

5-15-1981

## The California Supreme Court Survey: A Review of Decisions: December 1980 - February 1981

Drago C. Baric

William C. Bollard

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# The California Supreme Court Survey

## A Review of Decisions: December 1980 - February 1981

*In a continuing effort to provide the legal community with an analysis of precedential California Supreme Court cases, the Pepperdine Law Review surveys the following decisions. It is hoped that this issue's discussion will provide a useful source of material for the legal practitioner.*

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## I. CONSTITUTIONAL LAW

### A. DUE PROCESS

#### 1. *Commitment under California Welfare and Institutions Code Section 4825: In re Hop*

California Welfare and Institutions Code section 4825<sup>1</sup> permits a parent or a conservator of a developmentally disabled person<sup>2</sup> to commit such person to either a state hospital or a private institution by mere application. In *In re Hop*,<sup>3</sup> the California Supreme Court held that absent either a pre-admission hearing or a knowing and intelligent request by the person being admitted, section 4825 is constitutionally infirm on both due process and equal protection grounds.<sup>4</sup>

In applying a compelling state interest test<sup>5</sup> to the commitment statute, the court in *Hop* determined that section 4825 could not stand constitutional due process scrutiny.<sup>6</sup> The court reasoned that since admission into an institution based on section 4825

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1. The statute provides, in pertinent part:

Notwithstanding the provisions of Section 6000, the admission of an adult developmentally disabled person to a state hospital or private institution shall be upon the application of the person's parent or conservator in accordance with the provisions of section 4653 and 4803. Any person so admitted to a state hospital may leave the state hospital at any time, if such parent or conservator gives notice of his or her desire for the departure of the developmentally disabled person to any member of the hospital staff and completes normal hospitalization departure procedures.

CAL. WELF. & INST. CODE § 4825 (West Supp. 1981).

2. (a) "Developmental disability" means a disability which originates before an individual attains age 18, continues, or can be expected to continue indefinitely, and constitutes a substantial handicap for such individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include handicapping conditions found to be closely related to mental retardation or to require treatment similar to that required for mentally retarded individuals, but shall not include other handicapping conditions that are solely physical in nature.

CAL. WELF. & INST. CODE § 4512 (West Supp. 1981).

3. 29 Cal. 3d 82, 623 P.2d 282, 171 Cal. Rptr. 721 (1981). On a petition for habeas corpus brought by a public defender, Irene Hop, a developmentally disabled woman, sought to be removed from Lanterman State Hospital, where she had been relocated to by her mother in 1979, at a time when she lacked the ability to protest such a transfer. Justice Richardson delivered the opinion for the unanimous court.

4. *Id.* at 86, 623 P.2d at 285, 171 Cal. Rptr. at 723.

5. The court used the compelling state interest test because Hop's personal liberty, fundamental in nature, was at stake. See *In re Moye*, 22 Cal. 3d 457, 584 P.2d 1097, 149 Cal. Rptr. 491 (1978) (applied strict scrutiny in evaluating a commitment procedure); *People v. Olivas*, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976) (applied strict scrutiny in reviewing youthful offender statute which allowed commitment beyond the normal sentence for a given crime).

6. 29 Cal. 3d at 92, 623 P.2d at 288, 171 Cal. Rptr. at 727.

could not be subject to a waiver by acquiescence,<sup>7</sup> it was not voluntary and therefore required a judicial hearing.<sup>8</sup> In applying a rational basis standard under equal protection analysis, the court found section 4825 unconstitutional.<sup>9</sup> The *Hop* court stated that “[n]o other class of adults similarly situated and in need of protective custody may lawfully be placed in a state hospital without a knowing and intelligent waiver of rights, or a request, or a judicial determination that placement is appropriate.”<sup>10</sup>

Thus, the California Supreme Court has limited section 4825 commitments to state hospitals or private institutions to those particularized situations where a developmentally disabled person<sup>11</sup> either knowingly and intelligently requests admission or is given a pre-admission hearing.

## B. CRIMINAL PROCEDURE

### 1. *Excessive Pretrial Publicity as it Affects the Right to a Fair Trial: People v. Harris*

The possibility that potentially prejudicial pretrial publicity might require a change of venue from the area where the crime had been committed depends on whether a reasonable likelihood exists that a defendant could not get a fair trial in that area.<sup>1</sup> It is well established in California that in more populous and heterogeneous communities pretrial publicity weighs less against granting a change of venue.<sup>2</sup> The California Supreme Court in *People*

7. The idea that a developmentally disabled person did not, and quite possibly could not, object to his or her placement into a hospital or other facility he or she waived any right to object to the constitutionality of such placement was discredited by the *Hop* court.

8. The *Hop* court held that a constitutional waiver must be both voluntary and intelligent, assuring that the person is not only aware of his or her rights, but also aware of the consequences of his action. *Id.* at 91, 623 P.2d at 287, 171 Cal. Rptr. at 726 (quoting *In re Roger S.*, 19 Cal. 3d 921, 938 n.10, 569 P.2d 1286, 1296 n.10, 141 Cal. Rptr. 298, 308 n.10 (1977)). See generally *Faretta v. California*, 422 U.S. 806 (1975).

9. 29 Cal. 3d at 92-93, 623 P.2d at 288-89, 171 Cal. Rptr. at 727-28.

10. *Id.* at 92, 623 P.2d at 288, 171 Cal. Rptr. at 727.

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

1. See *Maine v. Superior Court*, 68 Cal. 2d 375, 438 P.2d 372, 66 Cal. Rptr. 724 (1968) where the California Supreme Court held that a change of venue should be granted if potentially prejudicial pretrial publicity creates a situation where a defendant is likely not to get a fair trial in that area.

2. See *People v. Sommerholder*, 9 Cal. 3d 290, 508 P.2d 289, 107 Cal. Rptr. 289 (1973); *People v. Manson*, 61 Cal. App. 3d 102, 132 Cal. Rptr. 298 (1974); *Corona v. Superior Court*, 24 Cal. App. 3d 872, 101 Cal. Rptr. 411 (1972). These cases all held

*v. Harris*<sup>3</sup> applied this general rule to a situation where extensive pretrial publicity, concentrated in the area of the crimes, was found to be sufficiently dissipated so as not to require a change of venue.<sup>4</sup>

In applying the test for change of venue,<sup>5</sup> the court found that where other factors are relatively equal, the size of the community would determine the venue issue.<sup>6</sup> Looking at the community in which the trial had taken place,<sup>7</sup> the court in *Harris* reasoned that because the community of San Diego was so large and cosmopolitan, the prejudicial effect of pretrial publicity was minimized.<sup>8</sup>

Even though the court found the pretrial publicity to be both damaging in nature and extensive in scope,<sup>9</sup> the court in *Harris* held that a change of venue would not be required for the defendant to have a fair trial.<sup>10</sup> While in similar cases such as *People v. Manson*<sup>11</sup> and *People v. Corona*,<sup>12</sup> prejudicial pretrial publicity

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that a change of venue is not necessary where trials take place in large, metropolitan areas.

3. 28 Cal. 3d 935, 623 P.2d 240, 171 Cal. Rptr. 679 (1981). In his San Diego trial for committing various felonies including two counts of murder, Robert Harris was convicted of several felonies, the gravest, first degree murder with special circumstances, carries the penalty of death. Before his trial, newspapers and television carried numerous stories most of which were very damaging to his case. Harris appealed many aspects of his conviction but none of the court's discussions are as important as its discussion of pretrial publicity. Justice Clark wrote the majority opinion, with Justices Richardson and Newman concurring. In a separate opinion, Justice Tobriner also concurred in the judgment, but expressed his belief that the death penalty was unconstitutional. Chief Justice Bird filed a dissenting opinion arguing that Harris could not have received a fair trial in San Diego with all of the local media attention.

4. *Id.* at 949, 623 P.2d at 247-48, 171 Cal. Rptr. at 685-86.

5. The court in *Harris* held that "(t)he factors to be considered are the nature and gravity of the offense, the nature and extent of the news coverage, the size of the community, the status of the defendant in the community, and the popularity and prominence of the victim." *Id.* at 948, 623 P.2d at 247, 171 Cal. Rptr. at 685 (citing *People v. Salas*, 7 Cal. 3d 812, 818, 500 P.2d 7, 11, 103 Cal. Rptr. 431, 435 (1972)).

6. 28 Cal. 3d at 948-49, 623 P.2d at 247, 171 Cal. Rptr. at 685.

7. The court pointed out that San Diego County is the third most populous in the state and that the city of San Diego is the second largest in California.

8. 28 Cal. 3d at 949, 623 P.2d at 248, 171 Cal. Rptr. at 686.

9. The *Harris* court stated that "(p)ress coverage of the crimes was extensive and included such information as that defendant was on parole for manslaughter, that his brother had confessed and had placed the blame primarily on defendant, and that defendant himself had confessed." *Id.* at 948, 623 P.2d at 247, 171 Cal. Rptr. at 685.

10. The court based this finding solely on the fact that "the populous metropolitan character of the community dissipate(s) the impact of pretrial publicity." *Id.* at 949, 623 P.2d at 248, 171 Cal. Rptr. at 686.

11. 61 Cal. App. 3d 102, 132 Cal. Rptr. 265 (1976) (news coverage of the events was widely disseminated throughout the state of California and was not concentrated in the Los Angeles area).

12. 24 Cal. App. 3d 872, 101 Cal. Rptr. 411 (1972) (news reports extended

covered the entire state, decreasing any positive effect which a change of venue may have, in *People v. Harris* the pretrial publicity was concentrated in the San Diego County area.<sup>13</sup> The *Harris* decision established that even where there is a great possibility that a defendant may get a fair trial with a change of venue, the change of venue will not be required if the trial takes place in a large community such as San Diego. Consequently, defendants will have greater problems attempting to get a change of venue if their trial is in a populous area.

## 2. Right to Plead Guilty Without the Consent of Counsel: *People v. Chadd*

*California Penal Code Section 1018, as amended in 1973, provides that a defendant charged with a crime for which the penalty is either death or life imprisonment without the possibility of parole could not plead guilty to such an offense without both presence and consent of counsel. In People v. Chadd, the California Supreme Court interpreted section 1018 as foreclosing the possibility of such a defendant waiving counsel, proceeding pro se, and entering a guilty plea.*

### I. INTRODUCTION

Section 1018 of the California Penal Code offers extraordinary protection to a criminal defendant charged with "a felony for which the maximum penalty is death or life imprisonment without the possibility of parole."<sup>1</sup> It provides that a defendant may not plead guilty to such an offense without the presence and consent of counsel.<sup>2</sup> Recently, the California Supreme Court in *Peo-*

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throughout the state of California and were not limited to the county in which the trial had taken place).

13. Chief Justice Bird's dissenting opinion discusses at length the extent of the news coverage in the San Diego area. *Id.* at 965-976, 623 P.2d at 256-68, 171 Cal. Rptr. at 695-702.

1. CAL. PENAL CODE § 1018 (West Supp. 1980).

2. Section 1018 provides:

Unless otherwise provided by law every plea must be entered or withdrawn by the defendant himself in open court. No plea of guilty of a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any such plea be received without the consent of the defendant's counsel. \* \* \* No plea of guilty of a felony for which the maximum punishment is not death or life imprisonment without the possibility of parole shall be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it and then, only if



*ple v. Chadd*,<sup>3</sup> upheld the validity of section 1018 while at the same time, clarifying its meaning. The majority opinion, written by Justice Mosk, firmly established that only one possible construction of section 1018 could be supported. The very plain and straightforward language of section 1018 states that in certain cases,<sup>4</sup> a guilty plea cannot be accepted by a court unless the defendant is represented by counsel, who is present at the time the plea is entered, and provided counsel consents to such a plea.<sup>5</sup>

In *Chadd*, the defendant, Billy Lee Chadd, was arraigned on ten separate felony counts,<sup>6</sup> including one count of first-degree murder<sup>7</sup> with special circumstances<sup>8</sup> which carries the penalty of death or life imprisonment without possibility of parole.<sup>9</sup> Through appointed counsel, David R. Pitkin, the defendant originally pleaded not guilty to all charges.<sup>10</sup> One week later at the bail hearing, Mr. Pitkin appeared alone and explained that Chadd had attempted to commit suicide.<sup>11</sup> Upon Chadd's return to the

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the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel. On application of the defendant at any time before judgment the court may, and in case of a defendant who appeared without counsel at the time of the plea the court must, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.

Upon indictment or information against a corporation a plea of guilty may be put in by counsel.

This section shall be liberally construed to effect these objects and to promote justice.

*Id.* (emphasis added).

3. 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981).

4. See note 1 *supra* and accompanying text.

5. See note 2 *supra*.

6. Defendant Chadd was charged with the following crimes: count one, Murder of Patricia Franklin; count two, Rape of Patricia Franklin; count three, Sodomy of Patricia Franklin; count four, Robbery of Patricia Franklin; count five, Burglary of Patricia Franklin's house; count six, Murder of Linda Hewitt; count seven, Rape of Linda Hewitt; count eight, Sodomy of Linda Hewitt; count nine, Oral copulation of Linda Hewitt; and count ten, Robbery of Linda Hewitt. 28 Cal. 3d at 744 n.1, 621 P.2d at 839 n.1, 170 Cal. Rptr. at 800 n.1.

7. Count six of the information, the murder of Linda Hewitt, received the major emphasis in the court's opinion.

8. The existence of "special circumstances" limits the type of cases in which the death penalty of life imprisonment without possibility of parole may be sought. Among the circumstances included are murder for hire, murder with unnecessary torture, murder of a police officer, and murder while in the perpetration of certain acts, including rape, robbery, sodomy, oral copulation, and burglary. CAL. PEN. CODE § 190.2 (West Supp. 1980). Chadd had been charged with rape, sodomy, oral copulation and robbery in connection with the murder of Linda Hewitt. See note 6 *supra*.

9. CAL. PENAL CODE § 190.2 (West Supp. 1980).

10. "Because it appeared to the court that the defendant might be mentally incompetent, after a suicide attempt the court directed that he undergo a 72-hour period of treatment and evaluation in a psychiatric facility. 28 Cal. 3d at 744, 621 P.2d at 839, 170 Cal. Rptr. at 800.

11. *Id.* at 745, 621 P.2d at 840, 170 Cal. Rptr. at 801.

court, the prosecution announced its intention to seek the death penalty for the count of first-degree murder.<sup>12</sup> After a brief colloquy between the defendant and the court, in which Chadd expressed his desire either to receive the death penalty or to commit suicide, the court ordered Chadd to submit to a psychiatric examination.<sup>13</sup> After being found mentally competent, Chadd insisted on pleading guilty, despite his counsel's objections.<sup>14</sup> Notwithstanding the prosecutor's recommendation that such a plea should not be accepted, the court found the defendant competent enough to represent himself under the standards established by *Faretta v. California*,<sup>15</sup> and accepted his guilty plea over Mr. Pitkin's refusal to give consent.<sup>16</sup> A jury, empanelled to set punishment, imposed the death penalty<sup>17</sup> from which an appeal was automatically taken.<sup>18</sup>

On appeal, Chadd "contend[ed] that the trial court had no authority to accept his guilty plea to a capital offense in the face of his counsel's express refusal to the entry of such a plea."<sup>19</sup> A majority of the court<sup>20</sup> fully agreed.<sup>21</sup> Recognizing that Mr. Pitkin was never officially discharged as defense counsel of record, Jus-

12. Alleging "special circumstances," the prosecutor sought the death penalty for the murder of Linda Hewitt, count six of the information. *Id.* at 744, 621 P.2d at 839, 170 Cal. Rptr. at 800.

13. *Id.* at 745, 621 P.2d at 840, 170 Cal. Rptr. at 801.

14. Even though counsel "acknowledged that defendant was attempting to enter such a plea, he stated 'I want the record to reflect that it's without my consent.'" *Id.*

15. 422 U.S. 806 (1975) (the United States Supreme Court held that the sixth amendment through the fourteenth amendment, guarantees a constitutionally based right to self-representation if undertaken by the defendant both voluntarily and intelligently).

16. 28 Cal. 3d at 745, 601 P.2d at 840, 170 Cal. Rptr. at 801.

17. *Id.* at 746, 621 P.2d at 840, 170 Cal. Rptr. at 801.

18. "When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel." CAL. PENAL CODE § 1239(b) (West Supp. 1980).

19. 28 Cal. 3d at 746, 621 P.2d at 840, 170 Cal. Rptr. at 801.

20. Justices Mosk, Tobriner, and Newman were in the majority, with Chief Justice Bird concurring in the judgment. Justice Richardson wrote a concurring and dissenting opinion joined by Justice Clark.

21. Penal Code Section 1018 provides in relevant part that no guilty plea to a felony punishable by death or life imprisonment without possibility of parole 'shall be received from a defendant who does not appear with counsel, or shall any such plea be received without the consent of the defendant's counsel.' The record amply demonstrates that Mr. Pitkin did not give that consent. Under the terms of section 1018, therefore, the court erred in allowing defendant to plead guilty to count 6 of the information. 28 Cal. 3d at 746, 621 P.2d at 840, 170 Cal. Rptr. at 801 (quoting CAL. PENAL CODE § 1018 (West Supp. 1980)).

tice Mosk dutifully avoided a confrontation between the constitutional right to self-representation established in *Faretta* and the legislature's power to regulate or conditionally limit a defendant's right to plead guilty in capital cases or those involving life sentences.<sup>22</sup>

The first major issue addressed by the court concerned whether or not there was sufficient state interest in the criminal justice system to warrant a denial of a defendant's right to plead guilty to a capital offense without the consent of counsel. The second major issue centered on whether or not the scope of self-representation should extend to include the right to plead guilty to a capital offense.

## II. HISTORICAL ANALYSIS

Justice Mosk placed a great deal of importance on the statutory evolution of penal code section 1018.<sup>23</sup> Enacted in 1872, section 1018 remained virtually unchanged until it was amended in 1949.<sup>24</sup> Basically, the 1949 amendment provided that in felony cases where the punishment to be imposed was death or life imprisonment without possibility of parole, a guilty plea from a defendant appearing without counsel would not be accepted. In other felony cases, a guilty plea would not be accepted from a defendant appearing without counsel unless the defendant had first been informed of his right to counsel and, after being so informed, had freely waived such right.<sup>25</sup> A further amendment in 1951 added the words "and then only if the defendant has expressly stated in open court, to the court, that he does not wish to be represented by counsel"<sup>26</sup> in order to give greater protection to the defendant

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22. According to Justice Mosk, since counsel for the defendant was never formally discharged from his duties, deciding whether or not a capital defendant may discharge his counsel in order to plead guilty would be an adjudication of a hypothetical question, *i.e.*, the rendition of an advisory opinion, which the court had no power to do. See *Younger v. Superior Court*, 21 Cal. 3d 102, 577 P.2d 1014, 145 Cal. Rptr. 674 (1978).

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

24. 1949 Cal. Stats. 2298 (current version at CAL. PENAL CODE § 1018 (West Supp. 1980)).

25. The amendment states, in pertinent part:

No plea of guilty for a felony for which the maximum punishment is death, or life imprisonment without the possibility of parole, shall be received from a defendant who does not appear with counsel, nor shall any plea of guilty of any other felony be accepted from any defendant who does not appear with counsel unless the court shall first fully inform him of his right to counsel and unless the court shall find that the defendant understands his right to counsel and freely waives it.

*Id.*

26. 1951 Cal. Stats. 245 (current version at CAL. PENAL CODE § 1018 (West Supp. 1980)).

in a noncapital felony case. A 1973 amendment<sup>27</sup> appears to have completed the statutory evolution of section 1018. The importance of this amendment is that it added the requirement that counsel consent to a guilty plea in a capital case.<sup>28</sup>

The first in a line of cases dealing with the interpretation of section 1018, as it pertains to *Chadd*, is *People v. Ballentine*.<sup>29</sup> Although *Ballentine* was decided well before the 1973 amendment requiring the consent of counsel, the holding in that case is relevant to the discussion in *Chadd*. Like the defendant in *Chadd*, Ballentine had been represented by counsel at his arraignment.<sup>30</sup> Unlike the circumstances in *Chadd*, however, Ballentine's attorney was allowed to withdraw and Ballentine expressly waived his right to counsel, wishing instead to plead guilty to murder.<sup>31</sup> The guilty plea was accepted, but the supreme court reversed the judgment.<sup>32</sup> The *Ballentine* court held that section 1018, as it then existed, "[did] not prevent a defendant from waiving his right to the aid of counsel and defending himself. It merely prohibit[ed] the court from receiving a plea of guilty to a felony for which the maximum punishment [was] death [when such plea was] made by a defendant not represented by counsel."<sup>33</sup>

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27. The only difference between the 1973 amendment and the statute in its present form is a minor substitution of words and a deletion of a sentence dealing with murders perpetrated by minors which, in effect, makes the two substantially the same.

28. Prior to 1973, the law required only that a capital defendant have counsel; the consent of counsel to a plea of guilty was not required. See, e.g., *People v. Vaughn*, 9 Cal. 3d 321, 508 P.2d 318, 107 Cal. Rptr. 318 (1973). Applying section 1018 before the 1973 amendment, the court held that although representation by counsel in a capital case was required, counsel need not consent to a guilty plea if the defendant was not guilty. At least one case decided after 1973 held likewise. See *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979). Determining the 1973 amendment, did not apply retroactively and following *Vaughn*, the court held that a defendant had a right to plead guilty to a capital offense even if counsel refused to give his consent.

29. 39 Cal. 2d 193, 246 P.2d 35 (1952) (the judgment was reversed in favor of the defendant because his guilty plea to murder and robbery was accepted while the defendant was without counsel, contrary to penal code section 1018, as it then existed).

30. *Id.* at 194, 246 P.2d at 36.

31. *Id.*

32. *Id.* at 197, 246 P.2d at 37.

33. *Id.* at 195-96, 246 P.2d at 36. The court further noted:

Although a defendant has the right to defend himself in person in a criminal prosecution (Const., art. I, § 13), he is not guaranteed the right to plead guilty to a charge of a felony punishable by death. In that situation 'such proceedings shall be had as are . . . prescribed by law.' (Const., art. I, § 8.) The legislature has deprived the court of the power to accept a

The court reasoned:

Not having an absolute right to enter a plea of guilty, the defendant is not deprived of any right by being permitted to enter a plea only if he is represented by counsel. The validity of the limitation upon entry of the plea is not affected, therefore, by the provision of one statute permitting the plea when the defendant has representation.<sup>34</sup>

The *Chadd* court might have simply cited *Ballentine* as authority for holding that a defendant charged with a capital offense has no right to plead guilty without counsel and ended the discussion there. Instead, the court chose to consider and distinguish two other important cases.

In *People v. Vaughn*,<sup>35</sup> Justice Tobriner, writing for the majority, found that acceptance by the court of a guilty plea from a defendant charged with a capital offense, and who was not represented by counsel, was not error.<sup>36</sup> Unfortunately, *Vaughn* was decided five and one half months prior to the passage of the 1973 amendment adding the consent of counsel requirement to section 1018.<sup>37</sup> Therefore, the language in *Vaughn* construing section 1018 could not be considered, in any sense, as binding precedent.

Another important case discussed by the *Chadd* court was *People v. Teron*<sup>38</sup> which, surprisingly, followed the decision in *Vaughn*. In dictum, the *Teron* court held that a defendant had "the right to plead guilty, even against the advice of counsel."<sup>39</sup> The majority in *Chadd*, properly disapproved of *Teron* since that case, likewise, "did not take into account this legislative development after *Vaughn*."<sup>40</sup> Believing that "the legislature [had] closed the statutory gap revealed in *Vaughn*,"<sup>41</sup> the *Chadd* court asserted "that since the 1973 amendment a capital defendant [was] no longer permitted to plead guilty . . . against the advice of his attorney."<sup>42</sup>

Turning to the issue of self-representation, Justice Mosk discussed the importance of *Faretta v. California*<sup>43</sup> to the *Chadd* decision. In *Faretta*, the United States Supreme Court recognized a

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guilty plea from a defendant charged with a felony punishable with death when he is not represented by counsel.

*Id.* at 196, 246 P.2d at 37.

34. *Id.* at 196-97, 246 P.2d at 37.

35. 9 Cal. 3d 321, 508 P.2d 318, 107 Cal. Rptr. 318 (1973). See note 28 *supra*.

36. 9 Cal. 3d at 328, 508 P.2d at 322, 107 Cal. Rptr. at 322.

37. *Vaughn* was decided on April 10, 1973. The 1973 amendment was signed and filed on September 24, 1973.

38. 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979). See note 28 *supra*.

39. 23 Cal. 3d at 115, 588 P.2d at 779, 151 Cal. Rptr. at 639.

40. 28 Cal. 3d at 750 n.7, 621 P.2d at 843 n.7, 170 Cal. Rptr. at 804 n.7.

41. *Id.* at 749, 621 P.2d at 843, 170 Cal. Rptr. at 804.

42. *Id.* at 750, 621 P.2d at 843, 170 Cal. Rptr. at 804.

43. See note 15 *supra*.

constitutional right of self-representation in state criminal actions<sup>44</sup> implicitly contained within the Sixth Amendment.<sup>45</sup> However, the Court recognized that this right was not to be absolute. At a minimum, the defendant had to both choose to represent himself and to conduct his defense in an intelligent and competent manner.<sup>46</sup> The state retained sufficient interest in the adequacy of the defense to place limits on this right.<sup>47</sup>

In determining the scope of a defendant's right to self-representation, the *Chadd* court found that "from a defendant's conceded right to 'make a defense' in 'an adversary criminal trial,'" it may not be intended that a defendant has a "right to make *no* such defense and to have *no* such trial, even when his life is at stake."<sup>48</sup> Further the court stated:

Nothing in *Faretta*, either expressly or impliedly, deprives the state of the right to conclude that the danger of erroneously imposing a death sentence outweighs the minor infringement of the right of self-representation resulting when defendant's right to plea guilty in capital cases is subject to the requirement of his counsel's consent.<sup>49</sup>

The majority noted that a state could refuse to accept guilty pleas altogether, instead of just conditioning such pleas on consent of counsel.<sup>50</sup>

According to the court, an apt analogy could be drawn between

44. 422 U.S. at 812-34.

45. "Although not stated in the Amendment in so many words, the right to self-representation—to make one's own defense personally—is thus necessarily implied by the structure of the Amendment." *Id.* at 819 (footnote omitted).

46. *Id.* at 835.

47. For example, "[a] State may—even over objection by the accused—appoint a 'standby counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary." *Id.* at 835 n.46.

48. 28 Cal. 3d at 751, 621 P.2d at 844, 170 Cal. Rptr. at 805.

49. *Id.*

Even in noncapital cases the state has properly circumscribed the right to plead guilty in order to protect defendants against the consequences of their own folly or neglect. Thus even an undoubtedly intelligent and voluntary guilty plea made by a defendant represented by counsel cannot be accepted until the court has satisfied itself by an evidentiary hearing that 'there is a factual basis for such a plea'.

*Id.* at 751 n.8, 621 P.2d at 844 n.8, 177 Cal. Rptr. at 805 n.8 (quoting CAL. PENAL CODE § 1192.5 (West Supp. 1980)).

50. 28 Cal. 3d at 751, 621 P.2d at 844, 170 Cal. Rptr. at 805. See, e.g., *North Carolina v. Alford*, 400 U.S. 25 n.38-39 (1970). The Supreme Court upheld defendant's plea of guilty to second-degree murder stating that although a state may decide not to accept plea bargains, but instead attempt to prove a first-degree murder case, the state is not required to do so, and may accept the plea of guilty to the lesser charge.

a waiver of counsel in order to plead guilty and a waiver of an automatic appeal.<sup>51</sup> Although the idea of waiver of automatic appeal predates *Faretta*, "nothing in *Faretta* abrogates that rule."<sup>52</sup> In fact, in *Massie v. Sumner*,<sup>53</sup> the Court of Appeals for the ninth circuit recently held that a compulsory review of a California death sentence did not violate the defendant's right to self-representation as set forth in *Faretta*.<sup>54</sup> This holding relates back to the idea that the state has a significant interest in the fair administration of criminal justice, especially when a death sentence is involved.<sup>55</sup> Justice Mosk reasoned that the state's interest is no less pronounced when, as in *Chadd* a defendant is permitted to plead guilty to a capital offense over the objections of counsel.<sup>56</sup> Further, he held that "the requirement of counsel's consent to such a plea was one of the 'reasonable proceedings' held permissible by the *Massie* court for the purpose of protecting that interest."<sup>57</sup>

### III. THE DISSENT

In a dissenting opinion,<sup>58</sup> Justice Richardson strongly disagreed with the majority's handling of the right to self-representation issue. It was fundamental to Justice Richardson that a defendant's right to self-representation not be disturbed. Citing *Faretta*, the dissenting justice argued that the right to refrain from offering a

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51. It is manifest that the state in its solicitude for a defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has also imposed a duty upon this court to make such a review. We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him. In other contexts it has been held that a defendant's waiver or attempted waiver of a right is ineffective where it would involve also the renunciation of a correlative duty imposed upon the court.

28 Cal. 3d at 752, 621 P.2d at 844, 170 Cal. Rptr. at 805 (quoting *People v. Stanworth*, 71 Cal. 2d 820, 833, 457 P.2d 889, 898, 80 Cal. Rptr. 49, 58 (1969)).

52. 28 Cal. 3d at 752, 621 P.2d at 844, 170 Cal. Rptr. at 805. See, e.g., *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 733, 151 Cal. Rptr. 633 (1979). The California Supreme Court, after *Faretta*, reasserted the holding in *Stanworth* that an automatic appeal may not be waived.

53. 624 F.2d 72 (9th Cir. 1980), cert. denied, 49 U.S.L.W. 3494 (U.S. Jan. 12, 1981) (on a writ of habeas corpus, defendant was denied a waiver of his automatic appeal of a death sentence by comparing the waiver to the right of self-representation).

54. *Id.* at 73-74.

55. *Id.* at 74.

56. 28 Cal. 3d at 753, 621 P.2d at 845, 170 Cal. Rptr. at 806.

57. *Id.*

58. 28 Cal. 3d at 759, 621 P.2d at 848, 170 Cal. Rptr. at 809. The opinion was both concurring and dissenting, but the concurring aspect was separate and apart from the main issues in the case. These collateral matters concerned counts two, three, four, and five of the original indictment which the majority found to be barred by the statute of limitations.

defense was also a personal right.<sup>59</sup> "If the right to 'take the stand and confess guilt' is constitutionally protected by *Faretta* from state interference, then surely the comparable right to appear at the arraignment and plead guilty is likewise so protected."<sup>60</sup>

The dissent cited *People v. Teron*,<sup>61</sup> disapproved of by the majority,<sup>62</sup> for the proposition that a defendant does have the right to plead guilty despite contrary advice from counsel. The dissent continued by referring to national acceptance of such a right.<sup>63</sup> In support of this position, Justice Richardson pointed to various factors which motivate a plea of guilty which justify allowing a capital defendant the opportunity to plead guilty even without counsel's consent: the desire to clear one's conscience; the desire to gain a tactical advantage; the desire to avoid a prolonged trial; and the desire to prevent unnecessary embarrassment.<sup>64</sup> The primary thrust of the dissenting opinion was that "the state can assert no interest sufficiently compelling to override defendant's constitutionally protected freedom of choice in the matter of his own plea, so long as that plea is voluntarily and knowingly made, and has sufficient factual basis."<sup>65</sup>

#### IV. ANALYSIS AND IMPACT

Although the *Chadd* court briefly discussed the construction of section 1018 of the California Penal Code,<sup>66</sup> the opinion focused

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59. 28 Cal. 3d at 760, 621 P.2d at 849, 170 Cal. Rptr. at 810 (Richardson, J., dissenting).

60. *Id.*

61. See note 38 *supra* and accompanying text.

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

63. 28 Cal. 3d at 760, 621 P.2d at 849, 170 Cal. Rptr. at 810 (Richardson, J., dissenting).

64. *Id.* at 761, 621 P.2d at 850, 170 Cal. Rptr. at 811 (Richardson, J., dissenting). Further the dissent states:

If he chooses to do so, intelligently and voluntarily, the defendant should have the right to accomplish these ends by pleading guilty. Under the majority's holding, however, state-appointed counsel can defeat these purposes with impunity by simply declining to consent to the plea. To me it makes no sense to say that a criminal defendant has a constitutional right to take the stand during his trial and freely admit his guilt but if the defendant wishes to spare himself the ordeal and embarrassment of trial by pleading guilty before trial his lawyer can prevent his doing so, and this even though he cannot be compelled to accept a lawyer.

*Id.*

65. 28 Cal. 3d at 762, 621 P.2d at 850, 170 Cal. Rptr. at 811 (Richardson, J., dissenting).

66. The court states that:



primarily on the fact that the interest of the defendant to make a plea competes with that of the state in the fair administration of criminal justice.

A defendant's personal interest in making his own plea was established early in the development of California law.<sup>67</sup> It was required that the defendant personally and in open court, enter his own plea. The purpose of this requirement was to ensure that the plea was his own.<sup>68</sup> Recently, California courts have reiterated this position.<sup>69</sup>

The right to enter a guilty plea developed later, initially emerging from a belief that a defendant should be the master of his own destiny.<sup>70</sup> More recently, a defendant's right to plead guilty has been allowed on a case by case basis.<sup>71</sup> The right itself now seems to have met its demise with the *Chadd* decision. The *Chadd* court stated that the concept of an absolute right to plead guilty,<sup>72</sup> in certain cases, did not exist in California.<sup>73</sup>

Closely associated with a defendant's right to enter his own

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[I]t is difficult to conceive a plainer statement of law than the rule of section 1018 that no guilty plea to a capital offense shall be received 'without the consent of the defendant's counsel.' It is settled that 'when statutory language is thus clear and unambiguous there is no need for construction, and courts should not indulge in it.'

*Id.* at 746, 621 P.2d at 841, 170 Cal. Rptr. at 802 (quoting *Solberg v. Superior Court*, 19 Cal. 3d 182, 198, 561 P.2d 1148, 1158, 137 Cal. Rptr. 460, 470 (1977)). See also *Caminetti v. Pac. Mutual Life Ins. Co.*, 22 Cal. 2d 344, 138 P.2d 908 (1943); *First Congregational Church v. County of Los Angeles*, 9 Cal. 2d 591, 71 P.2d 1106 (1937); *Rile v. Robbins*, 1 Cal. 2d 285, 34 P.2d 715 (1934); *People v. Stanley*, 193 Cal. 428, 225 P. 1 (1924).

67. A plea confessing himself to be guilty of crime should not be entered except with the express consent of the defendant, given by him personally, in direct terms, in open court. Nothing should be left to implication, and his confession of guilt should be explicitly made by himself in person in the presence of the court.

*People v. McCrory*, 41 Cal. 458, 461 (1871).

68. *In re Martinez*, 52 Cal. 2d 808, 815, 345 P.2d 449, 453 (1959).

69. *People v. Berry*, 257 Cal. App. 2d 731, 65 Cal. Rptr. 125 (1968) (guilty plea must be given by the defendant personally in open court); *People v. Martin*, 230 Cal. App. 2d 62, 40 Cal. Rptr. 700 (1964) (a personal plea need not come from the mouth of the defendant, it must evidence either authorization or adoption if spoken by defense counsel).

70. *In re Rose*, 62 Cal. 2d 384, 398 P.2d 428, 42 Cal. Rptr. 236 (1955) (client and not the attorney has the burden to decide whether or not he should plead guilty).

71. See *People v. Vaughn*, 9 Cal. 3d 321, 508 P.2d 318, 107 Cal. Rptr. 318 (1973); *In re Beaty*, 64 Cal. 2d 760, 414 P.2d 817, 51 Cal. Rptr. 521 (1966).

72. The *Chadd* court disaffirmed as much of the decision in *People v. Teron*, 23 Cal. 3d 103, 588 P.2d 773, 151 Cal. Rptr. 633 (1979), as held "that a capital defendant 'has the right to plead guilty, even against the advice of counsel.'" 28 Cal. 3d at 750 n.7, 621 P.2d at 843 n.7, 170 Cal. Rptr. at 804 n.7. In effect, the court in *Chadd* stated that in capital cases a defendant had no absolute right to plead guilty.

73. This holding was restricted in that only those defendants who were subject to the death penalty or life imprisonment without possibility of parole were denied such an absolute right.

plea is the right of the defendant to offer his own defense. Even before *Faretta v. California*,<sup>74</sup> a *pro se*<sup>75</sup> defense was widely accepted.<sup>76</sup> The *Faretta* decision merely recognized its existence while at the same time explaining and limiting its use.<sup>77</sup> The Supreme Court in *Faretta* explained that the right to offer a defense is personal to the accused.<sup>78</sup> Further, the Court reasoned that "[t]he language and spirit of the Sixth Amendment contemplate[d] that counsel, like the other defense tools guaranteed by the Amendment should be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally."<sup>79</sup> Otherwise counsel would not be an assistant, but would be a master and the right to offer a defense would be stripped of the personal character which rests upon the sixth amendment.<sup>80</sup> Hence, the defense itself would not be personal.<sup>81</sup>

At issue in *Chadd* was that portion of the *Faretta* decision guaranteeing a defendant the right to offer his own defense. The *Chadd* court carefully explained that although *Faretta* guaranteed the accused a right to offer a defense, it did not necessarily follow that *Faretta* also guaranteed the accused a right to choose to forgo offering a defense by pleading guilty.<sup>82</sup> A state may re-

74. See note 15 *supra*.

75. "For himself, in his own behalf, in person. Appearing for oneself, as in the case of one who does not retain a lawyer and appears for himself in court." BLACK'S LAW DICTIONARY 1099 (5th ed. 1979).

76. See generally Comment, *The Pro Se Defendant: No Right To Say No*, 23 EMORY L.J. 53 (1974); Note, *The Right To Defend Pro Se in Criminal Proceedings*, 1973 WASH. U.L.Q. 679.

77. For a complete discussion of the rights and limitations of self-representation see Note, *The Right To Defend Pro Se: Faretta v. California and Beyond*, 40 ALB. L. REV. 423 (1976); Note, *Criminal Defendants At The Bar of Their Own Defense—Faretta v. California*, 13 AM. CRIM. L. REV. 335 (1975); Note, *A Constitutional Right to Self-Representation—Faretta v. California*, 25 DEPAUL L. REV. 774 (1976); Note, *Faretta v. California: The Law Helps Those Who Help Themselves*, 28 HASTINGS L.J. 283 (1976); Comment, *The Constitutional Right of Self-Representation: Faretta and the "Assistance of Counsel"*, 3 PEPPERDINE L. REV. 336 (1976).

78. 422 U.S. at 819-20.

79. *Id.* at 820.

80. *Id.* (footnote omitted).

81. "An unwanted counsel 'represents' the defendant only through a tenuous and unacceptable legal fiction. Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a very real sense, it is not *his* defense." *Id.* at 821 (emphasis in original).

82. See note 48 *supra* and accompanying text.

fuse to accept all guilty pleas;<sup>83</sup> it may also choose to limit such pleas without running afoul of the *Faretta* guarantee of self-representation.<sup>84</sup>

Weighing against an individual's right to make his own plea and conduct his own defense is a state's interest in the fair administration of justice. The most pervasive idea found in the *Chadd* opinion dealt with "the larger public interest at stake in pleas of guilty to capital offenses."<sup>85</sup> The court, quoting *Massie v. Sumner*,<sup>86</sup> stated that "'California has a strong interest in the accuracy and fairness of its criminal proceedings.'"<sup>87</sup> Further, the majority recognized the great public interest served by the requirement of counsel's consent as an "independent safeguard against erroneous imposition of a death sentence."<sup>88</sup> The majority found support for these safeguards in the seriousness of the proceedings against a capital defendant. Pointing out that a guilty plea served as a waiver of the defendant's right against self-incrimination, right of confrontation and right to trial by jury,<sup>89</sup> as well as, admitted all matters essential to conviction,<sup>90</sup> and limited the issues which could be raised on appeal.<sup>91</sup> "In view of these consequences, the legislature has demonstrated an increasing concern to insure that no defendant enter a guilty plea in our courts without fully understanding the nature and consequences of his act."<sup>92</sup>

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83. See *North Carolina v. Alford*, 400 U.S. 25, 38-39 (1970). The Supreme Court stated that it was possible for a state to refuse acceptance of all guilty pleas if it so chose.

84. Refusal to accept all guilty pleas is just as much a burden on the right to proceed *pro se* as conditioning such a plea on consent of counsel. In both instances, the accused is limited concerning what action he may take. In fact, *Faretta* itself puts restrictions on the exercise of the right of self-representation. For admission of these restrictions see commentaries listed in note 77 *supra*.

85. 28 Cal. 3d at 747, 621 P.2d at 841, 170 Cal. Rptr. at 802.

86. See note 53 *supra*.

87. 28 Cal. 3d at 753, 621 P.2d at 845, 170 Cal. Rptr. at 806 (quoting *Massie v. Sumner*, 624 F.2d 72, 74 (9th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3494 (U.S. Jan. 12, 1981)).

88. *Id.* at 750, 621 P.2d at 843, 170 Cal. Rptr. at 804.

89. See *Boykin v. Alabama*, 395 U.S. 238 (1969). The defendant, represented by counsel, pled guilty to five counts of robbery and was sentenced to death. On appeal the question of whether the guilty plea was voluntary and intelligent was not raised. The court, believing these rights to be fundamental, reversed the convictions for failure of the record to reflect such a waiver.

90. *People v. DeVaughn*, 18 Cal. 3d 889, 895, 558 P.2d 872, 875, 135 Cal. Rptr. 786, 789 (1977). The California Supreme Court reversed the conviction of two men who had been induced to plead guilty under a plea bargain after they had been misled into believing that certain issues of law regarding involuntariness of their confessions were reviewable on appeal, when in fact they were not.

91. *Id.* at 895-96, 558 P.2d at 875, 135 Cal. Rptr. at 789. See generally Erickson, *The Finality of a Guilty Plea*, 48 NOTRE DAME LAW 835 (1973).

92. 28 Cal. 3d at 748-49, 621 P.2d at 842, 170 Cal. Rptr. at 803.

The accurate administration of justice is the cornerstone of criminal pleading in federal courts. According to Rule 11 of the Federal Rules of Criminal Procedure,<sup>93</sup> a defendant's right to make a certain plea can be made conditional in the interest of justice. Among the requirements before a guilty plea may be accepted are that the defendant must be advised of his right to counsel if he is not already represented by counsel; he must be advised that a guilty plea will act as a waiver of his right to trial; and finally, the court must determine that the plea is made voluntarily.<sup>94</sup> As the United States Supreme Court has stated, a guilty "plea must, of course, be voluntary and knowing and if it was in-

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93. Rule 11 States, in pertinent part:

(a) Alternatives. A defendant may plead not guilty, guilty, or nolo contendere. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

(b) Nolo Contendere. A defendant may plead nolo contendere only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice.

(c) Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:

(1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and

(2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and

(3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

(d) Insuring That the Plea is Voluntary. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

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94. See note 93 *supra*.

duced by promises, the essence of those promises must in some way be known. There is, of course, no absolute right to have a guilty plea accepted.”<sup>95</sup>

Public interest concerns have prompted some states to go further. Both New York<sup>96</sup> and Louisiana<sup>97</sup> deny certain defendants<sup>98</sup> the right to plead guilty, believing that such denial was not too great a burden on the defendant's rights.<sup>99</sup> By comparison, California allows a defendant in a capital case to plead guilty but only with the consent of counsel.<sup>100</sup> However, it is arguable that the law in California, after the *Chadd* decision, will be the same as in states such as New York and Louisiana. There will be very few cases where an attorney will consent to a client's plea of guilty to an offense for which the penalty is death or life imprisonment without possibility of parole. Therefore, as a practical consequence, the decision of the California Supreme Court in *People v. Chadd*<sup>101</sup> has aligned California with those jurisdictions which refuse to accept guilty pleas in capital cases. The *Chadd* decision firmly established that not only is presence of counsel necessary for the acceptance of a guilty plea in a capital case,<sup>102</sup> but the actual consent of counsel is required as well.<sup>103</sup> The *Chadd* court stated that just as the right of self-representation may not be used to circumvent the requirement of counsel,<sup>104</sup> the right of self-representation also may not be used to circumvent the requirement of counsel's consent.<sup>105</sup>

Quite significantly, the decision has cleared the murky waters

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95. *Santobello v. New York*, 404 U.S. 257, 261-62 (1971) (citing *Lynch v. Overholser*, 369 U.S. 705, 719 (1962)).

96. N.Y. CRIM. PROC. LAW § 220.10(s)(e) (McKinney Supp. 1980).

97. The Louisiana statute states: "A court shall not receive an unqualified plea of guilty in a capital case. If a defendant makes such a plea, the court shall order a plea of not guilty entered for him." LA. CODE CRIM. PRO. ANN. art. 557 (West Supp. 1981).

98. These statutes extend to those defendants subject to capital punishment upon entering an unqualified guilty plea.

99. At least one commentator believes that statutes such as these run against the directive of the sixth amendment. See Note, *The Right to "No Trial" and the Right To "No Counsel,"* 4 VAL. U.L. REV. 163 (1969). "By statute, these states have reworded the Sixth Amendment. They disregard the import of the wording that the defendant shall enjoy the right to trial and consider a trial as being a *sine qua non*." *Id.* at 167 (emphasis included).

100. See note 2 *supra*.

101. 28 Cal. 3d 739, 621 P.2d 837, 170 Cal. Rptr. 798 (1981).

102. The necessity of presence of counsel for the acceptance of a guilty plea had already been duly established. See *People v. Ballentine*, 39 Cal. 2d 193, 246 P.2d 35 (1952).

103. 28 Cal. 3d at 749-50, 621 P.2d at 843, 170 Cal. Rptr. at 804.

104. *Id.* at 754, 621 P.2d at 845, 170 Cal. Rptr. at 806.

105. *Id.* at 753, 621 P.2d at 844, 170 Cal. Rptr. at 805.

left behind in the wake of *People v. Teron*,<sup>106</sup> by dispelling all doubts concerning recent amendments to penal code section 1018.<sup>107</sup> In disapproving *Teron*, the *Chadd* court established that a capital defendant has no right to plead guilty without consent of counsel.<sup>108</sup>

## V. CONCLUSION

The decision in *People v. Chadd* has left little doubt as to the meaning of the 1973 amendment to California Penal Code section 1018.<sup>109</sup> The reasoning of the *Chadd* court that state interest in the fair administration of criminal justice may outweigh certain personal rights and prevent waiver of other rights, presents an opportunity for a myriad of similar arguments in a variety of areas of the law.<sup>110</sup> In the future, *Chadd* quite possibly will be cited for the proposition that certain individual rights must be subordinated in order to serve a greater state interest.<sup>111</sup>

### C. EQUAL PROTECTION

#### 1. *Affirmative Action in Law Schools: DeRonde v. Regents of the University of California*

*University admissions programs have often been the topic of cases involving affirmative action. Employing the United States Supreme Court case of Bakke v. Regents of the University of California, the California Supreme Court has recently approved a race conscious law school admissions program in DeRonde v. Regents of the University of California. The*

106. See notes 38 and 39 *supra* and accompanying text.

107. The law concerning guilty pleas was uncertain after *Teron* because of that court's approval in dictum of the practice of accepting such pleas without the consent of counsel contrary to section 1018 of the penal code. See *People v. Teron*, 23 Cal. 3d at 115, 588 P.2d at 779, 151 Cal. Rptr. at 639.

108. 28 Cal. 3d at 749-50, 621 P.2d at 843, 170 Cal. Rptr. at 804.

109. *Id.*

110. For example, courts might decide that a greater amount of education or legal expertise should be required of a defendant in order to proceed *pro se*. Or alternatively, courts might find that a greater degree of mental competency must be present when a defendant requests to represent himself. It is even conceivable that courts, in the name of adequate criminal justice, might more readily find that because of the importance of jury trials, a criminal defendant should not be given the opportunity to waive trial by jury under any circumstances.

111. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973). The United States Supreme Court held that although a woman has an undisputed right concerning the termination of her pregnancy, such right only exists through the first trimester since after that time the state has a compelling interest in both the lives of the fetus and the mother.

court compared the present situation to that in *Bakke* and found the objectionable aspects of *Bakke* absent in the *DeRonde* case.

## I. INTRODUCTION

The California Supreme Court case of *DeRonde v. Regents of the University of California*<sup>1</sup> resulted in a practical application of the United States Supreme Court case of *Bakke v. Regents of the University of California*.<sup>2</sup> Both cases address the propriety of racial preferences in university admissions policies. The extraordinary interest generated by this issue in the legal community recently prompted Justice Brennan to comment that “[f]ew constitutional questions in recent history have stirred as much debate.”<sup>3</sup>

Specifically, the issue addressed in *DeRonde* was whether admissions procedures, which permitted consideration of “ethnic minority status” as a factor in the selection of the 1975 first year class at the University of California at Davis School of Law, was “violative of the equal protection guarantees afforded nonminorities under the federal or state Constitutions.”<sup>4</sup> The California court, relying heavily on Justice Powell’s opinion in *Bakke*, concluded that they were not.<sup>5</sup>

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1. 28 Cal. 3d 875, 625 P.2d 220, 172 Cal. Rptr. 677 (1981).

2. 438 U.S. 265 (1978). The *Bakke* case originated from the California courts, involving an admissions policy employed by the same University being challenged by the present case. The *DeRonde* case represents the first time that the California Supreme Court has been able to apply the theoretical framework designed by the *Bakke* Court. See, e.g., *A Symposium: Regents of the University of California v. Bakke*, 87 CALIF. L. REV. 1 (1979); Darst & Horowitz, *The Bakke Opinions and Equal Protection Doctrine*, 14 HARV. C.F. - C.L.L. REV. 7 (1979); Lesnick, *What Does Bakke Require of Law Schools?*, 128 U. PA. L. REV. 141 (1979); Stone, *Equal Protection In Special Admissions Programs: Forward from Bakke*, 6 HASTINGS CONST. L.Q. 719 (1979).

3. *Defunis v. Odegaard*, 416 U.S. 312, 350 (1974). The *DeFunis* case involved an admissions policy much like the Davis’s policy of racial preference. The United States Supreme Court determined that the case was moot because *DeFunis* had later been admitted to the law school, and was about to graduate.

4. 28 Cal. 3d at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679.

5. *Id.* Powell begins his discussion on equal protection by noting that “(r)acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” 438 U.S. at 291. This statement could be labeled Justice Powell’s topic sentence. Accordingly, any interest of the government that is used as a basis for these distinctions would have to be “compelling.” *Id.* at 309.

The interest of the University was then identified as the freedom to formulate its own admissions policy as an aspect of academic freedom, which is, in the abstract, an interest of compelling importance. See *Loving v. Virginia*, 388 U.S. 1, 9 (1976). Justice Powell simply says: “The atmosphere of ‘speculation, experiment and creation;’—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body.” 438 U.S. at 312. The University’s interest, however, was dwarfed when weighed against the rights of *Bakke*. Justice Powell explains that “Fourteenth Amendment (rights) are, by its terms, guaranteed to

## II. FACTS OF THE CASE

The appellant, Glen DeRonde, a white male, unsuccessfully sought enrollment in the law school at the University of California at Davis in 1975.<sup>6</sup> DeRonde sought mandamus in the superior court against the Regents of the University of California to compel his admission on the grounds that the school's admissions criteria were unconstitutional because of the preferences given to minority applicants.<sup>7</sup> In February of 1976, the trial court denied DeRonde his requested relief by holding that he would have been unsuccessful in his application even if the challenged procedures had not been employed.<sup>8</sup> The court, however, also found that the University's admissions procedures were "facially discriminatory"<sup>9</sup> and violated the equal protection clauses of both the state and federal constitutions. As a result of this finding, the trial court enjoined the University from further use of this admission criteria.<sup>10</sup>

The University's admissions procedure consisted of a formula which combined an applicant's previous academic grade point average with his or her score on the law school admission test (LSAT). This formula produced a predicted first year average which was designed to predict each applicant's performance in law school. Like other law schools,<sup>11</sup> however, the University rec-

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the individual." *Id.* at 289. This is the basis for Powell's decision regarding the equal protection issue in *Bakke*.

The "fatal flaw" in the structure of the admission policy in *Bakke* was that it did not consider the "individual" for every available seat. Rather, the policy precluded white, male applicants from 16 seats of the incoming class of 1975. This was viewed, by Powell, as being a violation of Mr. Bakke's fourteenth amendment rights to equal protection.

6. 28 Cal. 3d at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679. On the basis of the criteria described in the text, 406 applicants were extended offers of admission. DeRonde was not one of these.

7. *Id.* at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679.

8. *Id.* at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679. Undoubtedly this involved a statistical analysis performed by comparing DeRonde's qualifications with those of the average minority applicant accepted. See note 45 *infra* and accompanying text.

9. *Id.* at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679.

The trial court enjoined the University from utilizing any admissions criteria based on an applicant's race, color, or ethnic origin. To this, the University responded with an appeal filed in the California Supreme Court.

10. 28 Cal. 3d at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679.

11. At least two major law schools are specifically mentioned within the *Bakke* cases. The University of Washington's Law School was the subject in the United States Supreme Court case of *DeFunis v. Odegaard*, 416 U.S. 312 (1974). Another



ognized that this formula did not consider other significant and relevant selection factors. Consequently, certain other non-meritorious factors were considered, such as previous work experience, extracurricular activities, recommendations, economic disadvantage, and "ethnic minority status."<sup>12</sup>

The University's stated purpose for considering ethnic minority status was twofold: first, the minority representation was thought to "contribute a valuable cultural diversity,"<sup>13</sup> and second, the increase in minority professionals would "strengthen and preserve minority participation in the democratic process at all levels."<sup>14</sup> The mechanics of minority consideration operated to adjust the predicted first year average either up or down.<sup>15</sup> The University

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policy which is mentioned is Harvard's program, which also incorporates a racial preference in its application process. See note 35 *infra* and accompanying text.

12. 28 Cal. 3d at 880, 625 P.2d at 222, 172 Cal. Rptr. at 679. "Ethnic minority status" was defined by the University as including Asians, Blacks, Chicanos, native Americans, and Philipinos. This group generally corresponds with the ethnic categories defined by the federal Equal Employment Opportunity Commission in its public reports." *Id.* at 881, 625 P.2d at 223, 172 Cal. Rptr. at 680.

13. *Id.* at 881, 625 P.2d at 223, 172 Cal. Rptr. at 680. While Justice Powell, in the *Bakke* decision, recognizes that diversity among a student body is a compelling interest of the University:

(T)he nature of the state interest that would justify consideration of race or ethnic background . . . is not an interest in simple ethnic diversity. . . . The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single through important element. The petitioner's special admissions program, focused *solely* on ethnic diversity, would hinder rather than further attainment of genuine diversity.

438 U.S. at 315 (emphasis in original). Diversity, then, contemplates something higher than mere diversity in ethnic origin. The diversity sought by Davis in *DeRonde* was evidently aimed at ethnic diversity primarily.

14. 28 Cal. 3d at 881, 625 P.2d at 223, 172 Cal. Rptr. at 680. The argument for strengthening minority participation is not unique to the case at hand. In *Bakke v. Regents of the University of California*, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), the California Supreme Court reviewed the same argument: "We reject the University's assertion that the special admission program may be justified as compelling on the ground that minorities would have more rapport with doctors of their own race and that black doctors would have a greater interest in treating diseases prevalent among blacks." *Id.* at 53, 553 P.2d at 1165, 132 Cal. Rptr. at 693. The California court in *Bakke* then cited the *DeFunis* case as holding that

(t)he Equal Protection Clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized. The purpose of the University of Washington cannot be to produce black lawyers for blacks, polish lawyers for Poles, Jewish lawyers for Jews, Irish lawyers for Irish. It should be to produce good lawyers for Americans . . . .

*Id.* (quoting *DeFunis*, 416 U.S. 312, 342 (1974)).

15. Just as a relatively low PFYA (predicted first year average) might be increased by utilization of any of the foregoing factors, a relatively high PFYA could be reduced by considering (1) the applicant's prior schools attended; (2) the difficulty of his or her prior course of study; (3) variations in an applicants multiple LSAT (law school admissions test) scores; (4) the absence of any factors indicating maturing or motivation; and (5) the applicant's advanced age. 28 Cal. 3d at 881, 625 P.2d at 223, 172 Cal. Rptr. at 680.

emphasized that the minority status was merely one of several factors considered in admissions and that it was not employing a quota system wherein a certain number of positions were reserved exclusively for minority applicants.<sup>16</sup>

### III. THE CALIFORNIA SUPREME COURT'S DECISION

The California Supreme Court began its analysis of the case by questioning whether or not it was proper to hear the case in light of subsequent developments. The record shows that DeRonde had graduated from another law school and had been admitted to the California State Bar.<sup>17</sup> Essentially, the issue was viewed as being moot. The court noted, however, that the parties were urging the court to resolve the issues because of the "cloud of uncertainty over the University's multiple and widely used procedures."<sup>18</sup> In light of the continuing statewide interest in "race conscious" administrative programs generally, the court agreed to hear the case. In doing so, the court found "ample precedent for appellate resolution of important issues . . . which otherwise may have been rendered moot and of no further immediate concern to the initiating parties."<sup>19</sup>

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16. The distinction drawn by the University was specifically meant to distinguish this case from the situation in *Bakke*. See note 41 *infra*.

17. 28 Cal. 3d at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679. The facts clearly indicate that *DeRonde* is no longer seeking admission to the law school at Davis. The Federal Constitution requires there be a "case and controversy" before deciding a particular case. U.S. CONST. art. III, § 2. The controversy must exist at all stages of review, not merely when the complaint is filed. The United States Supreme Court "does not sit to decide arguments after events have put them to rest." *Doremus v. Board of Education*, 342 U.S. 429, 433 (1952). Certain issues, however, are "capable of repetition, yet evading review." *Sosna v. Iowa*, 419 U.S. 393, 401 (1975) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 333 n.2.) Such appears to be the case in *DeRonde*. Unsuccessful applicants to law school are very likely to seek admission elsewhere so that by the time a case is eligible for review, the controversy would no longer exist.

18. 28 Cal. 3d at 879, 625 P.2d at 222, 172 Cal. Rptr. at 679. The plaintiff used the argument that these procedures are "multiple and widely used" to support the notion that the issue is capable of repetition, yet evading review. *Id.*

19. *Id.* The court cited *Johnson v. Hamilton*, 15 Cal. 3d 461, 541 P.2d 881, 125 Cal. Rptr. 129 (1975), as holding that "a case is not moot from the fact alone that the issue in the case is of no further immediate interest to the person raising it." *Id.* at 880, 625 P.2d at 222, 172 Cal. Rptr. at 679, (quoting *Johnson*, 15 Cal. 3d at 465, 541 P.2d at 882, 125 Cal. Rptr. at 130). Although the court only cited the *Johnson* case, there does exist "ample authority" for the above proposition. See, e.g., *Gordon v. Justice Court*, 12 Cal. 3d 323, 326 n.1, 525 P.2d 72, 74 n.1, 115 Cal. Rptr. 632, 634 n.1 (1974); *Zeilenga v. Nelson*, 4 Cal. 3d 716, 719-720, 484 P.2d 578, 579, 94 Cal. Rptr. 602, 603 (1971); For example, in *In re William M.*, 3 Cal. 3d 16, 23, 473 P.2d 737,

As a preliminary matter, the supreme court informed the parties that its analysis of the federal constitutional issues of the case was "both *aided and controlled* by the decision of the United States Supreme Court in *University of California Regents v. Bakke*."<sup>20</sup>

#### A. The Bakke Decision

A separate analysis of the *Bakke v. Regents of the University of California*<sup>21</sup> decision is necessary to understand the California court's dependence on that case. In *Bakke*, the United States Supreme Court for the first time decided a "reverse discrimination" case on its merits. While several equal protection issues were left unsolved,<sup>22</sup> *Bakke* did establish a significant precedent by upholding affirmative action programs in principle, while striking down the special minority admissions program of the Medical School of the University of California at Davis.<sup>23</sup> The California Supreme Court in *Bakke v. Regents of the University of California*,<sup>24</sup> decided, as they did in the present case, that the special admissions program violated the equal protection clause of the fourteenth amendment, but remanded the case for further consideration of the appropriate remedy on the ground that Bakke's showing of an equal protection violation shifted to the University the burden of proving that he would not have been admitted even without the special admissions program.<sup>25</sup> The University conceded that it was unable to carry this burden.<sup>26</sup> The Supreme

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741, 89 Cal. Rptr. 33, 37 (1970), the California Supreme Court noted that: "(I)f a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot."

20. 28 Cal. 2d at 882, 625 P.2d at 223, 172 Cal. Rptr. at 680, (emphasis in original). The two cases, *Bakke* and *DeRonde* are remarkably similar except as to one fact that becomes the primary focus in *Bakke*. *DeRonde* does not involve a racial quota, the use of which rendered the admissions program in *Bakke* invalid.

21. 438 U.S. 265 (1978). As indicated earlier, the Court had been presented with this issue once before, but dismissed the case as moot. *DeFunis v. Odegaard*, 416 U.S. 312 (1974); see note 3 *supra*.

22. See Lesnick, *supra* note 2.

23. The immediate effect of *Bakke* was the subject of the legal community for quite some time, during which many projections and speculations were formed as to its long-range impact. See *The Supreme Court, 1977 Term*, 92 HARV. L. REV. 5, 131 n.4 (1978).

24. 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976). It is interesting to note that the *DeRonde* case traveled through judicial channels as did *Bakke*, both beginning in the Superior Court of Yolo County.

25. *Id.* at 63-64, 553 P.2d at 1172, 132 Cal. Rptr. at 700. Justice Tobriner filed a dissenting opinion. *Id.* at 64, 553 P.2d at 1172, 132 Cal. Rptr. at 700.

26. The disparity in the qualifications between Mr. Bakke and the average minority applicant who was accepted apparently was the barrier to the University's

Court then ordered the school to admit Bakke.<sup>27</sup>

The United States Supreme Court decision in *Bakke* was severely fragmented<sup>28</sup> with no more than four justices concurring in reasoning on any one part. Five justices agreed that Bakke should be admitted while a different set of five found that a school may constitutionally consider race in its admissions program.<sup>29</sup> Because Justice Powell represented the "swing" or pivotal vote in *Bakke*, particular focus need be given to his views.<sup>30</sup>

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ability to show that Bakke would not have been accepted absent the quota system. See note 44 *infra*.

27. 18 Cal. 3d at 64, 553 P.2d at 1172, 132 Cal. Rptr. at 700.

28. 438 U.S. 265. Justice Powell announced the judgment of the Court. Justices Brennan, White, Marshall, and Blackmun filed a jointly written opinion, concurring in the judgment in part and dissenting in part. Justice Stevens, joined by Chief Justice Burger and Justices Rehnquist and Stewart, concurred in the judgment in part and dissented in part, thereby producing a five to four majority for each of these two holdings. Justices White, Marshall, and Blackmun wrote additional, separate dissents. This division within the Court stands in contrast to the unanimous decision by the Supreme Court 24 years earlier in *Brown v. Board of Education*, 347 U.S. 483 (1954), which rejected the "separate but equal" philosophy in public education.

29. Justice Powell's decision in *Bakke* touches common ground with (1) Bakke's admission, and (2) the use of race in admissions programs. The later point was shared by the group consisting of Justices Brennan, White, Marshall, and Blackmun but for different reasons. The Brennan group candidly embraces racial preferences that are soundly designed to remedy the effects of our society's history of systematic subordination of minorities, 483 U.S. at 362-63 (Brennan, White, Marshall, Blackmun, J.J., concurring and dissenting). This group of Justices felt that a racial classification for such purposes need not be subjected to the extremely severe standard of judicial review that has been applied to discrimination that stigmatizes a group or works against a subordinated minority. Instead, the Brennan group tests "benign" racial classification against the intermediate, although "searching", standard of review which the Court has recently adopted for cases of sex discrimination. See *Craig v. Boren*, 429 U.S. 190 (1976).

Powell's opinion differs sharply on this point, stating that all classifications by race, whether or not they produce immediately stigmatizing effects and whether or not they work against subordinated minorities, demands the rigors of "strict scrutiny" in its strictest sense. 438 U.S. at 290-91.

30. On the question of issuing a mandatory injunction, Justice Powell agreed with the four justices who agreed with Justice Stevens that Bakke's right to admission must be affirmed. But while their ground was that his exclusion was in direct conflict with the words of section 601 Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252 (codified at 42 U.S.C. § 2000d (1978)). See 438 U.S. 408-21, Stevens, J., concurring in part, dissenting in part; joined by Burger, C.J., Stewart, and Rehnquist, J.J.) Justice Powell's ground was that it amounted to discrimination under the equal protection clause. However, the very setting of limits on the permissible use of race criteria, which led Powell to conclude that the use of numerical racial quotas was not permissible, also led him to conclude, with respect to the validity of the Davis program, that the California Supreme Court's prohibition of "any consideration of the race of any applicant," see 18 Cal.

The California Supreme Court in *DeRonde*, in an independent analysis of Justice Powell's role in *Bakke*, points out that the primary objection of the United State Supreme Court to Davis's admissions policies was the quota system.<sup>31</sup> In *Bakke*, the school reserved sixteen of the one hundred available positions for minorities. Powell's view of such a system was clearly reflected when he indicated that the Davis procedure was one employing "an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class."<sup>32</sup> Although he concluded that any race conscious classification must meet a compelling governmental interest analysis,<sup>33</sup> Powell wrote that "the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin."<sup>34</sup>

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3d at 53-56, 553 P.2d at 1165-67, 132 Cal. Rptr. at 693-695, was too wide and must be reversed. 438 U.S. at 320.

On this second issue, Justice Powell's concurrence moved to the opinion held by the justices who sided with Justice Brennan. The delimitation of the permissible consideration of race was the common ground between the two issues.

31. Indeed, the Court labels the quota system as the "fatal flaw". 438 U.S. at 320. This served as the basis for Powell's equal protection analysis. Having reserved a specified number of seats exclusively to be filled by minorities, the University was denying the right of each applicant, regardless of race, to be considered individually for each seat. *Id.*

32. *Id.* at 319.

33. *Id.* at 299, 305. See note 5 *supra*, for a discussion of the compelling state interest involved in *DeRonde*. Justices Brennan, White, Marshall, and Blackmun concluded that "racial classification designed to further remedial purposes 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Id.* at 359 (quoting *Califano v. Webster*, 430 U.S. 313, 317 (1977)). This requirement that a classification be substantially related to an important governmental objective derives from the sex discrimination cases, see, e.g., *Craig v. Boren*, 429 U.S. 190, 197 (1976), and represents an intermediate level of scrutiny between strict scrutiny and the minimal review under a rational basis test. See *The Supreme Court, 1976 Term*, 91 HARV. L. REV. 1, 177-88 (1977). See generally, Gunther, *The Supreme Court, 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 20-24 (1972).

34. 438 U.S. at 320. It is unclear as to what would constitute a "properly devised program" from reading the *Bakke* decision. One author suggests that a university which elects to structure its law-school admissions program to meet Justice Powell's criteria of constitutionality may act as follows:

- a) Race or ethnic identity may be overtly employed as a factor enhancing the relative admissibility of minority applicants, provided that such admissibility is not determined merely according to an absolute measure of qualification or by a comparative ranking of minority applicants against one another . . . .
- b) A specific numerical objective for minority student membership in the entering class may be employed as a guideline or goal for those administering the program. . . .
- c) A law school may employ a committee to which members are as-

Justice Powell expressly used the admissions procedure at Harvard College as an example of a permissible racial preference. At Harvard, diversity is achieved without the use of racial quotas.<sup>35</sup> While race is a consideration for application, no one is precluded from competing for all available seats. The California Supreme Court found Powell's description and evaluation of Harvard's program to be significant: "In such an admissions program, race or ethnic background may be deemed a 'plus' in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats."<sup>36</sup> The California Supreme Court joined with Powell in viewing such a policy as being flexible enough to consider all the pertinent facts in each individual case while allowing "the weight attributed to any one particular quality to vary from year to year," depending on the degree of racial diversity achieved.<sup>37</sup> Powell's conclusion, which was followed by the court in *DeRonde*, was that such a program

treats each applicant as an individual . . . . The applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname.<sup>38</sup>

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signed on the basis of their racial or ethnic identification to administer a minority-admissions program. . . .

See Lesnick, *supra* note 2, at 157.

35. Harvard does not set "target-quotas." 438 U.S. at 316. However, it recognizes that the advantages of diversity among its students "cannot be provided without some attention to numbers." *Id.* at 323. While no minimum number is established, Harvard's committee "pays some attention to distribution among many types and categories of students," and one basis of categorization is race. *Id.* at 324.

36. *Id.* at 317 (footnote omitted). The United States Supreme Court continues by indicating that "(t)he file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared." *Id.* Such a statement would seem to preclude race from being given excessive consideration. Once again, the problem remains in the ambiguity left by *Bakke* concerning the proper weight to be given race in any admissions program. The Harvard program merely serves as a model of what would be permissible while *Bakke* attempts to decide where, in any particular case, an admissions program falls within this wide spectrum.

37. *Id.* at 317-18.

38. *Id.* at 318. The Court here is emphasizing that all important factors about an applicant would combine together to determine any applicant's qualifications, although several of these factors may be subjective. In such a situation, all applicant's qualifications are "weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment." *Id.* It is interesting to note, however, that most, if not all, of these non-objective factors are qualifications over which the applicant can exercise control, except race.

The California court then compares the admissions policy in *DeRonde* with that of Harvard. The conclusion reached was that "the admissions procedures used by the University [in *DeRonde*] to select its 1975 entering class at King Hall does not vary in any significant way from the Harvard program."<sup>39</sup> It is interesting to note that similar, indeed identical, results could occur under either the admissions policy in *DeRonde* or in *Bakke*. Under the admissions plan in *DeRonde*, which was approved by the California court, *DeRonde*'s race would represent a handicap or nonadvantage in the competition for every seat at the law school. On the other hand, in *Bakke*, the plaintiff's race was not the same kind of handicap because the competition between white students was for a slightly smaller number of seats. Such students were not in competition for the places reserved for minorities.<sup>40</sup> Statistically, however, the plaintiff's overall chance for admission would have been the same under the *Bakke* plan or under *DeRonde*:<sup>41</sup>

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39. 28 Cal. 3d at 884, 625 P.2d at 225, 172 Cal. Rptr. at 682. In both the *DeRonde* and Harvard programs, minority racial or ethnic origin was one of several competing factors employed by the schools to reach their ultimate decision on whether to admit an applicant. Each applicant was individually evaluated in light of the various positive or negative factors concerning their qualifications. Justice Powell observed that the primary defect in the *Bakke* program was that the quota system precluded individualized consideration of each applicant. 438 U.S. at 317-18, n.52.

40. Although details of the regular admissions program in *Bakke* are not provided in the briefs or the opinions, apparently race per se would be a factor in the regular selection process only because there were fewer seats for which white students could compete. See 438 U.S. at 275. Neither the Harvard/*DeRonde* plans nor the *Bakke* plan could be grossly different in result, if for example, Harvard had attached an enormous negative weight to being white or the plan in *Bakke* had reserved the bulk of its seats for blacks. In contrast, in any given year, whites might receive significantly more favorable treatment under one plan than the other. For instance, if in one year minority applicants appeared unusually weak, whites could fare better under a flexible, Harvard-type plan. The point being that neither scheme is intrinsically more fair than the other in terms of the overall statistical chance of being admitted.

41. The most obvious difference between the Justices who supported Brennan's opinion and that of Justice Powell is the sharp distinction between the impermissible use of racial quotas either as an end in itself or as a means to achieve a percentage representation and the permissible use of race as one preferential factor among others:

There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants as was done here.

438 U.S. at 378 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part, dissenting in part).

Justice Blackmun's separate opinion similarly questioned the validity of the line between the Powell-disapproved "two-track (race) system" and the Powell-approved Harvard College system where race and ethnic background is only one of many factors. "(T)he cynical . . ." he observed, "may say that under a program such as Harvard's one may accomplish covertly what Davis concedes it does

the admission plan approved in *DeRonde* could covertly achieve the same result that the quota system was forbidden to achieve in *Bakke*.

*B. Statistical Approach*

The United States Supreme Court in *Bakke* found that the medical school failed to show that Bakke would not have been admitted absent the unlawful special admissions program which reserved sixteen of the one hundred seats for minorities. Thus, Bakke was entitled to the relief of being admitted to school.<sup>42</sup> A similar analysis was employed by the trial court in the *DeRonde* decision. The superior court found that DeRonde would have been unsuccessful in his application even if the "challenged procedures"<sup>43</sup> had not been used. The California Supreme Court, in its majority decision, later made a curious application of this analysis.

As was the case in *Bakke*, a statistical analysis is appropriate in determining what would have happened absent the racial preference.<sup>44</sup> The California Supreme Court in *DeRonde* considered the statistical evidence in another light which was quite different

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openly"; but he thought that the program in *Bakke* was constitutional, "though perhaps barely so." 438 U.S. at 406 (Blackmun, J., concurring and dissenting).

42. The Supreme Court held that

(W)ith respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner (the University) has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction. . . .

438 U.S. at 320. Essentially, the Court was saying that while race may be considered in an admissions program, the University must also show that absent that racial preference, the rejected applicant would still not have qualified.

43. 28 Cal. 3d at 879, 675 P.2d at 222, 172 Cal. Rptr. 679. Details are not given as to the basis for the superior court's finding.

44. The following statistics reflect the admissions results for the two years in which Bakke applied to medical school:

	Class Entering in 1973				
	Grade point average	*Verbal	Quantitative	Science	Gen. Infor.
Bakke .....	3.46	96	94	97	72
Average of regular admittees ....	3.49	81	76	83	69
Average of Minority admittees ...	2.88	46	24	35	33



from that used by the United States Supreme Court in *Bakke*. The California court recognized that “facially valid procedure[s] may in [their] actual application produce a constitutionally discriminatory result.”<sup>45</sup> Instead of speculating about what might have been, the court held that the statistics showed no deliberate use of the challenged admissions procedure as a “cover” for a quota system.<sup>46</sup> Essentially, the court was saying that it found no

Class Entering in 1974					
	Grade point average	Verbal	Quantitative	Science	Gen. Infor.
Bakke .....	3.46	96	94	97	72
Average of regular admittees ....	3.29	69	67	82	72
Average of minority admittees ...	2.62	34	30	37	18

438 U.S. at 277 n.7. \*(The last four columns are sections to the MCAT).

The above statistics obviously indicate that race was given a tremendous amount of weight in view of the disparity between Bakke’s qualifications and those of the minority student admitted. 28 Cal. 3d at 886, 625 P.2d at 225, 172 Cal. Rptr. at 683.

45. The statistical evidence in *DeRonde* was considered very briefly by the majority despite the fact that the Supreme Court decision in *Bakke* was virtually controlled by the inequity that the statistics illustrated. The admissions statistics for the year in which DeRonde applied to the law school at Davis are as follows:

Class Entering in 1975		
	Grade point average	Law School Admission Test
DeRonde .....	3.74	575
Average of Regular Admittees .....	3.57	676
Average of Minority Admittees .....	3.27	551

DeRonde’s predicted first year average was 2.70, higher than 72 ethnic minorities admitted. His law school admission test score, was higher than 88 admittees, 78 of whom were minorities. His writing ability score was higher than 36 admittees, 33 of whom were minorities.

For the academic year of 1975-76, the following statistics emerged: 1,188 white males applied; 175 (or 13%) were admitted; 458 minorities applied; 133 (or 29%) were admitted. Forty-six percent of the entering class was comprised of minorities.

For previous years the acceptance percentage of minority applicants indicates a clear pattern: in 1972, 5% of white male applicants were accepted; 23% of minority applicants were accepted. In 1973, 8% of white male applicants were accepted; 24% of minority applicants were accepted. This information was compiled from 28 Cal. 3d at 899, 625 P.2d at 234, 172 Cal. Rptr. at 691.

While the majority in *DeRonde* analyzed these figures primarily for the purpose of finding a possible disproportionate impact, the disparity between DeRonde’s qualifications and those of the average minority is not unlike that presented in *Bakke*.

46. 28 Cal. 3d at 887, 625 P.2d at 227, 172 Cal. Rptr. at 684.

intent to discriminate.<sup>47</sup> The showing of intent is a required element when attempting to invalidate a neutral procedure<sup>48</sup> because of the disproportionate impact it has when applied. The court in *DeRonde* held that there was no evidence to "support a finding of such disproportionate impact."<sup>49</sup>

### C. California Constitutional Analysis

The appellant, DeRonde, urged the California Supreme Court to find that the admissions policy of racial preference violated the equal protection guarantees of article I, section 7 of the California Constitution.<sup>50</sup> The court begins its analysis of this issue by recognizing that on several occasions a majority of the California Supreme Court had "departed from applicable federal precedents in reliance upon state constitutional principles."<sup>51</sup> The most notable of these occasions was *Serrano v. Priest*.<sup>52</sup> In *Serrano*, the court indicated that the equal protection guarantees contained in article I, section 7 of the California Constitution "afford protections different from, and independent of, those extended by the Fourteenth Amendment."<sup>53</sup>

47. *Id.*

48. Laws or other official actions that are racially neutral on their face and that rationally serve a permissible governmental end do not violate the equal protection clause simply because they have a racially discriminatory impact. A violation requires that the governmental action have a discriminatory purpose, i.e., intentional or deliberate discrimination must be shown. See *Washington v. Davis*, 426 U.S. 229 (1976).

49. 28 Cal. 3d at 888, 625 P.2d at 227, 172 Cal. Rptr. at 684. The court recognized, however, DeRonde's argument that: "How can there be said to exist no 'disproportionate impact' when *extremely well-qualified* male Caucasian applicants outnumber *poorly-qualified* minority applicants by over three to one and are admitted to the school in a lesser percentage?" *Id.* at 889, 625 P.2d at 227, 172 Cal. Rptr. at 684. (emphasis in original).

50. CAL. CONST. of 1879, art. I, § 21 (current version at CAL. CONST. art. I, § 7).

51. 28 Cal. 3d at 889, 625 P.2d at 228, 172 Cal. Rptr. at 685.

52. 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976). In *Serrano*, the California Supreme Court stated that

our state equal protection provisions, while substantially the equivalent of the guarantees contained in the Fourteenth Amendment to the United States Constitution are possessed of an independent vitality which, in a given case, may demand an analysis different from that which would obtain if only the federal standard were applicable.

*Id.* at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366. The state high court, on that occasion, went as far as to say that "decisions of the United States Supreme Court defining fundamental rights are persuasive authority to be afforded respectful consideration, but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law." *Id.*

53. 28 Cal. 3d at 889, 625 P.2d at 278, 172 Cal. Rptr. at 685.

To this contention, however, the court responded with the case of *Price v. Civil Service Commission*,<sup>54</sup> which established that in the area of minority advancement programs, "the state Constitution imposes no greater restrictions than similar guarantees provided by the federal charter."<sup>55</sup> In other words, in the context of affirmative action programs, if a particular program is found to be permissible under the United States Constitution, it will be also permitted under the California Constitution. Here, the Davis admission program withstood the analysis under the United States Constitution and accordingly was found valid under the state charter.

#### *D. The California Supreme Court's Conclusion*

The California Supreme Court considered several factors: (1) the Bakke decision; (2) the statistical evidence presented; and (3) the lack of merit to the California constitutional claim. These factors combined together in the court's conclusion to produce a finding that the challenged admissions procedure was permissible under both the state and federal constitutions.<sup>56</sup> Of these factors, the most significant was clearly the *Bakke* decision.<sup>57</sup> Although the majority in *DeRonde* was convinced by Powell's analysis of Harvard's admissions policies and found no significant differences between Harvard's and those policies in *DeRonde*, the portion of the *Bakke* decision that served most as a foundation for this decision was specifically mentioned by the court. "Of even greater importance to the resolution of the present case . . . , (was that) a separate but clear majority of the high court (Justices Powell, Brennan, White, Marshall, and Blackmun) indicated approval of race conscious admissions programs similar to the University's procedure under scrutiny here."<sup>58</sup> Essentially, after having established that policies in *DeRonde* were not a quota system, the California court labeled these policies as being merely part of a "race conscious admissions program" which was clearly approved by the United States Supreme Court.

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54. 26 Cal. 3d 257, 604 P.2d 1365, 161 Cal. Rptr. 475 (1980). The *Price* case involved an affirmative action being employed by the Civil Service Commission of Sacramento County. The racially-conscious program was struck down on the grounds that it had a racially discriminatory impact and that it was not job related.

55. 28 Cal. 3d at 889, 625 P.2d at 228, 172 Cal. Rptr. at 685. The court's point here is that if the program at Davis withstood an analysis under the federal Constitution, it will also satisfy any state constitutional requirement.

56. 28 Cal. 3d at 890, 625 P.2d at 229, 172 Cal. Rptr. at 686.

57. The entire opinion in *DeRonde* was paralleled to the *Bakke* decision. In fact, without the *Bakke* decision to serve as a pattern, the court's analysis could have been quite different. From the beginning, the court's decision travels through the same considerations as the court in *Bakke*.

58. 28 Cal. 3d at 882, 625 P.2d at 223, 172 Cal. Rptr. at 680.

The issue was undoubtedly framed in this manner in order to reach the court's desired result. The decision in *DeRonde* appears to hinge on the mechanical distinction that there was no quota system present and seems to ignore the practical results produced by the program at Davis. Had the issue been framed with its primary focus on the effect such an admissions policy had on its applicants, the *DeRonde* decision would have endorsed a different holding. In contrast, the Supreme Court in *Bakke* was significantly influenced by the disparity between Bakke's qualifications and those of the average minority applicant accepted.<sup>59</sup> The use of such an analysis in *DeRonde* would have probably promoted a different conclusion. While the disparity in *DeRonde* was not as severe as that illustrated in *Bakke*,<sup>60</sup> the court would have had to make a determination as to how much disparity is required in order to render an affirmative action program invalid. Such an analysis would have provided answers for the unanswered questions in *DeRonde* concerning the future use of race conscious admissions programs and their disparate treatment of applicants.

#### IV. THE DISSENT IN *DERONDE*

The dissent, written by Justice Mosk, begins with an emotional appeal.<sup>61</sup> The dissenting justice expresses deep disappointment in the majority for having rejected the plea "for a colorblind America, the rallying cry for civil rights martyrs from William Lloyd Garrison to Martin Luther King."<sup>62</sup> Justice Mosk then makes an analogy between the present case and that point in American history when an entire race of people was placed in camps during the Second World War.<sup>63</sup> Essentially, the point

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59. See note 44 *supra*.

60. See note 45 *supra*.

61. 28 Cal. 3d at 891, 625 P.2d at 229, 172 Cal. Rptr. at 686. Justice Mosk begins his dissent by claiming that

(t)he majority opinion, I regret to say, was preordained. Any court that would stray so far from basic principles of constitutional equal protection as to approve a rigid racial quota system in public employment (referring to the *Price* case) can be expected to accept any program of race consciousness in public education. But repetition does not disinfect, it exacerbates legal and social error. *Id.*

62. *Id.*

63. The court here is referring to two of the most "universally discredited cases in modern American legal history." *Id.* at 892, 625 P.2d at 230, 172 Cal. Rptr. at 686. In *Korematsu v. United States*, 323 U.S. 214 (1944), and *Hirabayashi v. United States*, 320 U.S. 81 (1943), the United States Supreme Court legitimized the use of race as a basis, during wartime, to place a stigma upon an entire race of

made is that the majority's decision is an attempt to turn the calendar back several decades in regards to civil rights. The irony of the dissent's position is quite apparent, however, in light of the desired conclusion expressed by Justice Mosk. Having used examples such as "Martin Luther King," one would assume, initially, that the dissent's complaint would be that the majority's decision had not gone far enough in protecting and promoting minorities' rights. Justice Mosk, instead, puts forth the classic case of "reverse discrimination."<sup>64</sup> The dissent cites Professor Kitch, referring to the apparent inequities in any system which is race conscious: "Will this not be a particular problem for the young, who, having grown up on this side of the civil rights revolution, disassociate themselves from the racism of the old America, and may be surprised to learn that they are asked to pay for it?"<sup>65</sup>

The dissent also notes that "(n)o one (including the majority) has cited any constitutional authority<sup>66</sup> that requires or permits some kind of statistical parity among applicants on the basis of race, color, sex, or national origin; if there can be no proportionate representation, it seems obvious there can be no disproportionate underrepresentation."<sup>67</sup> Basically, this position views any set formula of how many minorities there should be in any given group as a "mockery of the traditional democratic theory of selec-

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people through government action which has since been recognized as being unwarranted. See, e.g., Rostowe, *The Japanese American Cases—Disaster*, 54 YALE L.J. 489 (1945).

The dissent points out that the Court in *Bakke* cited both *Korematsu* and *Hirabayashi* in their approval of race as a permissible factor to be considered in school admissions.

The analogy drawn here may be strained in light of the context in which *Korematsu* and *Hirabayashi* were decided. These two cases are generally recognized as bastardizations of constitutional law, see Rostowe, *supra*, at 489; they were not the product of such careful deliberation as was the case in *DeRonde*.

64. The dissent makes an appeal to the minority's sense of pride by informing the applicants that "any scheme involving preferences to some races contains the clear message that members of those races are inferior and unable to compete on a basis of equality." 28 Cal. 3d at 905, 625 P.2d at 237, 172 Cal. Rptr. at 694. Reverse discrimination occurs when "any affirmative action plan that counts blackness affirmatively, even in the context of numerous other factors, necessarily results in the rejection of some applicants who would not be rejected were they black, and in that sense are being turned away, 'only' because they were not black". *Id.* at 904, 625 P.2d at 237, 172 Cal. Rptr. at 694. (citing J. ELY, *DEMOCRACY AND DISTRUST* 257 n.102 (1980)).

65. 28 Cal. 3d at 896, 625 P.2d at 232, 172 Cal. Rptr. at 689. (citing Kitch, *The Return of Color-Consciousness to the Constitution: Weber, Dayton, and Columbus*, SUP. CT. REV. 1, 13 (1979)).

66. 28 Cal. 3d at 895, 625 P.2d at 232, 172 Cal. Rptr. at 689.

67. 28 Cal. 3d at 895, 625 P.2d at 232, 172 Cal. Rptr. at 689. The majority, in their opinion, raised the issue of "disproportionate underrepresentation of minorities" at Davis. The dissent views this as a "strange new concept that is creeping into legal literature." *Id.*

tion on the basis of individual merit."<sup>68</sup>

The dissent rejects two theories discussed by both *Bakke* and the majority in *DeRonde*: (1) that preferential treatments serve as a reparation for past societal discrimination against ethnic minorities, and (2) that the program is designed to promote diversity among the student body at Davis law school.

The first class of these theories, the dissent asserts, would only be conceivable if "(a) the minority applicants personally had been the victims of educational discrimination, and (b) the rejected majority applicants, including *DeRonde*, had personally committed or had been the beneficiaries of acts of discrimination."<sup>69</sup> Justice Mosk advocates a direct correlation between affirmative action and culpability of past discrimination. In other words, before any reverse discrimination is permitted, there should be a showing of past discrimination connected directly to the party now being discriminated against.

As to the second theory, the dissent cited Professor Alan Dershowitz of Harvard as saying that "(t)he checkered history of 'diversity' demonstrates that it was designed largely as a cover to achieve other legally, morally, and politically controversial goals."<sup>70</sup> The court continued by indicating that the Professor Dershowitz's inescapable conclusion was that to "give members of a minority race a preference in admissions is simply to reward them for the accident of their race, a fact that has no relevancy to

68. *Id.* California Supreme Court Justice Mosk feels that such a formula for statistical parity would also violate the prohibition on the unconstitutional effect of racial quotas.

69. *Id.* The dissent illustrates the possible inequities under such a system by drawing an analogy to a recent political development:

The incongruity of group reparations rather than individual appraisal can be illustrated by the recent black appointee to President Reagan's cabinet as Secretary of Housing and Urban Development: Samuel Riley Pierce, Jr., the son of a prosperous businessman, resident of a fashionable New York suburb, honor graduate of an Ivy League University. Would Davis be justified in rating Secretary Pierce's offspring, because of their color, more deserving of preferential treatment than the offspring of a Caucasian farm worker from the Imperial Valley, a Yugoslav fisherman from San Pedro, or an Italian cobbler from San Francisco's North Beach?

*Id.* at 896 n.1, 625 P.2d at 232 n.1, 172 Cal. Rptr. at 689 n.1.

70. *Id.* at 897, 625 P.2d at 233, 172 Cal. Rptr. at 690. (quoting Dershowitz & Hanft, *Affirmative Action and the Harvard College Diversity—Discretion Model: Paradigm or Pretext?* 1 CARDOZO L. REV. 379, 404, 407 (1979)). Professor Dershowitz concludes that "(t)o reward some persons for the accident of their race is inevitably to punish others for the accident of theirs." *Id.* at 420-421, (quoted in 28 Cal. 3d at 897, 625 P.2d at 233, 172 Cal. Rptr. at 690.)

the purported goals of education for service in a profession.”<sup>71</sup>

The sharpest criticism raised against the *DeRonde* decision by the dissent was directed at the majority’s acceptance of the University’s contention that race was merely one isolated, presumably minor factor in the selection process.<sup>72</sup> The dissent contends that *DeRonde* “presented persuasive evidence that the Davis admissions committee was predisposed to place undue emphasis upon race.”<sup>73</sup> While the majority recognized that affirmative action, in principle, was valid under *Bakke*, the issue of how much emphasis would be proper was never addressed.<sup>74</sup> Justice Mosk continued in his criticism of the point by noting that “(w)hen to that predisposition are added the figures of actual admissions to Davis for the year when plaintiff applied, . . . a clear discriminatory pattern emerges.”<sup>75</sup> This statement is qualified by the admission that the foregoing procedure would be unobjectionable “if the selected minority members were distinguished by criteria other than race.”<sup>76</sup> Nor would the process have been attacked if such an increase in minorities could be effectuated without the detrimental impact on nonminority, better qualified applicants.<sup>77</sup> The dissent expressed its belief that the trial court was in error in concluding that *DeRonde* would have been unsuccessful in his application even without the preferential treatment of minorities. The statistical evidence presented<sup>78</sup> was used to illustrate that “without the preferential treatment of applicants—acceptance of some and rejection of others on the basis of race—the plaintiff would have been included among the successful applicants in 1975.”<sup>79</sup>

The dissent’s contention appears to be meritorious. Both the California Supreme Court and the United States Supreme Court viewed the inability of the University to show Bakke would have been rejected, regardless of the racial preference, as being signifi-

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71. *Id.*

72. The statistics presented in note 45 *supra* indicate that race was given significant weight in the admissions program. In light of the discrepancies between *DeRonde*’s qualifications and those of the average minority accepted, it is reasonable to assume that race was the single most important factor.

73. 28 Cal. 3d at 898, 625 P.2d at 234, 172 Cal. Rptr. at 691. The composition of the admission’s committee was four of the six members were not only of “minority ethnic backgrounds themselves but also were or had been active in organizations dedicated to increasing the number of admittees from their particular racial group. Under the circumstances the committee’s objectivity was suspect at the outset.” *Id.*

74. See notes 25-26 *supra*.

75. 28 Cal. 3d at 898, 625 P.2d at 234, 172 Cal. Rptr. at 691. See note 34 *supra*.

76. *Id.*

77. *Id.*

78. See note 34 *supra*.

79. 28 Cal. 3d at 900, 625 P.2d at 235, 172 Cal. Rptr. at 692.

cantly relevant to their decisions to invalidate the admissions program. In essence, if statistics actually show, as the dissent asserts, that DeRonde would have been admitted but for the racial preference, then this would seem to present a difficulty to the majority's decision in *DeRonde*.

#### V. IMPACT

In final analysis, the overriding significance of *DeRonde v. Regents of University of California* is the opportunity it provides us with to view the principles of *Bakke* at work in a practical setting. While there is certainly nothing new about these principles, their application in *DeRonde's* admissions program serves as the first testing ground since the *Bakke* decision. In light of the similarity in the results of the admissions programs in these two cases,<sup>80</sup> however, the distinction between what is constitutionally permissible and what is not, remains somewhat clouded. This lack of precision and clarity may well be the catalyst that sends the *DeRonde* case up the rungs of judicial review.

Any further consideration of the *DeRonde* case will undoubtedly involve a determination of whether the admissions policy at the University actually promotes the desired racial diversity.<sup>81</sup> Though the criteria used by the University may include race, it must also include a sufficient range of other criteria which genuinely serve to measure the potential contributions to diversity of all applicants for admissions.<sup>82</sup>

Ultimately, however, the distinction between the two cases is the use of a racial quota. The presence of a racial quota in *Bakke*

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80. See notes 44-45 *supra*. The similarity is the fact that both the *Bakke* and *DeRonde* courts recognized that white, male applicants had superior qualifications to those of the average, successful minority.

81. Justice Powell's opinion, and that of the majority, advocates the use of a compelling state interest analysis, see notes 5 and 33 *supra*. Such an analysis calls for a finding that the state governmental purpose, diversity, actually be promoted by the actions taken by that governmental entity. See *Roe v. Wade*, 410 U.S. 113 (1973). In that case the Supreme Court held that whenever this strict level of review is employed, it must be shown that the governmental action is necessary to promote some compelling state interest and that the action is the least burdensome alternative available.

82. Cf. Blasi, *Bakke as Precedent: Does Mr. Justice Powell Have a Theory?*, 67 CALIF. L. REV. 21, 22-23, 61, 66 (1979). See also *id.* at 62-67, regarding various types of race-conscious programs. Mr. Blasi considers alternative rationales for the Powell position centered on the dignity of applicants and the reduction of racial prejudice.



was the "fatal flaw"; whereas, the absence of one in *DeRonde* was the saving factor. The cynical observer, however, would view no difference between that preference indirectly produced by a basket of factors, including race, and that produced by racial quotas.<sup>83</sup> Even though the exact percentage of representation of the disadvantaged racial group may be achieved by both approaches, one might ask whether there is a fundamental difference that would warrant opposing holdings in *Bakke* and *DeRonde*.

As Justice Powell established, it is the individual with whom the courts need to be concerned.<sup>84</sup> When the impact of the two approaches on individual applicants is examined, the direct and indirect preferences are seen to be quite different. The paramount distinguishing feature is the different psychological effect these two approaches have on applicants, particularly the white applicants, who do not gain admission. In the face of direct racial quotas, exclusion is felt to be based on an immutable characteristic of the applicant for which he should feel no responsibility. The fact, that many in the white community are conscious of the past wrongs for which racial quotas are intended to compensate, does not pacify the new feelings of injustice. Indeed, such a sense of inequity may even promote rather than reduce racial tensions.

On the other hand, when several factors are combined to evidence disadvantage of particular applicants, or of potential contributions by them, most of these factors will not have the immutability of race. In such a program, other elements may be considered over which the applicant has total control such as "unique work or service experience, leadership potential, maturity, . . . ability to communicate with the poor."<sup>85</sup> Added to this might be the capacity to contribute to solving social problems, bilingualism and the like. No doubt there would still be complaints from excluded whites, but these complaints may be met by the fact that such an admissions program is designed to be as fair as possible for all applicants and is consistent with the objective of providing for an eventual compensation for the wrongs inflicted by past discrimination.<sup>86</sup>

One senses from both the *Bakke* and *DeRonde* decisions, that the courts are concerned with the "appearance of justice"<sup>87</sup> and

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83. See notes 40-41 *supra* and accompanying text.

84. See note 5 *supra*.

85. 438 U.S. at 317.

86. See Bell, *Bakke, Minority Admissions, and the Usual Price of Racial Remedies*, 67 CALIF. L. REV. 3, 14-19 (1979). Professor Bell points out that black advances have historically involved, and continue to involve, changes in policies which oppress certain layers of whites, as well as blacks. Cf. Blasi, *supra* note 82, at 64-66.

87. 438 U.S. at 319 n.53.

"the perception of mistreatment."<sup>88</sup> The rigid and explicit racial preference before the Court in *Bakke* was seen to be "viewed as inherently unfair by the public generally as well as by applicants for admissions to state universities."<sup>89</sup> Under the *DeRonde* case admission program, in which racial preference was given in a framework of "individualized consideration," "(t)he applicant who loses out on the last available seat to another candidate receiving a 'plus' on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname."<sup>90</sup> Not only will this blurring of the borders of preference insulate the University from injunctive relief,<sup>91</sup> but it will also reduce the likelihood that rejected white applicants will focus on racial preference as the reason why they were rejected.

## VI. CONCLUSION

*DeRonde*, then, becomes yet another step in defining the permissible boundaries of affirmative action. It is apparent that these boundaries will tolerate a certain amount of disparate results so long as they are not achieved by the rejected method of racial quotas.

## II. ADMINISTRATIVE LAW

### A. WELFARE LAW

#### 1. *Legislative Intent Creates Exception to General Rule That Specific Statutes Preclude Prosecution for a General Crime: People v. Jenkins*

The California Supreme Court in *People v. Jenkins*<sup>1</sup> recently established an exception to the general rule that specific statutes preclude the prosecution for a general crime.<sup>2</sup> The issue

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88. *Id.* at 294 n.34.

89. *Id.* at 319 n.53.

90. *Id.* at 318.

91. *Id.* at 320, 319 n.53.

1. 28 Cal. 3d 494, 620 P.2d 587, 170 Cal. Rptr. 1 (1980).

2. *Id.* at 501, 620 P.2d at 592, 170 Cal. Rptr. at 6. See *In re Williamson*, 43 Cal. 2d 651, 654, 276 P.2d 593, 596 (1954). Reference was made to "the general rule that where the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment."

presented to the court in *Jenkins* was whether or not an individual who fraudulently obtains aid under the Aid for Families with Dependent Children (AFDC) in violation of section 11483<sup>3</sup> of the California Welfare and Institutions Code may also be prosecuted for perjury.

In *Jenkins*, the defendant was charged with one count of welfare fraud and one count of perjury. She moved to dismiss the second count on the ground that the Welfare and Institutions Code was a specific statute that precluded the state from prosecuting her under the more general perjury statute in the California Penal Code. The court, while recognizing this general rule, concluded that this general rule gave way to the "overwhelming indications of a contrary legislative intent."<sup>4</sup> The third sentence of section 11054 provides that "[a]ny person signing a statement containing such declaration is subject to the penalty prescribed for perjury in the Penal Code"<sup>5</sup> if he or she willfully makes a false statement. The court found that this phrasing explicitly authorizes a prosecution for perjury under section 118 of the California Penal Code, the general statute.

## B. EDUCATION LAW

### 1. *Back-pay under Education Code section 45025: California Teachers Association v. San Diego Community College District*

The California Supreme Court in *California Teachers Association v. San Diego Community College District*<sup>1</sup> addressed the issue of the proper method for determining pro-rata back-pay under section 45025 of the Education Code of California.<sup>2</sup>

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3. Section 11483 provides that,

Whenever any person has, by means of false statement of representation or by impersonation or other fraudulent device, obtained aid for a child not in fact entitled thereto, the person obtaining such aid shall be punished as follows. . . ."

CAL. WELF. & INST. CODE § 11483 (West 1980).

4. 28 Cal. 3d at 506, 620 P.2d at 584, 170 Cal. Rptr. at 8.

5. CAL. WELF. & INST. CODE § 11054 (West 1980). The explicit function of this language is to authorize a perjury prosecution under § 118 of the California Penal Code. Moreover, the legislative purpose here is aimed specifically and exclusively at AFDC applications. Section 11265 of the California Welfare and Institutions Code also deals with AFDC benefits and obliges a family receiving AFDC to complete a "certificate of eligibility" at each annual redetermination of eligibility. Each adult member of the family is required to provide "under penalty of perjury" the necessary information. CAL. WELF. & INST. CODE § 11265 (West 1980).

1. 28 Cal. 3d 692, 621 P.2d 856, 170 Cal. Rptr. 817 (1981).

2. Section 45025 provides that:

In fixing the compensation of part-time employees, governing boards shall provide an amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employ-

The plaintiffs in the present case sought a preemptive writ of mandate ordering the defendant to reclassify certain part-time teachers as regular employees, thereby entitling them to an increase in pay and other benefits not received as part-time employees. After determining that the teachers involved should be reclassified pursuant to *Peralta Federation of Teachers v. Peralta Community College District*,<sup>3</sup> the court turned its attention to section 45025 in order to determine the appropriate method of calculating pro-rata pay for the affected teachers. In that section, the question governing pay of part-time employees was the meaning of the phrase "time actually served." A statement made by the author of the statute, which he attributed to former Governor Reagan, indicated that this phrase meant that pay should reflect the time actually spent in the classroom, excluding time used for other activities. The majority held that these statements were merely the personal beliefs of an individual legislator and could not adequately qualify as the legislative intent of this section.<sup>4</sup> In so holding, the court concluded that "time actually served" included time spent for other duties undertaken outside the classroom.

In her dissent, Chief Justice Bird notes that the legislature specifically replaced the former phrasing "time required" with the present "time actually served," thereby concluding that the intent was to compensate for classroom time only.<sup>5</sup>

### C. SCOPE OF REVIEW

#### 1. California Unemployment Insurance Code Section

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ees bears to the time actually served by full-time employees of the same grade of assignment.

CAL. EDUC. CODE § 45025 (West 1978).

3. 24 Cal. 3d 369, 595 P.2d 113, 155 Cal. Rptr. 679 (1979). The applicable section of the Education Code does not apply to persons who were hired before its effective date, November 8, 1967. The situation here as "essentially the same" as in *Peralta*, and therefore, the court held that these professors should be reclassified accordingly. See 28 Cal. 3d at 697, 621 P.2d at 858, 170 Cal. Rptr. at 819.

4. 28 Cal. 3d at 699, 621 P.2d at 861, 170 Cal. Rptr. at 822.

5. 28 Cal. 3d at 702, 621 P.2d at 861, 170 Cal. Rptr. at 822. The Chief Justice focuses on the revenue-generating hours of determining compensation. She states that the legislature's purpose was to eliminate "time required" because that standard included non-revenue-generating hours filled with risks such as: counseling hours, supervising student activities, class preparation, etc. These activities could easily fill the 30 hours required for full-time teachers, while none of them may actually be generating revenue for the state. *Id.* at 704, 621 P.2d at 867, 170 Cal. Rptr. at 828.

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## 409.2: Pacific Legal Foundation v. California Unemployment Insurance Appeals Board

Section 409.2<sup>1</sup> of the California Unemployment Insurance Code authorizes an interested person or organization<sup>2</sup> to seek declaratory relief in order to overturn a decision of the Unemployment Insurance Appeals Board. Prior to the California Supreme Court's decision in *Pacific Legal Foundation v. California Unemployment Insurance Appeals Board*,<sup>3</sup> the proper level of review for factual findings of an administrative ruling was that a trial court could decide issues of fact de novo.<sup>4</sup> The *Pacific Legal Foundation* court held that the proper level of review for factual findings in a section 409.2 action was whether the facts, as stated in the board's decision, were supported by substantial evidence.<sup>5</sup> This decision, however, is limited to situations where interested

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1. Any interested person or organization may bring an action for declaratory relief in the Superior court in accordance with the provisions of the Code of Civil Procedure to obtain a judicial declaration as to the validity of any precedent decision of the appeals board issue under Section 409 or 409.1

CAL. UNEMP. INS. CODE § 409.2 (West Supp. 1981).

2. An interested person has been defined as meaning "a person having a direct, and not a merely consequential, interest in the litigation." *Associated Bd. Indus. v. Marshall*, 104 Cal. App. 2d 21, 22, 230 P.2d 379, 389 (1951).

*Pacific Legal Foundation* claimed to be an interested party because the Foundation had 32 employees covered by unemployment insurance. Therefore, the Foundation argued that it could be effected not only by having to pay increased insurance rates but also by finding themselves directly effected as a party to a benefit action where the precedent might have been followed. *Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.*, 74 Cal. App. 3d 150, 154-57, 141 Cal. Rptr. 474, 477-78 (1977).

3. 29 Cal. 3d 101, 624 P.2d 244, 172 Cal. Rptr. 194 (1981). Thurman Carroll, an applicant for unemployment insurance benefits, had been denied benefits by the Employment Development Department for failing to make a diligent job search even though he had been unfamiliar with the job market and he had taken the actions duly prescribed by a Department employee. Although as administrative law judge affirmed the benefit denial, the Unemployment Insurance Department for failing to make a diligent job search even though he had been unfamiliar with the job market and he had taken the actions duly prescribed by a Department employee. Although as administrative law judge affirmed the benefit denial, the Unemployment Insurance Appeal Board reversed. Thereafter, *Pacific Legal Foundation* sought declaratory relief to challenge the board's decision.

4. In deciding facts de novo, the trial court has great discretion to reweigh all the evidence presented before the administrative board. *See, e.g., Interstate Brands v. Unemployment Ins. Appeals Bd.*, 26 Cal. 3d 770, 608 P.2d 707, 163 Rptr. 619 (1980) (review of a Board's decision on finding of evidence allowed); *Douglas v. Unemployment Ins. Appeals Bd.*, 63 Cal. App. 3d 110, 133 Cal. Rptr. 604 (1976) (trial court did not err in making findings of fact different than those made by the board); *Agnone v. Hansen*, 41 Cal. App. 3d 524, 116 Cal. Rptr. 122 (1974) (independent judgment of the evidence at an administrative hearing is exercised by the trial court).

5. Substantial evidence, as applied to administrative review, "is the kind of evidence that 'a reasonable mind might accept as adequate to support a conclusion.'" *BLACK'S LAW DICTIONARY* 1281 (5th ed. 1979).

nonparties<sup>6</sup> bring an action for declaratory relief to challenge a particular decision merely for its precedential value.<sup>7</sup>

Thurman Carroll, a gardener and caretaker, was denied unemployment insurance benefits for a two week period for failure to make a diligent job search. On appeal, an administrative law judge affirmed the ruling that Carroll was ineligible for benefits. The Unemployment Insurance Appeals Board, however, reversed the previous holdings by finding Mr. Carroll eligible for unemployment insurance benefits. Pacific Legal Foundation, a private, nonprofit, public interest legal foundation, brought a declaratory action under section 409.2 in an attempt to overturn this decision of the appeals board.

The California Supreme Court in *Pacific Legal Foundation* determined that since the Foundation's interest, as an interested nonparty, was limited to the legal implications of the board ruling as precedent, it would be improper for a trial court in a section 409.2 action to review the facts in a particular case unless such facts were without substantial support.<sup>8</sup> The court specifically stated:

There should be no review of the underlying record or new evidence to discover whether the board correctly resolved disputes on adjudicative facts. The board's version of those facts may not be disturbed unless it lacks substantial support on the fact of the decision. And whatever result a court reaches on the merits, the declaratory judgment may not alter the result between the parties.<sup>9</sup>

Accordingly, the Supreme Court determined that in a section 409.2 action a trial court may not disturb the administrative board's findings of fact unless they are without substantial sup-

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6. See note 2 *supra*.

7. Challenging an administrative decision for its precedential values occurs when an interested nonparty seeks review of an administrative decision at the trial court level. Normally a review of a prior decision is made by an original party to the action. In this situation, the interested party is primarily interested in a vindication of his rights and obligations, while only secondarily interested in the law used or developed at the hearing or litigation. However, in a section 409.2 action, the interested nonparty seeking relief is only concerned with the precedential value of such decision. The interested nonparty has no personal rights or obligations at stake in the outcome of the hearing or litigation therefore is accorded the status of interested "nonparty."

8. The court in *Pacific Legal Foundation* reasoned that "because of the (unemployment) agency's expertise, its view of a statute or regulation, it enforces is entitled to great weight unless clearly erroneous or unauthorized." 29 Cal. 3d at 111, 624 P.2d at 248-49, 172 Cal. Rptr. at 198-99 (citing *International Business Mach. v. State Bd. of Equalization*, 26 Cal. 3d 923, 930-31, 609 P.2d 1,5, 163 Cal. Rptr. 782, 786 (1980)).

9. 624 P.2d at 248, 172 Cal. Rptr. at 198.

port of the evidence. In short, unlike an original interested party, an interested nonparty may not gain a de novo review of the facts in a section 409.2 action.<sup>10</sup>

Thus, the *Pacific Legal Foundation* decision makes it more difficult for an interested nonparty to gain reversal of prior decisions.<sup>11</sup> As a result, interested nonparties are less likely to seek trial court reviews of administrative decisions involving complex issues of fact because of the increased standard imposed on them in section 409.2 actions.

### III. ARBITRATION LAW

#### A. SELECTION OF THE ARBITRATOR

##### 1. *Non-neutrality Prohibited: Graham v. Scissor-Tail*

*Pursuant to the California Supreme Court case of Graham v. Scissor-Tail, the developing body of arbitration law in California has experienced another major adjustment. The previously held notion that parties to an arbitration agreement were absolutely free to designate whomever they wish as their arbitrator, was severely limited by this decision. The author analyzes the majority's opinion, which prohibits the use of non-neutral arbitrators, and calls attention to the significant body of law in California which is necessarily overruled by Graham.*

In a recent decision, the California Supreme Court has made a significant adjustment to the law regarding arbitration in California. Specifically, in the area of contractual arbitration, the court now requires that the agreed upon arbitrator must be an impartial entity. This decision imposes further restrictions on contractual arbitration than those that had existed under section 1280 of the California Arbitration Act.

#### I. INTRODUCTION

In recent years, arbitration has become an important part of the American judicial system. Very simply, arbitration<sup>1</sup> is a contrac-

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10. The court stated that "[s]ection 409.2 recognizes that precedent decisions are akin to agency rulemaking because they announce how governing law will be applied to future cases. . . . Therefore, the statute gives persons affected by the precedent judicial recourse similar to that available against regulations generally." *Id.* at 109, 624 P.2d at 247, 172 Cal. Rptr. at 197.

11. See note 4 *supra* and accompanying text.

1. An initial distinction must be made between the type of arbitration discussed in this case and another which has recently become the focus of many courts in California. The *Graham* decision discusses contractual arbitration, a process through which the parties *voluntarily* agree to submit themselves to an arbitration proceeding to resolve disputes that may arise under their contract. Addressing this contractual obligation, one author notes that "[w]hile it may be and usually is compulsory that the parties to arbitration respect and obey the award that terminates the proceedings, it is not compulsory that the parties enter into an arbitral agreement." C. UPDEGRAFF & W. MCCOY, *ARBITRATION OF LABOR DIS-*

tual device through which the parties agree to settle any subsequent contractual disputes out of court.<sup>2</sup> One of the items which may be agreed upon is the method of selection of the person who will arbitrate a dispute. The California Arbitration Act<sup>3</sup> expressly provides that this arbitrator need not be entirely neutral. In pertinent part, it states that "[i]f the arbitration agreement provides a method of appointing an arbitrator, such method shall be followed."<sup>4</sup> Such statutory language indicates that the parties' agreement shall govern the dispute resolution process. Section 1282 of the Act continues by noting that "[u]nless the arbitration agreement otherwise provides, . . . arbitration shall be by a single neutral arbitrator."<sup>5</sup> Therefore, only in the absence of a contrac-

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PUTES 9 (2d ed. 1961). See also *Robinson v. Bickley*, 30 Pa. 384, 389 (1858). The court defined arbitration as an agreement by the parties that the arbitrators shall by award, define and settle their legal rights and duties in relation thereto, and that the parties will obey the decision.

There is, however, another branch of arbitration that is *not* voluntary. In judicial arbitration, the parties to disputes, who have not agreed to arbitrate, are required to do so by the court. Rule 1600 of the California Rules of Court governs the procedure of judicial arbitration. It is much more formal than contractual arbitration, being subject to the rules of evidence with minor exceptions. See CAL. R. Cr. 1613 (West Supp. 1981) (rule 1613 governs rules of evidence at arbitration hearings).

As a point of clarification, however, it is important to note that the arbitration referred to by both this article and the court in *Graham* is contractual in nature, completely voluntary, and is quite separate and apart from judicial arbitration.

2. As initially conceived, arbitration was a process through which parties voluntarily referred their disputes to an impartial third party, designated as the arbitrator, for a final and binding decision. UPDEGRAFF, *supra* note 1 at 3-6. The object was to obtain an inexpensive and speedy determination from "judges" selected by the parties themselves. See, e.g., *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939). In *Gates*, the plaintiff sought to sue the defendant for back wages unpaid. Defendant's response was that the plaintiff had failed to state a cause of action, the contention being that the contract provided for arbitration before any suit could be brought in a court of law.

Certain studies indicate that arbitration requires less than one-fifth the hearing time and one-fifth to one-half the preparation of a complete judicial proceeding. See E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* 40 (1977).

While there are several advantages to arbitration over litigation, see F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 7 (4th ed. 1970), many attorneys are uncomfortable in its relaxed parameters. Because conventional rules of evidence are ignored in this setting, otherwise skillful lawyers find themselves relying on other skills that are seldom used. It has been noted that "lawyers do not like informality." See E. TEPLE & R. MOBERLY, *ARBITRATION AND CONFLICT RESOLUTION* 526 (1979).

3. CAL. CIV. PROC. CODE §§ 1280-99 (West 1972).

4. CAL. CIV. PROC. CODE § 1281.6 (West 1972).

5. CAL. CIV. PROC. CODE § 1282 (West 1972). Illustrating the extent to which



tual provision to the contrary will a neutral arbitrator be required. By inference,<sup>6</sup> a logical interpretation of this statute would allow the parties to an arbitration agreement to contract for someone other than a neutral person or group of persons to arbitrate a dispute. Such has been the law in California concerning arbitration.

The California Supreme Court recently made a significant adjustment to the aforementioned contractual autonomy that is provided for in the California Arbitration Act.<sup>7</sup> In *Graham v. Scissor-Tail*,<sup>8</sup> the supreme court held that “‘minimum levels of integrity,’ which are requisite to the contractual arrangement for the nonjudicial resolution of dispute are not achieved by an arrangement which designates the union of one of the parties at the arbitrator of disputes arising out of employment. . . .”<sup>9</sup> Such a decision clearly places added restrictions on the contractual freedom of choice of arbitrators available to parties under section 1282 of the California Arbitration Act.

## II. FACTS

The dispute in *Graham* arose as a result of differing interpretations of Form B,<sup>10</sup> a performance contract designed by the Ameri-

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the arbitrator and the parties may be associated, the case of *San Luis Obispo Bay Properties, Inc. v. Pacific Gas and Elec. Co.*, 28 Cal. App. 3d 556, 104 Cal. Rptr. 733 (1972), held that common membership in the same professional organization was not enough to create a reasonable impression of possible bias so as to require the arbitration award to be vacated. In *Federico v. Frick*, 3 Cal. App. 3d 872, 84 Cal. Rptr. 74 (1970), the court held that it was the legislature’s function to amend the California Arbitration Act in light of the fact that arbitration is “entirely a creature of statute.” *Id.* at 875, 84 Cal. Rptr. at 76. In so finding, the court refused to hold that contracts of adhesion were beyond the acts coverage. *Id.* at 876, 84 Cal. Rptr. at 76.

As will be discussed later, however, an arbitration agreement will not be enforced if it suffers from basic contract fatalities, such as unconscionability. See notes 39 & 41 *infra* and accompanying text.

6. The use of the conjunctive “unless” indicates that non-neutral arbitrators would be permissible *unless* the parties failed to appoint one specifically.

7. This “contractual autonomy” principle within arbitration was recognized by the *Graham* court in their opinion. Specifically, the court said that the “California Arbitration Act . . . contemplate[s] complete contractual autonomy in choice of an arbitrator.” 28 Cal. 3d 807, 821, 623 P.2d 165, 174, 171 Cal. Rptr. 604, 613.

8. 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604.

9. *Id.* at 827, 623 P.2d at 117, 171 Cal. Rptr. at 616. The term “minimum levels of integrity” was initially coined by the United States Supreme Court in *Hines v. Anchor Motor Freight*, 424 U.S. 554, 571 (1976). While no definition was given as to what these minimum levels would be, the facts of that case fell below the *Hines* Court’s perception of them. In *Hines*, the union, who was also the arbitrator, breached its duty to investigate false charges used as a basis for discharging certain employees. The Court held that in view of this breach on the union’s part, the employees were relieved of their duty to arbitrate the dispute. See notes 66-68 *infra* and accompanying text.

10. Form B is a standard industry contract. One is prepared for each scheduled performance and each is identical in contents, except for the provisions re-

can Federation of Musicians (A.F. of M.). The plaintiff, Bill Graham, was an experienced promoter and producer of rock concerts. Defendant, Scissor-Tail, Inc., was a California corporation, wholly owned by Leon Russell, a successful performer, recording artist, and member of the A.F. of M. The contract, Form B, provided that any dispute arising out of its terms would be arbitrated by the union.<sup>11</sup>

Four concerts were scheduled by Mr. Russell and identical contracts were prepared for each. All four contracts were signed by Graham while only two of the contracts, those concerning Ontario and Oakland appearances, were signed by the defendant Russell. The Ontario concert took place as scheduled and resulted in a net loss of \$63,000.<sup>12</sup> The Oakland concert followed, resulting in a net profit of \$98,000. The dispute arose over who was to bear the loss sustained in the Ontario concert.<sup>13</sup> Graham asserted that all losses should be offset against the profits at the Oakland concert while Scissor-Tail claimed that Graham should bear all losses without offset.

Although aware of the arbitration clause contained in their contracts, Graham filed an action for breach of contract when Russell refused to execute the two consigned contracts and used another promoter/producer for the two remaining concerts. Scissor-Tail responded with a petition to compel arbitration.<sup>14</sup> Arbitration proceedings resulted in a decision awarding the full amount of

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garding "hours of employment" and "wage agreed upon." 28 Cal. 3d at 812, 623 P.2d at 167, 168, 171 Cal. Rptr. at 606, 607.

11. *Id.* at 813, 623 P.2d at 168, 171 Cal. Rptr. at 607.

Form B reads in part: the parties will submit every claim, dispute, controversy or difference involving the musical services arising out of or connected with this contract and the engagement covered thereby for determination by the International Executive Board of the Federation . . . and such determination shall be conclusive, final and binding upon the parties.

12. Gross receipts were \$173,000, while the expenses exceeded \$236,000. *Id.* at 813, 623 P.2d at 168, 171 Cal. Rptr. at 607.

13. *Id.* at 813, 623 P.2d at 168, 171 Cal. Rptr. at 607.

14. "After once ordering arbitration, the trial court in 1974 granted reconsideration in order to permit discovery 'limited to the issues of whether an agreement to arbitrate was entered into and whether grounds exist to rescind such agreement . . .'" *Id.* at 814, 623 P.2d at 169, 171 Cal. Rptr. at 608. Section 1281.2 of the California Arbitration Act provides:

On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that:

Scissor-Tail's claim against Graham.<sup>15</sup> The decision was made in spite of the fact that Graham presented evidence that under music industry practices and customs, the promoter was "understood to bear no risk of loss because his share of the profits under such contracts was considerably smaller than under normal contracts."<sup>16</sup>

Graham contended that the provision requiring arbitration was unenforceable due to the fact that the arbitrator was a non-neutral entity.<sup>17</sup> As such, Graham refused to honor the arbitrator's decision. Scissor-Tail filed a petition in the superior court to confirm the award and force payment. Graham responded by filing a petition to vacate the arbitrator's award.<sup>18</sup> The court, however, affirmed Scissor-Tail's award.<sup>19</sup>

### III. THE SUPREME COURT'S DECISION

The decision in *Graham* was rendered without dissent. The supreme court's initial consideration was the validity of the order

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- (a) the right to compel arbitration has been waived by the petitioner; or
  - (b) grounds exist for the revocation of the agreement . . . .

CAL. CIV. PROC. CODE § 1281.2 (West 1979).

15. The award consisted of \$53,000, representing 85% of the net receipts from the Oakland concert less an advance made by Graham to Scissor-Tail prior to the concert. Apparently Graham had retained the net proceeds of the Oakland concert as an offset against the loss sustained in the Ontario concert. 28 Cal. 3d at 815 n.6, 623 P.2d at 169 n.6, 171 Cal. Rptr. at 608 n.6.

16. *Id.* at 815, 623 P.2d at 170, 171 Cal. Rptr. at 609. The "normal contract" referred to here, is one in which all the terms are negotiable between the parties. Form B has several terms which are non-negotiable, most likely due to the need for uniformity in the industry, and are thus not the product of normal contract-forming procedures. See notes 29 & 30 *infra*.

17. Graham's argument is basically that the contract is unconscionable. See note 37 *infra* and accompanying text.

18. 28 Cal. 3d at 816, 623 P.2d at 170, 171 Cal. Rptr. at 609. See CAL. CIV. PROC. CODE § 1285 (West 1972) which reads in part: "Any party to an arbitration in which an award has been made may petition the court to confirm, correct or vacate the award. The petition shall name as respondents all parties to the arbitration and may name as respondents any other persons bound by the arbitration award."

19. 28 Cal. 3d at 816, 623 P.2d at 170, 171 Cal. Rptr. at 609. See CAL. CIV. PROC. CODE § 1287.4 (West 1972) which reads in part:

If any award is confirmed, judgment shall be entered in conformity therewith. The judgment so entered has the same force and effect as, and is subject to all the provisions of law relating to, a judgment in a civil action; and it may be enforced like any other judgment of the court in which it is entered.

In denying Graham's petition to vacate, the trial court noted that the contracts which were executed by Graham, specifically contained a provision for arbitration. The court also noted that the "arbitration provision clearly designated the American Federation of Musicians as the Arbitrator. Therefore, any appearance of bias, nonneutrality, or lack of impartiality of the arbitrator was known to the plaintiff, Bill Graham, at the time of the execution of the agreement containing a provision for arbitration." 28 Cal. 3d at 816 n.8, 623 P.2d at 170 n.8, 171 Cal. Rptr at 609 n.8.

compelling arbitration.<sup>20</sup> Graham's primary contention was that the underlying agreement concerning arbitration was an unenforceable contract of adhesion.<sup>21</sup> The court's analysis of this contention was divided into two issues: whether or not the contract was one of adhesion; and if so, whether or not it was enforceable.

The court began its analysis of the first issue by citing *Neal v. State Farm Insurance Co.*,<sup>22</sup> wherein the California Court of Appeal defined the term "contract of adhesion" as a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it."<sup>23</sup> Applying the *Neal* analysis, the *Graham* court examined the bargaining power of the respective parties. While noting the apparent strength of Graham's position, due to his "prominence and success in the promotion of popular music concerts,"<sup>24</sup> the court was more impressed by the "realities" of the music industry. Apparently, all concert artists and groups of any significance belonged to the A.F. of M.<sup>25</sup> Consequently, as members of the union, they were not permitted to sign any form of contract other than that issued by the union.<sup>26</sup> As a result of these restrictions, any musical promoter or producer contracting for the services of an A.F. of M. member was reduced to the "humble role of an adherent."<sup>27</sup> Under the circumstances of this case, anyone wishing to promote a Leon Russell concert was presented with the non-negotiable option of either signing Form B or not conducting the promotion at

20. Normally, the plaintiff is not allowed to seek review of an order compelling arbitration. However, the plaintiff is entitled to have the validity of this order reviewed on appeal from the judgment of confirmation. See *La Pietra v. Freed*, 87 Cal. App. 3d 1025, 1031, 151 Cal. Rptr. 554, 557 (1978); *Atlas Plastering, Inc. v. Superior Court*, 72 Cal. App. 3d 63, 67-68, 140 Cal. Rptr. 59, 63-64 (1977); *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 353, 133 Cal. Rptr. 775, 784 (1976); *Maddy v. Cas-tle*, 58 Cal. App. 3d 716, 719-20, 130 Cal. Rptr. 160, 163-66 (1976).

21. 28 Cal. 3d at 817, 623 P.2d at 170, 171 Cal. Rptr. at 609.

22. 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961).

23. *Id.* at 694, 10 Cal. Rptr. at 784. See generally, Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640-42 (1943). For a discussion of contracts of adhesion and their treatment in California, see Sybert, *Adhesion Theory in California: A Suggested Redefinition And Its Application to Banking*, 11 LOY. L.A.L. REV. 297, 301-05 (1978).

24. 28 Cal. 3d at 818, 623 P.2d at 171, 171 Cal. Rptr. at 610.

25. *Id.*, 623 P.2d at 172, 171 Cal. Rptr. at 611.

26. *Id.* The effect of such a restriction is obvious. According to the definition in the *Neal* case, it becomes apparent that Graham must either sign Form B as presented to him by the union, or not do business with Mr. Russell at all.

27. *Id.*, 623 P.2d at 171, 172, 171 Cal. Rptr. at 610, 611.

all. The *Graham* court viewed this as a situation which fell within the confines of the definition of adhesion given in the *Neal* case.<sup>28</sup>

Scissor-Tail had argued that many other terms in Form B, such as "length, time, and date of concert,"<sup>29</sup> were entirely open to negotiation. The court, however, held that the presence of other allegedly negotiable terms could not remove the taint of adhesion,<sup>30</sup> and concluded that the contract could be "fairly described as adhesive."<sup>31</sup> The California Supreme Court had previously identified three factors which are commonly found in contracts of adhesion. In *Madden v. Kaiser Foundation Hospitals*,<sup>32</sup> a group medical plan was found not to be adhesive after the court analyzed the plan in light of these three factors. They were enumerated as follows:

(1) [T]he stronger party drafts the contract, and the weaker [party] has no opportunity . . . to negotiate concerning its terms . . . .

(2) In many cases of adhesion contracts, the weaker party lacks . . . any realistic opportunity to look elsewhere for a more favorable contract; he must either adhere to the standardized agreement or forgo the needed service . . . .

(3) Finally, in all prior contract of adhesion cases, the courts have concerned themselves with weighted contractual provisions which served to limit the obligations or liability of the stronger party.<sup>33</sup>

The situation between Graham and Russell satisfied the elements of this test. The rigid requirement of adherence to Form B, enclosed by the union, precluded any negotiations concerning the agreement to arbitrate. Yet any performer worth promoting belonged to the union and was thereby obligated to use Form B. Es-

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28. The definition in *Neal* describes a situation wherein one of the parties to a contract is forced to accept certain terms without the option of negotiations or be forced to completely refrain from doing business with the other person or group of persons. 188 Cal. App. 2d 690, 695, 10 Cal. Rptr. 781, 784 (1961). The contract was described by appellant as a "take-it-or-leave-it proposition," which the *Neal* court noted typifies a contract of adhesion. *Id.* Such was the case in *Graham*. If Graham wished to promote rock concerts, he had to sign Form B.

29. 28 Cal. 3d at 819, 623 P.2d at 172, 171 Cal. Rptr. at 611. The court felt that the terms asserted were of relatively minor significance in comparison to those imposed by Scissor-Tail, which included not only a provision concerning the manner and rate of compensation, but also a provision dictating a union forum for the resolution of any dispute.

30. *Id.* Basically, the court is saying that a few positive points (negotiable terms) cannot justify the unacceptable points of the contract.

31. In light of the *Neal* case, it appears as though there is a sound and adequate basis for this conclusion. Graham has no other option but to comply with Form B if he is to pursue his livelihood.

The court's description does not necessarily taint the entire contract. However, the portion of this contract that was found to be adhesive was the section that concerned whether or not the dispute would be arbitrated. Essentially, this is the basis of the entire agreement. If this portion is found to be unenforceable, the entire matter will have to be litigated to determine whether or not the remainder of the contract is enforceable.

32. 17 Cal. 3d 699, 552 P.2d 1178, 131 Cal. Rptr. 882 (1976).

33. *Id.* at 711, 552 P.2d at 1185-86, 131 Cal. Rptr. at 889-90.

entially, this situation forced Graham to either perform his service in accordance with Form B or not at all. Finally, the ability of the members of the A.F. of M. to control their contractual obligations by means of a union arbitration panel seemed to satisfy the third element. The essence of the court's concern appeared to be a reluctance to allow one party to benefit from another who had little or no ability to obtain a reciprocal benefit.

The second stage of the court's analysis involved an inquiry into whether or not the Form B arbitration clause, as an adhesion contract was enforceable.<sup>34</sup> In other words, the court did not believe adhesion alone would invalidate the contract. Referring to the determination of the enforceability of a contract, the court reasoned that "[i]t is, rather, the beginning and not the end of the analysis insofar as enforceability of its terms is concerned."<sup>35</sup> Essentially, a contract of adhesion may be fully enforceable according to its terms, unless other factors are present which "operate to render it otherwise."<sup>36</sup>

The court indicated that a two factor test is applied to determine whether or not a contract of adhesion is unenforceable. The first factor of the test examines whether or not an adhesion contract falls within the expectations of the weaker or "adhering" party; if it does not, it will not be enforced against him. The second factor of the test consists of the doctrine of unconscionability, which is "a principle of equity applicable to all contracts gener-

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34. 28 Cal. 3d at 819, 820, 623 P.2d at 172, 173, 171 Cal. Rptr. at 611, 612.

35. *Id.* at 819, 623 P.2d at 172, 171 Cal. Rptr. at 611. (citing *Wheeler v. St. Joseph Hosp.*, 63 Cal. App. 3d 345, 357, 133 Cal. Rptr. 775, 788 (1976)). The court here is explaining the two-step analysis that must be conducted when determining the validity of a contract that has been labeled "adhesive." In every case, there must be a finding of adhesion *plus* some other factor which would render the contract unenforceable. Several cases illustrate this point. In *Meyers v. Guarantee Sav. & Loan Assn.*, 79 Cal. App. 3d 307, 144 Cal. Rptr. 616 (1978), the court found that all ambiguities in an adhesive contract would be construed against the drafter. *Id.* at 311 n.1, 144 Cal. Rptr. at 619 n.1. Absent any ambiguity, however, the contract would be enforced according to its terms. *Id.* at 312, 144 Cal. Rptr. at 619. *Yeng Sue Chow v. Levi Strauss & Co.*, 49 Cal. App. 3d 315, 122 Cal. Rptr. 816 (1975), held that absent any ambiguity, contracts of adhesion are not unlike any other contract in regard to their validity and enforceability.

36. 28 Cal. 3d at 819, 820, 623 P.2d at 172, 171 Cal. Rptr. at 611. Several California cases serve as examples. In *Gray v. Zurich Ins. Co.*, 65 Cal. 2d 263, 270-71, 419 P.2d 168, 172, 54 Cal. Rptr. 104, 108 (1966), and *Employers Cas. Ins. Co. v. Foust*, 29 Cal. App. 3d 382, 386, 105 Cal. Rptr. 505, 508 (1972), the courts found that an additional factor of the adhering party not receiving his "reasonable expectations" would be fatal to the contract's validity.

ally.”<sup>37</sup>

Accordingly, the court applied the first of these factors to the facts of Graham. “By [Graham’s] own declarations and testimony, he had been a party to literally thousands of A.F. of M. contracts containing a similar provision . . . .”<sup>38</sup> Further testimony had revealed that several of these contracts had been with Scissor-Tail; each contract had contained arbitration provisions similar to those actually at issue.<sup>39</sup> Additionally, Graham had been involved with prior arbitration proceedings with the A.F. of M., and was familiar with disputes similar to his dispute with Scissor-Tail. Graham’s past experience with contracts containing arbitration agreements would seem to preclude any possibility of his reasonable expectations being unsatisfied. Having dealt specifically with the A.F. of M. on prior occasions, Graham was familiar with the union’s Form B and should have reasonably expected that arbitration would be required pursuant to the agreement. The supreme court decided that, “it must be concluded that the provisions requiring such arbitration . . . were wholly consistent with Graham’s reasonable expectations upon entering into the contract.”<sup>40</sup> Regarding this first factor, the court’s conclusion appears to be based on an accurate analysis of the facts stipulated.

The second factor, the doctrine of unconscionability, upon which the court based its decision, provided the vehicle for departure from previously recognized principles concerning contractual arbitration in California.<sup>41</sup> The issue was framed narrowly by the court: “whether the contract provision requiring arbitration *before the A.F. of M.*—because it designates an arbitrator who, by reason of its status and identity, is presumptively biased in favor of one

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37. 28 Cal. 3d at 820, 623 P.2d at 173, 171 Cal. Rptr. at 612. As demonstrated in *Jacklich v. Baer*, 57 Cal. App. 2d 684, 135 P.2d 179 (1943), “[e]quity will not lend its aid to enforce contracts which upon their face are so manifestly harsh and oppressive as to shock the conscience; it must be affirmatively shown that such contracts are fair and just.” *Id.* at 693, 135 P.2d at 183.

38. 28 Cal. 3d at 821, 623 P.2d at 173, 171 Cal. Rptr. at 612. See note 23 *supra* and accompanying text.

39. *Id.* at 821, 623 P.2d at 173, 171 Cal. Rptr. at 612. The facts also reveal that following the Oakland concert, Graham indicated that he, himself, would file charges with the A.F. of M. (the arbitrator) if the matter was not settled to his satisfaction. *Id.* at 814, 623 P.2d at 168-69, 171 Cal. Rptr. at 607-08.

40. *Id.* at 827, 623 P.2d at 173, 171 Cal. Rptr. at 612. While it is quite obvious that certainly not *all* of Graham’s expectations were met, in particular those dealing with offsetting losses, it is clear that Graham was aware of the arbitration agreement and that he reasonably knew what to reasonably expect. See note 39 *supra* and accompanying text.

The court seems to espouse an estoppel doctrine by holding that since Graham knew of the arbitration agreement and did not challenge it until an undesirable word was entered, he could not subsequently challenge the agreement on the grounds that it did not meet his reasonable expectations.

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

party—is for that reason to be deemed unconscionable and unenforceable.”<sup>42</sup>

Following a brief look at the applicable sections in the California Arbitration Act, the court recognized that the statutory language allows for the use of non-neutral arbitrators when agreed upon by the parties.<sup>43</sup> In *Federico v. Frick*<sup>44</sup> the Act was interpreted as “expressly permit[ing] the parties to an arbitration to agree to the conduct of the proceedings by a non-neutral arbitrator.”<sup>45</sup> The justices of the California Supreme Court continued by noting that this should be the result even though “[e]lementary fairness may seem to demand that arbitration proceedings be under the control of a neutral and impartial arbitrator.”<sup>46</sup>

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42. 28 Cal. 3d at 821, 623 P.2d at 173, 171 Cal. Rptr. at 612 (emphasis in original). To frame the issue of unconscionability in this fashion is peculiar in light of the fact that California statutory law allowed the parties to an arbitration agreement to agree to have a non-neutral arbitrator hear their disputes. See note 5 *supra* and accompanying text.

The same facts lend themselves to a variety of ways in which the issue could have been framed. Basically, the issue is whether or not parties to an arbitration agreement may decide on a non-neutral arbitrator. As has been shown, the response to this issue should be in the affirmative. It appears as though the court was merely framing an issue that would accommodate their preconceived conclusion.

43. CAL. CIV. PROC. CODE § 1282 (West 1979). See note 5 *supra* and accompanying text.

44. 3 Cal. App. 3d 872, 84 Cal. Rptr. 74 (1970). *Federico* involved a one-year employment contract which provided for arbitration under the rules of the employees union. The court interpreted the California Arbitration Act as being completely autonomous. Indeed, the court said that since “arbitration [is] a creature of statute, the statute controls.” 3 Cal. App. 3d at 876, 84 Cal. Rptr. at 76. *Federico* is probably the most relevant of all the cases cited due to its similarity in facts. The contract there, as in *Graham*, was found to be adhesive. The arbitrator in both cases was the union of one of the parties. Yet, the California Supreme Court chose to ignore the similarities and rule contrary to *Federico*.

It is somewhat unclear why the supreme court employed *Federico* at all. The portion of *Federico* cited in *Graham*, see note 45 *infra*, weighs heavily against the ultimate decision in *Graham*, and no attempt was made to distinguish the two. *Federico* merely served as additional authority that California case law did not support the court’s decision.

45. 28 Cal. 3d at 822, 623 P.2d at 174, 171 Cal. Rptr. at 613, (citing 3 Cal. App. 3d at 876, 84 Cal. Rptr. at 76).

46. *Id.* This effectively illustrates the fundamental difference between arbitration and conventional judicial proceedings. Arbitration is not governed by the usual rules of evidence or the strict procedural guidelines as are court proceedings. See note 2 *supra* and accompanying text. Accordingly, certain fundamental principles which are accepted in the field of courtroom procedure are virtually ignored in arbitration. This produces a certain amount of frustration in the attorney and parties who are accustomed to formalistic judicial proceedings. This frustration is illustrated by one author who notes that



The application of *Federico* to the situation in *Graham* is somewhat troublesome in light of *Federico*'s holding.<sup>47</sup> While the *Graham* court recognized *Federico*'s interpretation of section 1282 of the California Arbitration Act as correct, the court proceeded to formulate a holding clearly inconsistent with *Federico*, and was unable to offer any support for its holding from the large body of California case law on arbitration. The opinion continued with an acknowledgement of the fact that California courts had consistently reached the same conclusion as that reached in *Federico*.<sup>48</sup> In particular, a series of cases involving the New York Stock Exchange addressed the same issue. In *Arrieta v. Paine, Webber, Jackson & Curtis, Inc.*,<sup>49</sup> the court of appeal citing *Federico*, stated that "[p]otential unfairness from the non-neutral nature of an arbitrator is not a ground for vacation of the arbitration award."<sup>50</sup>

Another case which involved the New York Stock Exchange (NYSE) was *Richards v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*<sup>51</sup> While the facts of *Richards* are distinguishable from those

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[w]e are uncomfortable when we hear hearsay testimony. One of my partners, trying a case in a usual forum, had a very technical lawyer on the other side who kept interposing objections, primarily that the witness was testifying to hearsay. After several objections, the witness said, "That ain't hearsay, that's I say!" and the objection was overruled.

See E. TEPLE & R. MOBERLY, *ARBITRATION AND CONFLICT RESOLUTION* 526 (1979).

Another possible source of frustration is the distinction that serves as the focus of the dispute in *Graham*. While the California Arbitration Act allows the use of a non-neutral arbitrator, see note 5 *supra* and accompanying text, the California Code of Civil Procedure states that "[w]hen it is made to appear probable that, by reason of bias or prejudice . . . a fair and impartial trial cannot be had before him," such judge will be disqualified. CAL. CIV. PROC. CODE § 170(5) (West 1972). See generally E. JOHNSON, V. KANTOR & E. SCHWARTZ, *OUTSIDE THE COURTS: A SURVEY OF DIVERSION ALTERNATIVES IN CIVIL CASES* 55 (1977).

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

48. Following an examination of several California cases, 28 Cal. 3d at 822-23, 623 P.2d at 174, 171 Cal. Rptr. at 613, the court decided that there was "a host of cases from other jurisdictions which bear upon the problem." *Id.* at 823, 623 P.2d at 175, 177 Cal. Rptr. at 614. The obvious dissatisfaction with California case law on this point evidences a preconception on the court's part to decide against not only the arbitration agreement, but also an inability to substantiate that preconception with support from its own jurisdiction.

49. 59 Cal. App. 3d 322, 130 Cal. Rptr. 534 (1976).

50. *Id.* at 330, 130 Cal. Rptr. at 538.

51. 64 Cal. App. 3d 899, 135 Cal. Rptr. 26 (1976). See note 54 *infra* and accompanying text. There are similarities between *Richards* and *Graham*. In both cases, arbitration was to be conducted pursuant to the rules and under the authority of a professional organization in which one of the parties was a member. Such was also the case in both *Federico* and *Arrieta*. These facts alone were not found to invalidate the arbitration agreement in any of these cases. However, in *Richards*, the similarities with *Graham* cease. A comparison of the agreement in the two cases reveals the pivotal fact that rendered the *Richards* agreement unenforceable. The unbridled authority vested in the New York Stock Exchange proved to be the accompanying factor that made this adhesive contract unconscionable.

in *Graham*, the court chose to employ the *Richards* rationale to *Graham*.<sup>52</sup> In *Richards*, a customer of the defendant filed an action for breach of contract involving an alleged breach of a margin agreement. The defendants sought to compel arbitration as provided for in the agreement. The agreement referred to the Constitution and Rules of the Board of Governors of the NYSE and provided that the Board of Governors "may from time to time amend, alter or repeal any of the Rules of the Board with respect to arbitration, either generally or in reference to a particular case, as in its sole discretion may find expedient."<sup>53</sup> The court focused particularly on language in *Richards* that stated that it was a "basic apparent unfairness in requiring the nonmember to submit to arbitrators, all of whom have been appointed by the Exchange of which Merrill Lynch is a member."<sup>54</sup> However, the *Richards* court made it very clear in its decision that it was this "factor *in combination with others* which required the result reached."<sup>55</sup>

Apparently not satisfied with the case law of California to sup-

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52. The rationale in *Richards* was that the combination of factors present in that case would make enforcement unconscionable. See note 54 *infra* and accompanying text.

53. 64 Cal. App. 3d at 901-02, 135 Cal. Rptr. at 27. The problem with this arrangement is two-fold: 1) the parties agree to let one of the parties unilaterally control the arbitration proceeding; and 2) any specific provisions or procedure agreed upon are also subject to one party's changes and adjustments. Essentially, the parties are agreeing not to agree. Under such an arrangement the power appointed to one of the parties would be deemed as being "unconscionable." See note 51 *supra* and accompanying text.

The unconscionability of this contract is much clearer than the unconscionability alleged to be present in *Graham*. The unconscionability of the *Richards* contract is the likelihood of the nonunion party being deprived of his reasonable expectations. Indeed, the *Richards* rationale would have been more appropriate under the first portion of the analysis in *Graham* concerning the enforceability of a contract of adhesion.

54. 64 Cal. App. at 903, 135 Cal. Rptr. at 28. As mentioned earlier, this factor alone was insufficient to invalidate the arbitration agreement. See note 51 *supra*. The combination of both the adhesive nature of the contract and the authority to unilaterally change the agreement at any time was intolerable to the *Richards* court. While the first factor of adhesion was found in *Graham*, the latter was not. In fact, the second factor that was combined with the adhesion concept to overrule the arbitration agreement in *Graham* appears to have been the same factor that rendered the contract one of adhesion initially; *i.e.*, the arbitrator was the union of one of the parties. See note 28 *supra* and accompanying text. The contract in *Graham* was labeled one of adhesion after the court decided that *Graham* had no option but to submit himself to A.F. of M. arbitrators.

55. 28 Cal. 3d at 823, 623 P.2d at 175, 171 Cal. Rptr. at 614. The court is correct in its analysis that the partiality of the arbitrator *in combination with* the fact that unbridled authority was placed in the New York Stock Exchange, allowing it to alter its rules concerning arbitration at will, produced the fatal defect. However,

port their desired objective, the supreme court looked to other jurisdictions for assistance.<sup>56</sup> The most significant case outside of California was a New York case, *In re Cross & Brown*,<sup>57</sup> which closely paralleled the facts in *Graham*. *Cross & Brown* involved disputes over real estate brokerage claims which were handled under an employment contract providing for arbitration. The contract named the board of directors of the employer as the arbitrating body. The New York court determined that such an arrangement would violate a "well-recognized principle of 'natural justice' [that being] a man may not be a judge in his own cause."<sup>58</sup> Even the New York court, however, realized that while these well-recognized principles are normally adhered to

[a]s a general rule, since arbitration is a contractual method of settling disputes, whom the parties choose to act as an arbitrator is a matter of their own judgment. An interest in the dispute or a relationship with a party, if known to the parties to the agreement when the arbitrator is chosen, will not disqualify the arbitrator from acting.<sup>59</sup>

The New York Supreme Court in *Lipschutz v. Gutwirth*,<sup>60</sup> cited *Cross & Brown* for the proposition that while contractual autonomy should be the paramount consideration when dealing with arbitration agreements, "someone so identified with the party as to be in fact, even though not in name, the party" cannot be designated as the arbitrator.<sup>61</sup> The New York court held that such an arrangement would be illusory, at best, by allowing an interested party to decide disputes under the contract.<sup>62</sup> While *Lipschutz* and *Cross & Brown* provide a strong basis for the California Supreme Court's eventual decision, their holdings had not previously been recognized in California.<sup>63</sup> To the contrary, California courts had uniformly decided in favor of the explicit contractual terms under these circumstances.<sup>64</sup>

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such was not the case in the *Graham* situation. See note 59 *infra* and accompanying text.

56. See note 48 *supra* and accompanying text.

57. 4 A.D.2d 501, 167 N.Y.S.2d 573 (1957).

58. *Id.* at 502, 167 N.Y.S.2d at 573. As has been shown, many "well-recognized" principles that are applicable in the judicial systems, are not recognized in arbitration. See note 46 *supra* and accompanying text.

59. 4 A.D.2d at 502, 167 N.Y.S.2d at 576. Such relationship *was* known to the parties in *Graham*. Non-neutrality will not serve as a basis for overruling an arbitrator's award on appeal. In *Federico*, the court specifically stated that evidence of an arbitrator's bias will not suffice as a "statutory ground for either vacation of the arbitrator's award or dismissal of the confirmation proceedings." 3 Cal. App. 3d at 876, 84 Cal. Rptr. at 76.

60. 304 N.Y. 58, 106 N.E.2d 8 (1952).

61. 4 A.D.2d at 503, 167 N.Y.S.2d at 576.

62. 28 Cal. 3d at 824, 623 P.2d at 175, 171 Cal. Rptr. at 614. (citing 4 A.D.2d at 503, 167 N.Y.S.2d at 576).

63. Due to their jurisdictional setting, *Lipschutz* and *Cross & Brown* are persuasive authority at best.

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

In its continued search for authority for the additional factor of unconscionability, the California Supreme Court next turned its attention to the United States Supreme Court's decision in *Hines v. Anchor Motor Freight*.<sup>65</sup> The *Hines* case established a strong policy favoring arbitration. The Court there stated that "Congress has put its blessing on private settlement arrangements . . . , but it was anticipated, we are sure, that the contractual machinery would operate within some minimum levels of integrity."<sup>66</sup>

Such broad language as "minimum levels of integrity" lends itself to liberal interpretation. The California Supreme Court combined the holdings of *Lipschutz* and *Cross & Brown* with the broad language from *Hines* and took a somewhat unprecedented step away from the policy of the contractual autonomy of arbitration agreements.<sup>67</sup> From the *Hines* decision, the court noted its role in determining what the "minimum levels of integrity" should be.<sup>68</sup> Exercising its role, the court reasoned that the arbitration agreement between Graham and Scissor-Tail fell below these minimum levels of integrity. The arbitrating body in *Graham* was described as being incapable of impartially deciding<sup>69</sup> the dispute between the parties due to the close relationship be-

65. 424 U.S. 554 (1976).

66. *Id.* at 571. The Supreme Court implies that the party's power to design their own arbitration proceeding is not absolute. While these "minimum levels" are never defined, *see* note 9 *supra*, it could not be reasonably assumed that the arbitration proceedings in *Graham* would fall below them. This would seem the proper conclusion since everything that occurred in *Graham* falls within the statutory language of the California Arbitration Act, *see* notes 3-7 *supra* and accompanying text.

67. In view of the *Federico*, *Arrieta*, and *Richards* cases, a decision prohibiting the parties to an arbitration agreement from appointing a non-neutral arbitrator is, indeed, a departure from former California case law.

68. 28 Cal. 3d at 825, 623 P.2d at 176, 171 Cal. Rptr. at 615.

69. *Id.* at 825, 623 P.2d at 176, 171 Cal. Rptr. at 615. The California Supreme Court defines the word "tribunal" (in the context of arbitration) as an "entity or body which 'hears and decides disputes.'" *Id.* The court applied the reasoning in *Cross & Brown* to find that the A.F. of M. is "incapable of 'deciding' on the basis of what it has 'heard.'" *Id.* This conclusion is reached undoubtedly due to the court's belief that bias on the arbitrator's part would preclude him from having the "impartiality necessary to act in a judicial or quasi-judicial capacity regarding that controversy." 4 A.D.2d at 506, 167 N.Y.S.2d at 575.

This decision was made in *Cross & Brown* only after the court decided that the relationship between the arbitrator and the party was *unknown* to the opposition. *Id.* at 503, 167 N.Y.S.2d at 575. The court indicated that normally it will not consider the propriety of an agreement appointing the party's union as the arbitrator. This is because the individual or entity chosen by the parties "to act as an arbitrator is a matter of their own judgment." *Id.* However, in the case where the parties are not aware of the non-neutrality, the court will look to see whether the decision

tween Scissor-Tail and the arbitrator. The California Supreme Court concluded that the agreement, under the circumstances of this case, became, not a contract to arbitrate, "but an engagement to capitulate."<sup>70</sup>

This conclusion was reached despite the fact that past practices and prior cases would dictate an opposite holding.<sup>71</sup> The real difficulty with the *Graham* case is that the court appears to be overruling a substantial body of law without ever expressly doing so.<sup>72</sup> This is accompanied by the attempt to deliberately ignore statutory law in California.<sup>73</sup> No reasons were ever formulated for the sudden change. Indeed, the court's motives, whatever they were, seemed to be unlike those that compelled it to decide otherwise on previous occasions.

#### IV. IMPACT

Although the decision in *Graham v. Scissor-Tail* is somewhat limited to its factual confines,<sup>74</sup> its impact is anticipated to be significant nonetheless. Essentially, the holding in *Graham* is that a contractual provision designating the union of one of the parties to the contract as the arbitrator of all disputes arising under the contract, does not achieve the "minimum levels of integrity" which are demanded of contractual substitutes for judicial proceedings by the United States Supreme Court in the *Hines* case.<sup>75</sup> A combination of the adhesive nature of the contract and the assumed partiality of the arbitrator provided the basis for this decision.

Although not expressly, the California Supreme Court in *Gra-*

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rendered was impartial. Had the court found that the arbitrator was indeed neutral, their decision would have likely been in favor of the arbitrator's decision.

In *Graham*, the court was not faced with the situation in *Cross & Brown*. Both parties were aware of the arrangement and the position held by the arbitrator. It seems that under these circumstances, the court need not arrive at a decision regarding the arbitrator's neutrality.

70. *Id.* at 502, 167 N.Y.S.2d at 576. The arrangement in *Cross & Brown* forced the plaintiff to surrender its bargaining power.

71. Several California cases illustrate these past practices. In *Forrest v. Hotel Conquistador, Inc.*, 193 Cal. App. 2d 503, 14 Cal. Rptr. 349 (1961), the court reaffirmed its policy of favoring arbitration and allowing the parties to designate the nature of any arbitration proceeding according to their intent. Several California cases involving the New York Stock Exchange allowed for the use of a union arbitrator. *See, e.g.*, *Berman v. Dean Witter & Co., Inc.*, 44 Cal. App. 3d 999, 119 Cal. Rptr. 130 (1975); *Vernon v. Drexel Burnham & Co.*, 52 Cal. App. 3d 706, 125 Cal. Rptr. 147 (1975); *Lewsadder v. Mitchum, Jones & Templeton, Inc.*, 36 Cal. App. 3d 255, 111 Cal. Rptr. 405 (1973); *Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 20 Cal. App. 3d 668, 97 Cal. Rptr. 811 (1971).

72. *See* note 76 *infra* and accompanying text.

73. *See* notes 3-5 *supra* and accompanying text.

74. *See* note 42 *supra* and accompanying text.

75. *See* note 9 *supra* and accompanying text.

*ham* has effectively overruled a body of California case law and has made significant adjustments to the California Arbitration Act.<sup>76</sup> The difficulty with this action is the fact that the court's reasoning is inconsistent with statutory law.<sup>77</sup> The court combined the doctrines of adhesion and unconscionability to invalidate the agreement. However, the unconscionable element, the possible bias of an appointed arbitrator, was an arrangement expressly permitted under state law.<sup>78</sup> In essence, this decision does violence to section 1282 of the California Arbitration Act which has always allowed contracting parties to agree on the use of a non-neutral arbitrator of their choice.<sup>79</sup>

A presence of either adhesion or a non-neutral arbitrator would not, alone, have been sufficient grounds to invalidate an agreement.<sup>80</sup> It is difficult to see how these elements, when combined, make a contract any less enforceable, in light of the fact that

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76. Without exception, the California cases employed by the supreme court in its decision oppose the *Graham* holding. Such cases include *Federico*, *Arrieta*, and *Richards*. The most notable of these is the *Richards* case. The California Supreme Court relied heavily on this case and reached a similar decision. However, the main objection to the court in *Richards* was that the rules governing arbitration, including the appointment of the arbitrator, could be changed at any time and in reference to any particular case. 64 Cal. App. 3d at 903, 135 Cal. Rptr. at 28. The *Richards* court noted that the "code of Civil Procedure provides for the parties to agree upon an arbitrator and if the 'agreed method fails,' for the court to appoint one." *Id.* at 903 n.2, 135 Cal. Rptr. at 28 n.2. In *Graham*, the parties did agree to the arbitrator and that decision could not, thereafter, be altered by either party. The fact that this arbitrator was partial would not, alone, be fatal under the *Richards* case or any other California case cited.

Although present in *Richards*, the provision which allowed one of the parties to unilaterally decide on the arbitrator by changing the governing rules at the last moment was not present in *Graham*. In *Graham*, the decision to allow the A.F. of M. to arbitrate the dispute was made bilaterally; both parties were bound by that decision.

In light of the foregoing, the use of *Richards* as a precedent to the judicial action taken in *Graham* becomes problematic. Indeed, instead of following the reasoning in *Richards*, the supreme court, in effect, overruled it.

The section of the California Arbitration Act which are specifically affected are §§ 1281.6, 1282. CAL. CIV. PROC. CODE §§ 1281.6, 1282 (West 1972). See notes 4-5 *supra* and accompanying text.

77. See notes 3-5 *supra* and accompanying text.

78. CAL. CIV. PROC. CODE § 1282 (West 1972).

79. In *Federico v. Frick*, 3 Cal. App. 3d 872, 84 Cal. Rptr. 74 (1970), the California Court of Appeal held that while "[e]lementary fairness may seem to demand that arbitration proceedings be under the control of a neutral and impartial arbitrator . . . section 1282 of the Act expressly permits the parties to an arbitration to agree to the conduct of arbitration proceedings by a nonneutral arbitrator." *Id.* at 876, 84 Cal. Rptr. at 76.

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

these elements are permissible under state law. The effect of *Graham v. Scissor-Tail* will undoubtedly be a reduction in the contractual autonomy available when entering into arbitration agreements.

## V. CONCLUSION

The conclusion that will be reached by the various courts who interpret this decision is unpredictable. This is due to the fact that the *Graham* decision failed to clarify what factual settings would be effected by its holding. As with any sudden departure from precedent, the period of adjustment will undoubtedly experience some difficulties. What is clear, however, is that parties entering into an agreement that provides for arbitration are no longer afforded all of the freedoms previously available under the California Arbitration Act.

## IV. REAL PROPERTY

### A. LANDLORD AND TENANT

#### 1. *Implied Covenant of Habitability: Knight v. Hallsthammar*

##### I. INTRODUCTION

For almost a decade, California has recognized the existence of an implied warranty of habitability in residential property. In 1972, *Hinson v. Delis*<sup>1</sup> established that California would follow the lead of other jurisdictions in adopting this doctrine.<sup>2</sup> However, until *Knight v. Hallsthammar*,<sup>3</sup> California courts held that breaches of the implied warranty of habitability on residential

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1. 26 Cal. App. 3d 62, 102 Cal. Rptr. 661 (1972) (upon careful consideration of cases in other jurisdictions, the court adopted the common law implied warranty of habitability). For a further discussion of the implied warranty of habitability see generally Heskin, *The Warranty of Habitability Debate: A California Case Study*, 66 CALIF. L. REV. 37 (1978); Moskovitz, *The Implied Warranty of Habitability: A New Doctrine Raising New Issues*, 62 CALIF. L. REV. 1444 (1974); Meyers, *The Covenant of Habitability and the American Law Institute*, 27 STAN. L. REV. 879 (1975); Note, *The Great Green Hope: The Implied Warranty of Habitability in Practice*, 28 STAN. L. REV. 729 (1976); Note, *Green v. Superior Court: A New Remedy for the California Tenant*, 5 GOLDEN GATE L. REV. 145 (1974).

2. 26 Cal. App. 3d at 68-70, 102 Cal. Rptr. at 665-66.

3. 29 Cal. 3d 46, 623 P.2d 268, 171 Cal. Rptr. 707 (1981). A group of tenants living in housing having numerous health violations informed their new landlord that rent would be withheld after being informed themselves that rent was being raised. In an action by the new landlord for unlawful detainer, the tenants attempted to defend their actions by stating that the housing violations were a breach of implied warranty of habitability, justifying their withholding rent. The majority opinion was written by Chief Justice Bird, with Justices Tobriner, Mosk, Richardson, and Newman concurring. Justice Clark was the sole dissenter.

property could be waived under certain circumstances.<sup>4</sup> The *Knight* decision represents a significant extension of the protections afforded the tenant in *Green v. Superior Court*<sup>5</sup> by permitting a tenant to withhold rent and defend an unlawful detainer action, even when the tenant takes possession with prior knowledge of such defects. Additionally, *Knight* expressly held that the remedy of withholding rent for a breach of the warranty could be accomplished even before allowing a landlord a reasonable time to repair,<sup>6</sup> even if that landlord was not himself responsible for such breach.<sup>7</sup>

## II. THE COURT'S DECISION

In *Knight v. Hallsthammar*, the California Supreme Court determined that a tenant's knowledge of defects prior to occupancy does not serve as a waiver of the implied warranty of habitability.<sup>8</sup> The court stated:

The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty.<sup>9</sup>

Previously California law held that absent an agreement with a landlord that the landlord would repair known defects, the tenant

4. *Id.* at 53-54, 623 P.2d at 272-73, 171 Cal. Rptr. at 711-12. This is directly contrary to the holding in *Quevedo v. Braga*, 72 Cal. App. 3d Supp. 1, 140 Cal. Rptr. 143 (1977), that the defects must be neither known nor readily apparent in order for there to be a breach. See also *Pollard v. Saxe & Yolles Dev. Co.*, 12 Cal. 3d 374, 525 P.2d 88, 115 Cal. Rptr. 648 (1974); *Square Deal Mach. Co. v. Garrett Corp.*, 128 Cal. App. 2d 286, 275 P.2d 46 (1954).

5. 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974). In *Green*, the California Supreme Court noted that neither party to the unlawful detainer action had alleged that the premises in question were uninhabitable before the tenant had taken possession of the premises. As a result, the court did not decide whether the lease was an illegal contract or whether the tenant assumed any risk by renting property in a defective condition. *Id.* at 621, n.3, 517 P.2d at 1170-71 n.3, 111 Cal. Rptr. 706-07 n.3. Therefore, the *Green* court did not address that part of the *Knight* decision dealing with waiver of the warranty by knowledge of defect present before execution of a lease.

6. Previously, the law in California had been that a reasonable time to repair must be afforded a landlord before such withholding can take place. See *Hinson v. Delis*, 26 Cal. App. 3d 62, 70, 102 Cal. Rptr. 661, 666 (1972) (the court expressly held that allowing a landlord a reasonable time to repair was a prerequisite to withholding rent).

7. 29 Cal. 3d at 57, 623 P.2d at 274, 171 Cal. Rptr. at 714.

8. *Id.* at 54, 623 P.2d at 273, 171 Cal. Rptr. at 712.

9. *Id.*



could not withhold rent in an unlawful detainer action when he had actual knowledge of the defects before coming into possession of the property.<sup>10</sup>

The court in *Knight* also held that a residential tenant could withhold rent for a breach of implied covenant of habitability even though the landlord may not have been given a reasonable opportunity to repair.<sup>11</sup> Following *Green v. Superior Court*,<sup>12</sup> *Knight* held that a breach of implied warranty could be raised as a defense in an unlawful detainer action.<sup>13</sup> However, the *Knight* decision is a departure from previous California law.<sup>14</sup> This court expressly held that allowing the landlord a reasonable time to repair was not a necessary precondition to a tenant withholding rent.<sup>15</sup> The *Knight* court stated that "(o)therwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and a tenant's duty to pay rent, would make no sense."<sup>16</sup>

After finding an old California case, *Standard Livestock Co. v. Pentz*,<sup>17</sup> inapplicable to this particular situation, the *Knight* court established that "a tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner."<sup>18</sup>

### III. CONCLUSION

Accordingly, *Knight* affords tenants protection in these particularized situations. Tenants may be aware of specific defects in rental property, yet they may withhold rent or defend an unlawful detainer action.<sup>19</sup> Further, tenants are no longer required to afford their landlord a reasonable time to repair before withholding rent for a breach of implied warranty of habitability. Additionally,

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10. See note 4 *supra* and accompanying text.

11. 29 Cal. 3d at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

12. 10 Cal. 3d 616, 517, 1168, 111 Cal. Rptr. 704 (1974). In this case as a defense to an unlawful detainer action, Green pointed to 80 housing violations, many of a serious nature, for which the landlord had been cited. The tenant was successful in justifying his non-payment of rent on an implied warranty of habitability argument. For present dwelling standards, see CAL. CIV. CODE § 1941.1 (West Supp. 1981).

13. 29 Cal. 3d at 52, 623 P.2d at 271, 171 Cal. Rptr. at 710.

14. See note 4 *supra*.

15. 29 Cal. 3d at 55, 623 P.2d at 273, 171 Cal. Rptr. at 712.

16. *Id.*

17. 204 Cal. 618 (1928). The *Knight* court distinguished *Standard Livestock Co.* The case dealt with an implied covenant of quiet enjoyment and retroactive rent reductions prior to the new ownership of the property, while *Knight* concerned the warranty of habitability and present rent reductions against the present landlord.

18. 29 Cal. 3d at 57, 623 P.2d at 275, 171 Cal. Rptr. at 714.

19. See note 4 *supra* and accompanying text.

new landlords are subject to most breaches of warranty committed by their predecessor in interest, including the implied warranty of habitability.<sup>20</sup>

## B. LICENSES

### 1. *Business and Professions Code Section 10475: Deas v. Knapp*

Section 10475 of the California Business and Professions Code<sup>1</sup> automatically suspends the license of any real estate broker or salesman if a consumer successfully makes a claim of fraud against him and a special state fund is used to satisfy this claim.<sup>2</sup> The California Supreme Court in *Deas v. Knapp*<sup>3</sup> has now held

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

1. Should the commissioner pay for the separate account in the Real Estate Fund for education, research, and recovery purposes any amount in settlement of a claim or toward satisfaction of a judgment against a licensed broker or salesman, the license of the broker or salesman shall be automatically suspended upon the effective date of an order by the court as set forth herein authorizing payment from the separate account in the Real Estate Fund for education, research, and recovery purposes. No such broker or salesman shall be granted reinstatement until he has repaid in full, plus interest at the *prevailing legal rate \* \* \* applicable to a judgment rendered in any court of this state*, the amount paid for the separate account in the Real Estate Fund for education, research, and recovery purposes on his account. A discharge in bankruptcy shall not relieve a person from the penalties and disabilities provided in this article.

CAL. BUS. & PROF. CODE § 10475 (West Supp. 1981).

2. (a) When any aggrieved person obtains a final judgment in any court of competent jurisdiction against any person or persons licensed under this part, under grounds of fraud, misrepresentation, deceit, or conversion of trust funds arising directly out of any transaction when the judgment debtor was licensed and performed acts for which a license is required under this part, and which cause of action occurred on or after July 1, 1964, the aggrieved person may, upon the judgment becoming final, file a verified application in the court in which the judgment was entered for an order directing payment out of the separate account in the Real Estate Fund for education, research, and recovery purposes of the amount of actual and direct loss in such transaction up to the sum of ten thousand dollars (\$10,000) of the amount unpaid upon the judgment, provided that nothing shall be construed to obligate such separate account for more than ten thousand dollars (\$10,000) per transaction regardless of the number of persons aggrieved or parcels of real estate involved in such transaction.

CAL. BUS. & PROF. CODE § 10471 (West Supp. 1981).

3. 29 Cal. 3d 69, 623 P.2d at —, — Cal. Rptr. — (1981). In a suit for fraud against a real estate broker Knapp, judgment was entered for in excess of \$50,000. Later, the plaintiffs sought to collect at least part of their judgment by filing a claim against a state fund designed partially for that purpose. At the subsequent trial, plaintiffs were allowed to prevent relitigation of the fraud issues previously decided and therefore received the maximum amount of \$20,000 from the fund which was distributed among the various plaintiffs. Justice Newman wrote the

that in a preceeding against this state fund the doctrine of res judicata<sup>4</sup> would not bar relitigation of the fraud issues decided at the previous trial.<sup>5</sup>

The court in *Deas* stated:

Though the licensee has full opportunity to litigate the fraud in the original action, the fact that only monetary liability is immediately involved may fall into not defending it as vigorously as the later fund proceeding that can result in automatic exclusion from the real estate business.<sup>6</sup>

Thus, the court found that only a rebuttable presumption could be created by a prior judgment, and that "(i)f either the commissioner or the debtor introduced evidence from which fraud may be found nonexistent, the presumption disappears and plaintiff has the burden of proving the cause of action."<sup>7</sup>

The *Deas* decision affords greater liberty to real estate salesmen and brokers. Now salesmen and brokers need not diligently defend original suits for fraud knowing that res judicata will not prevent them from relitigating the fraud issue at a subsequent trial where the individual's license is at stake.

## V. CIVIL PROCEDURE

### A. PROCESS

#### 1. *Statutory Service Period Under Civil Procedure Code section 581(a): Hocharian v. Superior Court of Los Angeles County*

Under California law, a plaintiff must serve a summons on a complaint and make a return within three years after an action is filed. The California Supreme court addressed the issue of what

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court's opinion, with Justices Tobriner, Clark, and Richardson concurring. Justice Mosk, joined by Chief Justice Bird, believed that judicial economy dictated that all issues should have been decided at that time, filed a concurring and dissenting opinion.

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

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

5. The court distinguished § 10177.5 of the Business and Professions Code, which as interpreted by *Richard v. Gordon*, 254 Cal. App. 2d 735, 62 Cal. Rptr. 466 (1967), authorizes the use of res judicata, from § 10473.1 which was at issue in *Deas* and which does not mention res judicata. The court noted that while in § 10473.1, suspension or revocation of a license is discretionary, in *Deas* and § 10177.5, suspension or revocation of the license is mandatory if there is reimbursement by the distributed funds. CAL. BUS. & PROF. CODE § 10475 (West Supp. 1981).

6. 29 Cal. 3d at 79, 623 P.2d at 735, 171 Cal. Rptr. 823.

7. *Id.* at 79-80, 623 P.2d at —, 171 Cal. Rptr. 827. See generally CAL. BUS. & PROF. CODE § 10473.1 (West Supp. 1981).

set of criteria governed the operation of the mandatory dismissal provision section 581a of the California Code of Civil Procedure if the summons was not served within the required time.<sup>1</sup>

In *Hocharian v. Superior Court of Los Angeles*,<sup>2</sup> the plaintiff served a summons on the last of several defendants to a negligence action nine weeks after the expiration of the three-year service period. The delay in service was allegedly due to the difficulties experienced in learning of the petitioner's involvement in the case.<sup>3</sup> The court recognized that certain exceptions to section 581a had been established in *Wyoming Pacific Oil v. Preston*.<sup>4</sup> These exceptions include "impossibility, impracticability, and futility" in attempting to serve the defendant. The plaintiff in *Hocharian* claimed that her inability to learn of the petitioner's involvement until late in the suit caused her failure to comply with section 581a which therefore justified the enactment of the "impossibility" exception.<sup>5</sup> Chief Justice Bird ordered the trial court to hold a hearing on the issue of whether or not the plaintiff used reasonable diligence in presenting the case. Such a hearing would enable the court to determine if the plaintiff's situation fits

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1. Section 581a, subdivision (a) provides:

No action heretofore or hereafter commenced by complaint shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on the motion of any party interested therein, whether named as a party or not, unless the summons on the complaint is served and return made within three years after the commencement of said action. . . .

CAL. CODE CIV. PROC. § 581a (a) (West 1976).

2. 28 Cal. 3d 714, 621 P.2d 829, 170 Cal. Rptr. 790 (1981).

3. *Id.* at 718, 621 P.2d at 830, 170 Cal. Rptr. at 791. The plaintiff was unable to learn the identity of the party who actually had worked on the brakes of the automobile which had caused the accident.

4. 50 Cal. 2d 736, 329 P.2d 489 (1958). In *Wyoming Pacific*, the court found that it was an abuse of the court's discretion to dismiss an action merely because the defendant had been served only one week after the expiration of the three-year period provided under § 581a. This holding was a result of the finding of the trial court that the defendant had been intentionally concealing himself to avoid service, and that it was only through repeated efforts during the following week that personal service was finally accomplished. The court concluded that this discretionary power must be "exercised in accordance with the spirit of the law and with a view of subserving, rather than defeating, the ends of substantial justice." *Id.* at 741, 329 P.2d at 493.

5. The court found that the plaintiff had no way of knowing of the defendant's involvement until a deposition in September of 1979. At that time, the individual who was normally charged with the maintenance of the faulty brakes revealed the name of the temporary mechanic, Hocharian, who had acted negligently. See 28 Cal. 3d at 718, 621 P.2d at 830, 170 Cal. Rptr. at 791.

within the exceptions of "impossibility, impracticability, or futility" recognized in *Wyoming Pacific*.

## VI. FAMILY LAW

### A. CHILD CUSTODY SEVERENCE

#### 1. *Clear and Convincing Proof Required: In re Angelia P.*

Recently, there has been much confusion concerning the quantum of proof required in an action for permanent severance of a child from his or her parents.<sup>1</sup> *In re Angelia P.*<sup>2</sup> clarifies California's position by adopting the clear and convincing proof standards for all actions arising under section 232 of the California Civil Code.<sup>3</sup>

In *In re Angelia P.*, the California Supreme Court determined that the standard of clear and convincing proof to determine whether it would be detrimental to return the child to its parent, is proper when dealing with severance of parent-child relationships.<sup>4</sup> Aligning themselves with many other jurisdictions,<sup>5</sup> the

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1. Before a 1976 amendment, § 232 of the California Civil Code required proof that the return of the child would be detrimental and that this proof must be beyond a reasonable doubt where a child had been separated from its parents for more than two years. See 1973 Cal. Stats. 1242, current version at CAL. CIV. CODE § 232 (West Supp. 1981). Still, cases dealing with other portions of the section held that a mere preponderance of the evidence would be sufficient. See *In re Rose G.*, 57 Cal. App. 3d 406, 420, 129 Cal. Rptr. 338, 346-47 (1976) (the court used a preponderance of the evidence standard in a § 232 proceeding); but see *In re Cynthia K.*, 76 Cal. App. 3d 81, 85-86, 141 Cal. Rptr. 875, 878 (1977) (the court rejected the preponderance standard); *In re Robert P.*, 61 Cal. App. 3d 310, 319, 132 Cal. Rptr. 5, 10 (1976) (court found that clear and convincing proof would be required in severance actions). See generally *In re B.G.*, 11 Cal. 3d 679, 523 P.2d 244, 114 Cal. Rptr. 444 (1974); *Alsager v. District Court of Polk City, Iowa*, 496 F. Supp. 10 (S.D. Iowa 1975). See also Comment, *Dependency Proceedings What Standard of Proof: An Argument Against the Standard of "Clear and Convincing,"* 14 SAN DIEGO L. REV. 1155 (1977).

2. 28 Cal. 3d 908, 623 P.2d 198, 171 Cal. Rptr. 637 (1981). Angelia, three months old, suffered severe physical and psychological injuries at the hands of her father, who was ultimately imprisoned for wilful cruelty. The child, removed to a foster home, was to return eventually to her mother even though her mother objected at first to her return. After her father had been released, Angelia's mother requested that custody be returned to them gradually. The court refused to order the return of the child and found that Angelia should be free from her parents' custody and control according to her best interests. Justices Tobriner, Mosk, and Clark concurred in an opinion written by Justice Richardson. Chief Justice Bird dissented, joined by Justice Newman.

3. Section 323 deals with several different situations where severance will be permitted. In only one of these designated situations is a standard of proof even prescribed. CAL. CIV. CODE § 232 (West Supp. 1981).

4. 28 Cal. 3d at 919, 623 P. 2d at 204, 171 Cal. Rptr. at 643.

5. See, e.g., *Danford v. Dupree*, 272 Ala. 517, 132 So.2d 734 (1961) (clear and satisfactory); *Hill v. Neely*, 242 Ark. 686, 415 S.W.2d 558 (1967) (clear and convincing); *Torres v. Van Eepoel*, 98 So. 2d 735 (Fla. 1957) (clear and convincing); *In re Overton*, 211 Ill. App. 3d 1014, 316 N.E.2d 201 (1974) (clear and convincing);

court rejects the argument that parental rights, fundamental in nature,<sup>6</sup> should require a higher standard, proof beyond a reasonable doubt.<sup>7</sup> The *Angelia P.* court reasoned that although parenting may be a fundamental right, it is still well established in California that the "best interests of the child" are of paramount importance.<sup>8</sup> Therefore, the court concluded that the clear and convincing proof "test is fully consistent with the goal of section 232 to provide 'the fullest opportunity to the parents for exercise of their rights not inconsistent with the ultimate best interests of the child.'"<sup>9</sup>

The court, in adopting the clear and convincing standard over the reasonable doubt standard, establishes that the child's best interests must be given significant weight. Therefore, *In re Angelia P.* facilitates the removal of children from their parents under certain circumstances,<sup>10</sup> with lesser deference given to parental rights.

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Henrickson v. Binkley, 161 Ind. App. 388, 316 N.E.2d 376 (1974), *cert. denied*, 423 U.S. 868 (1975) (clear and cogent); Ransom v. Mitchell, 193 So. 2d 359 (La. App. 1966) (strong and clear); Hollick v. McDaniel, 401 P.2d 466 (Okla. 1965) (clear and convincing); *In re Hernandez*, 249 Pa. Super. Ct. 274, 376 A.2d 648 (1977) (convincing); Calhoun v. Ruffer, 425 S.W.2d 50 (Tex. Civ. App. 1980) (clear and convincing); Walker v. Brooks, 203 Va. 417, 124 S.E.2d 195 (1962) (clear, cogent, and convincing); State ex rel. Kiger v. Hancock, 153 W. Va. 404, 168 S.E.2d 798 (1969) (cogent and convincing); Farwell v. Farwell, 33 Wis. 2d 324, 147 N.W.2d 289 (1967) (substantial).

6. See *Stanley v. Illinois*, 405 U.S. 645 (1972). The United States Supreme Court in *Stanley* established that a parent has a very strong and undeniable interest in raising his or her children. See generally *Skinner v. Oklahoma*, 316 U.S. 535 (1942); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

7. Proof beyond a reasonable doubt generally applies only in criminal cases, where the possibility of loss of liberty exists. See *In re Winship*, 397 U.S. 358 (1970). See generally Comment, *Does Due Process Require Clear and Convincing Proof Before Life's Liberties May be Lost?*, 24 EMORY L.J. 105 (1975); Note, *Proceedings to Terminate Paternal Rights: Too Much or Too Little Protection for Parents?*, 16 SANTA CLARA L. REV. 337 (1976).

8. See *In re Marriage of Carney*, 24 Cal. 3d 725, 730, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979); *In re Marriage of Mehlmauer*, 60 Cal. App. 3d 104, 109, 131 Cal. Rptr. 325, 328 (1976); *In re Reyna*, 55 Cal. App. 3d 288, 304, 126 Cal. Rptr. 138, 144 (1976); *Cheryl H. v. Superior Court*, 41 Cal. App. 3d 273, 278, 115 Cal. Rptr. 849, 852 (1974).

9. 28 Cal. 3d at 919, 623 P.2d at 204, 171 Cal. Rptr. at 643.

10. Among the circumstances enumerated in § 232 are those circumstances where the child has been deliberately abandoned, where the child has been abused or neglected, where the parents are alcoholic, drug addicts, or morally depraved, where parents are either developmentally disabled or mentally ill, where the child receives inadequate supervision because of parent's mental deficiency or illness, and where the child has been in a foster home or other institution for over two years. CAL. CIV. CODE § 232 (West Supp. 1981).

## B. CHANGE IN CHILD'S SURNAME

### 1. *Best Interests of the Child Standard: In re Marriage of Schiffman*

#### 1. INTRODUCTION

Since the adoption of the Uniform Parentage Act<sup>1</sup> in 1975, California courts have steadily redefined areas of family law dealing with the parent-child relationship. The Uniform Parentage Act had provided that, wherever possible, both parents were to be accorded the same rights and obligations concerning their relationships with their children.<sup>2</sup> A recent California case, *Donald J. v. Evna M.*,<sup>3</sup> applied this Act to the common law rule that the father will be given preference in determining a child's surname. In discrediting the old common law rule, the court in *Donald J.* stated:

With the adoption of the California Uniform Parentage Act no longer can it be said that a parent has a primary right or protective interest in having his or her child bear and maintain the parent's surname merely because of the parent's sex and marital status with respect to that child's other parent at the time the child is born.<sup>4</sup>

Taking this one step further, the California Supreme Court in *In re Marriage of Schiffman*<sup>5</sup> now expressly disaffirms the line of previously well defined cases<sup>6</sup> which had held that in disputes be-

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1. CAL. CIV. CODE §§ 7000-7021 (West Supp. 1981).

2. *Id.* §§ 7001,7002 (West Supp. 1981).

3. 81 Cal. App. 3d 929, 147 Cal. Rptr. 15 (1978). In *Donald J.* the father of an illegitimate child sought to have himself declared the father and have the child's surname changed to his own from that of the mother's. He was denied relief of trial, but on appeal was allowed to attempt proof of paternity, thereby possibly receiving a name modification.

4. *Id.* at 937, 147 Cal. Rptr. at 20.

5. 28 Cal. 3d 640, 620 P.2d 579, 169 Cal. Rptr. 918 (1980). Patricia C. Herdman and Jason A. Schiffman separated six months after their marriage on January 15, 1977. Upon petitioning for dissolution on August 4, 1977, Mrs. Schiffman registered the child as Aita Marie Herdman on her birth certificate. At the trial for dissolution on February 21, 1978, the court granted dissolution, awarding Mrs. Schiffman custody of the child. Further, the trial court ordered the child's surname to be changed to Schiffman and enjoined both parties from changing it. The trial court wrongly based its decision on "the traditional rule that the father has a 'primary right' or 'protectable interest' in having the minor child bear his surname even after the mother is awarded custody." *Id.* at 642, 620 P.2d at 580, 169 Cal. Rptr. at 919 (citations omitted).

6. *In re Trower*, 260 Cal. App. 2d 75, 66 Cal. Rptr. 873 (1968), found that in a suit to change a child's surname from that of the father to that of the mother's second husband, the court stated that even though a father's right to have a child bear his name is not absolute, it is both primary and protectable. *In re Worms*, 252 Cal. App. 2d 130, 60 Cal. Rptr. 88 (1976), found that where a mother wished to change her children's names from their father's to their step-father's in order to avoid difficulties at school, the court held such slight inconvenience, in the absence of the father's misconduct or definite detriment to the child, was insufficient when compared to the natural rights vested in the father. *Montandon v. Montandon*, 242 Cal. App. 2d 886, 52 Cal. Rptr. 43 (1966), was an action by a divorced father to have his children bear his surname and not that of the mother's second hus-

tween parents over a child's surname the father had a "primary right" and a "protectible interest" in the minor using the father's surname. The court in *Schiffman*<sup>7</sup> replaced this old common law rule with the standard for child custody disputes, *i.e.*, best interests of the child will prevail.<sup>8</sup>

## II. THE COURT'S DECISION

The court in *In re Marriage of Schiffman* felt that "the Legislature clearly has articulated the policy that irrational, sex based differences in marital and parental rights should end and that parental disputes about children should be resolved in accordance with the child's best interest."<sup>9</sup> The court pointed to several recent developments to support its position. To begin with, the legislature eliminated the maternal preference in child custody disputes in favor of an absolute "best interests" standard.<sup>10</sup> Also,

band, the court determined that the father had a genuine interest in having his children retain his name. *In re Larson*, 81 Cal. App. 2d 258, 183 P.2d 688 (1947), held that where a mother sought to change the name of her child from the father's to her second husband's, a primary right existed in the father which prevented such action absent at least some opportunity for the father to establish his right in having the child's surname remaining the same.

7. Justice Newman wrote the majority opinion for the court with Justices To-briner and Manuel concurring. In a separate concurring opinion Justice Mosk expressed his concern about the implementation of the new standard. Justice Mosk believed that a custodial parent should have the right to either select or change the name of any child in his or her custody as a part of the panoply of rights to be associated with custody. Therefore, a rebuttable presumption would exist that the custodial parent had acted in the child's best interest and the noncustodial parent would bear the burden of proving otherwise. Chief Justice Bird, in another concurring opinion, expressed a different concern. The Chief Justice was "concerned about the lack of a clear jurisdictional basis for the trial court's modification of a child's name in the course of a dissolution of marriage." *Id.* at 651, 620 P.2d at 586, 169 Cal. Rptr. at 925. The Chief Justice would look to the legislature to clarify whether jurisdiction exists.

8. The idea that the best interests of the child is controlling in child custody cases emerged early in California law. *Wand v. Wand*, 14 Cal. 512, 517 (1860). Since that time, a child's best interest has continued as the paramount consideration in custody disputes. *See e.g.*, *In re Marriage of Carney*, 24 Cal. 3d 725, 730, 598 P.2d 36, 38, 157 Cal. Rptr. 383, 385 (1979); *In re Marriage of Mehlmauer*, 60 Cal. App. 3d 104, 109, 131 Cal. Rptr. 325, 328 (1976); *In re Reyna*, 55 Cal. App. 3d 288, 304, 126 Cal. Rptr. 138, 144 (1976); *Cheryl H. v. Superior Court*, 41 Cal. App. 3d 273, 278, 115 Cal. Rptr. 849, 852 (1974).

9. 28 Cal. 3d at 645, 620 P.2d at 582, 169 Cal. Rptr. at 921.

10. CAL. CIV. CODE § 4600 (West Supp. 1981). The statute states, in pertinent part:

(a) The Legislature finds and declares that it is the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage,



sex differences affecting marital property rights were virtually eliminated.<sup>11</sup> Further, the adoption of the Uniform Parentage Act gave equal rights and obligations to both parents regardless of their marital status.<sup>12</sup>

Continuing this line of development, the court in *Schiffman* stated that the common law rule of paternal preference in surname disputes was abrogated by *Donald J.*<sup>13</sup> Still, the court in *Donald J.* held that in a situation, where the surname of a child has been the same for a long period of time, a court "should exercise its power to change the child's surname reluctantly, and only where the substantial welfare of the child requires the change."<sup>14</sup> This standard was much less flexible than the one ultimately adopted by the court in *Schiffman*.<sup>15</sup>

In *Schiffman*, the majority stated that the length of time a surname is used is only one of many considerations entering into the determination of the child's best interest.<sup>16</sup> Other considerations include "the effect of a name change on preservation of the father-child relationship, the strength of the mother-child relationship, and the identification of the child as part of a family unit."<sup>17</sup>

### III. CONCLUSION

The *Schiffman* decision not only changes the law in California but it also separates California from other common law jurisdictions.<sup>18</sup> The law in California no longer evidences a strong prefer-

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and to encourage parents to share the rights and responsibilities of child rearing to effect this policy.

(b) Custody should be awarded in the following order of preference according to the best interests of the child:

(1) To both parents pursuant to Section 4600.5 or to either parent. In making an order for custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child or children frequent and continuing contact with the noncustodial parent, and shall not prefer a parent as custodian because of that parent's sex.

*Id.*

11. CAL. CIV. CODE §§ 5100-5138 (West Supp. 1981).

12. CAL. CIV. CODE §§ 7000-7021 (West Supp. 1981).

13. 28 Cal. 3d at 645, 620 P.2d at 582, 169 Cal. Rptr. at 921.

14. 81 Cal. App. 3d at 937, 147 Cal. Rptr. at 20.

15. The *Donald J.* standard not only requires a change of circumstances, an important aspect in child custody disputes, but also requires substantial detriment to the child before a change can be effected.

16. 28 Cal. 3d at 647, 620 P.2d at 583, 169 Cal. Rptr. at 922.

17. *Id.* See generally Comment, *The Controversy over Children's Surnames: Familial Autonomy, Equal Protection and the Child's Best Interest*, 1979 UTAH L. REV. 303 (1979).

18. Several states still show a strong preference for allowing or ordering children to maintain their father's surname. Among these states are Maryland, New York, Ohio, Oklahoma, Oregon, and Tennessee. See e.g., *Hall v. Hall*, 30 Md. App. 214, 351 A.2d 917 (1976); *In re Cohn*, 181 Misc. 1021, 50 N.Y.S.2d 278 (1942); *Kay v.*

ence that a child maintain its father's surname in virtually all situations.<sup>19</sup> Also, the law does not require that the child's substantial welfare be at stake before a surname can be changed.<sup>20</sup> The *Schiffman* standard, determining the surname from the best interests of the child, is much more flexible. It will allow parents to more readily modify their child's surname with a showing that the change is in the child's best interest.

## VII. CALIFORNIA CONSTITUTION

### A. ARTICLE IV, SECTIONS 12(E) AND 17

#### 1. *Adjustment to State Employee's Salary: Jarvis v. Cory*

The court in *Jarvis v. Cory*<sup>1</sup> considered the constitutionality of a lump sum payment to certain state employees, based on work already performed, due to an alleged miscalculation in percentage salary increases.

The plaintiff, a taxpayer, sought a writ of mandate against the defendant, the California State Controller, declaring the salary appropriation bill unconstitutional and prohibiting the defendant from expending funds pursuant to the bill. The ground for the claim was that the bill violated the California constitutional provisions that preclude the legislature from enacting retroactive "extra compensation" for state employees<sup>2</sup> and from spending money that effects a future budget act before that act takes effect.<sup>3</sup>

Responding to the first contention, the court, in an opinion written by Justice Mosk, held that state employees salaries were a

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Bell, 95 Ohio App. 520, 121 N.E.2d 206 (1953); *Reed v. Reed*, 338 P.2d 350 (Okla. 1959); *Walberg v. Walberg*, 22 Or. App. 118, 538 P.2d 96 (1975); *Pendraz v. Pendraz*, 35 Tenn. App. 284, 245 S.W.2d 204 (1951). See generally Calson, *Surname of Married Women and Legitimate Children*, 17 N.Y.L.F. (1971).

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

20. See note 15 *supra* and accompanying text.

1. 28 Cal. 3d 562, 620 P.2d 598, 170 Cal. Rptr. 11 (1980).

2. The California Constitution provides: "The legislature has no power to grant . . . extra compensation or extra allowance to a public officer, public employee, or contractor after service has been rendered or a contract has been entered into and performed in whole or in part." CAL. CONST. art. 4, § 17.

3. Until the budget bill has been enacted, the Legislature shall not send to the Governor for consideration any bill appropriating funds for expenditure during the fiscal year for which the budget bill is to be enacted, except emergency bills recommended by the Governor or appropriations for the salaries and expenses of the Legislature. CAL. CONST. art. 4, § 12(e).

matter of “legitimate on-going dispute and uncertainty” and could therefore be adjusted retroactively without violating the constitution. The second claim was also dismissed because the funds appropriated by the bill were part of a budget which had been enacted long before the enactment of the bill. The delay on the budget taking effect, however, was caused by a veto exercised by the governor and a subsequent override of that veto by the legislature. The plaintiffs final contention was that the lump-sum payment of back-salary constituted a gift of public funds serving no substantial public purpose. This was countered by the finding that such lump-sum payments do serve a public purpose by ensuring continued recruitment and retention of qualified employees and avoid legal disputes over equal protection claim.<sup>4</sup>

Justice Richardson dissented to the holding by the majority that the lump-sum payment did not constitute “extra compensation,” prohibited by the California Constitution. The dissent’s argument was that the uncertainty, salary levels were fixed and readily ascertainable.<sup>5</sup>

## VIII. CRIMINAL LAW

### A. COMMON LAW CRIMES

#### 1. *Public Policy behind Compounding Crimes: Hoines v. Barney’s Club, Inc.*

The Supreme Court of California in *Hoines v. Barney’s Club, Inc.*<sup>1</sup> established a modern interpretation of the common law crime known as “compounding crimes.” The compounding of crimes occurs when one frustrates the performance of justice.

In *Hoines*, the plaintiff was arrested by the defendant’s employ-

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4. 28 Cal. 3d at 578-79 n.10, 620 P.2d at 608 n.10, 170 Cal. Rptr. at 21 n.10. The court cites *Sonoma County Organization of Pub. Employees v. County of Sonoma*, 23 Cal. 3d 296, 591 P.2d 1, 152 Cal. Rptr. 903 (1979) as a potential basis for an equal protection claim although the court found it unnecessary to reach the merits of that claim due to the pay raise within.

The claim that the payment made was invalid as a gift rests under a provision of the California Constitution prohibiting any gift of public funds that serves no substantial public purpose. CAL. CONST. art 16, § 6. In *county of Alameda v. Carleson*, 5 Cal. 3d 730, 488 P.2d 953, 97 Cal. Rptr. 38 (1971), the court found that lump-sum payments for the continued operation of both recruitment and retention of qualified employees was a reasonable basis for such payment. *See also* *San Joaquin County Employee’s Ass’n., Inc. v. County of San Joaquin*, 39 Cal. App. 83, 87-88, 113 Cal. Rptr. 912, 916-917 (1974).

5. 28 Cal. 3d at 582, 620 P.2d at 610, 170 Cal. Rptr. at 23. Justice Richardson found no basis for the claim that the employee’s salaries were uncertain other than general economic considerations that are normally found. He also found that there were no ongoing negotiations that would indicate that the salary levels were not fixed.

1. 28 Cal. 3d 603, 620 P.2d 628, 170 Cal. Rptr. 42 (1980).

ees for disturbing the peace and was incarcerated in a county jail for approximately two hours before being released. Claiming inadequate grounds for the arrest, the plaintiff brought suit against the defendants alleging assault, battery, false imprisonment, malicious prosecution, and intentional infliction of emotional distress. A discussion between the plaintiff and the assistant district attorney occurred during which the assistant district attorney informed the plaintiff that he would be willing to dismiss the charge against the plaintiff, if the plaintiff would sign a release of all claims against other parties involved in the arrest. This dismissal, the plaintiff claims, constitutes a separate crime known as compounding a crime under the common law. Justice Clark, writing for the majority, explained that the assistant district attorney was vested with the authority to make judgments regarding whether or not to file formal charges against a defendant.<sup>2</sup> He then defined the crime as being limited to the situation where one receives consideration pursuant to an agreement to frustrate the prosecution of certain criminal conduct.<sup>3</sup> The majority distinguished the definition from the present situation by noting that no real compensation was rendered to the public official and that the dismissal of the criminal charge for the release of civil liability did not contravene public policy as expressed in the statute defining compounding crimes.<sup>4</sup>

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2. 28 Cal. 3d at 611, 620 P.2d at 633, 170 Cal. Rptr. at 47. The court analogized the present situation with that in *People v. Tenorio*, 3 Cal. 3d 89, 473 P.2d 993, 89 Cal. Rptr. 249 (1970). In *Fenorio*, the court found that the prosecutor is vested with the discretion to pursue or forego prosecution in any given case based upon an examination of the circumstances of the particular case before him.

3. See CAL. PENAL CODE § 153 (West 1981). In *Bowyer v. Burgess*, 54 Cal. 2d 97, 351 P.2d 793, 4 Cal. Rptr. 521 (1960), the California Supreme Court established that it is a crime for any person having knowledge of the actual commission thereof to agree to compound or conceal such crime or to abstain from any prosecution thereof and an agreement not to prosecute a person for a crime is illegal and void. See also Comment, *Compounding Crimes*, 27 HASTINGS L.J. 175 (1975).

4. 28 Cal. 3d at 613-14, 620 P.2d at 634, 170 Cal. Rptr. at 48. The court employs the case of *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970) for promoting the rationale behind release-dismissal transactions. Although *West* involved plea bargaining, the court viewed the principles advanced by *West* as being directly applicable to the present situation.

## IX. TORTS

### A. DEFENSES

#### 1. *Fireman's Rule Extended to Police Officers: Hubbard v. Boelt*

In the case of *Hubbard v. Boelt*,<sup>1</sup> the court was presented with the question: Does the "fireman's rule" bar recovery by a police officer who was injured during a high-speed chase of a reckless traffic offender?<sup>2</sup>

Although the California Vehicle Code<sup>3</sup> makes it a misdemeanor to willfully disregard an officer's siren and red light and the California Penal Code<sup>4</sup> forbids the use of force to resist arrest, these statutes were not designed to protect a police officer from injuries occurring in the line of duty. This policy is known as the "fireman's rule"<sup>5</sup> which originally provided that negligence in causing a fire furnishes no basis for liability to professional fireman injured during the fire. The *Hubbard* case, in an opinion written by

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1. 28 Cal. 3d 480, 620 P.2d 156, 169 Cal. Rptr. 706 (1980).

2. *Id.* at 483, 620 P.2d at 157, 169 Cal. Rptr. at 707. Hubbard was operating speed detection equipment when the defendant passed by at 50 miles per hour in a 25 mile per hour speed zone. The plaintiff immediately activated his emergency lights and siren and began pursuit. The defendant accelerated to avoid arrest and exceeded speeds of 100 miles per hour. While passing another vehicle on a blind curve, the defendant collided with a third vehicle and caused debris to be scattered all over the highway. The plaintiff approached the accident sight at a high speed and left the road when trying to avoid the debris. The plaintiff's suit is based on the defendant's negligent and reckless operation of his motor vehicle, proximately causing the plaintiff's injuries.

3. See CAL. VEH. CODE § 2800.1 (West Supp. 1981). This section provides:

Every person who, while operating a motor vehicle, hears a siren and sees at least one lighted lamp exhibiting a red light emanating from a vehicle which is distinctively marked and operated by a member of the California Highway Patrol or any peace officer of any sheriff's department or police department wearing a distinctive uniform and who with the intent to evade the officer, willfully disregards such siren and light, and who flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor.

4. See CAL. PENAL CODE § 148 (West 1970). In pertinent part it states:

Every person who wilfully resists, delays or obstructs any public officer, in the discharge or attempt to discharge any duty of his office, when no other punishment is prescribed, is punishable by a fine not exceeding one thousand dollars, or by imprisonment in a county jail not exceeding one year, or both such fine and imprisonment.

5. The court outlined the rationale behind the "fireman's rule" as being based upon (1) the traditional principle that one who has knowingly and voluntarily confronted a hazard" cannot recover for injuries sustained thereby, . . . and (2) a public policy to preclude tort recovery by firemen or policemen who are presumably adequately compensated (in special salary, retirement, and disability benefits) for undertaking their hazardous work.

28 Cal. 3d at 482, 620 P.2d at 158, 169 Cal. Rptr. at 708.

Justice Richardson, extended the applicability of the "fireman's rule" to police officers. The decision was described as being consistent with public policy in light of the related statutory provisions.<sup>6</sup>

DRAGO C. BARIC  
WILLIAM C. BOLLARD

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6. 28 Cal. 3d at 486, 620 P.2d at 160, 169 Cal. Rptr. at 710.

