeking a refund of taxes paid as required by the Santa Monica Condominium Tax Law, which was imposed by local ordinance.⁸ The ordinance required the payment of a tax or an execution of a lien agreement prior to the issuance of a condominium license.⁹ This was the method of enforcement since the condominium license was the prerequisite to an application for the other necessary building permits.¹⁰ The respondents contended that the local tax ordinance was invalid, basing their contention on the principle that state legislation in an area of statewide concern which is comprehensively covered such as the Subdivision Map Act, preempts conflicting regulation.¹¹ As support for their contention, the builders pointed both to the discouraging effect on condominium development to demonstrate the conflict with the state regulated area,¹² as well as case law which has interpreted the Map Act as a limitation on the power of local governments to impose taxes in areas related to the Act.¹³

HISTORY

The power of a local government to tax has been a long standing principle of constitutional law.¹⁴ The necessity for a chartered city to raise revenue for local purposes has been held to be essential to its very existence and its ability to serve a useful purpose.¹⁵ In support of this principle, the California Constitution grants the power of local governments to tax,¹⁶ provided that the local power does not directly conflict with a state statute or statutory

7. *Id.* at 665, 630 P.2d at 525, 175 Cal. Rptr. at 340 (concurring opinion).

8. *Id.* at 658, 630 P.2d at 521, 175 Cal. Rptr. at 336. The builders sought \$138,000 paid in taxes plus interest. The tax imposed is called a "condominium business license tax" by the SANTA MONICA MUN. CODE art. VI, ch. 6B, §§ 6650 et. seq. *Id.*

9. 29 Cal. 3d at 659, 630 P.2d at 521, 175 Cal. Rptr. at 336.

10. *Id.*

11. *Id.* at 659-60, 630 P.2d at 522, 175 Cal. Rptr. at 337.

12. *Id.* at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339.

13. *Id.* at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337. (all cases relied on to support this proposition are from the California Court of Appeals).

14. *United States v. New Orleans*, 98 U.S. 381, 392 (1878).

15. *Id.* at 393.

16. CAL. CONST., art. XI, § 5(a); see *Weekes v. City of Oakland*, 21 Cal. 3d 386, 392, 579 P.2d 449, 452, 146 Cal. Rptr. 558, 561 (1978) (citing CAL. CONST., art. XI, § 5(a)).

scheme.¹⁷ Charter cities¹⁸ not only have power to tax but also to govern municipal affairs that are within the scope of their charters, with such powers created therein prevailing over general state law.¹⁹ However, charter cities are subject to state laws when the area the city attempts to regulate is a matter of statewide concern.²⁰ The charter cities are then subject to the applicable state laws if the purpose and intent of the enactment of those laws are to control the field regulated and to exclude regulation by any municipality.²¹

The Subdivision Map Act established statewide requirements for land development and planning.²² This is to both assure that proper improvements are made by developers so that no undue burdens are placed on the taxpayer, as well as to assist in the coordination of development in line with the plans laid out by local authorities.²³ The Act was rewritten and re-enacted in 1937 in the California Business and Professions Code,²⁴ and then in 1964 it was again re-enacted in substantially the same language in the California Government Code.²⁵ The Act allows for local regulation for the design and improvement of subdivisions,²⁶ and also for local procedural requirements.²⁷ The Act requires the submission of a final map to assure that conditions required when the initial map was filed have been complied with.²⁸ The Act also has

17. *Weekes v. City of Oakland*, 21 Cal. 3d 386, 392, 579 P.2d 449, 451-52, 146 Cal. Rptr. 558, 560-61 (1978) (tax power restricted only by charter of the city or when "in direct and immediate conflict with a state statute or statutory scheme.").

18. Charter cities are those organized under a charter. CAL. GOV'T CODE § 34101 (West 1968). Cities organized under the general laws of the state are "general law cities," pursuant to CAL. GOV'T CODE § 34102 (West 1968).

19. *Sonoma County Organization of Public Employees v. County of Sonoma*, 23 Cal. 3d 296, 315, 591 P.2d 1, 12, 152 Cal. Rptr. 903, 914 (1979).

20. *Id.* at 315-16, 591 P.2d at 12, 152 Cal. Rptr. at 914.

21. *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61-62, 460 P.2d 137, 140, 81 Cal. Rptr. 465, 468 (1969). The court in *Bishop* stated that it is a judicial function to determine whether an area legislated by the state is a matter of statewide concern. The legislature cannot make a matter a statewide concern simply by labeling it as such. The courts will however give great weight to the purpose and intent of the legislature in enacting the legislation. *Id.* at 62-63, 460 P.2d at 138, 81 Cal. Rptr. at 469.

22. *Carmel Valley View, Ltd. v. Maggini*, 91 Cal. App. 3d 318, 320, 155 Cal. Rptr. 208, 210 (1979).

23. *Bright v. Board of Supervisors*, 66 Cal. App. 3d 191, 194, 135 Cal. Rptr. 758, 759 (1977). See generally Note, *Land Development and the Environment: The Subdivision Map Act*, 5 PACIFIC L.J. 55 (1974).

24. CAL. BUS. & PROF. CODE § 11500 (West 1964) (later repealed by Stats. 1974, c 1536, p 3464, § 1 March 1, 1975).

25. CAL. GOV'T CODE §§ 66410 et. seq. (West Supp. 1980).

26. CAL. GOV'T CODE § 66411 (West Supp. 1980).

27. CAL. GOV'T CODE § 66478.1 (West Supp. 1980) (includes statement that legislature intended § 66478.1 to implement art. XV, § 2); see also *Pines*, 29 Cal. 3d at 659, 630 P.2d at 522, 175 Cal. Rptr. at 337.

28. CAL. GOV'T CODE §§ 66458, 66473 (West Supp. 1980).

provisions for the imposition of fees in order to defray costs in operating the approval process itself.²⁹ However, within the Act there is no language indicating any prohibition of taxes, nor any language indicating an intent to preempt local tax power.³⁰ It is the absence of such express language as well as the importance the court placed on the need of a city to generate revenue through taxes which led the court to conclude that the Santa Monica Condominium Tax did not contravene the purpose or intent of the Subdivision Map Act.³¹

ANALYSIS

The court's conclusion that the Subdivision Map Act neither excluded nor regulated any aspect of taxes led the court to conclude as well that the local tax ordinance and the Subdivision Map Act do not conflict with each other.³² The court recognized the great importance of maintaining the taxing power of a community.³³ Also, prior judicial decisions of this court have held that whether or not an area is preempted by state law, the cities are still free to levy taxes for revenue purposes.³⁴ This is especially true when the tax does not interfere with the preempted field of law.³⁵

For example, in the case of *Riveria v. City of Fresno*, the court upheld a local tax on intra-state telephone communications and the interstate travel of gas and electrical energy through pipelines or wires throughout the Fresno area.³⁶ The area of utilities is a highly regulated and preempted field.³⁷ The field is further preempted by the state's approval of Local Sales and Use Tax laws which covers storage or consumption of the items taxed by the

29. CAL. GOV'T CODE §§ 66451.2, 66483 et. seq. (West Supp. 1980).

30. *Pines*, 29 Cal. 3d at 659, 630 P.2d at 522, 175 Cal. Rptr. at 337. (No revenue taxes are imposed or prohibited by the act's words, and it contains no statement of intent to preempt local tax powers.)

31. See 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336; see also *id.* at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339.

32. *Id.*

33. See 29 Cal. 3d at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337. The court stated that "[t]he taxation power is vital and is granted to charter cities by the constitution. Their ability to impose revenue taxes can be curtailed only by the charter itself or when 'indirect and immediate conflict with a state statute or statutory scheme.'" *Id.* at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337 (Citations omitted).

34. *Riveria v. City of Fresno*, 6 Cal. 3d 132, 139, 490 P.2d 793, 797, 98 Cal. Rptr. 281, 285 (1971).

35. *Ainsworth v. Bryant*, 34 Cal. 2d 465, 477, 211 P.2d 564, 571 (1954).

36. *Riveria*, 6 Cal. 3d 132, 490 P.2d 793, 98 Cal. Rptr. 281.

37. *Id.* at 139, 490 P.2d at 797, 98 Cal. Rptr. at 285.

Fresno use tax.³⁸ The court held that the Fresno tax was substantially a different tax as allowed for by the state scheme since it dealt with intangible personal property, whereas the state tax covered tangible personal property.³⁹ The support given to local taxes in preempted fields is demonstrated by the liberal construction given to local taxes in the face of all the state sales and use taxes, as well as the fact that the utility industry is a highly regulated field.⁴⁰ The *Fresno* holding established the premise that local taxes are not restricted solely because the particular area the tax is imposed on is otherwise regulated by the State; for the tax to be restricted it must be in direct conflict with the regulated area.⁴¹ In the case at bar, the Subdivision Map Act had absolutely no provisions for taxes.⁴² In view of the fact that the *Fresno* court upheld a local tax in an area regulated by state tax laws as well as utility regulations it was difficult for the *Pines* court to perceive how a local condominium tax in an area where the State had regulated, which had no provisions with respect to taxes at all, could be in conflict with that regulated area. Further, the imposition of taxes in preempted fields of law had been upheld in other contexts similar to the present case, so long as the tax did not impose additional requirements in the regulated area, other than the payment of the tax.⁴³ The *Pines* court easily distinguished cases in which tax ordinances were struck down as being preempted,⁴⁴ because in those cases the taxes were coupled with substantive reg-

38. *Id.* at 136-38, 490 P.2d at 795-96, 98 Cal. Rptr. at 283-84.

39. *Id.* at 138, 490 P.2d at 96, 98 Cal. Rptr. at 284.

40. *See id.*

41. *See Ainsworth*, 34 Cal. 2d at 477, 211 P.2d at 571.

42. *Pines*, 29 Cal. 3d at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339.

43. *See In re Groves*, 54 Cal. 2d 154, 156-57, 351 P.2d 1028, 1030-31, 4 Cal. Rptr. 844, 846-47 (1960) (court upheld a local tax regardless if the area taxed is occupied by state law regulation. The city was permitted to enforce the tax by requiring a license when dealing with milk products, an area regulated by the state); *Ainsworth*, 34 Cal. 2d 465, 211 P.2d 564 (court held a local purchase and use tax on a retailer of intoxicating liquors was not preempted by the state regulation in that field); *In re Galusha*, 184 Cal. 697, 195 P. 406 (1949) (court held that the imposition of an occupational tax did not place additional restrictions on the manner in which the license was used, and therefore there was no interference with the preempted area or state affairs).

The above cases are similar to the *Pines* case in that all allow an additional tax or fee in a regulated area so long as the tax does not change the actual regulations that will be subject to the surcharge.

44. 29 Cal. 3d at 661-62, 630 P.2d at 523, 175 Cal. Rptr. at 338. *See also Agnew v. City of Culver City*, 51 Cal. 2d 474, 334 P.2d 571 (1959) (a license-tax ordinance was struck down on the basis it required additional licenses for contractors who already held valid state contractors licenses); *Agnew v. City of Los Angeles*, 51 Cal. 2d 1, 330 P.2d 385 (1958) (struck down license-tax ordinance requiring additional licenses).

ulations far beyond those provided for by the state scheme.⁴⁵

The respondents relied on contrary case law of lower courts to support their contention that any additional regulations in a preempted area of law should not conflict with, and must reasonably relate to, the area regulated.⁴⁶ The California Court of Appeals held on several occasions that fees or taxes used for revenue purposes did not reasonably relate to the regulated area. The respondents used those cases to invoke the canon that when a statute is re-enacted in substantially the same language, such as the Subdivision Map Act was, the adoption of prior judicial constraints is required.⁴⁷ The court in *Pines*, however, found that canon inapplicable, based on their conclusion that "local taxes generally do not conflict with state regulatory laws."⁴⁸ The *Pines*' court held a local government's tax power to be so fundamental that in order for it to be preempted, the state's intent to preempt must be clear, which it was not in this case.⁴⁹ The court overruled the cases relied on by the respondents, finding no conflict with the state scheme for regulating subdivisions.⁵⁰

Addressing the developer's contention that the tax discouraged condominium development, the court did not agree that the possi-

45. See *Pines*, 29 Cal. 3d at 662, 630 P.2d at 523, 175 Cal. Rptr. at 338; *In re Groves*, 54 Cal. 2d 154, 157, 351 P.2d 1028, 1031, 4 Cal. Rptr. 844, 847 (1960).

46. 29 Cal. 3d at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337. See also *Benny v. County of Alameda*, 105 Cal. App. 3d 1006, 1011, 164 Cal. Rptr. 776, 779 (1980) (Imposition of a fee as a condition precedent to approval of a final map is inconsistent with the Subdivision Map Act); *Santa Clara County Contractors etc. Ass'n v. City of Santa Clara*, 232 Cal. App. 2d 564, 572-78, 43 Cal. Rptr. 86, 89-95 (1965) (Ruled a city ordinance requiring a fee from every subdivider to be used for general revenue purpose was invalid); *Newport Bldg. Corp. v. City of Santa Ana*, 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (1962) (Court held a city ordinance requiring \$50 fee payment per lot as a condition precedent to receive approval of the subdivision map to cover expenses for parks, recreation, and fire protection invalid under the Subdivision Map Act); *Kelber v. City of Upland*, 155 Cal. App. 2d 631, 636-38, 318 P.2d 561, 564-66 (1957) (The court allowed for supplemental regulations which did not conflict and which reasonably related to the state statutory scheme. With respect to a fee provision to provide funds for general revenue, the court concluded such fee provision did not reasonably relate.)

47. See *State of South Dakota v. Brown*, 20 Cal. 3d 765, 774, 576 P.2d 473, 479, 144 Cal. Rptr. 758, 764 (1978). The court refers to the rule as a "general rule" that when a law is re-enacted in identical language the new law is given the same fundamental meanings as the old. *Los Angeles Met. Transit, Authority v. Brotherhood of Railroad Trainmen*, 54 Cal. 2d 684, 688-89, 355 P.2d 905, 907-10, 8 Cal. Rptr. 1, 3-6 (1960) (presume same judicial meaning of re-enacted statute).

48. 29 Cal. 3d at 662, 630 P.2d at 524, 175 Cal. Rptr. at 339.

49. *Id.*

50. *Id.* at 664, 630 P.2d at 525, 175 Cal. Rptr. at 340. (overruled the cases cited in note 46 *supra*).

ble adverse effects of the tax supported the developer's argument that, instead of merely raising revenue, the tax regulated condominium development.⁵¹ In his concurring opinion, Justice Marshall pointed out that a decline in construction may have been caused by other factors, such as inflation or the builders' own tax rebellion.⁵²

CONCLUSION AND CASE IMPACT

What led the court to conclude the tax did not contravene the preempted area of subdivisions by the Subdivision Map Act was the court's determination that despite possible effects of the tax, the condominium building tax placed no additional regulations on the actual manner in which condominiums were built.⁵³

The result reached by the court further strengthens local tax power in preempted areas of law. The fact that an area of law is preempted will only prevent local legislation from directly modifying or changing the substance of the regulation.⁵⁴ However, local legislation, such as taxation, which deals with a preempted area of law, will not be restricted so long as the substance of the preempted area is left unchanged.⁵⁵

III. CIVIL PROCEDURE

A. CLASS ACTIONS

1. *Denial of Class Certification Because of Antagonistic Class Members: Richmond v. Dart Industries*

In *Richmond v. Dart Industries Inc.*¹, the California Supreme

51. *Id.* at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339.

52. *Id.* at 665, 630 P.2d at 525, 175 Cal. Rptr. at 340.

53. *See* 29 Cal. 3d at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339. Despite the fact that the ordinance may discourage condominium development, the court concluded that this did not merit the conclusion that the tax regulated as well. *Id.*

54. *See* notes 34 and 35 *supra* and accompanying text.

55. *See* note 43 *supra* and accompanying text.

1. 29 Cal. 3d 462, 629 P.2d 23, 174 Cal. Rptr. 515 (1981). Dart Industries developed a subdivision of recreational homesites called the Tahoe Donner Subdivision in 1971. The development project consisted of approximately 6,000 lots near Truckee, California. Each individual who purchased a lot in the subdivision was given a copy of the final subdivision public report which assured adequate water supply, sewage treatment, and recreational facilities for the entire development. Later this action arose under a complaint alleging that Dart Industries had violated California Business & Professional Code § 11025 by failing to provide "adequate amenities and utilities." The plaintiffs also sought to prove common law fraud and negligent misrepresentation by Dart Industries' alleged failure to provide adequate maintenance, water supply, sewage treatment, and recreational facilities. The plaintiff class sought relief through rescission, punitive damages, declaratory relief, and requested formation of a constructive trust.

Court reversed a lower court which had refused to certify an ascertainable class because of possible antagonism between potential class members.² The trial court had specifically held that a motion to certify a class must be denied if a defendant opposing the certification could show any antagonism between the members of the class and the named plaintiffs.³ The California Supreme Court, relying on precedent,⁴ held that if a party opposing class certification presents evidence of "widespread antagonism to the class suit" by some class members, then the adequacy of class representation by the named plaintiffs is brought into question⁵ and the certification should be denied.⁶ Furthermore, the court noted that in this situation, the conflict must go to the very subject matter of the litigation.⁷ Therefore, the mere fact of antagonism among class members in and of itself is not grounds for denial of certification, unless it can be shown that antagonism on the part of members of a class is widespread *and* goes to the very subject matter of the litigation.

The court considered a second issue which, in the its opinion,

2. 29 Cal. 3d at 479, 629 P.2d at 33, 174 Cal. Rptr. at 525. The ascertainable class was represented at the certification hearing as a group of past and present owners of recreational home sites developed by the defendant at the Tahoe Donner subdivision who had received the Final Subdivision Public Report. 29 Cal. 3d at 467, 629 P.2d at 26, 179 Cal. Rptr. at 518.

3. A survey conducted among the owners of the recreational sites of Tahoe Donner showed that approximately six percent of the potential class members might be antagonistic. The survey consisted of a flyer questionnaire mailed to the 2600 lot owners. Of the 2600 that were sent out, 325 responded. The facts showed that out of the 325 who responded, 266 indicated that "Tahoe Donner was a fine project" and that Dart was "meeting their commitments." On the other hand, 41 responded indicating that they were "not satisfied with Dart's efforts to met their commitments" and 18 returned the flyer unmarked. The trial court in denying the certification relied heavily on this survey.

4. The two main cases that the court relied on are *Fanucchi v. Coberly-West Co.*, 151 Cal. App. 2d 72, 311 P.2d 33 (1957) and *Hebbard v. Colgrove*, 28 Cal. App. 3d 1017, 105 Cal. Rptr. 172 (1972). In *Fanucchi*, the court held that a class was certifiable even though one-third of the proposed class signed affidavits stating that they did not want to be a part of the class. The *Hebbard* court held that several antagonistic class members could not defeat certification. The court also cited other cases and authority to establish the fact that antagonism must be widespread among class members in order to bar certification. *See, e.g.*, *Bailey v. Ryan Stevedoring Co., Inc.*, 528 F.2d 551, *cert. denied*, 429 U.S. 1052 (1976).

5. 29 Cal. 3d at 470, 629 P.2d at 28, 174 Cal. Rptr. at 520.

6. The court in making this point said that it is obvious that to not deny certification in a situation when there was widespread antagonism would defect the very purpose of class certification. *Id.* at 474, 692 P.2d at 30, 175 Cal. Rptr. at 522.

7. *Id.* at 470, 629 P.2d at 28, 175 Cal. Rptr. at 520.

appeared "to be one of first impression" in California.⁸ The defendant in *Richmond* claimed that since the action threatened its financial stability, the prayer for rescission or punitive damages by the class would create conflicting interests between the named plaintiffs and the absent class members because the named plaintiffs relied upon the defendant for certain services.⁹ In resolving this issue, the court considered methods that other courts had used in this situation, and followed the Pennsylvania decision of *Tober v. Charnita, Inc.*¹⁰ The *Tober* court, while recognizing potential for a conflict of interest between class members, stated that it was not prepared to deny certification of a class upon the mere prospect of a conflict which may or may not arise in the future.¹¹ The California Supreme Court agreed with the *Tober* court's view, noting especially that a trial court has continuing jurisdiction to de-certify a class in the event that evidence of actual conflict is later presented.¹² Finally, the court noted that the seeking of common relief is no longer a prerequisite to a class suit and that certification may be granted even though it includes a request for rescission and punitive damages.¹³

As a result of the court's ruling in *Richmond*, greater certainty and direction exists for trial courts in determining when certification of classes is proper. Furthermore, California courts now have precedent on the issue of conflicting prayers for damages and rescission when they arise in class suits.

B. DISMISSAL OF ACTIONS

1. *Voluntary Dismissal Under Section 581: Wells v. Marina City Properties, Inc.*

Since the turn of the century, California has recognized the limits within which a voluntary dismissal may be effected pursuant to subdivision 1 of the California Code of Civil Procedure Section 581.¹ In 1902, *Goldtree v. Spreckles*² established that such a right

8. *Id.* at 475, 629 P.2d at 31, 175 Cal. Rptr. at 523.

9. *Id.*

10. 58 F.R.D. 74 (M.D.Pa. 1973). In *Tober*, a similar issue was raised involving a prayer for damages or rescission. The named plaintiffs sought an option to gain relief by either rescinding a land purchase or retaining possession of the land and seeking damages. An argument was raised that there was a possibility that those who sought rescission might become adverse to those who wished to retain possession of the land.

11. *Id.*

12. The court's rationale was that it is preferable to defer a decision to deny class certification until after notice has been given and the trial court has more complete information. Any other ruling would merely invite speculation by the courts. 429 Cal. 3d at 476, 629 P.2d at 32, 175 Cal. Rptr. at 523.

13. *Id.* at 477, 629 P.2d at 33, 175 Cal. Rptr. at 524.

1. § 581 of the California Code of Civil Procedure provides that:

was ended when a trial court order sustained a defendant's general demurrer without leave to amend. In *Wells v. Marina City Properties, Inc.*,³ the California Supreme Court clarified a controversy regarding section 581, subdivisions 1 and 3 concerning whether a plaintiff can voluntarily dismiss a complaint under similar circumstances. The *Wells* court held that a plaintiff cannot do so after a trial court has granted leave to amend after sustaining a general demurrer.⁴

In 1947, pursuant to *Goldtree*, subdivision 1 of section 581 was amended to grant a plaintiff the right to dismiss a complaint at any time before the "actual commencement" of trial, as contrasted with the previous version's "before trial" provision. The plaintiff in *Wells* claimed that the 1947 amendment preserved the right of voluntary dismissal until the occurrence of one of the specific acts deemed to constitute the actual commencement of trial. The court, however, found that the cases used by the plaintiff to support this claim had drawn incorrect conclusions.⁵ The Court also noted that cases decided after the 1947 legislation amendment relied upon the *Goldtree* definition of a trial, which included an order sustaining a demurrer.⁶

An action may be dismissed in the following cases:

1. By plaintiff, by written request to the clerk, . . . at any time before actual commencement of trial. . . a trial shall be deemed to be actually commenced at the beginning of the opening statement of the plaintiff or his counsel, and if there shall be no opening statement, then at the time of the administering of the oath or affirmation to the first witness, or the introduction of any evidence. . . .

3. By the court . . . when, after a demurrer to the complaint has been sustained with leave to amend, the plaintiff fails to amend it within the time allowed by the court, and either party moves for such dismissal.

CAL. CIV. PROC. CODE § 581(1),(3) (West 1979).

2. 135 Cal. 666, 67 P. 1091 (1902).

3. 29 Cal. 3d 781, 632 P.2d 217, 176 Cal. Rptr. 704 (1981).

4. *Id.* The use of the term "trial" in the statute:

[c]annot be restricted in its meaning to trials of the merits after answer, for there may be such a trial on a general demurrer to the complaint as will effectually dispose of the case where the plaintiff has properly alleged all the facts which constitute his cause of action. If the demurrer is sustained, he stands on his pleadings and submits to judgment on the demurrer, and if not satisfied, has his remedy by appeal. In such a case, we think, there would be a trial within the meaning of the code

135 Cal. 666, 67, 67 P. 1091 (1902).

5. 29 Cal. 3d at 787, 632 P.2d at 223, 176 Cal. Rptr. at 710. The cases used by Wells in his argument which were overruled by the court were: *United Shippers, Inc. v. Super. Ct.*, 104 Cal. App. 3d 359, 162 Cal. Rptr. 871 (1980); *Parenti v. Lifeline Blood Bank*, 49 Cal. App. 3d 331, 122 Cal. Rptr. 709 (1975).

6. 29 Cal. 3d at 787, 632 P.2d at 223, 176 Cal. Rptr. at 710. The *Wells* court cited

In conclusion, the California Supreme Court noted that the purpose of the 1947 amendment was to "eliminate the practice of a plaintiff's voluntary dismissal of an action after the case had been called for trial or after the parties and the court had been engaged substantially in trial on the merits."⁷ Given this purpose, the court held that extending the right to the plaintiff would clearly be against the legislative purpose as it would provide for fruitless and non-ending litigation. Furthermore, the court felt it to be well established that the legislature does not favor extended litigation when it cannot be justified.⁸

When a plaintiff fails to exercise leave to amend granted after a general demurrer is sustained, he cannot thereafter voluntarily dismiss the complaint.⁹ The *Wells* decision provides a limit on wasteful litigation. This supports the legislative purpose of promoting a more effective and efficient judiciary.

C. LIS PENDENS

1. *The Proper Showing Required to Prevent Expungement of a Lis Pendens: Malcolm v. Superior Court*

The California Supreme Court in *Malcolm v. Superior Court*,¹ held that the crucial factor in determining if a lis pendens² should

several cases which had relied on the *Goldtree* definition of "trial" that had been decided after the 1947 amendment. See *McDonough Power Equipment Co. v. Super. Ct.*, 8 Cal. 3d 527, 503 P.2d 1338, 105 Cal. Rptr. 330 (1972); *London v. Morrison*, 99 Cal. App. 2d 876, 222 P.2d 941 (1950); *Berri v. Super. Ct.*, 43 Cal. 2d 856, 279 P.2d 8 (1955); *Venzor v. Santa Barbara Elks Lodge*, 56 Cal. App. 3d 209, 128 Cal. Rptr. 353 (1976). See also 4 WITKIN, CAL. PROCEDURE PROCEEDINGS WITHOUT TRIAL, § 44, p. 2709 (2d ed. 1971).

7. Rep. of Com. on Admin. of Justice, 1945-46, 21 STATE BAR J. 166, 197 (1946); The *Wells* court by using a previous decision, *People ex rel. Younger v. Superior Court*, 16 Cal. 3d 30, 40, 544 P.2d 1322 (1976), held that "potentially conflicting provisions should be reconciled in order to carry out the overriding legislative purpose." 29 Cal. 3d 781, 789, 632 P.2d 217, 176 Cal. Rptr. 104 (1981) (determined from a reading of the entire statute).

8. See *Goldtree v. Spreckles*, 135 Cal. 666, 671 P. 1091 (1902).

9. 29 Cal. 3d at 789, 632 P.2d at 225, 176 Cal. Rptr. at 111.

1. *Malcolm v. Super. Ct.*, 29 Cal. 3d 518, 629 P.2d 495, 174 Cal. Rptr. 694 (1981).

2. CAL. CIV. PROC. CODE § 409 defines lis pendens as follows:

In an action concerning real property or affecting the title or the right of possession of real property, the plaintiff at the time of filing the complaint, . . . or at any time afterwards, may record in the office of the recorder of the county in which the property is situated, a notice of the pendency of the action . . . From the time of filing such notice for record only, shall a purchaser or encumbrancer of the property affected thereby be deemed to have constructive notice of the pendency of the action as it relates to the real property and only of its pendency against parties designated by their real names.

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

be expunged is whether the plaintiff's action was brought for a proper purpose and in good faith. Here, the defendant in the original suit, who sought to expunge the *lis pendens*, had argued that the court should consider the merits of the case in making its expungement determination.

The court, in assessing the defendant's claims, looked at the legislative history of section 409.1 of the California Code of Civil Procedure.³ This section provides that the *lis pendens* be expunged unless the party wishing to prevent expungement can show by a mere preponderance of the evidence that the action affects the real property, and that the suit is brought for a proper purpose and in good faith.⁴ The California Supreme Court could find nothing in the legislative history of section 409.1 which indicated that the legislature wanted the issue of expungement to turn on the probable merit of the plaintiff's case. The court could find nothing in the judicial interpretation of the statute to indicate that the defendant's contentions were correct.⁵

The California Supreme Court ruled that evidence relating to the merits of the plaintiff's claim could be considered because a person's motive for bringing suit is subjective, and because good faith is usually determined from circumstantial evidence. Also, the obvious lack of merit in a case suggests that the suit was not brought in good faith. Therefore, the court held that the plaintiff should have to present a "prima facie" case based on the merits of his claim.⁶ The defendant can not rebut this evidence simply by showing there are triable issues of fact. The burden on the plaintiff is not substantial; he simply must show that there are triable issues, and that there is at least a chance that he can win on the merits. The court held that the defendant was not without a remedy here since section 409.1 gives the trial court the discretion to require the party who wins on the expungement motion to provide an undertaking to protect the opposing party from potential loss due to a *lis pendens* motion.⁷

3. CAL. CIV. PROC. CODE § 409.1 deals with the expungement of *lis pendens* and is the section in controversy in this case.

4. CAL. CIV. PROC. CODE § 409.1 (West Supp. 1981).

5. 29 Cal. 3d at 526-27, 629 P.2d at 499-500, 174 Cal. Rptr. at 698-99.

6. "In this context, a 'prima facie' case is an evidentiary showing, by affidavit or such other evidence as the court may permit, that it would be entitled to relief if his evidence is credited." 29 Cal. 3d at 528 n.6, 629 P.2d at 500-01 n.6, 174 Cal. Rptr. at 699-700 n.6 (1981).

7. Section 409.1 provides in pertinent part:

This case clearly indicates that the proper showing required to prevent expungement of a lis pendens is that the suit must affect the real property in question, and that suit is brought for a proper purpose and in good faith.

IV. ADMINISTRATIVE LAW

A. RATE REGULATION

1. *Exemption for Private Vessel Commodities from Motor Carrier Minimum Rate Regulations: United States Steel v. Public Health Utilities Commission*

In *United States Steel Corporation v. Public Health Utilities Commission*,¹ the California Supreme Court annulled a decision rendered by the Public Utilities Commission which exempted private vessel commodities² from its motor carrier minimum rate regulations. The exemption would have resulted in giving some commodity shippers an advantage over others who use the same or similar vehicles or routes.³ The effect of the exemption would have been that foreign steel would be carried at the lower federal rates while domestic steel would be carried at the higher state rates.⁴ The court based its decision on two factors: first, the failure of the Commission to consider the economic impact of their decision;⁵ and second, that the Commission erred in finding that it

The court, as a condition of granting or denying the motion to expunge, may require that the party prevailing upon such motion give the other party an undertaking of such nature, and in such amount as shall be fixed by the court, such undertaking to be to the effect that such prevailing party will indemnify the other party for all damages which he may incur if he ultimately prevails in the action.

CAL. CIV. PROC. CODE § 409.1(b) (West Supp. 1981).

1. 29 Cal. 3d 603, 629 P.2d 1381, 175 Cal. Rptr. 169 (1981).

2. The court in *United States Steel Corp.* noted that "Private Vessel Commodities" include imports of manufactured steel, newsprint, paper, and salt and exports of scrap iron, steel, and woodchips. In *United States Steel Corp.* the commodity in question was imported steel. *Id.* at 607, 629 P.2d at 1385, 175 Cal. Rptr. at 173.

3. It is important to note that "[t]he primary purpose of the Public Utilities Act . . . is to insure the public adequate service at reasonable rates without discrimination." *Pacific Tel. & Tel. v. Pub. Util. Comm'n*, 34 Cal. 2d 822, 826, 215 P.2d 441, 444 (1950).

4. 29 Cal. 3d at 609, 629 P.2d at 1385, 175 Cal. Rptr. at 173. Discrimination in rates may be established through disparity of rates in the same area under substantially similar conditions. *Cal. Portland Cement Co. v. Public Util. Comm'n*, 49 Cal. 2d 171, 175, 315 P.2d 709, 712 (1957).

5. CAL. PUB. UTIL. CODE § 3662 (West 1975) requires that rates be "just, reasonable, and nondiscriminatory," and that in "establishing or approving such rates the commission shall give due consideration to the cost of all of the transportation services performed . . . , the value of the commodity transported, and the value of the facility reasonably necessary to perform the transportation service."

was too difficult to determine whether foreign steel was transported by common carrier or by private vessel.⁶

The Public Utilities Commission recognized the potential advantages available to foreign producers of steel as a result of its decision, but claimed that these advantages were not material.⁷ The court, however, held that a commission decision which has the possible economic impact of putting certain shippers out of business is of such concern that it is material.⁸

In the case of *California Trucking Association v. Public Utilities Commission*,⁹ a refusal to impose minimum rates was allowed "when the record failed to demonstrate an obvious or persuasive need in the public interest" or when "the rates would not have a meaningful effect on the transportation involved."¹⁰ It is in the public interest to maintain the solvency of domestic shippers in regard to employment as well as the nation's economy. The disparity of rates would also have a definite effect on the transportation of steel since foreign steel would be carried at more favorable rates.¹¹ Applying these factors to the standard established in *California Trucking Association*, it is evident that the minimum rates of California must be complied with. The Commission must consider the alternatives presented as well as the factors warranting the adoption of those alternatives. In *U.S. Steel Corporation*, the evidence presented did not meet this burden.¹²

The Commission took the position that it was too difficult to determine whether foreign steel was transported by common carrier or by private vessel, and therefore that the exemption would not

6. 29 Cal. 3d at 610, 629 P.2d at 1386, 175 Cal. Rptr. at 174. The relationship between the transportation differentials and the prices of delivered foreign and domestic steel is not substantiated by firm evidence. *Id.* at 611, 629 P.2d at 1386, 175 Cal. Rptr. at 174.

7. The commission specifically stated that the potential advantage to foreign producers

is not a material fact in this proceeding inasmuch as it is not the function or duty of this commission to attempt to allocate markets between competing producers, or to equalize variations in production and distribution costs of different producers of the same commodity through the establishment of freight rates on that commodity.

Id. at 608, 629 P.2d at 1384, 175 Cal. Rptr. at 172.

8. *Id.* at 610, 629 P.2d at 1380, 175 Cal. Rptr. at 174.

9. 19 Cal. 3d 240, 561 P.2d 280, 137 Cal. Rptr. 190 (1977).

10. *Id.* at 247, 561 P.2d at 285, 137 Cal. Rptr. at 195.

11. 29 Cal. 3d at 611, 629 P.2d at 1386, 175 Cal. Rptr. at 174.

12. 29 Cal. 3d 603, 609, 629 P.2d 1381, 175 Cal. Rptr. 169 (1981).

be discriminatory.¹³ The Commission, however, failed to present sufficient evidence to support this position. Furthermore, the court ruled that convenience by itself is not adequate justification for such discrimination. The court finally stated that whether the rates were discriminatory or not could not be decided without a more complete record.¹⁴

The court's decision in *U.S. Steel Corporation* establishes the importance of public interest in the regulation of rates when concerning the economic impact of such a decision.¹⁵ It is now clear that the economic impact must be carefully considered in creating an exemption of the minimum motor carrier rates. It is also emphasized that convenience by itself is not adequate justification for discriminatory rates.¹⁶

V. EVIDENCE

A. ATTORNEY-CLIENT PRIVILEGE

1. *The Admissibility of the Products of Privileged Communicators: People v. Meredith*

The admissibility of evidence which is the product of privileged communities that precludes the proper authorities from not making the same observations has not been addressed by any court in the United States. The California Supreme Court in People v. Meredith held that observations by a defense counsel or his private investigator may not be admitted into evidence if such observations are the product of a privileged communication, except where such observations remove or alter the evidence in a manner that precludes the prosecution from making the same observation.

I. INTRODUCTION

The California Supreme Court held in *People v. Meredith*,¹ that observations by a defense counsel or his private investigator may not be admitted into evidence if such observations are the product of a privileged communication, except where such observations remove or alter the evidence in a manner that precludes the

13. The Commission has wide discretion to determine rate classifications that "reflect a broad and varied range of economic classifications." *Wood v. Public Util. Comm'n*, 4 Cal. 3d 288, 294-95, 481 P.2d 823, 827, 93 Cal. Rptr. 455, 459 (1971).

14. 29 Cal. 3d at 614, 629 P.2d at 1388, 175 Cal. Rptr. at 176. According to *Wood*, administrative convenience will justify imprecision when the classification is related to the objective, but in *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), the Court held that convenience by itself does not justify discriminatory classifications.

15. See note 12 *supra*; see also CAL. PUB. UTIL. CODE § 453 (West Supp. 1980) which prohibits public utilities from granting any preference or advantage to any corporation or person, and from establishing or maintaining any unreasonable difference as to rates.

16. 29 Cal. 3d at 614, 629 P.2d at 1388, 175 Cal. Rptr. at 176.

1. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612 (1981).

prosecution from making the same observation.²

The factual issue in *Meredith* concerned the admissibility into evidence of the observations of an investigator retained by the defense counsel. The observations stemmed from privileged communications made by the defendant. The issue arose when co-defendant, Frank Earl Scott, told his original defense attorney, James Schenk,³ the location of a wallet. This evidence was later used to convict him, along with his co-conspirator Michael Meredith, on counts of first degree murder and robbery.⁴

James Schenk was replaced as counsel, presumably because he was subpoenaed to testify at a preliminary hearing.⁵ After being threatened with contempt, Schenk testified that he had visited defendant Scott in jail, and that this contact with his client led to the discovery of the wallet's location.⁶ Schenk stressed to Scott the importance of the need for the attorney to be aware of all the facts, at which time the defendant revealed to Schenk that he picked up the wallet, which was next to the murder victim, and hid it.⁷ Scott later returned for the wallet, removed the money, and unsuccessfully attempted to burn it by placing it in a plastic bag which he threw into a burn barrel behind his house.⁸ Schenk, without consulting the defendant, retained Stephen Frick, an investigator, to find the wallet, basing the investigation on Scott's description.⁹ The investigator found the wallet and brought it back to Schenk. After examining the contents Schenk determined that it belonged to the murder victim. Schenk turned it back over to the investigating officer, stating only that he believed it belonged to the victim.¹⁰ At the subsequent trial Frick was required

2. *Id.* at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

3. *Id.* at 688, 631 P.2d at 49, 175 Cal. Rptr. at 615. The facts Scott revealed to his attorney were not revealed to the police in statements made to them by the defendant. *Id.* at 687, 631 P.2d at 49, 175 Cal. Rptr. at 615 (summarization of the evidence other than as to the location of the wallet).

4. *Id.* at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614. Meredith was the one who shot the victim in the presence of witnesses.

5. *Id.* at 688, 631 P.2d at 49-50, 175 Cal. Rptr. at 615-16.

6. *Id.*

7. *Id.* at 688, 631 P.2d at 49, 175 Cal. Rptr. at 615. The attorney stressed "that he had to be fully acquainted with the facts to avoid being 'sandbagged' by the prosecution during the trial." *Id.*

8. *Id.*

9. *Id.*

10. *Id.* The investigator's action of removing the wallet from its location precluded the prosecution from possibly obtaining it. The court noted that evidence turns up not only from police discovery but also inadvertently through bystanders,

to testify, over the objections of defense counsel, as to the information leading up to the discovery of the wallet and where the wallet was eventually found.¹¹ Frick's testimony was the major basis of this appeal.¹²

The defense counsel acknowledged that the wallet was properly admitted into evidence, and the prosecution acknowledged that the communications between the initial attorney and his investigator were protected under the attorney-client privilege, but the focus of this case is on a narrower point: "whether under the circumstances of this case (the private investigator's) observation of the location of the wallet, the product of a privileged communication, finds protection under the attorney-client privilege."¹³

The issue as to the admissibility of evidence which is the product of a privileged communication that effectively precludes the prosecution from making the same observations has not been addressed by any court in the United States,¹⁴ and is thus one of first impression,¹⁵ not only for California, but for any jurisdiction. The California Supreme Court is presented with competing policy considerations. The court must consider the policy of the attor-

or in this case rubbish collectors. 29 Cal. 3d at 694-95, 631 P.2d at 53-54, 175 Cal. Rptr. at 619-20.

11. 29 Cal. 3d at 689, 631 P.2d at 50, 175 Cal. Rptr. at 616.

12. *Id.* at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614. The other contentions for the appeal were rejected by this court in their adoption verbatim of the court of appeal's opinion. The court of appeals held that if a defendant commits multiple violations as a result of pursuing a single objective, a conviction is proper for each violation, but the defendant may be punished only for one of the offenses. The court did modify the judgment stated against Meredith. The court deleted from the abstract judgment that Meredith used a firearm in the commission of the offense. The court stated, relying on prior authority, that the finding that Meredith was armed with a deadly weapon would not support a conclusion and finding that the defendant used a firearm.

Further, the appeals court concluded that the judgment may not be modified to include as an amendment the fact that the defendant was armed with a deadly weapon in the first degree robbery case. The court reasoned that such a finding was already established by the conviction of first degree robbery, which being armed with a deadly weapon is an essential requirement. Nor would the court modify the murder verdict to include a special finding of being armed with a deadly weapon, since the defendant was sentenced to life imprisonment and such a modification would conflict by statute with his sentence. *Id.* at 695-97, 631 P.2d at 54-55, 175 Cal. Rptr. at 620-21. *See also* *People v. Meredith*, 98 Cal. App. 3d 925, 159 Cal. Rptr. 877, 887 (1980) (98 Cal. App. 3d at 912 states that the *People v. Meredith* opinion was omitted because a hearing was granted by the California Supreme Court).

13. 29 Cal. 3d at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614.

14. *Id.* at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619. The court looked at cases from other jurisdictions that dealt with observations that resulted from privileged communications, none of which confronted the issue directly as to whether precluding the prosecution from observing the evidence in its original position should prevent a defendant from asserting the attorney-client privilege to exclude testimony concerning the original location.

15. *Id.* at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614.

ney-client privilege to keep free and open communication between the attorney and his client, as well as to promote thorough investigation and preparation of a client's case, without establishing a precedent that would encourage the defense to seize evidence first in an attempt to shield it from being admitted into evidence under the attorney-client privilege. Such policy considerations must be matched against the necessity to discover and present all relevant evidence in a case needed to promote accurate fact finding in all fair and just decisions.¹⁶

II. HISTORY

The attorney-client privilege can be traced back as far as the Roman Era.¹⁷ The lawyer was first viewed as a servant who by duty was required to keep the secrets of his master.¹⁸ The privilege also has roots in the English law system.¹⁹ In England, the policy supporting the protection of communications between an attorney and client was to maintain the honor of the attorney by placing a duty on him to keep the secrets of his clients.²⁰ However, this approach lost support as the need for the courts to establish the truth began to outweigh the honor or pledge to secrecy by an attorney.²¹

A new rationale for the privilege was developed and accepted at nearly the same time the old rationale was being cast aside.²² The new rationale, emphasizing the client as the holder of the privilege, became well established around 1850.²³ The policy be-

16. *Id.*

17. Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487, 487-89 (1928).

18. *Id.* at 487. The testimony of a servant was viewed as valueless. If the servant spoke in favor of his master the testimony was discounted on the basis of the servant's strong motive to mistake facts for the benefit of his client or master. If the lawyer/servant would venture to speak against his master/client he was deemed unrespectable for his breach of loyalty and therefore unworthy of belief. *Id.* at 488-89.

19. Whether the English common law at the time of Elizabeth I was influenced by the Roman law is unclear. *Id.* at 489.

20. 8 J. WIGMORE, EVIDENCE § 2290, 543 (1961).

21. *Id.* The honor of the attorney would not be at stake if it was a court of law that compelled his disclosure, thus maintaining his honor and the court's desire to know all the circumstances. *Id.*

22. *Id.* This was all developing around the latter portion of the 1700's. *Id.* For a detailed discussion of confidential communications see 8 J. WIGMORE §§ 2285-2329.

23. 8 J. WIGMORE § 2290 at 543.

hind putting communications beyond the reach of the courts²⁴ was aimed at providing open communication between the attorney and client without the apprehension that the attorney would be compelled by a court to reveal the privileged communications.²⁵

The adoption of the client oriented approach in the American courts was accepted as early as 1826, with the same policy interest of protecting the free and open communication between the client and his attorney.²⁶ There are several cases that expand the attorney-client privilege,²⁷ supporting the conclusion that the privilege is not confined only to words communicated, but also encompasses circumstances under which the evidence was obtained, pertaining to the very substance of the communication.²⁸ This extension beyond simply the words communicated also includes communications between the attorney and third parties obtained to assist in carrying out the purposes of the client.²⁹

The established and accepted case law is supplemented by legislation which mirrors the case law developments of the privilege. The California legislature enacted legislation governing the privilege as early as 1872, which is now in its amended form in section 954 of the California Evidence Code.³⁰ The section reads in pertinent part:

[E]xcept as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from

24. *Id.* (The new theory looked to the necessity of removing the client's apprehension in consulting his legal advisor, and proposed to assure this by removing the risk of disclosure by the attorney even at the hands of the law.) *Id.*

25. *Id.* § 2291 at 545. "In order to promote freedom of consultation of legal advisors by clients, the apprehension of compelled disclosure by the legal advisors must be removed; hence the law must prohibit such disclosure except on the client's consent." *Id.*

26. *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826).

27. *People v. Belge*, 372 N.Y.S. 2d 798, 83 Misc. 2d 186 (1975), *aff'd*, 50 A.D. 2d 1088, 376 N.Y.S. 2nd 771 (App. Div. 1975) (protecting observations by an attorney of murder victim's body not found by police as being within the attorney-client privilege); *State v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964) (protecting an attorney who secured a knife from revealing his source); *State of West Virginia v. Douglass*, 20 W. Va. 770, 780 (1882) (including letters, papers, books left by the client with his attorney).

28. *United States v. Kendrick*, 331 F.2d 110, 114 (4th Cir. 1964). "It is the substance of the communications which is protected, however not the fact that there have been communications." *Id.* at 113.

29. *People v. Lines*, 13 Cal. 3d 500, 531 P.2d 793, 119 Cal. Rptr. 225 (1975) (Reports by a psychotherapist to an attorney on the nature and extent of the defendant's mental condition were protected by an attorney-client privilege.); *City and County of San Francisco v. Super. Ct.*, 37 Cal. 2d 227, 231 P.2d 26 (1951) (Doctor had no physician-patient relationship with the lawyer's client, but the physician did have a relationship with the attorney relating to two exams given to the client in assisting the lawyer in representing his client which were protected as privileged communications.)

30. CAL. EVID. CODE § 954 (West Supp. 1981) (*See History*).

disclosing, a confidential communication between client and lawyer if the privilege is claimed by: (a) The Holder of the privilege; (b) A person who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the lawyer at the time of the confidential communication³¹

In section 912 of the Evidence Code the legislature more fully refines what is and is not a waiver of this privilege, and states that disclosures which are "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted, is not a waiver of the privilege."³² The allowance for "reasonably necessary" disclosures expands the protection of the privilege beyond protecting merely the specific initial communication by a client.³³ This contention is further supported by a comment of the Senate Committee on the Judiciary accompanying section 912 of the Evidence Code.³⁴

Therefore, the case law and the statutes clearly establish protection of confidential communications to the attorney as well as necessary parties he retains to carry out the purposes of his client. Further, the law has given protection to the actual observations of the attorney or those necessary third parties working for him.³⁵ However, in all of the prior cases extending protection to the observations of either the attorney or his agents, no court has addressed the issue of whether such observations have excluded the proper authorities from making the same observations.³⁶ The

31. *Id.*

32. CAL. EVID. CODE § 912 (West Supp. 1981).

33. *Id.* The allowance for disclosures to persons "reasonably necessary" to accomplish the purposes for which the attorney was obtained is implicitly implied from the quoted language of § 912; see also note 29 *supra*.

34. The Senate Judiciary Committee Comment to § 912(d) states in pertinent part:

Subdivision (d) is designed to maintain the confidentiality of communications in certain situations where the communications are disclosed to others in the course of accomplishing the purpose for which the lawyer, physician, or psychotherapist was consulted. For example, where a confidential communication from a client is related by his attorney to a physician, appraiser, or other expert in order to obtain that person's assistance so that the attorney will better be able to advise his client, the disclosure is not a waiver of the privilege Communications such as these, when made in confidence, should not operate to destroy the privileged even when they are made with the consent of the client or patient. Here, again, the privilege holder has not evidenced any abandonment of secrecy. Hence, he should be entitled to maintain the confidential nature of his communications to his attorney or physician despite the necessary further disclosure.

CAL. EVID. CODE § 912(d), Comment, Senate Committee on Judiciary (West 1966).

35. See notes 27 and 29 *supra*.

36. 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619. The court referred to

court in *People v. Meredith* addressed that concern, and held that such observations are not protected when they preclude the prosecution from making the same observations.³⁷

III. ANALYSIS

The California Supreme Court was faced with making a policy decision concerning the extent of protection given to observations that are a product of a privileged communication, even when such observations preclude the prosecution from making the same observations.³⁸ In essence, the court weighed the unfavorable result of excluding evidence from discovery against the need for protecting the attorney-client privilege. The court's analysis of this issue was in three stages. The court first considered whether the defendant had standing to assert the attorney-client privilege. This came into question because it was a third party and not solely the attorney himself working from the privileged communication.³⁹ After establishing standing, the court looked second at the actual policy of the privilege,⁴⁰ and then to cases that have applied the policy to observations which were the result of privileged communications.⁴¹ After going through this step, which included reviewing cases from various jurisdictions, the court decided to protect observations that were a product of privileged communication,⁴² except where the defense alters or destroys the evidence in such a way as to prevent the prosecution from making the same observations.⁴³

A. Reasonably Necessary Disclosures

The court stated first that in order to find protection under the attorney-client privilege, a confidential communication must have first been made. The court placed the burden of proving the existence of such a communication on the defendant, or the one who is seeking the privilege.⁴⁴ The court was satisfied that the communi-

decisions in other jurisdictions and California as not directly addressing the issue of the effect of removal or alteration of evidence upon the right of an attorney or client to assert the attorney-client privilege.

37. *Id.* at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614.

38. *Id.*

39. *Id.* at 689-90, 631 P.2d at 50, 175 Cal. Rptr. at 616.

40. *Id.* at 690-91, 631 P.2d at 51, 175 Cal. Rptr. at 617.

41. *Id.* at 691-94, 631 P.2d at 51-53, 175 Cal. Rptr. at 617-19.

42. *Id.* at 693, 631 P.2d at 52, 175 Cal. Rptr. at 618.

43. *Id.* at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

44. *Id.* at 689, 631 P.2d at 50, 175 Cal. Rptr. at 616; *Gonzales v. Mun. Ct.* (for the Los Angeles Jud. Dist., 67 Cal. App. 3d 111, 136 Cal. Rptr. 475 (1977) (for the defendant to invoke the attorney-client privilege he must establish an attorney-client relationship and the communication intended to be confidential); *compare* *People v. Flores*, 71 Cal. App. 3d 559, 139 Cal. Rptr. 546 (1977) (presumption that communi-

cation between the defendant and his attorney regarding the wallet met the statutory requirements of evidence for a privileged communication.⁴⁵ The court further concluded that the privilege was not waived upon the attorney's disclosure of the confidential information to the investigator.⁴⁶ The court found the disclosure to the investigator to be a "reasonably necessary" disclosure to a third party allowed for by Evidence Code section 912, which defines waivers and exceptions.⁴⁷ Thus, both the attorney and the investigator were encompassed within the privilege and therefore not required to disclose any of the information revealed to the attorney in confidence.⁴⁸ Such analysis by the court made the investigator, in effect, a sub-agent of the client.⁴⁹ The court was

cation between client and attorney is made in confidence and the opponent of the claim of privilege must establish that such communication was non-confidential).

45. See note 3 *supra*; see also CAL. EVID. CODE § 952 (West Supp. 1981). Evidence Code § 952 requires the transmission of information from a client to his attorney be based on an existing attorney-client relationship, and that the communication be made in confidence.

46. 29 Cal. 3d at 690, 631 P.2d at 50, 175 Cal. Rptr. at 616; see also CAL. EVID. CODE § 952 and comment by Law Revision Committee. Both provide for communications to third parties which are reasonably necessary to carry out the purpose for which the attorney was committed as being privileged communication. See also CAL. EVID. CODE § 954 (West Supp. 1981) (preventing another from disclosing a confidential communication).

47. 29 Cal. 3d at 690, 631 P.2d at 50, 175 Cal. Rptr. at 616. See also CAL. EVID. CODE § 912 (West Supp. 1981); see also note 34 *supra* (Comment by Senate Judiciary Committee).

48. The court's conclusion that the investigator fit within the exceptions to finding a waiver of the privilege by the client led the court to place the investigator in the same position as the attorney. 29 Cal. Rptr. at 690 n.3, 631 P.2d at 50-51 n.3, 175 Cal. Rptr. at 616-17 n.3.

49. Agency principles were not expressly used by the court but are relevant to include certain third parties within the privilege.

In *City and County of San Francisco v. Super. Ct.*, 37 Cal. 2d 227, 236-37, 231 P.2d 26, 29 (1951), the court allowed a client to assert the attorney-client privilege only because the doctor was an "intermediate agent" for communication between the defendant and the attorney. Without finding such a relationship, the doctor's reports would not have been protected as an uninvolved third party. See also note 29 *supra*. The court extended the same statutory requirements of non-disclosure to the doctor that would be extended to the lawyer as the court did in the *Meredith* case, except the prohibiting disclosure statute was CAL. CIV. PROC. § 1881(4) (1955).

The court in *People v. Lee*, 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715, 723 (1970), referring to CAL. EVID. CODE § 952, stated that the attorney-client privilege does not protect information held by any third person "unless the person is acting as the client's agent;" see 8 J. WIGMORE, EVIDENCE § 2317 at 618-19:

The privilege of confidence would be a vain one unless its exercise could be thus delegated. A communication, then, by *any form of agency* employed or set in motion by the client is within the privilege It follows, too, that the communications of the *attorney's agent* to the attorney

convinced that the statutes protected the confidentiality and the right of the defendant to assert the privilege where a third party is acting for the attorney in fulfilling his duties, but stated the statutes were unclear as to what extent direct results of the confidential communication, such as observations or discovered evidence, are shielded from discovery under the privilege.⁵⁰ In answering that question, the court looked to the underlying policy of the attorney-client privilege.⁵¹

B. Policy of the Attorney-Client Privilege

Wigmore stated the purpose of the attorney-client privilege, as it was developed in England, was to be for the enhancement of the unrestricted freedom to consult with legal advisors without the apprehension of compelled disclosure by the courts.⁵² The same well rooted historical policy is deemed by the court to be the "fundamental purpose" of the privilege.⁵³ The court felt it important to state the identical purpose of the privilege in its own words.⁵⁴ Specifically the court proclaimed that policy to be "to encourage full and open communications between client and attorney."⁵⁵

In providing a rationale for the policy,⁵⁶ the court quoted excerpts from an earlier California Supreme Court decision.⁵⁷ One quotation in particular fully amplifies the supporting rationale:

The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence. Adequate legal representation in the ascertainment and enforcement of rights or the prosecution or defense of litigation compels a full disclosure of the facts by the client to his attorney. Unless he makes known to the lawyer all the facts, the advice which follows will be useless, if not misleading; the lawsuit will be conducted along improper lines, the trial will be full of surprises, much useless litigation may result. Thirdly, unless the client

are within the privilege, because the attorney's agent is also the client's subagent and is acting as such for the client.

Id. The court's decision to label the investigator as a party "reasonably necessary for the accomplishment of the purpose for which the lawyer . . . was consulted," as allowed for under Evidence Code § 912, is supported by other decisions which have held legal secretaries, paralegals, or receptionists under the same duty as the lawyer not to disclose privileged communications. *Anderson v. State*, 297 So. 2d 871 (Fla. App. 1974). See also note 29 *supra* for cases concerning doctors and psychotherapists.

50. 29 Cal. 3d at 690, 631 P.2d at 51, 175 Cal. Rptr. at 617.

51. *Id.*

52. See notes 24 and 25 *supra* and accompanying text.

53. 29 Cal. 3d at 690, 631 P.2d at 51, 175 Cal. Rptr. at 617; compare notes 23 and 24 *supra* and original source of those notes.

54. See 29 Cal. 3d at 690, 631 P.2d at 51, 175 Cal. Rptr. at 617.

55. *Id.*

56. *Id.*

57. *Id.*

knows that his lawyer cannot be compelled to reveal what is told him, the client will suppress what he thinks to be unfavorable facts.' [Citation] Given the privilege, a client may make such a disclosure without fear that his attorney may be forced to reveal the information confided to him. [T]he absence of the privilege would convert the attorney habitually and inevitably into a mere informer for the benefit of the opponent.⁵⁸

The court noted the significance of the policy and the effect contrary policies would have on a client's freedom to discuss confidential matters with his attorney.⁵⁹ The court felt that infringements upon the client's constitutional right to counsel will result if the client is not allowed to obtain the full benefits of legal advice.⁶⁰ The right to counsel, guaranteed in a criminal case to a defendant by both the United States Constitution and the California State Constitution⁶¹ includes the right to private consultation with that counsel.⁶² "As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney . . . than from himself, . . . the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."⁶³

C. Policy Reasons for Extending the Privilege to Products of the Privileged Communications

There are two policy reasons why the attorney-client privilege should be extended to the product of the privileged communications, both concerning the effectiveness of counsel were the privilege not to be extended. First, the utility of providing an attorney with confidential information would be greatly reduced if actions taken by the attorney to substantiate such information were allowed to be discovered.⁶⁴ In criminal matters, a defense attorney has a duty, imposed by the defendant's constitutional right to

58. *City and County of San Francisco v. Super. Ct.*, 37 Cal. 2d at 235, 241 P.2d at 30; *e.g.*, *People v. Canfield*, 12 Cal. 3d 699, 705, 527 P.2d 633, 637, 117 Cal. Rptr. 81, 85 (1974) (court protected financial eligibility statement in seeking an attorney even though not actually yet obtained).

59. 29 Cal. 3d at 691, 631 P.2d at 51, 175 Cal. Rptr. at 617.

60. *Id.*

61. *Barber v. Mun. Ct.*, 24 Cal. 3d 742, 750-51, 598 P.2d 818, 822-23, 157 Cal. Rptr. 658, 662-63 (1979) (Criminal charges were dismissed when an undercover agent was intentionally present at confidential attorney-client meetings.)

62. *Id.*

63. 29 Cal. 3d at 691, 631 P.2d at 51, 175 Cal. Rptr. at 617; *e.g.*, *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Barber v. Mun. Ct.*, 24 Cal. 3d at 751, 598 P.2d at 882, 157 Cal. Rptr. at 662.

64. *See generally* 29 Cal. 3d at 691-92, 631 P.2d at 51-52, 175 Cal. Rptr. at 617-18; *State of West Virginia v. Douglass*, 20 W. Va. at 783.

counsel, to investigate all possible defenses of fact and law.⁶⁵ A primary source of obtaining information to develop available defenses is private consultation with the actual defendant.⁶⁶ The defendant's right to counsel would be a hollow one if the law upheld private consultations in order to obtain information from the defendant so as to assist in developing defenses of fact and law, but then protected only the information transmitted during the consultation and not the products of the communication.⁶⁷ Allowing for such results would undermine the policy of allowing for privileged communications by inhibiting the free and open communication between attorney and client, creating an apprehension of a forced disclosure.⁶⁸

There is a second reason for extending the privilege so as not to undermine the right to effective counsel, in that the defendant would not be as free to openly discuss his case in confidence.⁶⁹ The court in *Meredith* recognized the hollowness of restricting the protection to the exact communications without extending protection to the observations or discoveries made as a result of a privileged communication,⁷⁰ noting that such a result is "practically as mischievous in all its tendencies and consequences, as if it required the [attorney] to state everything, which his client had confidentially told him. . . ."⁷¹

The court looked to three decisions from other jurisdictions to support their conclusion that the attorney-client privilege is not strictly limited to cover only the initial communication.⁷² In two of these cases, the attorney's observations prevented the prosecution from making similar observations.⁷³ Neither of those two courts even considered that issue in their analysis.⁷⁴

The first case is from the Supreme Court of West Virginia.⁷⁵ The court held that the attorney's observation of where he discov-

65. 24 Cal. 3d at 751, 598 P.2d at 882, 157 Cal. Rptr. at 662. See generally Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464, 485-86 (1977).

66. 24 Cal. 3d at 751, 598 P.2d at 882-83, 157 Cal. Rptr. at 662-63.

67. *Id.*

68. See notes 57 and 58 *supra* and accompanying text.

69. *Id.* See also *Barber v. Mun. Ct.*, 24 Cal. 3d at 751, 598 P.2d at 882-83, 157 Cal. Rptr. at 662-63.

70. See 29 Cal. 3d at 691-92, 631 P.2d at 51-52, 175 Cal. Rptr. at 617-18.

71. *Id.*

72. *Id.* at 691-93, 631 P.2d at 51-52, 175 Cal. Rptr. at 617-18; see also note 27 *supra*.

73. See *State v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964); *State of West Virginia v. Douglass*, 20 W. Va. 770 (1882).

74. See generally 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619; 64 Wash. 2d 828, 394 P.2d 681 (1964); *State of West Virginia v. Douglass*, 20 W. Va. 770 (1882).

75. *State of West Virginia v. Douglass*, 20 W. Va. at 783; *e.g.*, *People v. Meredith*, 29 Cal. 3d at 691-92, 631 P.2d at 51-52, 175 Cal. Rptr. at 617-18.

ered a gun used in a murder was protected under the attorney-client privilege as the observation was the result of a privileged communication.⁷⁶ The West Virginia Supreme Court stated:

The spirit of this law of evidence would obviously be violated, if we were to confine the communications thus excluded, to the words used by the client in his conversation with his counsel, and accordingly it is held, that letters or papers, or books, left by a client with his attorney, relating to the matter about which he has been employed, cannot be required to be produced.⁷⁷

The West Virginia court's holding goes beyond the quoted language from that court.⁷⁸ The holding extended the privilege not only to physical evidence brought in by a client, but to items and observations that the attorney had to procure.⁷⁹ The problem of infringing on privileged communications was summarized in a statement adopted by the *Meredith* court.⁸⁰ "It may be, that . . . this evidence tended to the promotion of right and justice, but as well said in *Pearce v. Pearce* [citations omitted]: "Truth like all other good things may be loved unwisely, may be pursued too keenly, may cost too much. . .'"⁸¹

The California Supreme Court acknowledged more recent decisions that reach similar conclusions. In *State v. Orwell*,⁸² the court reversed contempt charges against an attorney who refused to disclose the source of a knife.⁸³ The court required the evi-

76. *State of West Virginia v. Douglass*, 20 W. Va. at 783; 29 Cal. 3d at 691-92, 631 P.2d at 51-52, 175 Cal. Rptr. at 617-18.

77. *State of West Virginia v. Douglass*, 20 W. Va. at 780.

78. Cf. note 75 *supra* (*Douglass* holding). See also note 77 *supra* and accompanying text.

79. See note 75 *supra*.

80. 29 Cal. 3d at 691, 631 P.2d at 51, 175 Cal. Rptr. at 617.

81. *Id.* The Virginia Supreme Court went on to elaborate on what the costs encompass.

And surely the meanness, and the mischief of prying into a man's confidential communications with his legal advisors, the general evil of infusing reserve and dissimulation, uneasiness and suspicion and fear, into these communications which must take place, and which, unless in a condition of perfect security, must take place uselessly or worse, are too great a price to pay for truth itself.

20 W. Va. at 783.

82. 64 Wash. 2d 828, 394 P.2d 681 (1964).

83. *Id. e.g.*, 29 Cal. 3d at 692, 631 P.2d at 52, 175 Cal. Rptr. at 618 (*Meredith* court states *Orwell* facts). Defense counsel is required to turn evidence over to authorities, but is not required to disclose further information pursuant to CAL. PENAL CODE § 135 (West 1970) (destroying or concealing evidence). See generally Comment, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979); Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received From His Client*, 38 U. CHI. L. REV. 211 (1970).

dence be given over to the prosecution, but the fact that it was the defendant who gave it to him was classified as privileged information.⁸⁴ The court did not address the issue of whether the prosecution was precluded from finding the knife in an incriminating location.⁸⁵ In the third case relied on by the *Meredith* court, *People v. Belge*,⁸⁶ the defense counsel did not alter the evidence observed as a direct result of a privileged communication. In *Belge*, the defendant told the attorney the location of the body of one of three murder victims. The attorney's unwillingness to disclose the location and the additional murders was protected under the attorney-client privilege.⁸⁷

Of the decisions reviewed by this court, none address the issue as to whether the attorney-client privilege should be restricted when results of that privilege destroys or alters evidence in a way which prevents the prosecution from making the same or similar observations.⁸⁸

D. A Policy Decision

The court considered both the underlying policy of the attorney-client privilege⁸⁹ and the previous contexts in which the privilege had been extended to protect products of privileged communications.⁹⁰ Through these initial inquiries, the court was able to gain a proper perspective to make a policy decision to determine if the privilege should be restricted with regard to products of privileged communications.⁹¹

84. See note 83 *supra*.

85. *State v. Olwell*, 64 Wash. 2d 828, 394 P.2d 681; See also *People v. Meredith*, 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

The court in *Olwell* was content that requiring the defense counsel to turn over evidence to the prosecution without disclosing the source of such evidence balanced the conflicting interests of the prosecution and defense. They stated that the public interest was served by allowing the prosecution to recover the evidence, and the defense interest was served by not having to disclose the source of the evidence. 64 Wash. 2d at 834, 394 P.2d at 685.

86. 372 N.Y.S.2d 798, 83 Misc. 2d 186 (1975), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (App. Div. 1975); see also *People v. Meredith*, 29 Cal. at 692-93, 631 P.2d at 52, 175 Cal. Rptr. at 618 (statement of facts of *Belge*).

87. See note 86 *supra*.

88. 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

89. *Id.* at 690-91, 631 P.2d at 51, 175 Cal. Rptr. at 617; see also notes 52-63 *supra* and accompanying text.

90. 29 Cal. 3d at 691-93, 631 P.2d at 51-52, 175 Cal. Rptr. at 617-18; see also notes 64-88 *supra* and accompanying text.

91. The court states early in its opinion that the matter is one of first impression requiring the balancing of competing policy considerations:

On the one hand, to deny protection to observations arising from confidential communications might chill free and open communication between attorney and client and might also inhibit counsel's investigation of his client's case. On the other hand, we cannot extend the attorney-client

The court was concerned with the fact that the prosecution may be prevented from viewing the evidence in its original location and condition when the defense alters or removes it.⁹² The defense acknowledged a need for an exception to the privilege under such circumstances.⁹³ The defense suggested a test of "probability of eventual discovery."⁹⁴ The test would require the prosecution to prove that "the police probably would have eventually discovered the evidence."⁹⁵ The court rejected the test as being "unworkably speculative."⁹⁶

The court reached its final decision by viewing the defense's decision to remove or alter evidence as a "tactical choice."⁹⁷ The court extended the attorney-client privilege to cover the observations made as a result of a privileged communication, but that when the defense goes a step further and alters or destroys the evidence, the observations will no longer be shielded by the privilege.⁹⁸

IV. CASE IMPACT

The Evidence Code allows an attorney to disclose privileged communications of his client's to third parties that are "reasonably necessary" to assist the lawyer in carrying out the purpose for which he was consulted.⁹⁹ The court's holding in the present case, that the observations by the investigator would be protected under the privilege if they did not destroy or alter evidence,¹⁰⁰ clearly establishes defense investigators, and by analogy any

privilege so far that it renders evidence immune from discovery and admission merely because the defense seizes it first.

29 Cal. 3d at 686, 631 P.2d at 48, 175 Cal. Rptr. at 614.

92. See note 88 *supra* and accompanying text.

93. 29 Cal. 3d at 694, 631 P.2d at 53, 175 Cal. Rptr. at 619.

94. *Id.* The prosecution argued that without an exception the defense would be permitted to "destroy" critical evidence. To allow for such a result "might encourage defense counsel to race the police to seize critical evidence." *Id.*

95. *Id.*

96. *Id.*

97. *Id.* See also note 10 *supra*.

98. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620; The tactical choice is either to observe the evidence and have such observations protected by the privilege, or to remove the evidence and examine it more closely in the hope that a more in depth examination of the evidence will produce strong evidence favorable to the client. *Id.* See 29 Cal. 3d at 693 n.7, 631 P.2d at 619 n.7, 175 Cal. Rptr. at 619 n.7.

99. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

100. See notes 32 and 46 *supra*.

other similar third parties, as being "reasonably necessary" under Evidence Code sections 912 and 952.¹⁰¹

The court's decision further supports the attorney-client privilege in criminal contexts.¹⁰² The policy of the privilege is to enhance the free and open communication between attorney and client.¹⁰³ The court recognized that encroachments on that policy also infringe on the defendant's constitutional rights to counsel.¹⁰⁴

The major impact of the case is that it protects observations or other products that result from a privileged communication, including those of necessary third parties, as being within the confines of the attorney-client privilege.¹⁰⁵ Such observations or "products" will be protected so long as they do not alter or destroy the evidence in a manner that would preclude the prosecution from making the same observations.¹⁰⁶

V. CONCLUSION

The California Supreme Court, in considering the question as a matter of first impression, was faced with making a policy decision involving two competing policy issues.¹⁰⁷ Those policy issues were the need for open communication between a client and his attorney, balanced against the need to prevent the exclusion of relevant evidence at trial because of the privilege.¹⁰⁸

The court held that the privilege would be restricted and would not protect observations by those under the privilege that altered or destroyed evidence in a way that would preclude the prosecution from making the same observations.¹⁰⁹ However, in cases not altering or destroying evidence, the privilege would protect the observations and products made or discovered by those acting under the privilege.¹¹⁰

101. 29 Cal. 3d 682, 631 P.2d 46, 175 Cal. Rptr. 612.

102. The court's discussion of paralegals, legal secretaries, receptionists, physicians, or psychiatrists indicates the court's extension of the privilege to encompass similar third parties. 29 Cal. 3d at 690 n.3, 631 P.2d at 50 n.3, 175 Cal. Rptr. at 616 n.3.

103. See *People v. Meredith*, 29 Cal. 3d at 691, 631 P.2d at 51, 175 Cal. Rptr. at 617.

104. See notes 52-55 *supra* and accompanying text.

105. See notes 65-67 *supra* and accompanying text.

106. See 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

107. *Id.*

108. See note 91 *supra*.

109. *Id.*

110. 29 Cal. 3d at 695, 631 P.2d at 54, 175 Cal. Rptr. at 620.

B. EXPERT TESTIMONY

1. *Expert Testimony in Criminal Competency Hearings: People v. Samuel*

In *People v. Samuel*,¹ the California Supreme Court held that expert testimony is entitled to great weight in a criminal competency hearing² where the expert addresses the defendant's intelligence, ability to communicate, and emotional and mental stability, especially where the expert is able to observe the defendant for a long period of time.³

In *Samuel*, the defendant's conviction was reversed, based on the erroneous jury verdict at the competency hearing.⁴ The court concluded that a jury could not have reasonably rejected the evidence produced by experts which proved the defendant's mental incompetence to stand trial.⁵ An "impressive array" of uncontra-

1. 29 Cal. 3d 489, 629 P.2d 485, 174 Cal. Rptr. 684 (1981). The defendant was charged with the first degree murder of a gas station attendant during a robbery attempt. The defendant's attorney requested a competency hearing when he became aware of his client's mental illness.

2. The California Penal Code provides in pertinent part:

(b) If counsel informs the court that he believes the defendant is or may be mentally incompetent, the court shall order that the question of the defendant's mental competence is to be determined in a hearing which is held pursuant to Sections 1368.1 and 1369. If counsel informs the court that he believes the defendant is mentally competent, the court may nevertheless order a hearing. Any hearing shall be held in the superior court.

CAL. PENAL CODE § 1368(b) (West Supp. 1981).

3. The standard required for a determination of a defendant's competency to stand trial has been articulated as being substantial evidence showing defendant's competence or incompetence to stand trial. *See People v. Beivelman*, 70 Cal. 2d 60, 447 P.2d 913, 73 Cal. Rptr. 521 (1968); *People v. Lauder milk*, 67 Cal. 2d 272, 431 P.2d 228, 61 Cal. Rptr. 644 (1967); *People v. Pennington*, 66 Cal. 2d 508, 426 P.2d 942, 58 Cal. Rptr. 374 (1967). Substantial evidence is evidence "reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials which the law requires in a particular case." *People v. Bassett*, 69 Cal. 2d 122, 139, 443 P.2d 777, 787, 70 Cal. Rptr. 193, 203 (1968) (quoting *Estate of Teed*, 112 Cal. App. 2d 638, 644, 247 P.2d 54, 58 (1952)).

4. "It is a fundamental canon of criminal law, and a foundation of due process, that '[a] person cannot be tried or adjudged to punishment while such person is mentally incompetent.'" 29 Cal. 3d at 494, 629 P.2d at 486, 174 Cal. Rptr. at 685. (quoting CAL. PENAL CODE §1367 (West Supp. 1981)).

5. Samuel exhibited clear signs of mental disorder from a very young age. He experienced catatonic episodes, heard disembodied voices, and hallucinated. Treatment at a state hospital with medication and constant supervision failed to correct his problems. In all, Samuel suffered from three separate mental disorders: Chronic schizophrenia, some degree of mental retardation, and organic dysfunction. He was unable to respond to specific inquiries about his trial and attorney and he had no concept of the proceedings he was involved in. 29 Cal. 3d at 498-505, 629 P.2d at 488-93, 174 Cal. Rptr. at 687-92.

dicted evidence⁶ compelled the court to avoid the deferential stance ordinarily taken in reviewing jury decision.⁷ Although the decision in *Samuel* primarily concerned the sufficiency of evidence, the court also reaffirmed its decision in *People v. Morse*,⁸ which prevents a criminal defendant from challenging the use of a questionably obtained confession after defense counsel uses such a confession to aid an expert witness in forming his opinion on the defendant's competence.⁹

VI. LABOR LAW

A. AGRICULTURAL LABOR RELATIONS ACT

1. *The Proper Test for Determining a Violation of the A.L.R.A.: Martori Brothers Distributors v. Agricultural Labor Relations Board*

In the situation where both permissible and impermissible motivations for an employer's actions in discharging his employees are seen to exist, a variety of tests have been employed by the courts to determine when the ALRA has been violated. Martori Brothers Distributors v. Agricultural Labor Relations Board settled the law in California with regard to unfair labor practices under the ALRA. The author explores the background of

6. Five court-appointed psychiatrists, three psychologists, a medical doctor, a nurse, and three psychiatric technicians attested to Samuel's mental incompetence to stand trial. The prosecution presented only two lay witnesses, neither of whom contradicted any of the defense testimony. The court reviewed the defendant's psychological history in detail, which revealed a lifetime of mental problems and disorders. *Id.*

7. The power of the court to weigh the evidence is limited by the deference due the trier of fact. The court must review the record in the light most favorable to the verdict, using care not to invade the province of the jury. *People v. Simpson*, 43 Cal. 2d 553, 275 P.2d 31 (1954); *Meiner v. Ford Motor Co.*, 17 Cal. App. 3d 127, 94 Cal. Rptr. 702 (1971). Discretion of the jury is not absolute and upon a showing of an absence of substantial evidence supporting the jury decision, the court may weigh the evidence. *People v. Bassett*, 69 Cal. 2d at 137-38, 443 P.2d at 786-87, 70 Cal. Rptr. at 202-03. The court gave three reasons for closely scrutinizing the verdict. First, the right to a jury in a competency hearing is statutory, not mandated by the Constitution, and therefore, involves no constitutional right. Second, testimony offered by the witnesses cannot be considered insignificant, and they could not be reasonably suspected of falsification or bias. Finally, reversal of a finding of incompetence does not necessarily affect the question of a defendant's guilt. 29 Cal. 3d at 506, 629 P.2d at 493, 174 Cal. Rptr. at 692.

8. 70 Cal. 2d 711, 452 P.2d 607, 76 Cal. Rptr. 391 (1969). A competence hearing is held only after a prima facie showing of mental incompetence; therefore, defense counsel must necessarily assume an increased role in the fundamental decision making process. It would be unrealistic to expect him to get approval from his client on strategic matters in the competence hearing.

9. Chief Justice Bird disagreed on the viability of *Morse*. She argued that *People v. Disbrow*, 16 Cal. 3d 101, 545 P.2d 272, 127 Cal. Rptr. 360 (1976) and *People v. Rucker*, 26 Cal. 3d 368, 605 P.2d 843, 162 Cal. Rptr. 13 (1980) had overruled the holding in *Morse*. If so, the defendant could challenge the use of a questionably obtained confession regardless of its use by defense counsel.

the specific standards examined by the court, and shows the court's reasoning in adopting the stated test.

I. INTRODUCTION

Where an agricultural employee,¹ who is an active union member, is disciplined or discharged for allegedly valid reasons and brings an unfair labor practice charge,² the Agricultural Labor Relations Board is faced with the less than enviable task of determining the true motivation for the employer's action. If the agricultural employer,³ motivated by anti-union animus, discharges an employee solely for engaging in a protected activity,⁴ a clear violation of the Agricultural Labor Relations Act has occurred.⁵ On the other hand, where the employer discharges an employee solely on valid grounds absent any anti-union animus there has clearly been no violation of the Act.⁶ Between these two extremes lies a vast quagmire of judicial phraseology.⁷

In *Martori Brothers Distributors v. Agricultural Labor Relations Board*⁸ the California Supreme Court laid all semantic distinctions to rest by adopting a "but for" test⁹ to apply to these dual motivation situations.¹⁰

II. HISTORICAL BACKGROUND

In 1975, the California Legislature adopted the Agricultural Labor Relations Act (ALRA).¹¹ The purpose of the Act was to provide collective bargaining rights for agricultural employees¹² and to promote harmony in the previously disrupted area of farm la-

1. CAL. LAB. CODE § 1140.2 (West 1980).

2. CAL. LAB. CODE § 1153 (West 1981).

3. CAL. LAB. CODE § 1140.4 (West 1981).

4. CAL. LAB. CODE § 1152 (West 1981).

5. In this situation any claim of legitimate reasons by the employer would be wholly without merit and would be termed a pretext. *Wright Line, Inc.*, 105 L.R.R.M. 1169, 1170 n. 5 (1980).

6. See generally *NLRB v. Sheboygan Chair Co.*, 125 F.2d 436 (7th Cir. 1942) (employer testified that employee was fired for not doing his work and employee's testimony corroborated this).

7. See note 21 *infra*.

8. 29 Cal. 3d 721, 631 P.2d 60, 175 Cal. Rptr. 626 (1981).

9. See notes 27 and 28 *infra* and accompanying text.

10. Dual motivation refers to the situation where both permissible and impermissible motivations for employer actions are present in a discrimination case.

11. CAL. LAB. CODE § 1140 *et seq* (West 1981) (hereinafter referred to as the Act or the ALRA).

12. CAL. LAB. CODE § 1140.2 (West 1981).

bor.¹³ The ALRA was modelled after the National Labor Relations Act (NLRA)¹⁴ and specifically provides that “[t]he board shall follow applicable precedents of the National Labor Relations Act. . . .”¹⁵ Accordingly, the Agricultural Labor Relations Board (ALRB)¹⁶ will take cognizance of NLRA policies, NLRB rulings, and decisions of federal courts when performing its functions.

Historically, courts have sought out rules of law, policies, or principles to hang their adjudicative hats on. However, where review of an agency’s findings is undertaken, “there are no talismanic works that can avoid the process of judgment.”¹⁷ In the area of dual motivation for employer conduct, the nature of the employment situation requires a balancing of conflicting interests.¹⁸ The employer’s right to run his business as he sees fit must be balanced with the employee’s right to engage in protected activities.

The traditional language found in the cases dealing with the dual motive situation states that an employer may discharge any employee for any reason, or for no reason at all, so long as the employer’s motivation was not to do that which section 8(a)(3) of the NLRA forbids.¹⁹ Courts are thus placed in the position of determining causality.²⁰ To facilitate this determination a variety of “tests” have been developed.²¹ These “tests” can be reduced to

13. Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza de California Para el Futuro*, 15 SANTA CLARA LAW. 783 (1975).

14. 29 U.S.C. §§ 141-97 (1970) (hereinafter referred to as the NLRA).

15. CAL. LAB. CODE § 1148 (West 1980).

16. CAL. LAB. CODE § 1141 (West 1981) (hereinafter referred to as the ALRB or the Board).

17. *Universal Camarra Corp. v. Labor Bd.*, 340 U.S. 474, 489 (1951).

18. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967) (Board must balance employer’s business justification against the invasion of employee’s rights); *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967) (the Board must balance the asserted business justification and the invasion of employee’s rights in light of the policies of the NLRA); *Wright Line, a Div. of Wright Line, Inc.*, 105 L.R.R.M. 1169, 1173 (1980) (the ultimate problem is the balancing of conflicting legitimate interests).

19. See *S.W. Nogle Co. v. NLRB*, 478 F.2d 1144, 1146 n. 1 (8th Cir. 1973); *NLRB v. Red Top, Inc.*, 455 F.2d 721, 726 n. 4 (8th Cir. 1972); *R.J. Lison Co. v. NLRB*, 379 F.2d 814, 817 (9th Cir. 1967); *Fort Smith Broadcasting Co. v. NLRB*, 341 F.2d 874, 878 (8th Cir. 1965); *NLRB v. Florida Steel Corp.*, 308 F.2d 931, 935-36 (5th Cir. 1962); *NLRB v. McGahey*, 233 F.2d 406, 413 (5th Cir. 1956); 105 L.R.R.M. at 1171.

20. Causality has been defined as the relationship between protected activities and employer actions that deliberately effect an employee’s employment. 105 L.R.R.M. at 1170.

21. *NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1002 (10th Cir. 1977) (partially motivated); *Neptune Water Meter Co. v. NLRB*, 551 F.2d 568, 570 (4th Cir. 1977) (no discharge but for); *Oil, Chemical, & Atomic Workers Int’l Union v. NLRB*, 547 F.2d 575, 590 (D.C. Cir. 1977) (motivated in any part); *Allen v. NLRB*, 561 F.2d 976, 978 (D.C. Cir. 1977) (motivated in part); *NLRB v. Townhouse T.V. & App., Inc.*, 531 F.2d 826, 828 (7th Cir. 1976) (motivated at least in part); *NLRB v. Broyhill Co.*, 514 F.2d 655, 660 (8th Cir. 1975) (motivated in part); *Famet Inc. v. NLRB*, 490 F.2d

three broad categories.

The first of these categories is the "partly motivated" test. Where the discharge of an employee was in any part motivated by the employee's exercise of protected activities, an 8(a)(3) violation has occurred.²² Under this test the burden is on the employee to show the existence of a dual motivation.²³

Another line of cases has applied the so called "dominant motive"²⁴ test. Where an employee is discharged based on both permissible and impermissible grounds and the improper motivation is dominant, an unfair labor practice exists.²⁵ The only require-

293, 296 (9th Cir. 1973) (dominant motive); *NLRB v. Gentithes*, 463 F.2d 557, 560 (3rd Cir. 1972) (substantial or motivating cause); *NLRB v. Fibers Int'l Corp.*, 439 F.2d 1311, 1312 (1st Cir. 1971) (dominant motive), *but see NLRB v. E. Smelting and Mining Corp.*, 598 F.2d 666, 671 (1st Cir. 1979) (but for); *NLRB v. Gladding Key-stone Corp.*, 435 F.2d 129, 131 (2nd Cir. 1970) (partially motivated); *Frosty Morn Meats, Inc. v. NLRB*, 296 F.2d 617, 621 (5th Cir. 1961) (moving cause).

22. *See Allen v. NLRB*, 561 F.2d 976, 982 (D.C. Cir. 1977) (Board finding of no violation of the Act not supportable where motivated in part by union animus); *NLRB v. Central Press of California*, 527 F.2d 1156, 1158 (9th Cir. 1975) (a discharge of employee due in part to his work on behalf of union violated §§ 8(a)(3) and (1)); *NLRB v. Broyhill*, 514 F.2d 650, 660 (8th Cir. 1975) (discharge in part motivated by anti-union animus is an unfair labor practice despite failure to work enough mandatory overtime); *NLRB v. Big Three Indus., Inc.*, 497 F.2d 43, 49 (5th Cir. 1974) (though justifiable grounds abound, employee's discharge was unlawful where partially motivated by employee's protected activity); *NLRB v. M.H. Brown Co.*, 441 F.2d 839, 843 (2nd Cir. 1971) (discontinuance of second shift not partially motivated by anti-union considerations); *S.A. Healy Co. v. NLRB*, 435 F.2d 314, 315 (10th Cir. 1970) (union activity was one of the reasons for not rehiring employee and thus was an unfair labor practice); *NLRB v. D'Armingene, Inc.*, 353 F.2d 406, 409 (2nd Cir. 1965) (insufficient evidence on the record as a whole to conclude that discharge was not in significant part motivated by anti-union animus).

23. *NLRB v. Fibers Int'l Corp.*, 439 F.2d 1311, 1312 (1st Cir. 1971). This test has been criticized as insulating and immunizing the employee from employment decisions in the normal operation of the employer's business. *Waterbury Community Antenna, Inc. v. NLRB*, 587 F.2d 90, 97 (2nd Cir. 1978); *Bekiaris v. Board of Educ.*, 6 Cal. 3d 575, 593, n.12, 493 P.2d 480, 491, n.12, 100 Cal. Rptr. 16, 27 n.12 (1972) (teacher's exercise of constitutional rights does not automatically insulate him from dismissal); *Royal Packing Co. v. ALRB*, 101 Cal. App. 3d 826, 833, 161 Cal. Rptr. 870, 874 (1980). In all cases involving discharge of an active union member there is always sufficient evidence to meet this test. 587 F.2d at 97. In such a case the employee is placed in an impregnable position merely because of his union activity. *NLRB v. Billen Shoe Co., Inc.*, 397 F.2d 801, 803 (1st Cir. 1968); 101 Cal. App. at 834, 161 Cal. Rptr. at 874; *see Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977) (discussing causation principles in the context of teacher's exercise of first amendment rights).

24. "To dominate means to control. The 'dominant' motive is the controlling or effective motive." *NLRB v. Fibers Int'l Corp.*, 439 F.2d 1311, 1315 (1st Cir. 1971).

25. *NLRB v. Sacramento Clinical Laboratory Inc.*, 623 F.2d 110, 113 (9th Cir. 1980) (dominant motive in denial of time off was anti-union animus); *Firestone Tire and Rubber Co. v. NLRB*, 539 F.2d 1335, 1337 (4th Cir. 1976) (discharge for

ment under this test is a clear showing that the employer's dominant motive was anti-union animus.²⁶

A third approach has been termed the "but for" test. If an employee would not have been discharged "but for" his union activities there has been an unfair labor practice.²⁷ This test places the initial burden of proof upon the employee to show that anti-union animus was a motivating factor in the employer's action. Once this prima facie case is established the burden shifts to the employer to show that the same action would have been taken absent any anti-union animus.²⁸

falsifying employment application was sufficient cause even though employee was union steward); *Famet Inc. v. NLRB*, 490 F.2d 293, 296 (9th Cir. 1973) (the Board's conclusion that employees were motivated by union activities was supported by substantial evidence even though employee's knowledge of such activities was based on circumstantial evidence); 439 F.2d at 1312 (Board failed to apply dominant motive test in reinstating ill-behaved employee); 397 F.2d at 803 (fact that employer was pleased to effectuate discharge does not mean that anti-union animus was primary motive); *NLRB v. Lowell Sun Publishing Co.*, 320 F.2d 835, 842 (1st Cir. 1963) (improper motive was not dominant where employee repeatedly shirked responsibilities placed on him giving rise to discharge).

26. This method falls short of determining the true intent of the employer because it fails to consider whether the same decision would have been made regardless of union animus. 429 U.S. at 287. It also places the employee in a better position for having engaged in the activity than he would have been had he done nothing at all. *Id.* at 285-86; 587 F.2d at 99. In addition, it ignores the situation where the union activity plays a minute role in the particular incident leading to the discharge but was the "straw that broke the camel's back." *NLRB v. Whitfield Pickle Co.*, 374 F.2d 576, 582 (5th Cir. 1967).

27. 429 U.S. at 287 (exercise of first amendment rights held not to be but for motivation of school board's refusal to renew teacher's permit and grant tenure); *Stephenson v. NLRB*, 614 F.2d 1210, 1213 (9th Cir. 1980) (employee discharge for poor work upheld by the Board even though it occurred after he was told that he could join union because union animus was not the "but for" cause for termination). 587 F.2d at 99 (employee would have been discharged regardless of his union activities and the Board's conclusion that he would not have been fired but for such activities was not supported by substantial evidence on the record as a whole); *Colletti's Furniture, Inc. v. NLRB*, 550 F.2d 1292, 1293 (1st Cir. 1977) (employee would not have been fired but for his union activities); *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49-50 (9th Cir. 1970) (nurse would not have been fired but for union activities); *NLRB v. Whitfield Pickle*, 374 F.2d 576, 582 (5th Cir. 1967) (employee reinstated with back pay where he would not have been discharged but for anti-union animus, and high rate of absenteeism could not justify employer's action); *Abatti Farms, Inc. v. ALRB*, 107 Cal. App. 3d 317, 328, 165 Cal. Rptr. 887, 893 (1980) (Board's determination that but for union activities employees would have been rehired enforced by court); 101 Cal. App. 3d at 835, 161 Cal. Rptr. at 875 (burden of demonstrating that discharge of teamster shop steward would not have occurred but for his union activities was not met by the charging party).

28. 429 U.S. at 287; 105 L.R.R.M. at 1175. The distinction between the "dominant motive" test and the "but for" rule is more than mere semantics. The dominant motive test (as well as the "partial motive" test) requires no shifting of the burden of proof once a prima facie case is made. Thus, the employer is never permitted to show that the same action would have been taken in any event. The "but for" test accommodates the competing interests of employer and employee by shifting the burden of proof. *See* note 18 *supra*. By this method the employer's

From the foregoing it is clear that the balancing of interests of employer and employee is peculiar to the facts of each case. Thus, the standard by which the court determines employer motivation is crucial to whether an employee has a case or an employer a defense.

III. FACTUAL SETTING

Heriberto Silva, an agricultural employee, filed an unfair labor practice complaint with the ALRB alleging that he had been terminated by Martori Brothers Distributors for engaging in protected activities. The ALRB found that the Martori Brothers had committed an unfair labor practice because Silva's union activities were the motivating reasons for his discharge.²⁹ The Supreme Court of California set aside this order and remanded the case for further proceedings³⁰ based on the following facts.

Having previously been employed by Martori Brothers,³¹ Silva was hired on December 9, 1976, for the 1976-77 crop season in the Imperial Valley. On January 6, 1977, Silva's demand for duties as a stitcher instead of a cutter resulted in a confrontation between Silva and Edward and Steven Martori.³² After Silva voiced obscenities and threats against the Martoris, he was terminated.³³ The following morning Silva came to the field, distributed leaflets, and talked with the workers. After a lengthy discussion with Steven Martori, he left.

Silva filed an unfair labor practice claim with the ALRB through the United Farm Workers of America (UFWA) based on his termination. He was rehired pending the results of the hearing in or-

actions are not unnecessarily curtailed and the employee is protected from discrimination. *See generally* 429 U.S. 274; 105 L.R.R.M. 1169.

29. 29 Cal. 3d at 727, 631 P.2d at 63, 175 Cal. Rptr. at 629.

30. *Id.* at 731, 631 P.2d at 66, 175 Cal. Rptr. at 632.

31. Silva had worked the 1966-67 crop seasons for Martori Brothers in Arizona. The Martoris knew of Silva's activities on behalf of the United Farm Workers of America (UFWA). This is significant because knowledge of an employee's union activities is required before there can be discrimination due to these activities. *See Air Survey Corp. v. NLRB*, 601 F.2d 256 (6th Cir. 1979); *Independent Gravel Co. v. NLRB*, 566 F.2d 1091 (8th Cir. 1977).

32. Silva was told that he could not switch jobs in the middle of the day but that the next day he could be a stitcher. 29 Cal. 3d at 724, 631 P.2d at 61, 175 Cal. Rptr. at 627.

33. Later that day, Silva went to Steven Martori's office and renewed the confrontation replete with threats and obscenities. He then asked Martori if he was fired, to which Martori replied that if he wanted to be fired, he was. 29 Cal. 3d at 724, 631 P.2d at 61, 175 Cal. Rptr. at 627.

der to mitigate damages should he be reinstated. Another confrontation ensued and a few days later Silva quit the job. The Board found that the Martoris' actions were not motivated by Silva's union activities and dismissed the claim.³⁴

Contrary to Steven Martori's instructions, Silva was rehired by Juan Martinez, a foreman, on January 6, 1978. Before and after his third day on the job, Silva circulated petitions among the workers which stated that Martori Brothers should be required to bargain collectively with the UFWA. This activity was observed by one of the Martori foremen.

On Silva's fifth day at work, some of the workers discussed with him their rights to payment for repacking rain damaged boxes. A foreman told them that they would be paid for all of the boxes. Steven Martori was not privy to this conversation, but as the workers dispersed he recognized Silva³⁵ and questioned his presence.³⁶ At the end of the day, Silva was discharged with about ten other workers for lack of work.³⁷

The Administrative Law Officer (ALO) found that Silva was terminated for his union activities and for testimony at the board hearings and that any claimed justification was pretextual. In addition, he found that no personal threats had been made and that any "disturbing" remarks were overlooked by the employer in rehiring him. The ALRB agreed with the ALO and concluded that Steven Martori had condoned the past threats and that the real motivation for Silva's discharge was his union activities.

IV. THE SUPREME COURT'S DECISION

In *Martori Brothers Distributors v. Agricultural Labor Relations Board*, the California Supreme Court exercised jurisdiction in order to make the Board aware of the correct legal standard by which it should analyze dual motive situations.³⁸ The court noted the relative contentions of the parties but made no factual determinations applying the legal standards enunciated. Instead, the

34. 4 ALRB 80 (1977).

35. Silva had grown a full beard since the last time Steven Martori had seen him. 29 Cal. 3d at 726, 631 P.2d at 62, 175 Cal. Rptr. at 628.

36. Silva told Steven Martori that he was working for him. Martori replied, "No you're not." Silva testified that Martori then said that he could not keep Silva because of the damage that Silva had done at the 1977 hearings. Martori said that the real reason was the prior threats against the Martoris. *Id.* at 726, 631 P.2d at 62, 175 Cal. Rptr. at 628.

37. There was no evidence that the other workers were active in the union. Martinez testified that he terminated troublemakers first and that Steven Martori told him to terminate Silva. *Id.* at 726, 631 P.2d at 63, 175 Cal. Rptr. at 629.

38. *Id.* at 731, 631 P.2d at 66, 175 Cal. Rptr. at 632.

case was remanded to the Board for reconsideration.³⁹

After stating the applicable standard of review,⁴⁰ the court considered testimony regarding Silva's erratic behavior. Silva was present at the hearing before the ALRB and had ample opportunity to rebut such testimony. The court held that, in light of his failure to do so, the Board must accept as true the uncontradicted and unimpeached testimony.⁴¹ However, the court then retreated from this assertion and stated that such testimony may be disbelieved where there is some rational basis for doing so.⁴²

After taking note of the "in part"⁴³ and "dominant motive"⁴⁴ tests the court adopted the "but for" test. It held that "[w]hen it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained 'but for' his union membership or his performance of other protected activities."⁴⁵

In adopting this test the court relied on *Wright Line, Inc.*⁴⁶ In that case the NLRB, after comparing and analyzing the various approaches in the circuits,⁴⁷ applied a "but for" test⁴⁸ to find a dis-

39. *Id.*

40. *Id.* at 727, 631 P.2d at 63, 175 Cal. Rptr. at 627. "The findings of the board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall . . . be conclusive." CAL. LAB. CODE § 1160.8 (West 1981).

41. 29 Cal. 3d at 728, 631 P.2d at 63-64, 175 Cal. Rptr. at 629-30 (citing *McCalister v. Workmen's Comp. App. Bd.*, 69 Cal. 2d 408, 413, 445 P.2d 313, 315, 71 Cal. Rptr. 697, 699 (1968)); *Levesque v. Workmen's Comp. App. Bd.*, 1 Cal. 3d 627, 639, 463 P.2d 432, 440, 83 Cal. Rptr. 208, 216 (1970). *McCalister* relied on *Wilhelm v. Workmen's Comp. App. Bd.*, 255 Cal. App. 2d 30, 62 Cal. Rptr. 829 (1967) for the proposition that uncontradicted and unimpeached evidence must be accepted as true. However, *McCalister* stated the Board could not deny the existence of evidence that a public health nurse employee contracted herpes zoster from students with chicken pox. It could, however, disbelieve testimony even though uncontradicted and unimpeached. *Id.* at 33, 62 Cal. Rptr. at 831. Thus, reliance upon *Wilhelm* may have been misplaced. *Levesque* quoted *McCalister* for this same proposition. This is the position of Justice Newman in his concurring opinion in *Martori*. 29 Cal. 3d at 732, 631 P.2d at 66, 175 Cal. Rptr. at 632.

42. 29 Cal. 3d at 728, 631 P.2d at 64, 175 Cal. Rptr. at 630.

43. See notes 22 and 23 *supra* and accompanying text.

44. See notes 24-26 *supra* and accompanying text.

45. 29 Cal. 3d at 730, 631 P.2d at 65, 175 Cal. Rptr. at 630.

46. 105 L.R.R.M. 1169.

47. *Id.* at 1170-72.

48. See notes 27 and 28 *supra* and accompanying text.

charge in violation of section 8(a)(3) of the NLRA.⁴⁹ Since section 1148⁵⁰ directs the ALRB to follow precedents of the NLRA, the court concluded that the “but for” test should henceforth be applied by the ALRB.⁵¹

A final issue dealt with by the court was that of waiver by condonation, which explored the question of whether there was clear and convincing evidence that the Martori Brothers had forgiven Silva and intended to wipe the slate clean.⁵²

V. IMPACT AND CONCLUSION

Martori Brothers settled California law with regard to unfair labor practice proceedings under the ALRA where dual motivation is at issue. The relatively short tenure of the ALRA and its reliance upon unsettled NLRA precedent⁵³ required a definitive statement of the correct standard to be applied. Adopting the “but for” rule filled this need.

Where uncontradicted and unimpeached testimony is concerned, *Martori Brothers* seems to limit the discretion of the ALRB. It restricts the Board from rejecting such evidence absent a rational basis for doing so. As the expertise of this Board grows, the deference attributed to its findings will also increase.

In addition, the “but for” test meets the needs of the employer by not interfering with business decisions where such decisions would have been made regardless of the employee’s activities. Likewise, the employee is protected from employer action taken in light of the exercise of protected activities.

VII. COMMUNITY PROPERTY

A. DIVISION OF RETIREMENT BENEFITS

1. *Allocating Risks of Nonvesting and Nonmaturation in Pension Plans Between Spouses: In re Marriage of Gilmore*

With the increasing importance of retirement or pension benefits to the marriage community, the question of the allocation of the risks of nonvesting and nonmaturation inherent in the division of these benefits has become an issue of concern. In re Marriage of Gilmore clarifies and refines the rules regarding the timing of and

49. 105 L.R.R.M. at 1176 (discrepancies in the time sheet of a leading union advocate led to his discharge just two months after a hotly contested election).

50. CAL. LAB. CODE § 1148 (West 1981).

51. 29 Cal. 3d at 730, 631 P.2d at 65, 175 Cal. Rptr. at 630.

52. *Id.* at 731, 631 P.2d at 66, 175 Cal. Rptr. at 632.

53. See note 23 *supra*.

method for distribution of pension funds in situations where division of the pension plan is severed from division of the balance of the community property.

I. INTRODUCTION

The California community property system is hinged upon the classification of real and personal property as community property, quasi-community property, or separate property of the spouses. Once classified, property is subject to many rules dealing with its equal division for purposes of dissolution and death. Under this system, the classification of retirement or pension rules has become more significant as the prevalence and value of such plans have increased.¹ In addition, as the employee spouse nears retirement, the value of the pension increases while the risk of nonvesting and nonmaturation decreases.² The length of the marriage and the proximity in time to the retirement date have a direct bearing upon the value of the pension.³ As a result, the issue of when the right to such a plan vests has become very important with respect to changes in the law which reflect the expectations flowing from the marital relationship.⁴ As divorce or dissolution of marriage has become more commonplace in today's changing society,⁵ the issue of when a nonemployee spouse is entitled to a share in the employee spouse's pension has taken on added significance.

It is settled California law that retirement or pension benefits earned by an employee spouse during marriage are community property and divisible upon dissolution of marriage.⁶ In dividing vested pension benefits,⁷ a court has two alternatives. First, the

1. *In re Marriage of Stenquist*, 21 Cal. 3d 779, 786, 582 P.2d 96, 100, 148 Cal. Rptr. 9, 13 (1978); *In re Marriage of Brown*, 15 Cal. 3d 838, 847, 544 P.2d 561, 566, 126 Cal. Rptr. 633, 638 (1976).

2. 15 Cal. 3d at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638.

3. *Id.* In the *Brown* case, the pension in question had become a valuable asset built up by twenty-four years of community effort through marriage, but would escape division because the marriage dissolution occurred two years before the vesting date. *Id.*

4. See notes 25-27 *infra* and accompanying text.

5. L. HALEM, *DIVORCE REFORM 1* (1980). The divorce rate has more than doubled between 1960 and 1975. *Id.*

6. See 7 WITKIN, *SUMMARY OF CALIFORNIA LAW* § 22 (8th ed. 1978 Supp.); see also notes 25-27 *infra* and accompanying text.

7. "In divorce or dissolution cases . . . the term 'vested' . . . refers to a pension right which is not subject to a condition of forfeiture if the employment rela-

court may compensate the nonemployee spouse with other community property, which has the same present value of the pension, in a single lump sum and award the pension itself to the employee spouse.⁸ Second, it may order the employee spouse to make installment payments based upon the value of the nonemployee spouse's community interest in the pension.⁹

*In re Marriage of Gilmore*¹⁰ posed a problem because the trial court had divided all of the community property of the marriage except the husband's pension.¹¹ Thus, there were no community assets remaining to offset the value of the retirement benefits. Nonetheless, the California Supreme Court ordered an immediate division at the present value of the pension.¹²

This analysis of *In re Marriage of Gilmore* will focus on the allocation of the risks of nonvesting and nonmaturation inherent in the division of retirement benefits.¹³

II. HISTORICAL BACKGROUND

Traditionally, the courts have distinguished between vested rights, nonvested rights, and mere expectancy interests when dealing with classification of pensions and retirement plans.¹⁴ Where a plan was contributory,¹⁵ courts have normally held that

tionship terminates before retirement." 15 Cal. 3d at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635.

8. See notes 37-39 *infra* and accompanying text.

9. See notes 40-42 *infra* and accompanying text.

10. 29 Cal. 3d 418, 629 P.2d 1, 174 Cal. Rptr. 493 (1981).

11. At the time of the trial, the pension was not vested and the court refused to divide it. When it became vested, the wife sought an order directing the husband to pay her share immediately. *Id.* at 422, 629 P.2d at 3, 174 Cal. Rptr. at 495.

12. *Id.* at 426, 629 P.2d at 6, 174 Cal. Rptr. at 498.

13. A matured pension right is an unconditional right to immediate payment of benefits and must be distinguished from a vested right. 15 Cal. 3d at 842, 544 P.2d at 563, 126 Cal. Rptr. at 635. Maturing of benefits "occurs only after the conditions precedent to the payment of the benefits have taken place or are within the control of the employee." *In re Marriage of Fithian*, 10 Cal. 3d 592, 596 n.2, 517 P.2d 499, 451 n.2, 111 Cal. Rptr. 369, 371 n.2, *cert. denied*, 419 U.S. 825, *rehearing denied*, 419 U.S. 1060 (1974). Thus, if the right to payment is subject to one or more conditions, it may be vested but not matured. *In re Marriage of Skaden*, 19 Cal. 3d 679, 685, 566 P.2d 249, 251-52, 139 Cal. Rptr. 615, 617-18 (1977).

14. See *Smith v. Lewis*, 13 Cal. 3d 349, 355, 530 P.2d 589, 593, 118 Cal. Rptr. 621, 625 (1975) (attorney malpractice suit wherein the court held that retirement benefits which flow from the employment relationship, to the extent that they are vested, are community property); *French v. French*, 17 Cal. 2d 775, 778, 112 P.2d 235, 237 (1941) (nonvested pension rights held not property but an expectancy); *Williamson v. Williamson*, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167 (1962) (pensions become community property when and to the extent that the party is certain to receive some payment or recovery of funds).

15. A plan is contributory when the employee spouse either pays into it or has money deducted from his or her salary check for that purpose. *Dryden v. Bd. of Pension Comm'rs*, 6 Cal. 2d 575, 578, 59 P.2d 104, 105-06 (1936) (four percent of each

the right to benefits vested upon acceptance of employment.¹⁶ This was so because the earnings of the spouse during marriage were used to acquire the right to the pension.¹⁷ Thus, the pension was an acquisition during marriage and presumed to be community property.¹⁸

The notion that a nonvested right to a pension is to be seen as a mere expectancy interest is derived from language in the case of *French v. French*.¹⁹ In that case, the husband had served in the United States Navy for sixteen years. At the time of divorce he had transferred from active service to the Naval Reserve.²⁰ Compensation in the reserves was based upon the level of salary at the time of the transfer and was designated as "pay" for the obligations of a reserve. The trial court found that this pay was community property and divided it between the husband and wife.²¹

In reversing the lower court, the supreme court noted that the pay as a member of the reserves was of the type that may or may not continue.²² It was compensation for particular services and not a pension for "services that were entirely performed before the date of his transfer."²³ Having held that the pay was not a pension, the court then stated that the husband would not be entitled to retirement pay "until he completes a service of fourteen years in the Fleet Reserve and complies with all of the requirements of that service. At the present time, his right to retirement pay is an expectancy which is not subject to division as community property."²⁴

Cases following *French* applied the expectancy language to such an extent that it became settled California law that pensions or retirement benefits "which flow from the employment relation-

salary check went to pension fund); *Crossan v. Crossan*, 35 Cal. App. 2d 39, 40, 94 P.2d 609, 609 (1939) (money deducted from paycheck).

16. 6 Cal. 2d at 579, 59 P.2d at 106.

17. 35 Cal. App. 2d at 40, 94 P.2d at 610.

18. Earnings by a spouse during marriage are considered acquisitions within the general presumption of community property. CAL. CIV. CODE § 5110 (West Supp. 1981).

19. 17 Cal. 2d 775, 112 P.2d 235 (1941).

20. As a reserve, the husband was required to serve not more than two months every four years, was subject to training duty, and could be recalled to active duty. *Id.* at 776-77, 112 P.2d at 236.

21. *Id.* at 776, 112 P.2d at 236.

22. *Id.* at 777, 112 P.2d at 236.

23. *Id.*

24. *Id.* at 778, 112 P.2d at 236-37.

ship, to the extent that they are vested, are community property and subject to division between the spouses in the event" of dissolution of the marriage.²⁵ The pension was said to serve as remuneration or compensation for services rendered, and if rendered during marriage, it was deemed to be community property.²⁶ As pensions became more important, the *French* rule proved to be increasingly inadequate²⁷ as evidence by discon-

25. *In re Marriage of Fithian*, 10 Cal. 3d 592, 596, 517 P.2d 449, 451, 111 Cal. Rptr. 369, 371 (1974). See also *In re Marriage of Sommers*, 53 Cal. App. 3d 509, 514, 126 Cal. Rptr. 220, 223 (1975) (wife entitled to one-half of husband's pension plan); *In re Marriage of Ward*, 50 Cal. App. 3d 150, 151-52, 123 Cal. Rptr. 234, 235 (1975) (husband's retirement benefits held to be community property although they did not vest until after separation but before divorce decree); *In re Marriage of Martin*, 50 Cal. App. 3d 581, 583, 123 Cal. Rptr. 634, 635 (1975) (where husband is entitled to receive military retirement benefits at time of divorce, wife is entitled to division of such benefits); *In re Marriage of Brugel*, 47 Cal. App. 3d 201, 203, 120 Cal. Rptr. 597, 598 (1975) (wife has vested right in husband's union pension); *In re Marriage of Peterson*, 41 Cal. App. 3d 642, 649, 115 Cal. Rptr. 184, 189 (1974) (wife entitled to share in vested pension); *In re Marriage of Karlin*, 24 Cal. App. 3d 25, 29, 101 Cal. Rptr. 240, 242 (1972) (wife entitled to 25% interest in husband's military retirement plan even though government can increase, diminish, or abolish such plan); *Williamson v. Williamson*, 203 Cal. App. 2d 8, 11, 21 Cal. Rptr. 164, 167 (1962) (wife held not entitled to pension that had not vested); *Kern v. City of Long Beach*, 29 Cal. 2d 848, 851, 179 P.2d 799, 801 (1947) (writ of mandamus issued compelling city to pay pension). See generally *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963) (wife has no vested interest in pension until it becomes payable to her); *Packer v. Board of Retirement*, 35 Cal. 2d 212, 217 P.2d 660 (1950) (city had the right to modify pension system which resulted in nonvesting of pension). But see, Note, *In re Marriage of Stenquist: Tracing the Community Interest in Pension Rights Altered by Spousal Election*, 67 CAL. L. REV. 856, 863 n.27 (1979).

26. See generally *In re Marriage of Emmett*, 109 Cal. App. 3d 753, 169 Cal. Rptr. 473 (1980) (husband awarded pension and wife awarded equivalent of its value in separate property); *Smith v. Lewis*, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975) (attorney held liable for failure to assert clients' claim to retirement benefits as community property); *In re Marriage of Wilson*, 10 Cal. 3d 851, 519 P.2d 165, 112 Cal. Rptr. 405 (1974) (wife entitled to retirement benefits of husband to the extent earned during the marriage); *Waite v. Waite*, 6 Cal. 3d 461, 492 P.2d 13, 99 Cal. Rptr. 325 (1972) (judge's retirement benefits held to be community property); *Philipson v. Board of Admin.*, 3 Cal. 3d 32, 473 P.2d 765, 89 Cal. Rptr. 61 (1970) (both accumulated contributions and matured retirement benefits allocable to those contributions held to be community property); *In re Marriage of Karlin*, 24 Cal. App. 3d 25, 101 Cal. Rptr. 240 (1972) (wife entitled to share of husband's military retirement benefits); *Bensing v. Bensing*, 25 Cal. App. 3d 889, 102 Cal. Rptr. 255 (1972) (wife entitled to share of retirement benefits earned during marriage by husband); *Benson v. City of Los Angeles*, 60 Cal. 2d 355, 384 P.2d 649, 33 Cal. Rptr. 257 (1963) (former wife held not to be widow of deceased under pension provisions).

27. We do not believe the rule which we must follow is fair. Roy's pension rights constitute a bundle to which Elizabeth, as a partner in the community during the years of the marriage contributed her equal share. Why should she be deprived of her right to any single stick in the bundle?
... We must, however, follow *Benson*, *Philipson*, and *Wilson*.

In re Marriage of Peterson, 41 Cal. App. 3d 642, 656, 115 Cal. Rptr. 184, 194 (1974). The California Supreme Court also found that *French* was ripe for reevaluation but that the issue was not before the court due to waiver by the nonemployee spouse. 10 Cal. 3d at 853, 519 P.2d at 167, 112 Cal. Rptr. at 406.

tented lower courts which were bound by the decisions which implemented the rule.²⁸

In 1976, the Supreme Court of California, in *In re Marriage of Brown*,²⁹ overruled *French*³⁰ and held that nonvested pensions are property subject to classification within the community property system.³¹ The facts of that case involved Robert Brown, who had been an employee of General Telephone Company for twenty-four years. The company had a noncontributory pension plan requiring accumulation of a certain number of "points"³² before the employee's right to the pension vested. Brown had not accumulated the requisite number of points at the time of separation from his wife.³³ However, if he were to keep working, he would eventually accumulate the required number and the pension would vest. Based on these facts, the court went on to state:

In dividing nonvested pension rights as community property the court must take account of the possibility that death or termination of employment may destroy those rights before they mature. In some cases the trial court may be able to evaluate this risk in determining the present value of those rights But if the court concludes that because of uncertainties affecting vesting or maturation of the pension that it should not attempt to divide the present value of pension rights, it can instead award each spouse an appropriate portion of each pension payment as it is paid. This method of dividing the community interest in the pension renders it unnecessary for the court to compute the present value of the pension rights, and divides equally the risk that the pension will fail to vest.³⁴

In light of this statement, the case was remanded for further proceedings consistent with the holding of the court.³⁵

As the *Brown* decision noted, there are two methods of dividing pensions.³⁶ Perhaps the best method is to award the whole pension to the employee spouse and compensate the nonemployee

28. See note 27 *supra*.

29. 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

30. *Id.* at 841, 544 P.2d at 562, 126 Cal. Rptr. at 634. The court also disapproved of many cases inconsistent with its holding. *Id.* at 851 n.14, 544 P.2d at 569 n.14, 126 Cal. Rptr. at 641 n.14.

31. *Id.* at 847, 544 P.2d at 566, 126 Cal. Rptr. at 638.

32. "Points" were based on a combination of age and years of service to the company. *Id.* at 842-43, 544 P.2d at 563, 126 Cal. Rptr. at 635.

33. *Id.* Seventy-eight points were required and Brown had accumulated 72 at the date of separation. *Id.*

34. *Id.* at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639.

35. *Id.* at 852, 544 P.2d at 570, 126 Cal. Rptr. at 642.

36. *Id.* at 848, 544 P.2d at 567, 126 Cal. Rptr. at 639. See notes 8 and 9 *supra* and accompanying text.

spouse with other property of equal value.³⁷ This is the most efficient method because it ends all involvement on the part of the court and between the parties.³⁸ However, utilization of this method must not "tie the hands of the trial court. That court retains the discretion to divide the community assets in any fashion which complies with the provisions of Civil Code section 4800."³⁹

The second method alluded to in *Brown* was to order the employee spouse to pay the nonemployee spouse her community interests in each payment as it is received.⁴⁰ By this method, both spouses share the risk that the pension will not vest or mature. In addition, the nonemployee spouse retains an interest in the pension and may share in any increase in its value.⁴¹ To determine the proportion of this interest, a time rule is normally applied. The ratio between the length of employment during marriage and the total length of the marriage would control.⁴²

III. FACTUAL BACKGROUND AND THE COURT'S DECISION

Earl and Vera Gilmore separated in 1978 after a marriage spanning fourteen years. In January of 1979, final judgment of dissolution of the marriage was entered and the community property was divided equally. However, the court reserved jurisdiction over Earl's retirement plan, which had not yet vested at that time.⁴³ When Earl subsequently became eligible to retire and re-

37. *Philipson v. Board of Admin.*, 3 Cal. 3d 32, 46, 473 P.2d 765, 774, 89 Cal. Rptr. 61, 70 (1970).

38. Comment, *Community Property: Dividing the Community Property Interest in Nonvested Pension Rights*, 65 CAL. L. REV. 275, 283-84 (1977).

39. 15 Cal. 3d at 848 n.10, 544 P.2d at 567 n.10, 126 Cal. Rptr. at 639 n.10; see *Emmett v. Emmett*, 109 Cal. App. 3d 753, 169 Cal. Rptr. 473 (1980). Civil Code § 4800 provides in pertinent part that "[t]he court shall . . . divide the community property and quasi-community property of the parties . . . equally." CAL. CIV. CODE § 4800(a) (West Supp. 1981).

40. *In re Marriage of Judd*, 68 Cal. App. 3d 515, 520, 137 Cal. Rptr. 318, 320 (1977).

41. See *In re Marriage of Anderson*, 64 Cal. App. 3d 36, 39-40, 134 Cal. Rptr. 252, 253-54 (1976) (wife entitled to proportionate share of each payment as it is paid). This eliminates the need for immediate determination of the pension's value, but requires continuing supervision by the court.

Another method of dividing pensions is by enforcing a settlement contract between the spouses. Such a contract would be subject to rules controlling the actions of persons in a confidential relationship with each other. CAL. CIV. CODE § 5103 (West 1970). This would be preferable because it reduces the time and expense of trial; however, the court retains the right to modify or revoke the order enforcing the contract. CAL. CIV. CODE § 4811 (West Supp. 1981).

42. 68 Cal. App. 3d at 522, 137 Cal. Rptr. at 321.

43. Earl was employed by the Pacific Telephone Co. and became eligible to retire in April of 1979. He was in his early 50s and was not required to retire until the age of 70. 29 Cal. 3d at 422, 174 Cal. Rptr. at 495.

The doctrines of *res judicata* and *collateral estoppel* do not apply where pension rights, though vested, were not included in the pleadings or not before the court at

ceive benefits, Vera requested the court to order the immediate payment to her of one-half of the community's interest in the pension benefits, retroactive to the date on which Earl became eligible to receive them.⁴⁴ The trial court, exercising its discretion, held that the benefits would not be paid until Earl actually retired.⁴⁵ In reversing the lower court ruling,⁴⁶ the supreme court, after discussing the *Brown* decision,⁴⁷ dealt with the issue of who should bear the risk of nonmaturation of the pension benefits.⁴⁸ Since the only condition precedent to payment of retirement benefits was totally within Earl's control, the court concluded that the pension was both vested and matured.⁴⁹ Accordingly, Earl could not defeat the community's interest in the pension by invoking this condition.⁵⁰ The court maintained that the nonemployee spouse should have the choice as to when his or her share in the benefits should begin.⁵¹ Otherwise, Earl, by his own unilateral decision, could delay Vera's receipt of her share of the benefits and subject her to the risk of losing the asset completely should he die.⁵² In addition, the court found that since there were no uncertainties which would affect vesting or maturation of the benefits other than those wholly within Earl's control, the trial court abused its discretion in refusing to distribute the benefits until Earl actually retired.⁵³

The court further stated that the right of the employee to alter

the time of dissolution. *Henn v. Henn*, 26 Cal. 3d 323, 330-32, 605 P.2d 10, 13-14, 161 Cal. Rptr. 502, 505-06 (1980); *In re Marriage of Smethurst*, 102 Cal. App. 3d 494, 496, 162 Cal. Rptr. 300, 301-02 (1980); *In re Marriage of Carl*, 67 Cal. App. 3d 542, 546, 136 Cal. Rptr. 703, 705 (1977).

44. 29 Cal. 3d at 422, 629 P.2d at 3, 174 Cal. Rptr. at 495.

45. *Id.* The trial court is only required to divide all community property equally. CAL. CIV. CODE § 4800 (West Supp. 1981).

46. *Id.* at 429, 629 P.2d at 8, 174 Cal. Rptr. at 500.

47. *See* notes 29-34 *supra* and accompanying text.

48. *See* note 34 *supra* and accompanying text.

49. 29 Cal. 3d at 423, 629 P.2d at 4, 174 Cal. Rptr. at 496. *See* notes 7 and 13 *supra*.

50. 29 Cal. 3d at 423, 629 P.2d at 4, 174 Cal. Rptr. at 496 (quoting *In re Marriage of Stenquist*, 21 Cal. 3d 779, 786, 582 P.2d 96, 100, 148 Cal. Rptr. 9, 13 (1978)).

51. 29 Cal. 3d at 424-25, 629 P.2d at 5, 174 Cal. Rptr. at 497. The court relied on the case of *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (1980), which held that the nonemployee spouse is the one who has the choice as to when his or her share of the pension shall begin. *Id.* at 960, 164 Cal. Rptr. at 95. Note that the area of military retirement pay has been preempted by the case of *McCarty v. McCarty*, 101 S. Ct. 2728 (1981).

52. 29 Cal. 3d at 424, 629 P.2d at 4, 174 Cal. Rptr. at 496.

53. *Id.* at 426, 629 P.2d at 6, 174 Cal. Rptr. at 498.

the terms of the pension or to elect alternative benefits is "limited by the fact that the nonemployee spouse owns an interest in the retirement benefits . . . [and] [i]f the right to choose among alternative retirement plans is exercised in a way which impairs the nonemployee's interest in the benefits, the nonemployee spouse must be compensated."⁵⁴ Thus, for example, a husband could not elect disability payments instead of pension benefits thereby depriving his wife of her interest in the pension.⁵⁵

The court dismissed Earl's claim that he was being forced to retire as "missing the point."⁵⁶ As to his claim that the court lacked jurisdiction over his separate property, the court found that it was "without merit."⁵⁷ To aid in alleviating the inequities of the situation, Earl could renew his motion for modification of spousal support⁵⁸ after the pension has been divided.

54. *Id.* at 425-26, 629 P.2d at 5-6, 174 Cal. Rptr. at 497-98. *Id.* at 630, 106 Cal. Rptr. at 665. See *Ball v. McDonnell Douglas Corp.*, 30 Cal. App. 3d 624, 106 Cal. Rptr. 662 (1973), where the court held that a husband could choose higher than ordinary benefits but could not elect a method of payment that decreased his benefits.

55. 21 Cal. 3d at 786, 582 P.2d at 100, 148 Cal. Rptr. at 13. See *In re Marriage of Samuels*, 96 Cal. App. 3d 122, 158 Cal. Rptr. 38 (1979); *In re Marriage of Mason*, 93 Cal. App. 3d 215, 155 Cal. Rptr. 350 (1979). Such an election would defeat the community interest in the plan because a veteran's right to future disability payments upon dissolution of the marriage is his separate property. *In re Marriage of Jones*, 13 Cal. 3d 457, 459, 531 P.2d 420, 421, 119 Cal. Rptr. 108, 109 (1975).

An issue not raised in *Gilmore* is whether the employee spouse may take advantage of a provision permitting him to retire early and receive fewer benefits, thus reducing the value of the nonemployee's interest.

56. 29 Cal. 3d at 427, 629 P.2d at 6, 174 Cal. Rptr. at 498. This statement is subject to criticism because the only way that Earl could have insured that he would have received some payment would have been to retire. It is very conceivable that Earl could have worked for a number of years after purchasing Vera's interest in the pension with his separate funds and then died before he had a chance to enjoy the benefits. Further, it could have well been that any payments he did receive would have amounted to less than the amount he had paid to Vera. Thus, Vera would have been enjoying the fruits of Earl's work to the extent of her contribution to it, while Earl would have been bearing all of the risks of nonmaturation.

The court answers this by saying, in effect, "Unfortunately, Earl, you're the one who chose not to retire so you'll have to pay for it." See Note, *In re Marriage of Stenquist: Tracing the Community Interest in Pension Rights Altered by Spousal Election*, 67 CAL. L. REV. 856 (1979), quoted in 29 Cal. 3d at 427 n.7, 629 P.2d at 6-7 n.7, 174 Cal. Rptr. at 498-99 n.7.

57. 29 Cal. 3d at 427, 629 P.2d at 6, 174 Cal. Rptr. at 498. The court stated that it is solely Earl's decision to use separate property to reimburse Vera. However, if he wishes to insure maturation, his only other choice would be to retire. *Id.*

58. *Id.* at 428, 629 P.2d at 7, 174 Cal. Rptr. at 499. The court noted that financial need was only a consideration in determining the extent of support and not a factor considered in dividing the community property. Distributing the community property pension and adjusting the spousal support seems to further the general policies of equal division of community property. *Id.* at 427-28, 629 P.2d at 7, 174 Cal. Rptr. at 499.

IV. IMPACT AND CONCLUSION

The value of *Gilmore* is that it clarifies and refines the rules regarding the timing of and method for distribution of pension funds first set out in *Brown*.⁵⁹ In circumstances where division of the pension plan is severed from division of the balance of the community property,⁶⁰ the courts should apply the *Gilmore* decision. If the nonemployee spouse chooses to have immediate payment, the employee spouse cannot frustrate that desire by invoking a condition wholly within his or her control.⁶¹

The decision in *Gilmore* reflects the general policy of the court to divide all community property equally between the spouses.⁶² Despite the inequity to the employee spouse that may result from applying *Gilmore*, it is the only equitable method of dividing the pension. A reduction in spousal support would seem to alleviate any serious problems which may be incurred by the employee spouse. In balancing the nonemployee's right to half of the community's interest in the pension, against the employee's right to continue employment at the same rate of profit as before the divorce, the scales tip toward the nonemployee. First, there is no rational basis why the nonemployee spouse should have to incur the risk of nonmaturation of the benefits while it is wholly within the control of the other spouse.⁶³ Second, the employee should not be able to deny the nonemployee something that is rightfully his/hers.⁶⁴ Finally, the employee spouse with a matured pension may always retire, collect the pension, and obtain other employment, thereby increasing his income.

The situation in *Gilmore* is *somewhat* of an anomaly. Had the trial court simply divided the nonvested pension, taking into account the risk of nonvesting by some sort of discounting method, this case would never have reached the supreme court. The *Gilmore* rule should only have application in situations where nondivision of the pension was unavoidable. This would include situations where the fact of the pension was inadvertantly left out of the pleadings or where the parties did not know of it at the

59. See note 34 *supra* and accompanying text.

60. See note 36 *supra* and accompanying text.

61. See notes 49-52 *supra* and accompanying text.

62. See note 39 *supra* and accompanying text.

63. 29 Cal. 3d at 423-24, 629 P.2d at 2, 174 Cal. Rptr. at 496.

64. *Id.*

time of trial. However, due to the inherent inequities in this situation, it is best avoided at the trial court level.

VIII. PROFESSIONAL RESPONSIBILITY

A. DISCIPLINE OF JUDGES

1. *Clarification of Proper Modes of Discipline for the Wrongful Acts of Court Justices: Wenger v. Commission on Judicial Performance*

In *Wenger v. Commission on Judicial Performance*,¹ the California Supreme Court, agreeing with the unanimous decision of the Commission on Judicial Performance, sustained nine counts of wilful misconduct and one count of prejudicial conduct, in removing a justice court judge from office.² The Commission had recommended³ that Judge Wenger "be removed for 'wilful misconduct in office' . . . and 'conduct prejudicial to the administration of justice that brings the office in disrepute'"⁴ It is from that finding that Judge Wenger appealed. The supreme court concerned itself only with the decision of the Commission, sustaining fourteen charges of wilful misconduct and six charges of prejudicial conduct arising out of eleven separate incidents.⁵ The supreme court held that it had the power to review the findings of the Commission⁶ and render an independent decision to

1. 29 Cal. 3d 615, 630 P.2d 954, 175 Cal. Rptr. 420 (1981).

2. There were 14 charges of wilful misconduct and six charges of prejudicial conduct arising out of 11 incidents. Of the charges sustained, the court held that Judge Wenger had: (1) on three occasions intruded into matters that had become another judge's responsibility; (2) on three occasions groundlessly pried into a counsel's advice to his client; (3) on one occasion attempted to dissuade an attorney from representing a client; (4) on three occasions interfered with the practice of law by threatening to exclude attorneys from the court room; (5) on one occasion sentenced an attorney to jail when angered by the advice given to the client although the advice was proper; (6) on one occasion attempted to punish disobedience to informal directions with contempt; (7) on one occasion unilaterally investigated facts; and (8) on three occasions violated contempt procedure rules. *Id.* at 653, 620 P.2d at 975, 175 Cal. Rptr. at 441.

3. The California Constitution states in pertinent part:

(c) *On recommendation of the Commission on Judicial Performance the Supreme Court may . . . censure or remove a judge for action occurring not more than 6 years prior to the commencement of the judges current term that constitutes wilful misconduct in office . . . or conduct prejudicial to the administration of justice that brings the judicial office into disrepute.*

CAL. CONST. art. 6, § 18 (West 1980) (emphasis added).

Wilful misconduct can be described as conduct which a judge acting in his official capacity commits in bad faith. Prejudicial conduct is conduct undertaken in good faith which nevertheless would undermine public confidence in the judiciary. *Geiler v. Commission on Jud. Qualif.*, 10 Cal. 3d 270, 283-84, 515 P.2d 1, 9, 110 Cal. Rptr. 201, 209 (1973).

4. 29 Cal. 3d at 620-21, 630 P.2d at 956, 175 Cal. Rptr. at 422.

5. *Id.* at 622, 630 P.2d at 956, 175 Cal. Rptr. at 422.

6. *Id.* at 622, 630 P.2d at 957, 175 Cal. Rptr. at 423. In *Geiler*, the court held

be based on clear and convincing evidence.⁷

The court, in announcing this independent decision, addressed the eleven incidents involving the alleged misconduct, sustaining nine charges of wilful misconduct and one charge of prejudicial misconduct.⁸ After concluding that Judge Wenger's conduct warranted discipline, the court had the option of either removing him from the bench or censuring him.⁹ The court, in other similar cases, had previously made this decision by considering both the nature and the number of wrongful acts, with the latter factor usually determinant.¹⁰

The court clarified the approach to be used in determining the appropriate discipline in cases of judicial misconduct,¹¹ articulating a rule which would impose discipline by censure where wrongful conduct by a judge occurs in isolated instances; discipline by removal would occur where the number of wrongful acts are part of a pattern of behavior¹² constituting a "lack of temperament and ability to perform judicial functions in an evenhanded manner."¹³ Since the court found that Judge Wenger's conduct established such a pattern,¹⁴ his removal was deemed appropriate.

The court also considered whether there was mitigation of the

that "since the ultimate, dispositive, decision to censure or remove a judge has been entrusted to this court, . . . we must make our own, independent evaluation of the record evidence adduced below." 10 Cal. 3d at 276, 515 P.2d at 4, 110 Cal. Rptr. at 204.

7. 29 Cal. 3d at 622, 630 P.2d at 957, 175 Cal. Rptr. at 423. The *Geiler* court declared "the standard of proof [when censuring or removing a judge is] to be proven by clear and convincing evidence sufficient to sustain a charge to a reasonable certainty." 10 Cal. 3d at 275, 515 P.2d at 4, 110 Cal. Rptr. at 4.

8. 29 Cal. 3d at 653, 630 P.2d at 975, 175 Cal. Rptr. at 441.

9. See note 3 *supra*. "Petitioner's conduct warrants discipline, and our choice is between removal (the Commission's unanimous recommendation) and censure." 29 Cal. 3d at 652, 630 P.2d at 975, 175 Cal. Rptr. at 441.

10. See, e.g., *Cannon v. Commission on Jud. Qualif.*, 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975), where after finding wrongful conduct, the court emphasized the numerous instances of wrongful conduct as being the compelling reason for choosing removal rather than censure.

11. "The aim of the Commission proceedings is not punishment but 'to protect the judicial system and the public which it serves from judges who are unfit to hold office' . . . [f]aithfulness to that aim requires removal here." 29 Cal. 3d at 654, 630 P.2d at 976, 175 Cal. Rptr. at 442.

12. *Id.* at 653, 630 P.2d at 975, 175 Cal. Rptr. at 441. "The number of wrongful acts is relevant in determining whether they were merely isolated occurrences or, instead, part of a course of conduct." *Id.*

13. *Id.*

14. *Id.* See note 2 *supra*.

wrongful conduct by Judge Wenger. In determining the extent of mitigation, the court balanced the nature of the wrongful acts¹⁵ and the number of wrongful acts¹⁶ against the mitigating circumstances themselves. In *Wenger*, the court held that the conduct was so serious that it could not be mitigated by the judge's inexperience,¹⁷ nor could it be mitigated where there was no showing that the judge attempted to reform his conduct.¹⁸

IX. TORT LAW

A. CAL. BUS. & PROF. CODE § 25602

1. *The Constitutionality of Civil Nonliability of Vendors and Social Hosts Serving Alcohol to Intoxicated Persons: Cory v. Shierloh*

With respect to the liability of a commercial vendor or a social host who provides an obviously intoxicated person with alcoholic beverages, the law in California has not remained static. With the advent of the 1978 amendments to the existing statutes, the California legislature enacted into law provisions disallowing civil liability for such persons. The constitutionality of these amendments was challenged in the case of Cory v. Shierloh. The court's finding of the constitutionality of the amendments and the development of the law as it stands today is explored in this note.

I. INTRODUCTION

In California, prior to 1978, a commercial vendor¹ or a social host² who sold or gave alcoholic beverages to an obviously intoxicated person was subject to liability for injuries to person or property caused by that intoxicated person. The theory was that the

15. See generally 14 Cal. 3d 678, 537 P.2d 898, 122 Cal. Rptr. 778 (1975) (no mitigation for maliciously motivated nonjudicial conduct); *Spurance v. Commission on Jud. Qualif.*, 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 811 (1975) (no mitigation where conduct was in bad faith).

16. The court emphasized the number of repeated acts of misconduct in holding there was no mitigation.

17. His abuses were "too serious to be explainable by inexperience." 29 Cal. 3d at 654, 630 P.2d at 976, 175 Cal. Rptr. at 442. See also *Spurance v. Commission on Jud. Qualif.*, 13 Cal. 3d 778, 532 P.2d 1209, 119 Cal. Rptr. 811 (1975) (no mitigation where he was inexperienced as a judge but had twenty years experience as a criminal attorney); *McCartney v. Commission on Jud. Qualif.*, 12 Cal. 3d 512, 526 P.2d 268, 116 Cal. Rptr. 260 (1974) (court held there was mitigation where she had only one and a half years experience as a judge).

18. "Mitigation of wrong doing requires more than an unfulfilled intent to reform." 29 Cal. 3d at 654, 630 P.2d at 976, 175 Cal. Rptr. at 442.

1. Such as is found in *Vesely v. Sager*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971). See notes 22-29 *infra* and accompanying text for the facts and circumstances surrounding *Vesely*.

2. Such as is found in *Coulter v. Superior Court of San Mateo County*, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978). See notes 35-38 *infra* and accompanying text for the facts and circumstances surrounding *Coulter*.

furnishing, and not the consumption, of alcohol was the proximate cause of any resulting injuries.³ However, in 1978, the California legislature amended California law such that the consumption, and not the serving, of alcohol was to be the proximate cause of injuries inflicted on another by an intoxicated person.⁴ The consequent result of the amendments was that no person who sold or gave away any alcoholic beverages could be civilly liable to any person for injuries caused as a result of the intoxication of the consumer of that alcohol.⁵

The constitutionality of these amendments was challenged and upheld by the California Supreme Court in *Cory v. Shierloh*.⁶ The court held that both the general rule of immunity,⁷ and the special rule of liability of licensed providers to minor consumers,⁸

3. 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631. The *Vesely* court reasoned that the consumption of the alcohol was a foreseeable intervening cause which makes the furnishing of the alcohol negligent. See note 25 *infra* and accompanying text.

4. CAL. BUS. & PROF. CODE § 25602 (West Supp. 1981), as amended provides:

(a) Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor.

(b) No person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage pursuant to subdivision (a) of this section shall be civilly liable to any injured person or the estate of such person for injuries inflicted on that person as a result of intoxication by the consumer of such alcoholic beverage.

(c) The Legislature hereby declares that this section shall be interpreted so that the holdings in cases such as *Vesely v. Sager* (5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971)), *Bernhard v. Harrah's Club* (16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976)) and *Coulter v. Superior Court* (21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 543 (1978)) be abrogated in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person.

But see CAL. CIV. CODE § 1714 (West Supp. 1981), which provides that every person is responsible for their wilful and negligent acts. The 1978 amendments to § 25602, however, immunize a provider of alcohol from liability for damages suffered by another resulting from the consumption of alcoholic beverages furnished.

5. CAL. BUS. & PROF. CODE § 25602(b) (West Supp. 1981).

6. 29 Cal. 3d 430, 629 P.2d 8, 174 Cal. Rptr. 500 (1981). See note 4 *supra* and accompanying text.

7. General immunity substantially limits the liability of a provider of alcoholic beverages by designating consumption, and not the serving, of alcohol as the proximate cause for any injury to any person caused by the intoxicant. 29 Cal. 3d at 439-40, 629 P.2d at 13, 174 Cal. Rptr. at 505.

8. This special rule of liability states that a licensed provider who sells to, furnishes, or gives to any obviously intoxicated minor, alcoholic beverages, will be subject to liability for any injury to any person caused by such minor. CAL. BUS. & PROF. CODE § 25658 (West 1964).

were classifications supported by some rational basis and therefore constitutional.⁹

This analysis of *Cory* will develop the common law doctrine of negligence, as applied to tort liability, arising out of the sale of intoxicating beverages. In addition, the effect of wilful misconduct on the part of both the provider and the consumer will be discussed. Finally, the court's decision in *Cory* and the impact it may have upon the use and abuse of intoxicating liquors in California will be examined.

II. HISTORICAL ANALYSIS

The application of the theories of negligence¹⁰ to injuries arising out of the sale of intoxicating beverages was first mentioned in the case of *Lammers v. Pacific Electric Railway Co.*¹¹ decided in 1921. It seems that the plaintiff was ejected from defendant's train, while intoxicated, for his inability to find either his ticket or his money. Some time later he was found seriously maimed, having been struck by a train. In rejecting his claim the court relied upon the general rule that the consumption, and not the furnishing, of alcohol was the proximate cause of injuries subsequently sustained by the purchaser due to his intoxication.¹² The court went on to note that the sale of the whiskey to the plaintiff would come nearer to being the proximate cause of his injuries than the ejection from the train.¹³ This dicta was the first hint that the sale of alcohol could possibly be a proximate cause of an injury caused by or incurred by the intoxicant.

The notion that the consumption of alcohol is to be the proxi-

9. 29 Cal. 3d at 440-41, 629 P.2d at 14, 174 Cal. Rptr. at 506. See notes 62-75 *infra* and accompanying text for discussion of the court's finding of this rational relationship.

10. The traditional elements of a negligence cause of action are:

- 1.) A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.
- 2.) A failure on his part to conform to the standard required. . . .
- 3.) A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause," or "proximate cause."
- 4.) Actual loss or damage resulting to the interests of another.

W. PROSSER, HANDBOOK OF THE LAW OF TORTS, 143 (4th ed. 1971) (Hereinafter cited as PROSSER).

11. 186 Cal. 379, 199 P. 523 (1921), *rev'd*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

12. 186 Cal. at 384, 199 P. at 525.

13. *Id.* The court stated "that but for the plaintiff's action in so returning to a position of danger the accident would not have occurred." *Id.* The fact that the plaintiff did leave the place of danger and subsequently returned, further supported the defendant's claim that ejection from the train did not proximately cause the injuries.

mate cause of any resulting injury was followed in the case of *Hitson v. Dwyer*.¹⁴ There, the plaintiff was served alcohol at defendant's bar while obviously intoxicated and fell from the movable bar stool. The defendants then dragged him across the floor presumably to remove him from bar room traffic. As a result, the plaintiff sustained injuries for which he brought an action for damages against the bar. The court held that violation of the Alcoholic Beverage Control Act was not negligence per se because the proximate cause of plaintiff's fall was not the serving of the alcohol but rather its consumption.¹⁵

In *Fleckner v. Dionne*,¹⁶ the court relied on language in *Lammers* and the decision in *Hitson* to affirm a judgment for a tavernkeeper who had served a minor alcoholic beverages.¹⁷ It appeared that the defendant knew that the patron was a minor, knew he was going to drive, and knew that driving in an inebriated state was very dangerous. The bartender served the patron, who subsequently crashed into plaintiff's automobile injuring them. Despite the tavernkeeper's specific knowledge of the situation, the court held that since the consumption of alcohol was the proximate cause of resulting injuries, the bartender could not be held liable.¹⁸

14. 61 Cal. App. 2d 803, 143 P.2d 952 (1944), *rev'd*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).

15. *Id.* at 808-09, 143 P.2d at 955. The defendant's alleged violation of the statute was termed "wholly immaterial" because of the lack of a causal connection between its violation and the injuries sustained. *Id.*

16. 94 Cal. App. 2d 246, 210 P.2d 530 (1949).

17. *Id.* at 251, 210 P.2d at 534. "[W]ith such views as have been expressed by our courts on the subject (*Lammers* and *Hitson* cases. . .) coinciding with the holdings in other jurisdictions where the questions have been directly passed upon, we are satisfied that the sustaining of the demurrer. . . was correct." *Id.*

18. *Id.* at 248, 210 P.2d at 532. See generally *Nelson v. Steffens*, 170 Conn. 356, 365 A.2d 1174, 1177 (1976) (no cause of action where complaint alleged passenger deaths in accident caused by negligence of defendant in serving alcohol to minor who then became intoxicated); *Parsons v. Jow*, 480 P.2d 396 (Wyo. Sup. Ct. 1971) (court affirmed nonsuit where minor was sold intoxicating liquor by defendant and thereafter crashed into school building injuring plaintiff and his passenger); *Graham v. General United States Grant Post No. 2665, V.F.W.*, 43 Ill. 2d 1, 8, 248 N.E.2d 657, 661 (1969) (no common law action against tavern owners for injuries of plaintiff sustained in a collision with an automobile operated by a person allegedly served liquor by that tavern prior to the accident); *Nevin v. Carlasco*, 139 Mont. 512, 365 P.2d 637 (1961) (court affirmed a judgment of nonsuit denying a female patron of a bar recovery for injuries sustained when a male patron, while attempting to kiss her was shoved, which caused her to be knocked to the floor); *Howlett v. Doglio*, 402 Ill. 311, 318, 83 N.E.2d 708, 712 (1949) (at common law, selling or giving liquor to a strong able-bodied man was not an actionable tort); *Collier v. Stamatis*,

A complaint alleging wrongful death resulting from negligent furnishing of alcohol to an able-bodied man was held not to state a cause of action in *Cole v. Rush*.¹⁹ The supreme court's decision was a reaffirmation of the general rule that the voluntary consumption, and not the sale or gift, of intoxicating liquor is the proximate cause of any injury resulting from its use.²⁰ In addition, by consuming the liquor the decedent was contributorily negligent and therefore his heirs were barred from recovery.²¹

The 1971 case of *Vesely v. Sager*²² overruled *Cole* and *Lammers* and abolished the common law consumption rule, holding that furnishing alcoholic beverages to an obviously intoxicated person could be a proximate cause of injuries to a third person caused by the intoxicated patron.²³ Sager owned and operated the Buckhorn Lodge near the top of Mt. Baldy. From 10 p.m. until 5 a.m., he permitted O'Connell to be served a large quantity of alcohol knowing that the road down the mountain was steep, winding, and narrow and that O'Connell was going to use the road on his way home. After leaving the Lodge, O'Connell proceeded down the mountain, veered into oncoming traffic, and collided with plaintiff's vehicle.²⁴

63 Ariz. 285, 162 P.2d 125 (1945) (parents of a fifteen year old girl who became delinquent because of drinking liquor sold to her by defendant were denied recovery); Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147 (1940) (wife recovered damages where her husband, an "habitual" drunkard, was served liquor by defendant when defendant knew that husband had lost his volition). See also 30 Am. Jur. *Intoxicating Liquors*, §§ 520, 821 (1938).

19. 45 Cal. 2d 345, 289 P.2d 450 (1955), *rev'd*, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (decedent became intoxicated at defendant's tavern and died when he struck his head on pavement in the course of a brawl).

20. 45 Cal. 2d at 356, 289 P.2d at 457.

21. *Id.* This rule changed with the adoption of comparative negligence in California. The comparative negligence doctrine applies where both plaintiff and defendant are negligent to some degree. It apportions their respective degrees of fault and awards the plaintiff damages to the extent that he was not negligent. See generally *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

22. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).

23. 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631. The court did not decide liability in regard to noncommercial furnishers nor liability of commercial vendors, for injuries to the consumer suffered as a result of being served alcohol in violation of the CAL. BUS. & PROF. CODE § 25602 (West. Supp. 1981). For a discussion of this code provision see note 4 *supra*. For a discussion of cases implementing civil liability in other jurisdictions see Keenen, *Liquor Law Liability in California*, 14 SANTA CLARA LAW. 46 (1974). For a list of states with Dram Shop Acts as of 1978, see Comment, *California Liquor Liability: Cole v. Rush Revived?*, 12 LOYOLA L.A. L. REV. 387, 392 n.32 (1978-79).

24. 5 Cal. at 157-58, 486 P.2d at 154, 95 Cal. Rptr. at 626. The defendant demurred to the complaint and moved to strike certain allegations referring to principles of agency and contentions that the driver was operating his vehicle with defendant's permission. The trial court sustained the demurrer without leave to amend, granted the motion to strike, and dismissed the complaint as to the defendant Sager, resulting in this appeal.

In assessing whether the complaint stated a cause of action, the court stated that because O'Connell consumed alcohol to the point of intoxication and then engaged in injury producing behavior, those actions would be considered foreseeable, intervening acts.²⁵ Since serving the alcohol could be a proximate cause and O'Connell's actions were foreseeable, the only remaining question was whether Sager owed a duty to the plaintiff or to a class of which the plaintiff was a member.²⁶ The court held that this duty was imposed by section 25602 of the Business and Professions Code dealing with the illegality of the sale of intoxicating beverages to those obviously inebriated.²⁷ Plaintiff's complaint indicated that the statute was enacted to protect a class of persons of which Vesely was a member, and to protect against the particular harm which Vesely encountered.²⁸ If at trial plaintiff could prove these elements along with showing that Sager violated the statute and thereby proximately caused injury to the plaintiff, Sager could be presumed negligent.²⁹

In *Brockett v. Kitchen Boyd Motor Co.*,³⁰ the court applied the

25. *Id.* at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631. The result of such a finding is that the furnishing of alcohol will be considered the proximate cause of injuries inflicted by that intoxicated person.

26. *Id.*

27. *Id.* at 165, 486 P.2d at 159, 95 Cal. Rptr. at 631. At the time of the *Vesely* case § 25602 provided: "Every person who sells, furnishes, gives, or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor." See note 4 *supra* for text of the subsequent amendment to this section.

28. 5 Cal. 3d at 165-66, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32.

29. *Id.* The court found that a presumption of negligence would arise out of the furnishing of the alcohol. Statutory negligence has been codified as follows:

- (a) The failure of a person to exercise due care is presumed if:
- (1) He violated a statute, ordinance, or regulation of a public entity;
 - (2) The violation proximately caused death or injury to a person or property;
 - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
 - (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

CAL. EVID. CODE § 669(a) (West Supp. 1981).

Prosser, in discussing the doctrine of negligence per se, stated:

California has arrived at what appears to be precisely the same result by holding that the violation creates a presumption of negligence, which may be rebutted by a showing of an adequate excuse but calls for a binding instruction in the absence of such evidence

PROSSER, *supra* note 10, at 201.

30. 24 Cal. App. 3d 87, 90, 100 Cal. Rptr. 752, 754 (1972). In *Brockett* the court

Vesely logic to hold an employer liable for dispensing alcohol at a Christmas party to a minor³¹ employee who subsequently injured plaintiffs in an automobile accident.³² A later case, *Bernhard v. Harrah's Club*,³³ construed *Vesely* as stating that there was no bar to civil liability under modern negligence principles even though a statute had not been violated.³⁴

The *Vesely* theories of negligence were carried to their logical extreme in the case of *Coulter v. Superior Court of San Mateo County*.³⁵ In that case a passenger injured in an automobile accident brought an action against the owner and operator of an apartment complex and its manager. The cause of action in question was based on the alleged negligence of the defendants in serving alcohol to the driver of the car involved in the accident when they knew that she was going to drive and it was foreseeable that third persons could be exposed to injury thereby.³⁶ The court read the word "person" in section 25602 of the Business and Professions Code³⁷ to mean social hosts as well as commercial suppliers. Thus, the requisite duty was supplied by this section.

found a presumption of negligence on the part of the defendant based upon a statute prohibiting the sale or gift of alcohol to a minor.

31. The facts in *Brockett* were a bit extreme. The defendant having served plaintiff, a minor, intoxicating beverages, guided him to his car, placed him in it, and directed him to drive home. The drive through the city traffic ended with the collision. 24 Cal. App. 3d at 88-89, 100 Cal. Rptr. at 753. See also *King v. Wetzstin*, 81 Cal. App. 3d 837, 146 Cal. Rptr. 782 (1978), where a minor who furnished liquor to another minor was held liable for damages to person and property to the owner of a car with which the intoxicated collided.

32. See also *Coffman v. Kennedy*, 74 Cal. App. 3d 28, 141 Cal. Rptr. 267 (1977). In *Coffman*, a motorist injured in a collision with a car driven by an intoxicated person sued the passenger of the car on a variety of theories. The trial court sustained defendant's demurrer, but the supreme court reversed allowing plaintiff to amend her complaint to allege facts to the effect that the passenger had breached a duty owed to plaintiff by furnishing the driver with alcohol. In dicta, the court stated that a social host could be liable where alcoholic beverages are served to an obviously intoxicated person who is expected by the host, to drive a vehicle on the public highways. *Id.* at 37, 141 Cal. Rptr. at 272.

33. 16 Cal. 3d 313, 546 P.2d 719, 128 Cal. Rptr. 215 (1976). *Bernhard* involved an injury to the plaintiff as a result of an automobile accident caused by an individual who was intoxicated from beverages served to him at the defendant's gambling and drinking establishment.

34. *Id.* at 325, 546 P.2d at 726, 128 Cal. Rptr. at 222.

35. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

36. *Id.* at 147-48, 577 P.2d at 670-71, 145 Cal. Rptr. at 535-36. The plaintiff stated a first cause of action against the intoxicated driver of the vehicle in which he was injured and the apartment owner/operator, together with its manager, for furnishing the alcohol to defendant driver. *Id.* at 147-48, 517 P.2d at 671, 145 Cal. Rptr. at 535-36. In the second cause of action plaintiff sued defendant owner/operator and manager stating that they "permitted," "aided, abetted, participated [in], and encouraged" defendant driver to drink excessively. *Id.* at 148, 577 P.2d at 671, 145 Cal. Rptr. at 536. The trial court sustained demurrers to both causes of action. The supreme court reversed only the ruling regarding the first cause of action.

37. See note 27 *supra*.

In overruling the defendant's demurrer, the court also relied on strong public policy favoring the prevention of future injuries of the kind involved in *Coulter*. In addition, the court stated that the widow gained no comfort with the knowledge that the supplier was a social host and not a commercial seller, and that the danger of harm was equally foreseeable to both social host and bartender.³⁸

Another group of cases exemplified by *Ewing v. Cloverleaf Bowl*,³⁹ have dealt with the effect of contributory negligence⁴⁰

38. 21 Cal. 3d at 153, 577 P.2d at 674, 145 Cal. Rptr. at 539. As to when this duty is met, the court in *Paula v. Gagnon*, 81 Cal. App. 3d 680, 146 Cal. Rptr. 702 (1978), stated:

If a bartender serves a customer until the point where he becomes obviously intoxicated, then stops serving the customer and such person thereafter is injured in an accident proximately caused by his intoxication, the bartender is not liable. To attach liability under such circumstances would place an unreasonable duty on the bartender. His duty is discharged by not serving an obviously intoxicated patron

Id. at 686, 146 Cal. Rptr. at 706. This logically, would apply to the social host as well. However, intoxication may be difficult to detect:

Obvious intoxication is often recognizable only after the fact, and what is patent when the drinker falls off his bar stool may have been only latent 60 seconds earlier Visual diagnosis of intoxication has not greatly improved upon Peacock's rough and ready classification of 1929: "Not drunk is he who from the floor can rise alone and still drink more; But drunk is he, who prostrate lies, Without the power to drink or rise."

Cooper v. National R.R. Passenger Corp., 45 Cal. App. 3d 389, 393-94 n.1, 119 Cal. Rptr. 541, 544 n.1 (1975), *rev'd*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

39. 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978).

40. In discussing the relationship between contributory negligence and a statutory duty, Prosser states:

[T]he contributory negligence of the plaintiff is a complete bar to his action for any common law negligence of the defendant. Whether it is a bar to the liability of a defendant who has violated a statutory duty is a matter of the legislative purpose which the court finds in the statute. If it is found to be intended merely to establish a standard of ordinary care for the protection of the plaintiff against a risk, his contributory negligence with respect to that risk will bar his action, as in the case of common law negligence. But there are certain unusual types of statutes . . . which have been construed as intended to place the entire responsibility upon the defendant, and to protect the particular class of plaintiffs against their own negligence. In such a case, . . . the object of the statute itself would be defeated if the plaintiff's fault were a defense, and the courts refuse to recognize it.

PROSSER, *supra* note 10, at 425-26.

See *Rose v. International Brotherhood of Elec. Workers*, 58 Cal. App. 3d 276, 129 Cal. Rptr. 736 (1976), *rev'd*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978), union member died in a single car accident after leaving union picnic where, in the course of 8 hours, he consumed large quantities of beer; court held decedent to be in *pari delicto* and contributorily negligent barring cause of action of widow and children; *Venzor v. Santa Barbara Elk Lodge No. 613*, 56 Cal. App. 3d 209, 128 Cal.

and wilful misconduct⁴¹ of both the plaintiff and the bartender upon a cause of action based on the negligent serving of alcoholic beverages. *Ewing* involved a tragic story and a senseless death. An experienced bartender served a 21 year old a "vodka collins" on the house in honor of his twenty first birthday. The bartender then proceeded to pour ten straight shots of 151 proof rum and two "beer chasers" in less than an hour and a half. The youth was carried home unconscious where he was found dead the next morning.⁴² An autopsy revealed a blood alcohol level of .47%.⁴³ The court stated that a jury could reasonably conclude that the bartender engaged in wilful misconduct while the deceased was only negligent. If so, under the doctrine of comparative negligence,⁴⁴ the plaintiff could recover even though he was contributorily negligent.⁴⁵ Thus, even a person who becomes intoxicated may recover against a bartender who served him drinks regardless of any contributory negligence.

In 1978, the California legislature adopted amendments to the

Rptr. 353 (1976), comparative negligence held not in effect so contributory negligence barred cause of action by widow where decedent struck by automobile and killed after leaving Elks Lodge where he had consumed large quantities of alcohol; *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972), defendant who purchased liquor from store and subsequently fell and struck his head in a public eating place and died was held to be contributorily negligent; *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972), bar not liable in wrongful death action where decedent who suffocated by inhaling his own vomit was held to be contributorily negligent.

41. Wilful misconduct has been defined as "[the] intentional doing of something either with knowledge, express or implied, that serious injury is a probable, as distinguished from a possible, result, or the intentional doing of an act with a wanton and reckless disregard of its consequences." *Williams v. Carr*, 68 Cal. 2d 579, 584, 440 P.2d 505, 509, 68 Cal. Rptr. 305, 309 (1968). See *Trenier v. California Inv. & Dev. Corp.*, 105 Cal. App. 3d 44, 164 Cal. Rptr. 156 (1980), plaintiff who was served 27 straight shot glasses of Jack Daniels whiskey and 4 shot glasses of tequilla in less than two hours and subsequently ran car off winding road held guilty of wilful misconduct and barred recovery; *Sissle v. Stefenoni*, 88 Cal. App. 3d 633, 152 Cal. Rptr. 56 (1979), in a cause of action where the plaintiff, who was served in a bar while obviously intoxicated, drove and was killed in an accident while proceeding on the wrong side of the road, the court held such disregard for rights and safety of others to be wilful misconduct barring the action.

42. 20 Cal. 3d at 394, 572 P.2d at 1157, 143 Cal. Rptr. at 15.

43. 20 Cal. 3d at 398, 572 P.2d at 1159, 143 Cal. Rptr. at 17. Expert testimony indicated that where blood count exceeds .20% a casual observer would notice signs of drunkenness. If between .30 and .40% the person would begin to become comatose. If the level exceeds .42%, the person will die as a result of paralysis of the brain centers controlling heart rhythm and respiration. *Id.*

44. California has adopted the "pure" form of comparative negligence. See note 21 *supra*.

45. The court disapproved of *Kindt v. Kauffman*, 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976), *rev'd*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978), to the extent that it held that a patron, as a matter of law, commits wilful misconduct in consuming enough liquor to become intoxicated. 20 Cal. 3d at 404 n.10, 572 P.2d at 1163 n.10, 143 Cal. Rptr. at 21 n.10.

Business and Professions Code and the Civil Code abrogating cases such as *Vesely*, *Bernhard*, and *Coulter* and reinstating the common law view of proximate cause.⁴⁶ In addition, the legislature specifically immunized any person who gives, sells, or furnishes any alcoholic beverages from civil liability to any person injured as a result of intoxication of the consumer.⁴⁷ Essentially, the 1978 amendments returned California to the common law status of non-liability for suppliers of alcohol, with one exception.⁴⁸ The legislature preserved a cause of action against a licensed provider who serves alcoholic beverages to an obviously intoxicated minor who subsequently causes injury to third persons.⁴⁹

Several jurisdictions have considered the question of civil liability of providers of alcoholic beverages.⁵⁰ For example, in *Ono v. Applegate*,⁵¹ the Hawaii Supreme Court allowed recovery where a head-on collision killed three people and seriously injured two others. The accident was found to have been 75% caused by the negligence of the intoxicated driver and 25% caused by the negligent providing of alcohol.⁵² The court relied upon the reasoning in *Vesely* and the clear trend toward allowing recovery against the tavern for injuries received by a third person as the result of the intoxication of a customer.⁵³

Many states have enacted and implemented statutes creating

46. CAL. CIV. CODE § 1714(b) (West Supp. 1981); CAL. BUS. & PROF. CODE § 25602(c) (West Supp. 1981). See note 4 *supra*. The consumption of alcoholic beverages rather than the serving of such beverages is the proximate cause of injuries inflicted by an intoxicated person, according to these amendments.

47. CAL. CIV. CODE § 1714(c) (West Supp. 1981); CAL. BUS. & PROF. CODE § 25602(b) (West Supp. 1981). See note 4 *supra*.

48. See generally Note, *Liability of Liquor Supplier in California: A Return to the Common Law*, 12 U.C.D. L. REV. 191 (1979). The note traces the evolution of civil liability of suppliers of alcoholic beverages from its common law origins.

49. CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1981) provides:

[A] cause of action may be brought by or on behalf of any person who has suffered injury or death against any person . . . who sells, furnishes, gives or causes to be sold, furnished or given away any alcoholic beverage to any obviously intoxicated minor where the furnishing, sale or giving of such beverage to the minor is the proximate cause of the personal injury or death sustained by such person.

50. See *Ono v. Applegate*, 612 P.2d 533, 538 (Hawaii 1980), and cases cited therein.

51. *Id.*

52. *Id.* at 536-37. The driver had been consuming alcoholic beverages at her home and subsequently at a bar. *Id.* at 536.

53. *Id.* at 538. The court held that the consumption of the alcohol and the resulting injurious acts were foreseeable intervening acts thereby allowing liability. *Id.* at 541.

civil liability for a provider of alcoholic beverages.⁵⁴ These statutes, commonly called Dram Shop Acts, impose a form of strict liability on providers of alcohol for the actions of intoxicated patrons.⁵⁵

III. FACTUAL SETTING AND THE COURT'S DECISION

Richard Cory, a minor, was injured after he became intoxicated at a party and lost control of his car while attempting to drive home. In his complaint, Cory named as defendants the lessor of the building in which the party was held, the liquor stores which sold the alcohol, and various individuals including Michael Shierloh, also a minor, who hosted the party. Defendant Shierloh interposed a general demurrer to the complaint relying upon the 1978 amendments.⁵⁶ The plaintiff's contention on appeal was that his complaint was valid despite the 1978 amendments. According to plaintiff, his negligence theories⁵⁷ were not affected by the amendments. Further, he contended that the amendments were unconstitutional on equal protection grounds.⁵⁸

After discussing the common law development of the cause of action based on negligent selling or furnishing of alcohol to one obviously intoxicated,⁵⁹ the court held that the 1978 amendments were controlling notwithstanding plaintiff's contention that they did not apply to the injured intoxicated consumer.⁶⁰ The court stated that a fair reading of the statute would compel the conclusion that it precluded suit for injuries to third persons as well as to the intoxicated consumer.⁶¹

With respect to constitutional objections to the amendments,

54. See Comment, *supra* note 22.

55. See Comment, *Dram Shop Liability—A Judicial Response*, 57 CAL. L. REV. 995, 996 (1969). The enactment of Dram Shop Acts has been the most common response to the problem of liability of sellers.

56. See notes 4 and 46-48 *supra* and accompanying text.

57. The complaint contained several causes of action including negligent operation and control of the leased premises, unlicensed and unlawful sale and furnishing of alcohol to minors, and unlawful furnishing or selling of alcoholic beverages to plaintiff while he was obviously intoxicated. 29 Cal. 3d at 433-34, 629 P.2d at 9, 174 Cal. Rptr. at 501.

58. *Id.* at 434-35, 629 P.2d at 9-10, 174 Cal. Rptr. at 501-02.

59. See notes 10-33 *supra* and accompanying text.

60. "Although the 1978 amendments are hardly models of draftsmanship, we must conclude that section 25602, subdivision (b), reasonably construed, bars a suit by the intoxicated consumer as well as third persons injured by him." 29 Cal. 3d at 437, 629 P.2d at 11-12, 174 Cal. Rptr. at 503-04. By proclaiming that the proximate cause of any such injury is the consumption of the alcohol, the legislature precluded an action based on negligence. See note 4 *supra*. However, there is some argument that when an intoxicant is injured as a result of the wilful and intentional misconduct of the provider a cause of action exists against that person. See note 41 *supra*.

61. See note 60 *supra*.

the plaintiff argued that the general immunity and statutory classifications between unlicensed and licensed providers, and adult and minor consumers were irrational and served no legitimate state interest.⁶² Though the court seriously questioned the propriety of narrowing civil liability,⁶³ it determined that its only inquiry was whether the legislation adopted was reasonably supportable.⁶⁴ Under separation of powers principles,⁶⁵ the only proper forum for "correction of ill-considered legislation is a responsive Legislature."⁶⁶ In addition, the court stated that the legislature has complete power over the rights of individuals except as the constitution provides.⁶⁷ Thus, the courts have no power to change laws that they deem to be unwise.

In deciding whether the classifications in the 1978 amendments could be sustained, the court first looked at the general immunity provided for in the amendments. In finding a rational basis to sustain this provision, the court stated that the legislature may have relied upon the assertion that it is unfair to require the provider of alcohol to share both supervisory responsibility over the imbibor, as well as the legal blame for his actions, where his voluntary consumption was the more direct and immediate cause of injury.⁶⁸ In addition, the legislature could have determined that exclusive liability upon the consumer of alcoholic beverages

62. 29 Cal. 3d at 438-39, 629 P.2d at 12, 174 Cal. Rptr. at 504.

63. The court implied that the legislature should be thinking of expanding civil liability instead of restricting it. 29 Cal. 3d at 437-38, 629 P.2d at 12, 174 Cal. Rptr. at 504. "When a driver's blood alcohol reaches .15 . . . the probability of the driver causing a traffic accident is 25 times greater than if he were sober." GREEN, CASES ON THE LAW OF TORTS, 668-69 (2d ed. 1977). This comment indicates the import of drinking and then driving. To figures such as this, the legislature has responded with a restriction on liability. It seems that the allocation of burdens should be on the sellers of alcoholic beverages. The licensed liquor operator is profiting from those who buy his products and could easily defray the costs of liability resulting from his negligence in serving one who is obviously intoxicated. The court felt, however, that in the final analysis, the legislature must answer to public opinion. 29 Cal. 3d at 437-38, 629 P.2d at 12, 174 Cal. Rptr. at 504.

64. 29 Cal. 3d at 437-38, 629 P.2d at 12, 174 Cal. Rptr. at 504.

65. CAL. CONST. art. III, § 3 (1972). This section provides: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

66. 29 Cal. 3d at 438, 629 P.2d at 12, 174 Cal. Rptr. at 504 (quoting Werner v. Southern Cal. Newspapers, 35 Cal. 2d 121, 129, 216 P.2d 825, 831 (1950)).

67. 29 Cal. 3d at 439, 629 P.2d at 13, 174 Cal. Rptr. at 505.

68. *Id.* at 439-40, 629 P.2d at 13, 174 Cal. Rptr. at 505. The legislature relied upon the pre-*Vesely* cases finding *supra* consumption to be the proximate cause of resulting injuries. See notes 10-21 *supra* and accompanying text.

would encourage a heightened sense of responsibility in the drinker, thereby decreasing the frequency of injuries.⁶⁹

Regarding the special distinctions between licensed providers and those that are unlicensed, the court found that maintaining liability of licensed providers serving obviously intoxicated minors was rationally related to some legitimate purpose.⁷⁰ It could be that the legislature relied upon the experience of the seller in detecting signs of intoxication among his patrons⁷¹ or that such establishments are better able than a social host to defray the costs of liability.⁷²

In limiting the protected class to minors, and excluding adults, the legislature may have felt that minors need more safeguarding than adults. The court noted that adults are generally more experienced at drinking and driving than minors.⁷³ Thus, the court concluded that the legislature could suspend the normal rule of causation when it comes to minors due to society's realistic concern for its well being.⁷⁴ Accordingly, the court found a rational basis for all of the classifications contained in the 1978 amendments, and affirmed the judgment of the lower court.⁷⁵

IV. IMPACT OF THE CASE

The court in *Cory v. Shierloh*, by upholding the constitutionality of the 1978 amendments, closed the door on many lawsuits initiated by innocent third parties against tavern keepers or providers of alcohol. California, by sustaining this legislation, has gone against the predominant trend toward enlarging tort liability of providers of alcoholic beverages throughout the United States.⁷⁶

69. 29 Cal. 3d at 440, 629 P.2d at 13, 174 Cal. Rptr. at 505. This rationale is a questionable deterrent. That the drinker who is not liable would behave differently with the knowledge that he may be liable for injuries to third persons caused by him is doubtful.

70. The court thought it unprecedented in the law of negligence to base liability on the license status of a supplier but deferred to the legislature. 29 Cal. 3d at 440, 629 P.2d at 13-14, 174 Cal. Rptr. at 505.

71. *But see* note 38 *supra* for an indication of the unpredictability of detecting intoxication.

72. 29 Cal. 3d at 441, 629 P.2d at 14, 174 Cal. Rptr. at 506. The contra argument is that social hosts may maintain liability insurance against these types of risks and would therefore be equally able to defray costs. In addition, the court noted that it makes no difference to the injured third party or surviving spouse whether the intoxicant was served by a gracious host or a gruff bartender. *Id.*

73. "[T]he Legislature might reasonably have deemed such persons more in need of safeguarding from intoxication than adults because of the comparative inexperience of minors in both drinking and driving." *Id.*

74. CAL. BUS. & PROF. CODE § 25602.1 (West Supp. 1981).

75. "With effort a reasonable basis for the 1978 amendments may be found." 29 Cal. 3d at 441, 629 P.2d at 14, 174 Cal. Rptr. at 506.

76. *Id.* *See* note 23 *supra* for a discussion of the authority for this trend.

It is clear that the California legislation is constitutional. However, it is equally clear that through the adoption of the 1978 amendments and the affirmation of their constitutionality, California has regressed in the allocation of responsibility for injuries to innocent third persons which are caused, at least in part, by the negligent serving of alcoholic beverages to visibly intoxicated persons. It is also apparent that the remedy for any inequities created by these amendments must come from the legislature.

There still remains an open area where liability for furnishing alcoholic beverages may attach. Where a plaintiff can show wilful or intentional misconduct a cause of action may lie.⁷⁷ The 1978 amendments appear to apply to negligent behavior of the provider,⁷⁸ and it is doubtful that the legislature would take another step backward in the future. Thus, in a situation such as that in *Ewing or Trenier v. California Investment & Development Corp.*,⁷⁹ if the plaintiff can overcome allegations of his own wilful misconduct, he should be able to state a cause of action.

V. CONCLUSION

The notion that the 1978 amendments, by imposing liability upon the individual drinker, will deter the drinking habits of Californians, is highly speculative. It is similar to the idea that a driver without insurance will drive more carefully for fear of incurring liability. The fallacy of this notion is that nobody desires to be involved in an automobile accident regardless of whether they are insured or not. Similarly, the fact that a consumer of alcohol knows that the provider is subject to liability rather than himself would not encourage the drinker to indulge more heavily and then drive. The effects that drinking can have on one's ability to drive are well known.⁸⁰ Consequently, by imposing liability upon the drinker and immunizing the provider, the legislature has only affected the innocent third person who is of course the victim at the end of the chain of causation.

77. See note 41 *supra*.

78. Such was the case in *Vesely, Bernhard, and Coulter*. See notes 22-38 *supra* and accompanying text.

79. See notes 39-45 *supra* and accompanying text.

80. "[I]t is common knowledge that one who operates a motor vehicle after drinking liquor is more apt to be negligent than one who has not imbibed." GREEN, *supra* note 60, at 668 (quoting *Davis v. Hollowell*, 326 Mich. 673, 677, 40 N.W.2d 641, 644 (1950)).

