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Case Notes

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CASE NOTES

CONSTITUTIONAL LAW—NEWS MEDIA HAVE NO CONSTITUTIONAL RIGHT OF ACCESS TO A COUNTY JAIL DIFFERENT FROM OR GREATER THAN THAT ACCORDED THE PUBLIC GENERALLY—*Houchins v. KQED, Inc.*, 98 S. Ct. 2588 (1978).

On March 31, 1975, KQED, a licensed television and radio broadcasting station, reported the suicide of a prisoner in Greystone, the maximum security unit of the Alameda County Jail at Santa Rita. KQED requested permission to inspect and to take pictures in Greystone where the suicide occurred. Thomas L. Houchins, who as Sheriff of Alameda County controlled all access to the jail, refused permission. The Sheriff advised KQED that it was his policy not to allow any access to the jail by the news media.[1]

KQED and the Alameda and Oakland Branches of the NAACP filed suit under 42 U.S.C. § 1983,[2] alleging that the Sheriff's policy of "denying KQED and the public" access to the jail violated the first and fourteenth amendments. This right of access had been abridged, they argued, because the Sheriff had refused to permit media access and had provided no "means by which the public may be informed of conditions prevailing in Greystone or by which the prisoners' grievances may reach the public."[3] Preliminary and permanent injunctive relief was sought to prevent the Sheriff from "excluding KQED news personnel from the Greystone cells and Santa Rita facilities and genrally preventing full and accurate news coverage of the conditions prevailing therein."[4]

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1. Houchins v. KQED, Inc., 98 S. Ct. 2588, 2599-2600 (1978).

2. 42 U.S.C. § 1983 (1974) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. 98 S. Ct. at 2600.

4. *Id.* at 2591. In 1972, KQED broadcast a report of a district court decision wherein the court concluded, after a visit to Greystone, that the "shocking and debasing conditions which prevailed there constitute cruel and unusual punishment for man or beast as a matter of law." *Id.* at 2599, *citing* Brenneman v. Madigan, 343 F. Supp. 128, 133 (N.D. Cal. 1972). The *Brenneman* court ordered the sheriff and the board of supervisors to "take whatever steps were necessary" to alleviate those conditions and

At the time suit was filed, neither the press nor the public had access to the areas where prisoners were confined, and no public tours were conducted through any part of the jail.[5] Two days after the suit was initiated, the Sheriff proposed an experimental public tour program to the county board of supervisors. Six monthly guided tours were announced shortly thereafter. Tours were limited to twenty-five people; no cameras, tape recorders or inmate interviews were allowed. Inmates were generally removed from view, and the Greystone portion of the jail was closed to the tours.[6]

An evidentiary hearing was held on the motion for preliminary injunction after the first four tours had taken place.[7] The district court rejected the Sheriff's claim that the media policy then in effect was necessary to protect the privacy of inmates and to minimize problems of security and administration.[8] It found that the experience at other jails indicated a "more flexible press policy at Santa Rita was both desirable and attainable."[9] The court issued a preliminary injunction restraining the Sheriff "from excluding as a matter of general policy plaintiff KQED and responsible representatives of the news media from the Alameda County jail facilities at Santa Rita, including the Greystone portion thereof, or from preventing KQED and responsible representatives of the news media from providing full and accurate coverage of the conditions prevailing therein."[10] The injunction allowed KQED to use cameras and sound equipment and to interview inmates. It further allowed KQED access to the jail at "reasonable times and hours," reserving to the Sheriff the discretion to exclude the press "for the duration of those limited periods when tensions in the jail make such media access dangerous."[11]

On interlocutory appeal, the Court of Appeals for the Ninth Circuit affirmed. In three separate opinions, it held that the district court had not abused its discretion by issuing an injunction that, on its face, granted greater access to the media

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to make continued reports to the court. *Id.* Presumably some further changes occurred following the *Brenneman* decision.

5. 98 S. Ct. at 2603, 2603 n.14.

6. *Id.* at 2592.

7. *Id.* at 2601.

8. *Id.* at 2593.

9. *Id.*

10. Houchins v. KQED, Inc., 429 U.S. 1341 (1977) (Rehnquist, Cir. J.) (order for stay pending petition for certiorari).

11. *Id.* at 1342.

than was afforded the general public on the monthly tours.[12]

The appellate court rejected the Sheriff's argument that the "no greater access" doctrine of *Pell v. Procunier*[13] and *Saxbe v. Washington Post*[14] was controlling. In *Pell,* an absolute ban on interviews of inmates in state prisons by representatives of the media was imposed following an escape attempt at San Quentin, which prison officials regarded as the climax of disciplinary problems caused at least in part by a liberal press interview policy and the ensuing notoriety of a few inmates.[15] *Saxbe* involved a similar ban on interviews of federal prison inmates.[16] In both cases, the Supreme Court upheld the bans, finding that since they applied to the public, as well as the media, there was no abridgement of the first amendment's protection of the press: "Newsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."[17] The appellate court interpreted *Pell* as holding simply "that the news media's constitutional right of access to prisons or their inmates is coextensive with the public's right."[18] It recognized that the press and the public have different needs of access and create different kinds of administrative problems, and concluded that the implementation of their correlative constitutional rights is not required, under *Pell,* to be implemented identically.[19]

The Supreme Court reversed by a 4-3 decision. Chief Justice Burger wrote for the Court, joined by Justices White and Rehnquist. Justice Stewart filed a separate opinion concurring in the result but dissenting in the rationale. Justices Marshall

12. KQED, Inc. v. Houchins, 546 F.2d 284, 286 (9th Cir. 1976).

13. 417 U.S. 817 (1974).

14. 417 U.S. 843 (1974).

15. 417 U.S. at 831-32.

16. 417 U.S. at 848.

17. 417 U.S. at 834, 835. *See also* 417 U.S. at 846, 849. However, two factors were present in both *Pell* and *Saxbe* which may have influenced the Court's decision. First, in both cases, the media had substantially greater access to prisons and their inmates than did the public at the time the prohibitions were issued, including the ability to visit maximum security sections of any prison facility and to interview randomly-encountered inmates. 417 U.S. at 831; 417 U.S. at 847, 849. Second, in both cases the Court noted that the regulations were not issued as a part of any attempt to conceal prison conditions from the public. 417 U.S. at 830; 417 U.S. at 848.

18. 546 F.2d at 285-86.

19. *Id.* at 286. The court admitted that the trial court had only "implicitly" found that the first amendment rights of the public had been abridged, but that it had nonetheless applied the proper test to determine whether those rights had been infringed: whether the restriction furthered a substantial government interest unrelated to suppressing speech and whether it was the least drastic means of furthering that interest. *Id.*

and Blackmun did not participate.

On appeal, KQED linked the right to gather news, constitutionally guaranteed under *Pell* and *Branzburg*,[20] with the constitutionally protected right to receive information. From this link they attempted to forge an implied special right of access by the media to sources of information under the government's control. This right of access, they argued, was implied from and constitutionally compelled by the right to gather news and the right to receive information. The Supreme Court broke that link. In two simple declaratory sentences, the Court concluded that:

> The right to *receive* ideas and information is not the issue in this case . . . . The issue is a claim (sic) special privilege of access which the Court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish.[21]

KQED further claimed that language in *Grosjean v. American Press Co.*[22] and *Mills v. Alabama*[23] noting "the importance of an informed public as a safeguard against 'misgovernment' and the crucial role of the media in providing (that) information" provided further support for their claimed right of access.[24] The Court agreed that prison conditions are a matter "of great public importance," and noted that the press has traditionally played a powerful role in informing public opinion about the operation of public institutions.[25] Nonetheless, the Court declared, no basis was thereby afforded

> for reading into the Constitution a right of the public or the media to enter these institutions, with camera equipment, and take moving and still pictures of inmates for broadcast purposes. This Court has never intimated a First Amendment guarantee of a right of access to all sources of information within government control.[26]

The Court then analyzed its decisions in *Grosjean* and *Mills*. *Grosjean* involved a state tax on the advertising revenues of newspapers, which was successfully challenged on the basis that its purpose was to curtail the publication of selected news-

20. Branzburg v. Hayes, 408 U.S. 665, 681, 707 (1972).
21. 98 S. Ct. at 2596.
22. 297 U.S. 233 (1936).
23. 384 U.S. 314 (1966).
24. 98 S. Ct. at 2593.
25. *Id.*, *citing* Pell v. Procunier, 417 U.S. at 830 n.7.
26. 98 S. Ct. at 2594.

papers. *Mills* involved a statute which made it a crime to publish editorials about election issues on election day. The Court found that in each of these cases the issue was the freedom of the press to communicate information *once the information was received.* The Court insisted that neither the language nor the rationale of these cases could be read as implying a first amendment right to compel disclosure of information from any source. On the contrary, the Court stated, both *Branzburg* and *Pell* explicitly assume that the press has *no* constitutional right of access to information which has not been made available to the public.[27]

The Court concluded by noting that other means exist whereby the public can learn of problems in penal facilities, such as citizen task forces and grand juries, and firmly deferred to the legislative process for the proper resolution of the extent to which prisons should be open to public inquiry. The Court expressed its concern that the absence of constitutional guidelines and statutory standards would invite "hundreds of judges . . . to fashion ad hoc standards . . . according to their own ideas of what seems 'desirable' or 'expedient.'"[28] It therefore rejected the court of appeals' "conclusory assertion that the public and the media have a First Amendment right to government information regarding the conditions of jails and their inmates *and presumably all other public facilities such as hospitals and mental institutions.*"[29] (emphasis added)

The Court specifically held that neither the first nor the fourteenth amendment requires disclosure of information under government control and that "until the political branches decree otherwise, as they are free to do, the media has no right of special access to the Alameda County jail different from or greater than that accorded the public generally."[30]

Justice Stewart, who wrote the Court's opinions in *Pell* and *Saxbe,* filed a concurring and dissenting opinion. Stewart found that by allowing KQED to enter the Greystone portion of the jail and to interview inmates, the preliminary injunction issued by the district court gave greater access to the press than was available to the public. He therefore agreed that the injunction exceeded constitutional bounds and cast the deciding vote to reverse. He also agreed "substantially" with Chief Jus-

27. *Id.* at 2595.
28. *Id.* at 2597.
29. *Id.*
30. *Id.*

tice Burger that the first and the fourteenth amendments do not guarantee to the public a right of access to government controlled information nor do they guarantee to the press any basic right of access superior to that of the public.[31] However, he disagreed that the concept of *equal access* means *identical access*. The separate constitutional protection of the press acknowledges its crucial role in informing the public, he said. The Constitution therefore requires sensitivity to the special needs of the press in performing that role effectively. Stewart therefore found that the first and fourteenth amendments required the Sheriff to give KQED *effective* access to the same areas and sources of information available to the general public.[32] Accordingly, he believed that KQED was entitled to limited injunctive relief on remand, including the use of cameras and sound equipment and more flexible and frequent entry.[33]

Justices Stevens, Brennan and Powell dissented. They argued that the proper focus of the Court's inquiry should have been on the *public's* right to be informed about prison conditions, and whether that right was impermissably abridged by the Sheriff's policies in effect at the time litigation was commenced. From this perspective, they argued, *Pell* and *Saxbe* do not apply. The issue was not whether the press had any greater access to the prison than the public; the issue was whether a state policy which entirely excluded the press from observing and reporting on prison conditions could be constitutionally justified because that same policy also excluded the public. In a three step analysis, the dissent found that it could not.

They first found that the first amendment protects both the receipt of information and the important societal function served by an informed public.[34] They next found that information gathering is entitled to some measure of constitutional protection in order to insure a fully informed citizenry.[35] Lastly,

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31. *Id.* at 2598.

32. *Id.*

> [T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.
>
> . . . The sheriff evidently assumed that he could fulfill this obligation simply by allowing reporters to sign up for tours on the same terms as the public. I think he was mistaken in this assumption, as a matter of constitutional law.

Id.

33. *Id.* at 2598-99.

34. *Id.* at 2605.

35. *Id.*

they found that the flow of information to the public about prisons warranted "special protection" because of the unique function of prisons in a democratic society—as publicly funded and administered agencies and as an important part of the constitutionally guided criminal justice system.[36] The dissent concluded that the Sheriff's policy of denying access to the press abridged both the public's right to be informed and the freedom of the press and thereby violated the first and fourteenth amendments.[37] The dissent further argued that relief was properly granted to KQED on the basis of its harm and need not have awaited specific relief to the public.

Houchins emanated from a deeply divided Court—divided in approach and in concept. Insofar as only three Justices joined in the whole of the opinion, it has limited precedential value. These three Justices—Burger, White and Rehnquist—specifically affirmed the holdings in *Branzburg*, *Pell* and *Saxbe*: that the news media has no constitutional right of access to information that is not available to the public generally. Justice Stewart agreed in principle, though citing neither *Pell* nor *Saxbe*, and *Branzburg* only insofar as it recognized the value of an informed citizenry. But he disagreed sharply with the Chief Justice's position that equal access means identical access—a concept which would substantially narrow the right of the press to gather information. Stewart's dissent notwithstanding, three Justices expanded *Pell* and *Saxbe* and held unequivocably that the press has no constitutional right of access to prisons which is any different, in degree or in kind, from that which has been granted to the public.

Yet the Court refused to find any constitutional basis or to consider any constitutional guidelines for a public right of access to such information. By equating a press right of access to information under the government's control with the public's right of access, the Court seemingly defined one unknown in terms of another.

Moreover, the Court ignored the constitutionally distinct protection of the press. By refusing to allow the right of the press to gather information to be linked to the right of the public to receive information, the Court was able to state that no fundamental right of access to information could be independently derived from the right to gather information. Since

36. *Id.* at 2608-09.
37. *Id.* at 2609.

no fundamental right was involved, no balancing of state interests against that right need be accomplished.

The troubling aspect of this line of reasoning is the implication that, absent a statutory provision, a government agency may choose not to disclose *any* information to the public about its operation and be free from constitutional scrutiny.

Susan Kirk

EMPLOYMENT/SEX DISCRIMINATION—PENSION FUND CONTRIBUTION DIFFERENTIALS BASED ON SEX ARE DISCRIMINATORY—*City of Los Angeles, Department of Water and Power v. Manhart,* 435 U.S. 702 (1978).

The female employees of the Los Angeles Department of Water and Power (hereinafter "Department") objected to making larger contributions than male employees to its pension plan for the same benefits. The Department based its rate of contribution on mortality tables which demonstrated a longer life expectancy for women as a class. The difference in contribution was substantial. A female employee might contribute $18,171, while a male employee, similarly situated, would contribute only $12,843.

In 1973, five female employees[1] filed a class action-sex discrimination suit in the United States District Court for the Central District of California against the Department as employer.[2] The women argued that differential contributions based on sex violated section 703(a)(1) of Title VII of the Civil Rights Act of 1964[3] (hereinafter "Title VII" or "Civil Rights Act"). They sought an injunction and restitution of excess contributions.

The district court, ruling for the plaintiffs, held that the Department's use of contribution differentials constituted sex discrimination in violation of section 703(a)(1) of Title VII.[4] The court ordered a refund of all excess contributions made before a 1975 amendment to the Department's pension plan.[5]

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1. The union to which the women belonged, the International Brotherhood of Electrical Workers, Local Union No. 18, was also a plaintiff in th action. City of Los Angeles, Dept. of Water & Power v. Manhart, 435 U.S. 702, 706 n.7 (1978).

2. The action was brought under Title VII of the Civil Rights Act which provides in part:

> It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

42 U.S.C. § 2000e-2(a)(1)(1964).

3. *Id.*

4. 435 U.S. at 706.

5. While the district court action was pending, the California Legislature enacted a law that prohibited some municipal agencies from charging female employees higher contributions for pension funds than they charged male employees. CAL. GOV'T CODE § 7500 (West Supp. 1977). Prior to that, the Department had no notice that its pension plan was discriminatory. Accordingly, the Department amended its plan to require equal contributions from males and females, effective January 1, 1975. 435 U.S. at 706.

The district court awarded retroactive relief to the female employees for the period from April 5, 1972, to January 1, 1975. *Id.*

The United States Court of Appeals for the Ninth Circuit affirmed the decision of the lower court, and the United States Supreme Court granted certiorari.

Challenging the lower court's ruling, the Department argued that because the difference in take-home pay was offset by the difference in pension benefits, there was no discriminatory effect. Thus, a Title VII claim of discrimination must fail.[6] The Department further argued that the contribution differential, based on longevity not sex, was permissible under the Equal Pay Act.[7] In addition, the Department contended that the Supreme Court case of *General Electric Company v. Gilbert,*[8] which held that the exclusion of pregnancy from an employer's disability plan is not sex discrimination under Title VII, required reversal of *Manhart.*[9] Finally, the Department asserted that even if the Court were to find discrimination in the present instance, the award of retroactive relief was unjustified.[10]

Affirming the decision of the circuit court, the Supreme Court held that the use of contribution differentials based on sex in an employer-operated pension plan violated section 703(a)(1) of the Civil Rights Act.[11] The Court also ruled that appellant's reliance on the Equal Pay Act was inappropriate where the facts clearly indicate that the contribution differentials were based solely on the factor of sex.[12] Additionally, the Court held that *Gilbert,* which dealt with discrimination on the basis of a physical disability, was not controlling.[13] Lastly, the Court held that the district court gave insufficient attention to the relief issue and remanded it for further consideration.[14]

In discussing whether the contribution differentials based on sex violated Title VII, the Court first examined the use of class characteristics in making discriminatory employment decisions. It pointed out that the disparate treatment of female employees involved a generalization that both parties accepted as true: women as a class live longer than men. However, the

6. 435 U.S. at 707.

7. 29 U.S.C. § 206(d) (1968). The Equal Pay Act became part of Title VII through the Bennett Amendment. 42 U.S.C. § 2000e-2(h) (1964). *See also* 110 CONG. REC. 13647 (1964).

8. 429 U.S. 125 (1976).

9. 435 U.S. at 707.

10. *Id.*

11. *Id.* at 711.

12. *Id.*

13. *Id.* at 714-15.

14. *Id.* at 719.

language of Title VII prohibits discrimination "against any individual. . . ."[15] Because the language of the statute clearly demands individual scrutiny, the Court rejected the use of general class characteristics, even if the generalization about the class were true.

The Court summarily dismissed appellant's claim that the class of females would be subsidized by the class of males if they were all required to make equal contributions. The question of fairness, the Court noted, is a policy matter for the legislature. The Court found the language of Title VII required fairness to the individual and not fairness to a class and found no congressional intent to make an exception of employee group insurance coverage. Thus, the Court ruled that, since the language and policy of Title VII requires individual scrutiny, the use of contribution differentials based on sex violated section 703(a)(1) of the Civil Rights Act.[16]

Next, the Court discussed whether the contribution differentials were exempted by the Equal Pay Act.[17] The Equal Pay Act permits unequal treatment of the sexes where such treatment is based on "any factor other than sex."[18] In the present case, the Court could find no evidence in the record that any factor other than the employee's sex was taken into account in calculating the differential. Hence, the Court held that the Department's plan did not fall within the Equal Pay Act exception.[19]

Turning to appellant's third contention, the Court examined whether the rationale of *General Electric Co. v. Gilbert*[20] required reversal. *Gilbert* held that the exclusion of pregnancy from an employer's disability benefit plan did not constitute sex discrimination within the meaning of Title VII. The Court distinguished *Gilbert* by noting that it permitted discrimination on the basis of a special physical disability, namely, pregnancy. Discrimination occurred between pregnant women and non-pregnant persons. In the present case, however, discrimination was based on sex; each group was exclusively composed of members of the same sex. The Court thus refused to apply the rationale of *Gilbert* where an employment practice on its

15. 42 U.S.C. § 2000e-2(a)(1) (1964).
16. 435 U.S. at 709.
17. 29 U.S.C. § 206(d) (1966).
18. *Id.*
19. 435 U.S. at 711-14.
20. 429 U.S. 125 (1976).

face discriminates against all female employees.[21]

The Court emphasized that the absence of a discriminatory effect in the distribution of benefits did not prevent a finding of discrimination where the Department's plan discriminated on its face. Lastly, the Court ruled out the availability of a cost-justification defense whereby appellant argued that the greater cost of providing benefits to women as a class justifies their greater rate of contribution. The Court pointed out that neither Congress nor the courts have recognized such a defense under Title VII.

Finally, the Court examined whether the awarding of retroactive relief was justified. The Court cited *Albemarle Paper Co. v. Moody*[22] as establishing a presumption in favor of retroactive liability in Title VII cases. The presumption, however, as the Court pointed out, does not relieve a lower court from determining whether retroactive relief is appropriate in a particular case.

The Court focused on several factors which the lower courts failed to consider in granting retroactive relief. The most significant factor to the Supreme Court was the potential impact such an award under Title VII would have on insurance and pension funds. If, as the lower courts contemplated, the award were to come from the pension fund itself, the impact would ultimately fall on employees faced either with increased contributions or reduced benefits. The foreeseeable impact persuaded the Court to conclude that Title VII should not apply retroactively with respect to insurance and pension funds unless Congress clearly commanded such a result. Since Title VII does not require the award of retroactive relief, the Court held that the lower courts erred in granting the award before adequately determining its appropriateness.[23]

The *Manhart* Court explicitly restricted its holding to unequal contributions made by male and female employees to an employee-operated pension fund. It emphasized that Congress did not intend to revolutionize the insurance industry through Title VII legislation. Thus, the decision does not invalidate certain existing insurance and pension plan practices. Nor does it affect insurance companies who consider the composition of the employer's work force to determine the probable cost of a retirement or benefit plan.[24]

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21. 435 U.S. at 716-17.
22. 422 U.S. 405 (1975).
23. 435 U.S. at 718-19.
24. *Id.* at 717-18.

Even though the *Manhart* decision is narrow, its impact is significant in two areas. The first involves the nature of sex discrimination. Prior to *Manhart,* sex discrimination cases involved inaccurate stereotypes, not valid actuarial tables. Given *Manhart,* actuarial tables, even if they describe a true generalization about the sexes, may not be used as the basis for requiring differential contributions in employer-operated pension plans.

The second area involves retroactive relief. Women who have suffered discrimination by paying larger contributions than men to pension plans will likely be denied retroactive relief where such an award would undermine the pension fund and, ultimately, employee benefits.

Anita Paleologos

PLEA BARGAINING—OFFERING DEFENDANT ALTERNATIVE OF PLEADING GUILTY OR BEING REINDICTED ON A MORE SERIOUS CHARGE DOES NOT VIOLATE CONSTITUTIONAL DUE PROCESS—*Bordenkircher v. Hayes*, 434 U.S. 357 (1978).

The defendant, Hayes, was indicted by a Kentucky state grand jury on a charge of uttering a forged instrument, an offense punishable by a term of two to ten years.[1] After his arraignment, Hayes, his counsel, and the state prosecutor held pretrial conferences to discuss a possible plea agreement. The prosecutor offered to recommend a five-year prison sentence if Hayes would plead guilty. Hayes was warned that if he did not plead guilty, the prosecutor would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act.[2] A conviction under this act would subject Hayes to a mandatory life sentence by reason of his two prior felony convictions.[3] Hayes did not plead guilty, and the prosecutor obtained an indictment charging him under the Habitual Criminal Act. Hayes was convicted on the forgery charge, found to have been twice convicted of prior felonies, and was sentenced to life imprisonment as required under the Habitual Criminal Act.

The Kentucky Court of Appeals upheld Hayes' life sentence, holding that the prosecutor's reindictment of Hayes under the Habitual Criminal Act was a legitimate use of his plea bargaining leverage. Based on the same reasoning, the United States District Court for the Eastern District of Kentucky denied Hayes' petition for a writ of federal habeas corpus.

The Sixth Circuit Court of Appeals reversed the district court, holding that Hayes had been denied his right to due process of law. The court stated that to permit a prosecutor to enhance a charge against a defendant who refuses to plead

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1. KY. REV. STAT. § 434.130 (repealed 1974) (current version at KY. REV. STAT. §§ 516.020, -.030 (1975)).

2. *Id.* § 431.190 (repealed 1974) (current version at KY. REV. STAT. § 532.080 (1977 Interim Supp.)).

3. Hayes testified that his two prior felony convictions were:

1) In 1961, at 17 years of age, he pleaded guilty to a charge of detaining a female, for which he spent 5 years in the state reformatory.

2) In 1970 he was convicted of robbery and sentenced to 5 years in prison and immediately released on probation.

Borderkircher v. Hayes, 434 U.S. 357, 359 n.3 (1978).

guilty allows the "potential for impermissible vindictiveness" in the use of the prosecutor's discretion.[4] The court found that the prosecutor acted vindictively in this case because he conceded that the reindictment was motivated by his sole desire to obtain a guilty plea. Accordingly, the circuit court ordered Hayes' sentence discharged, except for a lawful sentence for the crime of uttering a forged instrument.

The United States Supreme Court granted certiorari and reversed the court of appeals. In a 5-4 decision, the majority, in an opinion written by Justice Stewart, held that a prosecutor's presentation to the defendant of the alternative of pleading guilty, or facing reindictment on a more serious charge, did not violate constitutional due process.[5]

The Supreme Court was faced with the issue of whether the concept of prosecutorial vindictiveness as a violation of due process can be applied to a plea bargaining situation. The principle of unconstitutional vindictiveness was first announced in *North Carolina v. Pearce*,[6] where the defendant received a harsher sentence at a new trial after he successfully attacked his first conviction. Unconstitutional vindictiveness was also found in *Blackledge v. Perry*,[7] where a prosecutor reindicted a convicted misdemeanant on a felony charge after the defendant exercised his right to appeal his misdemeanor conviction and obtain a trial *de novo*. In both cases, the Court ruled that impermissible vindictiveness was present because the state unilaterally imposed a penalty on a defendant who exercised a legal right to attack his original conviction.

In the present case, the Court found that the concept of vindictiveness is not applicable to the plea bargaining situation, reasoning that in the "give and take" process between the prosecutor and defendant there can be no element of retaliation, for an accused is free to accept or reject a prosecutor's offer. If one accepts the legitimacy of plea bargaining, it necessarily follows that the defendant's plea decision is constitutionally voluntary. It also must follow that the prosecutor's interest in inducing guilty pleas is constitutionally recognized as a permissible element of the plea bargaining system.

The Court held that the prosecutor's discretion may properly extend to any charge on which he has probable cause to

4. Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976).
5. 434 U.S. at 366.
6. 395 U.S. 711 (1969).
7. 417 U.S. 21 (1974).

indict. The discretion is valid as long as it is not based on unjustifiable standards, such as race, religion, or other arbitrary classifications. Hayes' reindictment was a result of his voluntary rejection of the prosecutor's offer, which expressly included the possibility of reindictment. The reindictment subsequently handed down was based on probable cause. The Court held that this was a legitimate plea bargaining situation, and that there was no element of unconstitutional vindictiveness involved.[7]

The dissent failed to see the majority's distinction between vindictiveness against a defendant when he "legally attacks an original conviction" and vindictiveness in the "give and take negotiations common in plea bargaining."[8] The dissent argued that if a defendant is reindicted to face a more serious charge after he refused to plead guilty on a lesser charge involving the same conduct, a strong inference of vindictiveness is created. The dissent recognized that prohibiting reindictment might create an incentive for a prosecutor to bring inflated charges in the initial indictment. Such conduct makes the plea bargaining system less reliable, for the charge and sentence offers rarely would reflect the prosecutor's expectation of conviction. Yet, the dissent maintained, this is still the better view because public criticism would preclude an elected prosecutor from bringing unrealistically inflated charges.

Bordenkircher v. Hayes extends the power of the prosecutor by adding to his arsenal in the plea bargaining process. The prosecutor may threaten to reindict the defendant on a more serious charge for his failure to accept a plea bargain. Basing its decision on the necessity and legitimacy of plea bargaining, the majority has allowed the prosecutor to use all the tools at his discretion to induce a guilty plea—limited only by constitutional equal protection guarantees. Although the closeness of the decision suggests that the prosecutor's plea bargaining role may be in for more refined definition, significant changes appear unlikely as long as plea bargaining is considered a necessary expedient in our crowded court system.

Kathryn Sure

7. Hayes v. Cowan, 547 F.2d 42, 44 (6th Cir. 1976).
8. 434 U.S. at 363.

REAL PROPERTY—DUE-ON-SALE CLAUSES UNENFORCEABLE UPON OUTRIGHT SALE OF PROPERTY IF SECURITY OF LENDER IS NOT IMPAIRED—*Wellenkamp v. Bank of America*, 21 Cal. 3d 943, 582 P.2d 970, Supp., 148 Cal. Rptr. 379 (1978).

In July, 1973, the Mans purchased a parcel of real property. They financed their purchase with a $19,000 loan from Bank of America, giving the bank a promissory note secured by a deed of trust. Both the note and the deed of trust contained a standard "due-on" clause providing for the acceleration of the note upon the sale or encumbrance of the property.[1]

Two years later, Cynthia Wellenkamp purchased the property from the Mans. She paid her sellers an amount equal to their equity in the property and agreed to assume the balance of the loan. Bank of America was given prompt notice of the transfer, as well as a check for Ms. Wellenkamp's first payment. The bank, however, returned the check together with a letter giving notice of its right to enforce the due-on-sale clause. It offered to waive the right to accelerate in return for Ms. Wellenkamp's agreement to assume the loan at an increased rate of interest. Ms. Wellenkamp refused, and the bank filed a notice of default and election to sell under the deed of trust.[2]

Ms. Wellenkamp filed an action seeking to enjoin the enforcement of the due-on-sale clause. She also sought a declaration that the exercise of such a clause, without any showing that the defendant's security had been impaired as a result of the sale, constituted an unreasonable restraint on alienation.[3]

The trial court sustained a general demurrer by defendant bank, and the case was ultimately appealed to the California Supreme Court.[4] The primary issue on appeal was whether due-on-sale clauses are automatically enforceable upon outright sale of property.

The court reviewed past cases in which it had faced similar issues. In *Coast Bank v. Minderhout*,[5] the court held that a

1. The clause stated that if "the trustor sells, conveys, alienates . . . said property or any part thereof . . . or becomes divested of his title or any interest therein in any manner or way, whether voluntary or involuntary . . . [the] Beneficiary shall have the right at its option, to declare said note . . . secured hereby . . . immediately due and payable without notice . . . ." 21 Cal. 3d 943, 946, 582 P.2d 970, 972, Supp., 148, Cal. Rptr. 379, 381 (1978).

2. *Id.* at 946, 582 P.2d at 972, Supp., 148 Cal. Rptr. at 381.

3. *Id.* at 947, 582 P.2d at 972, Supp., 148 Cal. Rptr. at 381.

4. *Id.*

5. 61 Cal. 2d 311, 392 P.2d 265, 38 Cal. Rptr. 505 (1964).

restraint on alienation, caused by enforcement of a due-on clause, was reasonable if necessary to prevent impairment to the lender's security. An outright sale had occurred in *Coast Bank*, and the court concluded that the restraint was reasonable. However, in *La Sala v. American Savings and Loan Ass'n*,[6] the court held that a mere encumbrance of the property was not sufficient for automatic enforcement of the due-on clause. Likewise, in *Tucker v. Lassen Savings and Loan Ass'n*,[7] the court found that automatic enforcement of a due-on clause upon sale of property by installment contract constituted an unreasonable restraint on alienation.

By a six-one vote, the *Wellenkamp* court extended the *La Sala* and *Tucker* decisions to outright sale situations. The majority held that upon an outright sale of real property, an institutional lender may not enforce the due-on-sale clause contained in the seller's promissory deed of trust, "unless the lender can demonstrate that the enforcement is reasonably necessary to protect against impairment to its security or the risk of default."[8]

The majority opinion, relying on *Tucker*, weighed the "quantum of restraint"[9] on alienation caused by the enforcement of a due-on-sale clause against the justification for that enforcement. It found that defendant bank's acceleration of the loan caused a high quantum of restraint on the parties to the sale. In times of inflation and resulting higher interest rates, buyers may not be able to afford new loans. As a result, if the lender refuses to permit assumption of the existing loan by the new buyer, sale of the property could be entirely prohibited. Even if the lender offers to waive the right to accelerate in return for an increase in the interest rate of the existing loan, the seller may be forced to lower his sale price to offset the higher cost to the buyer.[10]

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6. 5 Cal. 3d 864, 489 P.2d 1113, 97 Cal. Rptr. 849 (1971).

7. 12 Cal. 3d 629, 526 P.2d 1169, 116 Cal. Rptr. 633 (1974).

8. 21 Cal. 3d at 953, 526 P.2d at 976-77, Supp., 148 Cal. Rptr. at 385-86. The majority also held that the trial court erred procedurally when it sustained the demurrer of defendant bank, since the complaint sufficiently set forth facts showing the existence of an actual controversy relating to the legal rights and duties of the parties. *Id.* at 947-48, 526 P.2d at 973, Supp., 148 Cal. Rptr. at 382. The court expressly limited its holding to institutional lenders, leaving unresolved the question of whether a private lender, including the vendor who takes back secondary financing, has interests which justify enforcement of a due-on clause upon resale. *Id.* at 952 n.9, 582 P.2d at 976 n.9, Supp., 148 Cal. Rptr. at 385 n.9.

9. *Id.* at 949, 582 P.2d at 974, Supp., 148 Cal. Rptr. at 383.

10. *Id.* at 950-51, 582 P.2d at 974-75, Supp., 148 Cal. Rptr. at 383-84.

The majority distinguished dicta in *La Sala* that suggested that the restraint on alienation resulting from acceleration after an outright sale appeared to be minimal.[11] In *La Sala,* it explained that "outright sale" referred only to transactions in which the seller/trustor received full payment from the buyer, usually through the new financing of the purchase. In this case, the term was expanded to encompass any sale by the trustor in which legal title is transferred.[12] This broader definition allowed the court to distinguish "cash to loan"[13] transactions from the language of *La Sala.*

Having found a high quantum of restraint, the majority turned to the factor of justification. As in *Tucker,* it held that a restraint on alienation could be justified only when a "legitimate interest"[14] of the lender was threatened. Such interests include prevention of waste and protection against the "moral risks"[15] of having to resort to the security upon default of a buyer.

The majority rejected defendant bank's contention that risks of default and waste are necessarily present in an outright sale. The bank argued that the seller's interest in preventing such risks is eliminated when both possession and legal title to the property are transferred. The court, however, reasoned that when a large down payment is made to cover the seller's equity, this equity is transferred to the buyer, who may be as good, if not a better credit risk than the seller.[16] In addition, if the seller accepts from the buyer a second or "all inclusive" deed of trust rather than a down payment, he retains an equity interest in the property, providing him with incentive to prevent waste and default.

The bank's justification for maintaining its loan portfolio at current interest rates was also rejected. The majority explained that this justification would not further the legitimate purpose of the due-on-sale clause, which was to protect the

11. *Id.* at 949, 582 P.2d at 974, Supp., 148 Cal. Rptr. at 383.

12. *Id.* at 950, 582 P.2d at 974, Supp., 148 Cal. Rptr. at 383.

13. In a "cash to loan transaction," the buyer arranges to pay the seller only an amount equal to the seller's equity in the property, assuming or taking "subject to" the existing mortgage or deed of trust. *Id.*

14. *Id.* at 951, 582 P.2d at 975, Supp., 148 Cal. Rptr. at 384.

15. *Id.* (quoting J.R. Hetland, *Real Property and Real Property Security: The Well Being of the Law,* 53 CAL. L. REV. 151, 170 (1965)); *see also* HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS § 4.56, at 184 (1970).

16. 21 Cal. 3d at 952, 582 P.2d at 975-76, Supp., 148 Cal. Rptr. at 384-85. The court did not specifically address the situation wherein the buyer obtains a third party loan to finance his down payment, thus forfeiting his equity in the property.

lender's security. Such a restraint on alienation could not be justified merely because its enforcement would be commercially beneficial to the lender.[17]

Justice Clark dissented, stating that the majority opinion offers a "bonus" to the seller of encumbered property, who can now take advantage of old interest rates to gain a higher price than if the property were unencumbered.[18] He also contended that the restraint on alienation was not imposed by the enforcement of the due-on-sale clause, but was rather caused by the tight condition of the market.[19]

The decision in *Wellenkamp v. Bank of America,* while utilizing the principles of *La Sala* and *Tucker,* both broadens the concept of "restraint" and renders enforcement of restraint exceedingly difficult to justify. By emphasizing the importance of the remaining equity in the subject property itself, rather than the continued interest of the original debtor or the financial solvency of the proposed purchaser, the case presents a formidable burden on the lender to show that his security has been impaired.[20]

Wellenkamp, by prohibiting enforcement of most due-on-sale clauses, will promote the widespread use by lenders of variable rate mortgages, an "attractive and viable alternative"[21] for maintaining long term loans at current interest trends.[22] Though variable rate mortgages will not completely

17. *Id.* at 952, 582 P.2d at 976, Supp., 148 Cal. Rptr. at 385.

18. *Id.* at 954, 582 P.2d at 977, Supp., 148 Cal. Rptr. at 386.

19. *Id.* at 956, 582 P.2d at 978-79, Supp., 148 Cal. Rptr. at 387-88.

20. This approach seems consistent with California's antideficiency judgment legislation, which forces the residential or purchase money lender to rely solely on the proceeds from the foreclosure sale to satisfy the debt. CAL. CIV. PROC. CODE § 580b (West 1976). The overall strength or weakness of the assuming debtor thus becomes relevant only in assessing his ability to meet monthly payments. *See* Comment, *Judicial Treatment of the Due-On-Sale Clause: The Case for Adopting Standards of Reasonableness and Unconscionability,* 27 STAN. L. REV. 1109, 1115 (1975).

The question arises whether *Wellenkamp,* which dealt with the sale of residential property, should be applied to commercial, non-purchase money transactions, in which lenders may have a more vital interest in the ability of the assuming debtor to meet the expense of a deficiency judgment. *But see* Birkhefer v. Krumm, 4 Cal. App. 2d 43, 40 P.2d 553 (1935), which held that when a grantee assumes a mortgage, the grantor/primary debtor becomes the surety for any deficiency remaining after foreclosure.

21. 21 Cal. 3d 952 n.10, 582 P.2d at 976 n.10, Supp., 148 Cal. Rptr. at 385 n.10.

22. Section 1916.5 of the California Civil Code permits lenders to charge a variable interest on secured notes. The rate of interest must correspond to variations in a prescribed standard index. The rate cannot change more often than once in any semiannual period, and 6 months must elapse between changes. No alteration can exceed one fourth of one percent, and the total increase cannot exceed 2.5%. CAL. CIV. CODE § 1916.5(a) (West Supp. 1978). Federally chartered savings and loan associations are not currently authorized to issue variable rate loans.

eliminate the incentive of sellers to have their loans assumed,[23] they will temper the competitive advantage held by sellers of encumbered property over those whose property is unencumbered.

Paul N. Dubrasich

23. *E.g.*, sellers can now avoid substantial prepayment penalties, which are applicable to involuntary as well as voluntary prepayment, by having the buyer assume their loans.

MUNICIPAL TAXATION—LICENSE FEE LEVIED UPON PERSONS EMPLOYED WITHIN CITY IS NOT AN INCOME TAX SUBJECT TO STATUTORY PROHIBITION—*Weekes v. City of Oakland,* 21 Cal. 3d 386, 579 P.2d 449, 146 Cal. Rptr. 558 (1978).

In June, 1974, the City of Oakland adopted Municipal Code section 5-1.65, providing for an "employee license fee" upon the "privilege of engaging in . . . any business, trade, occupation or profession as an employee."[1] This fee consists of a one percent levy measured by the employee's gross receipts in excess of $1,625 per quarter for services performed in Oakland and is collected by employer withholdings. Plaintiffs, who are subject to the levy, challenged the ordinance on the ground that it was essentially a municipal income tax in direct conflict with Revenue and Taxation Code section 17041.5, prohibiting municipal taxes "upon income."[2]

The trial court declared the city's employee license fee invalid and permanently enjoined enforcement of the ordinance. The court of appeal reversed after concluding that neither constitutional provisions nor state legislation governing the levy of an income tax preempted the right of a chartered city to levy a tax of this nature. Plaintiffs sought review by the California Supreme Court.

Upon consideration by the supreme court, the majority framed the issue as whether a chartered city like Oakland, "in the exercise of [constitutional home rule] powers . . . [may] levy upon all persons employed within the city, a tax measured by the compensation received from employers, notwithstanding an express statutory prohibition against municipal taxes upon 'income.' "[3] In holding that Oakland's employee license

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1. OAKLAND, CAL., MUNI. CODE § 5-1.65 (1974).

2. CAL. REV. & TAX. CODE § 17041.5 (West 1970) reads in part: "Notwithstanding any statute, ordinance, . . . or decision to the contrary, no city, county . . . whether incorporated or not or whether chartered or not, shall levy or collect or cause to be levied or collected any tax upon income, or any part thereof, of any person, resident, or nonresident."

3. 21 Cal. 3d 386, 390, 579 P.2d 449, 450, 146 Cal. Rptr. 558, 559 (1978). Municipal home rule powers are conferred by article XI, section 5(a), of the California Constitution, which provides in part:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this

fee did not conflict with Revenue and Taxation Code section 17041.5, the court concluded that the license fee is not a tax upon income but rather a long-approved business or occupation tax measured by gross receipts, expressly authorized by the latter part of section 17041.5.[4]

In setting out the foundation for their decision, the majority recognized the long-standing principle of local governments' power to raise revenues for local purposes and the charter cities' power to tax as accorded by the home rule provision of the California Constitution.[5] Based upon guidelines offered by *Bishop v. City of San Jose*,[6] the court reasoned that Oakland's right to enact a revenue raising tax was not at issue under the home rule provision unless the city ordinance was in direct conflict with a state statute. In finding that the Oakland ordinance established a license tax as opposed to an income tax, and was therefore not barred by the state statute forbidding municipal income taxes, the majority avoided further home rule inquiry.

The court distinguished the Oakland license fee from the typical income tax on several grounds and concluded that although Oakland's license fee was closely tied to "income" in terms of measuring tax liability, it bore no immediate, compelling resemblance to the more familiar income tax levy which section 17041.5 purports to bar.[7] Initially, the court noted that gross income for state income tax purposes includes income from a wide variety of sources such as interest, rents, and royalties. The Oakland tax, being limited to income from employment, did not purport to reach such sources. In addition, the Oakland license fee is calculated on the basis of gross receipts—that is, business-related expenses are not deductible from the income subject to levy, while commonly recognized income tax levies are computed upon net income. Finally,

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Constitution . . . with respect to municipal affairs shall supersede all laws inconsistent therewith.

4. 21 Cal. 3d at 391, 579 P.2d 451, 146 Cal. Rptr. at 560. The latter part of section 17041.5 provides "[t]his section shall not be construed so as to prohibit . . . any otherwise authorized license tax upon a business measured by or according to gross receipts."

5. CAL. CONST. art. XI, § 5(a).

6. 1 Cal. 3d 56, 460 P.2d 137, 81 Cal. Rptr. 465 (1969). A city's right is not at issue under the home rule provision "unless the city's own charter imposes restrictions upon its taxing power or the city ordinance is in direct and immediate conflict with a state statute or statutory scheme." 21 Cal. 3d at 392, 579 P.2d at 452, 146 Cal. Rptr. at 561.

7. 21 Cal. 3d at 392-94, 579 P.2d at 452-53, 146 Cal. Rptr. at 561-62.

municipal income taxes typically seek to tax *all* earned income of city residents regardless of whether that income is earned inside or outside the taxing jurisdiction. In contrast, the Oakland levy is based only upon *Oakland-derived* earnings.[8]

Plaintiffs also sought to invalidate the city license fee by differentiating it from traditionally valid occupation taxes. While plaintiffs conceded that a tax upon owners of a particular business measured by gross receipts of that business is a legitimate occupation tax, they argued that a tax upon employees measured by compensation can be nothing but an income tax. The court rejected this contention stating that because the tax is levied upon the privilege of engaging in an occupation as an employee rather than as a proprietor, the license fee is no less a tax upon the privilege of doing business.[9]

Finally, the majority rejected plaintiff's contention that the Oakland tax was an income tax because liability was measured by employee compensation. The court, in noting the established rule that the measure or mode of ascertaining a particular tax is not conclusive as to its type or nature, again emphasized that "Oakland's license fee is exacted only from persons who in fact exercise the privilege of selling their skills and services within the City of Oakland, and only to the *extent* that they do so."[10] The court considered it crucial "that it is the privilege, not the income generated by its exercise, that is the direct and immediate subject of the tax."[11]

After criticizing the majority's "remarkable conclusion that a tax on income is not an income tax," dissenting Justice Mosk predicted the imposition of similar taxes in most California cities.[12] The question as to whether general law cities as well as charter cities are now free to enact occupation taxes was left open by the decision since the majority focused on the nature of the business license fee and concluded that since there was no conflict between the statute and the municipal ordinance, there was no need for further legislative authorization for such a levy.

Such focus suggests that general law cities may move in this direction. This is significant because the Oakland levy differs materially in two respects from most other occupation taxes: (1) its application is not restricted to traditionally enu-

8. *Id.*
9. *Id.* at 395, 579 P.2d at 454, 146 Cal. Rptr. at 563.
10. *Id.* at 396, 579 P.2d at 455, 146 Cal. Rptr. at 564.
11. *Id.* at 397, 579 P.2d at 455, 146 Cal. Rptr. at 564.
12. *Id.* at 409, 579 P.2d at 463, 146 Cal. Rptr. at 572.

merated or generally identified businesses but purports to encompass all trades and professions, and (2) it reaches the individual employee in contrast to the traditional occupation or license tax which burdens only owners and independent contractors. Adoption of an Oakland-type levy may therefore increase the tax base within the taxing authority's jurisdiction and produce greater revenues for fiscally troubled municipalities.

The *Weekes* decision, while opening the door to further municipal taxation, did so on the narrow factual determination of whether the Oakland levy was preempted by state statutes. The court declined to rule on the constitutional questions of whether home rule provisions would prevent the legislature from proscribing municipal income taxes. In a concurring opinion, Justice Richardson urged resolution of this question in anticipation of future litigation over novel municipal levies that arguably are disguised income taxes.[13] Justice Richardson, joined by Justice Clark, suggested distinguishing "municipal affairs" from "statewide concerns" by balancing the city's interest against the state's need to require uniformity or to control the extracurricular impact of the challenged municipal activity.[14] The concurring opinion's eagerness to resolve the issue on more far-reaching grounds and the sharp criticism of the majority's analysis by the dissenting justices suggest the likelihood of further litigation to determine the constitutionality of Revenue and Taxation Code, section 17041.5, under the home rule doctrine.

Gordon Yamate

13. *Id.* at 398, 579 P.2d at 456, 146 Cal. Rptr. at 565.
14. *Id.* at 406-08, 579 P.2d at 461-62, 146 Cal. Rptr. at 570-71.

Editorial Note: *On December 19, 1978, the City Council of Oakland repealed the license fee tax by a vote of 6 to 3. Nevertheless, the California Supreme Court's decision remains as the leading judicial statement on the validity of the employee license fee as levied under the home rule powers of municipal governments.*

NEGLIGENCE—A BARTENDER OWES A DUTY OF CARE TO PATRONS TO REFRAIN FROM SERVING THEM INJURIOUS AMOUNTS OF ALCOHOL—*Ewing v. Cloverleaf Bowl*, 20 Cal. 3d 389, 572 P.2d 1155, 143 Cal. Rptr. 13 (1978). LEGISLATURE NULLIFIES DECISION: S.B. 1645.

On April 13, 1971, Christopher Ewing celebrated his twenty-first birthday. Between 8:30 and 9:00 p.m., Chris and a number of his friends went to the bar at the Cloverleaf Bowl in Fremont to have some drinks. Richard Lamont was the only bartender on duty that night.[1] He had more than eleven years of experience as a bartender.[2]

Upon discovering that it was Chris' twenty-first birthday, Lamont served Chris a vodka collins on the house. With the exception of perhaps one beer, the drink was the first Chris took that day. After finishing his drink, Chris expressed a desire to get drunk. One of Chris' companions asked the bartender to serve Chris the strongest drink in the house. Lamont then served Chris a shot of 151 proof rum which was fifty to one hundred percent higher in alcohol content than any of the other liquors he served. Lamont was aware of this and even warned Chris that it was a powerful drink. Chris drank the shot immediately. Lamont then poured Chris another drink.[3]

Over the next hour and a half, Chris drank a total of ten shots of 151 proof rum and two beer chasers. He was warned by both his friends and Lamont to take it easy. Some of his friends tried to intercede and stop his drinking. Chris insisted, however, that he would be all right.[4]

Lamont served each of these drinks.[5] He served at least three of them when Chris was in an apparent state of intoxication, with slurred speech, glassy eyes, and a red face. Serving intoxicated patrons was contrary to the policy of the Cloverleaf Bowl. A sign by each cash register stated the policy. Lamont was well aware of this house rule.[6]

Chris' older brother stopped by the bar at about 10:00 p.m. Upon seeing Doug, Chris asked Lamont to pour him another

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1. Ewing v. Cloverleaf Bowl, 20 Cal. 3d 389, 395-96, 572 P.2d 1155, 1157, 143 Cal. Rptr. 13, 15-16 (1978).
2. *Id.* at 403, 572 P.2d at 1162, 143 Cal. Rptr. at 20.
3. *Id.* at 396, 572 P.2d at 1157, 143 Cal. Rptr. at 16.
4. *Id.* at 397, 572 P.2d at 1157-58, 143 Cal. Rptr. at 16.
5. *Id.*
6. *Id.* at 397, 572 P.2d at 1158, 143 Cal. Rptr. at 17.

drink to have with his brother. Lamont started to comply with Chris' request. Doug intervened, stating that Chris had had enough since he could not even stand. Doug walked his brother to a table where Chris passed out. Chris never regained consciousness. He died at home that night of acute alcohol poisoning.[7]

A blood sample was taken at the autopsy. The alcohol level in Christopher Ewing's blood was .47%. Dr. Allan McNie testified at the trial that if the level of alcohol in a person's blood exceeds .20%, the casual observer will be able to tell that the person is drunk. If the level reaches between .30% and .40%, the person will become comatose. Death will occur at a level of .42%.[8]

Christopher Ewing's sons brought this wrongful death action against Cloverleaf Bowl, alleging both negligence and willful misconduct. The trial court granted defendants' motion for nonsuit, and plaintiffs appealed.

The California Supreme Court held that a bartender owes to a patron a duty to exercise due care and is liable for his neglect of such care.[9] The court relied on its decision in *Veseley v. Sager*,[10] which overturned *Cole v. Rush*.[11]

The doctrine as set forth in *Cole* held that, as a matter of law, the consumption and not the service of alcoholic beverages was the proximate cause of drinking-related injuries. This doctrine immunized bartenders from liability to both patrons and third parties.

In *Veseley*, the court validated a cause of action against a bartender brought by a motorist who was injured by the erratic driving of a drunken patron. *Veseley* held that the proximate cause of the injury could be attributed to the bartender. The defendant in *Ewing* argued that since the action in *Veseley* was brought by a third party, *Cole* still applied when a patron brings an action for his own injuries. In holding that *Veseley* and not *Cole* applies to such situations, the *Ewing* court stated that "regardless of whether a third party injured by an intoxicated customer or a customer himself sues a bartender, the bartender's liability in both circumstances depends upon the application of the principle that an individual is liable for the

7. *Id.* at 397-98, 572 P.2d at 1158, 143 Cal. Rptr. at 17.
8. *Id.* at 398, 572 P.2d at 1158, 143 Cal. Rptr. at 17.
9. *Id.* at 399, 572 P.2d at 1159, 143 Cal. Rptr. at 17.
10. 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971).
11. 45 Cal. 2d 345, 289 P.2d 450 (1955).

foreseeable injuries caused by his failure to exercise reasonable care."[12]

This case went to trial prior to the court's decision in *Li v. Yellow Cab,*[13] thus the principles of comparative negligence did not apply. Prior to *Li,* contributory negligence barred any recovery unless the defendant's actions amounted to willful misconduct. Assumption of risk or willful misconduct on the part of the patron would completely bar any recovery.[14] In this legal context, the court evaluated the facts to determine if a jury could reasonably find for the plaintiffs. Lamont knew Chris' age, and should have been aware of Chris' apparent inexperience in drinking. Lamont knew of the high potency of the liquor he served, while Chris seemed to be unaware of the difference between the rum and most other liquors. Lamont violated house policy in serving Chris while he was intoxicated. His experience should have made him aware of the health hazard in such a consumption of 151 proof rum.[15] The court found that Lamont's actions were such that willful misconduct could be inferred. Therefore, plaintiffs could recover even if the patron were contributorily negligent but not if his actions constituted willful misconduct or assumption of risk.

With regard to willful misconduct on the part of the patron, the court rejected the appellate court decision in *Kindt v. Kauffman,*[16] to the extent that it held that, as a matter of law, a patron necessarily commits willful misconduct when becoming intoxicated.[17] "Willful misconduct implies the intentional doing of something with knowledge, express or implied, that serious injury is probable."[18] Since his friends warned him that he would get drunk, he may have acted with reckless disregard only to the usual consequences of getting drunk. The court emphasized that Chris' friends did not warn him that he might die. Though it was Chris' intent to get drunk, he did not act with reckless disregard of his life. He had apparently no knowledge of the risk of alcohol poisoning. The court thus held that a reasonable jury would not be compelled to find that Chris' behavior amounted to willful misconduct.[19]

12. 20 Cal. 3d at 400-01, 572 P.2d at 1160, 143 Cal. Rptr. at 18-19.
13. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).
14. 20 Cal. 3d at 401, 572 P.2d at 1160-61, 143 Cal. Rptr. at 19.
15. *Id.* at 402-03, 572 P.2d at 1161, 143 Cal. Rptr. at 20.
16. 57 Cal. App. 3d 845, 129 Cal. Rptr. 603 (1976).
17. 20 Cal. 3d at 404 n.10, 572 P.2d at 1162 n.10, 143 Cal. Rptr. at 21 n.10.
18. *Id.* at 402, 572 P.2d at 1161, 143 Cal. Rptr. at 20.
19. *Id.* at 404, 572 P.2d at 1162, 143 Cal. Rptr. at 21.

Using the same reasoning, the court held that Chris could not have assumed a risk of which he was not aware. Assumption of risk requires a victim to know, to appreciate, and to accept the specific danger involved.[20] Though Chris may have been aware of the more usual risks of drinking, the facts fail to indicate that he was aware of the risk of acute alcohol poisoning.[21] The court rejected the holdings of two appellate cases, *Rose v. International Brotherhood of Electrical Workers*[22] and *Cooper v. National Railroad Passenger Corp.*[23] These cases held that a patron's action would be barred, as a matter of law, by the assumption of risk that the drinker takes upon himself while becoming intoxicated.

The court thus found that not only was there a valid cause of action, but that a reasonable jury could grant recovery to the plaintiff. Since the case was before the trial court on a motion for nonsuit, the supreme court's evaluation of the facts is only what a jury might possibly infer from them. More important is the policy the court established that cases are to be evaluated on their facts by a jury and not on per se rules. Plaintiffs in actions against bartenders are not to be denied recovery on the basis of willful misconduct or assumption of risk as a matter of law.

Soon after the *Ewing* decision, the court, in *Coulter v. Superior Court,*[24] sustained a cause of action against a social host for the negligent service of alcoholic beverages. The plaintiff in *Coulter* was injured by an intoxicated motorist who was served an excessive amount of drinks by the defendant at his apartment. The defendant was aware of his guest's intent to drive home, yet continued to serve her alcoholic beverages.

In reaction to the outcome in both *Ewing* and *Coulter,* the California Legislature has passed, and the Governor has signed into law, a bill which essentially negates these decisions. S.B. 1645,[25] effective January 1, 1979, declares that no person who sells or furnishes alcoholic beverages shall be civilly liable for injuries incurred as a result of their consumption. S.B. 1175,[26]

20. *Id.* at 406, 572 P.2d at 1163-64, 143 Cal. Rptr. at 22.

21. *Id.* at 406, 572 P.2d at 1164, 143 Cal. Rptr. at 22.

22. 58 Cal. App. 3d 276, 129 Cal. Rptr. 736 (1976).

23. 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (1975).

24. 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978).

25. S.B. 1645, Reg. Sess. (1978), *enacted as* 1978 Cal. Stats., ch. 929, § 1 (amending CAL. BUS. & PROF. CODE § 25602), § 2 (amending CAL. CIV. CODE § 1714).

26. S.B. 1175, Reg. Sess. (1978), *enacted as* 1978 Cal. Stats., ch. 930, § 1 (adding to CAL. BUS. & PROF. CODE § 25602.1).

which the Governor has also signed into law, makes S.B. 1645 inapplicable where drinking minors are involved. Therefore, the holding in *Ewing* is still good law where minors are concerned.

The complexities of the legislative action cannot be treated adequately here. Certain issues, however, merit attention. It is clearly the intent of the legislature to place the fault for alcohol related injuries on the drinker. Such a line of reasoning appeals to common sense. It was not, however, so much the intent of the court to immunize the patron from his actions as it was to hold liable all persons concurrently responsible for injuries. The plaintiffs in *Ewing* could not have recovered a cent if the patron's behavior amounted to assumption of risk, willful misconduct, or contributory negligence in the face of mere negligence on the part of the defendant. Similarly, in a comparative negligence system, the plaintiff's recovery would be decreased by the degree of fault attributable to the patron.

The new law allows an experienced bartender to carelessly and recklessly serve a naïve patron sufficient amounts of liquor to cause his death without becoming civilly culpable for his action. The *Ewing* court essentially held that the liability of a bartender in such a situation should be decided by a jury. Since the statute forces the intoxicated individual to bear the full brunt of the injuries he causes, future plaintiffs will not be allowed legal recourse against those whose actions may have contributed to their injuries.

Robert D. Griffing, Jr.

CRIMINAL LAW—RAPE ALONE DOES NOT CONSTITUTE GREAT BODILY INJURY FOR PENALTY ENHANCEMENT PURPOSES—*People v. Caudillo*, 21 Cal. 3d 562, 580 P.2d 274, 146 Cal. Rptr. 859 (1978).

On May 2, 1975, the victim Maria entered an elevator intending to return to her second floor apartment. When the elevator door opened on the second floor, a man, later identified as defendant Daniel Caudillo, stepped in and immediately pushed her against the elevator wall. He covered her mouth with one hand and held a carving knife to her throat. Maria recognized her assailant as someone she had previously seen around her apartment complex.

When the elevator door reopened, defendant took Maria to a small storage room near her apartment. Defendant kept her there for about twenty minutes while people left for work. During that time she suffered lacerations to her neck and fingers in a minor scuffle with defendant. From the storage room, defendant moved Maria down the hall to her apartment and compelled her to open the door. He then pushed her inside and blindfolded her. During the ordeal which followed, Maria was raped twice. She was also sodomized by the defendant which caused her to have diarrhea, and was forced to orally copulate with him several times which caused her to gag and vomit. Before leaving the apartment, defendant took sixty dollars from Maria's wallet and threatened to kill her if she told anyone. She managed to call her boyfriend who subsequently called the police.

A later examination at the emergency center revealed that Maria had sustained a three-inch laceration on the front of her neck and a one-and-a-half-inch laceration on the back of her neck. Neither of these wounds required suturing. No visible injury, laceration, or hematoma of the sexual organs or anus was found. A few days later, Maria identified the defendant's picture in three different sets of mug shots.

Defendant was convicted in the Superior Court of Los Angeles County of kidnapping, forcible rape, sodomy, oral copulation, first degree robbery, and first degree burglary. Pursuant to Penal Code section 461,[1] the jury found that, while commit-

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1. CAL. PENAL CODE § 461 (West 1970) (amended, 1976 to delete great bodily injury enhancement, 1976 Cal. Stats., ch. 1139, § 207).

Burglary is punishable as follows:

1. Burglary in the first degree: by imprisonment in the state prison for not less than five years.

ting the crimes of robbery and burglary, the defendant intended to and did inflict great bodily injury upon Maria.

On appeal, defendant contended that there was insufficient evidence to support the findings and judgment. His contentions were as follows: (1) the evidence was insufficient to identify him as the perpetrator of the crimes and to sustain any conviction against him; (2) the evidence as to the movement of the victim was insufficient to support the kidnapping conviction; and (3) the evidence was insufficient to support the jury's finding that while committing the burglary he inflicted great bodily injury upon the victim.[2]

The supreme court found that there was substantial evidence to support the judgment of conviction against him. However, the court reversed the kidnapping conviction because the victim's movements were not substantial movements within the meaning of section 207 of the Penal Code.[3] The court also held that evidence that the victim was raped twice, sodomized, and forced to orally copulate the defendant several times was

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2. Burglary in the second degree: by imprisonment in the county jail not exceeding one year or in the state prison for not less than one year or more than 15 years.

The preceding provisions of this section notwithstanding, in any case in which defendant committed burglary and in the course of commission of the burglary, with the intent to inflict such injury, inflicted great bodily injury on any occupant of the premises burglarized, such fact shall be charged in the indictment or information and if found to be true the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or if admitted by the defendant, defendant shall suffer confinement in the state prison from 15 years to life.

Id.

2. People v. Caudillo, 21 Cal. 3d 562, 567, 580 P.2d 274, 276, 146 Cal. Rptr. 859, 861 (1978).

3. CAL. PENAL CODE § 207 (West 1970).

Every person who forcibly steals, takes, or arrests any person in this state, and carries him into another country, state, or county, or into another part of the same county, or who forcibly takes or arrests any person, with a design to take him out of this state, without having established a claim, according to the laws of the United States, or of this state, or who hires, persuades, entices, decoys, or seduces by false promises, misrepresentations, or the like, any person to go out of this state, or to be taken or removed therefrom, for the purpose and with the intent to sell such person into slavery or involuntary servitude, or otherwise to employ him for his own use, or to the use of another, without the free-will and consent of such persuaded person; and every person who, being out of this state, abducts or takes by force or fraud any person contrary to the law of the place where such act is committed, and brings, sends, or conveys such person within the limits of this state, and is afterward found within the limits thereof, is guilty of kidnapping.

Id.

insufficient to sustain the finding that "great bodily injury" had been inflicted upon the victim.[4]

The court quickly disposed of defendant's first contention by finding that there was sufficient evidence on which to identify defendant as the perpetrator of the crime. The court reasoned that Maria's testimony identifying defendant as the perpetrator of the crime fulfilled the threshold requirements for a sex crime identification.

The court dealt next with defendant's second contention that there was insufficient movement to sustain a conviction for kidnapping. It first compared the factual situation in this case with other cases where the movement requirement had been an issue. In order to sustain a kidnapping conviction, the movement must be characterized as substantial or significant as opposed to "slight, trivial, or insignificant."[5] In *People v. Stanworth*[6] (one-fourth of a mile) and *People v. Stender*[7] (two hundred feet), the movements were deemed sufficient. However in *People v. Thornton*[8] (within single room of a laundromat), *People v. Brown*[9] (seventy-five feet), and *Cotton v. Superior Court*[10] (fifteen feet), contrary conclusions were reached. The court here refused to consider factors other than distance, such as moving victim into storage room to avoid detection. It concluded that the movement of Maria for some unspecified distance between the storeroom and her apartment was best characterized as insignificant and thus insufficient to uphold the kidnapping conviction.

Defendant's final contention was that Maria's injuries, either physical or psychological, were insufficient to support the finding that she sustained great bodily injury for purposes of penalty enhancement under Penal Code section 461.[11] In 1967 the legislature added penalty enhancement provisions to Penal Code sections 461 (burglary),[12] 213 (robbery),[13] and 264 (rape).[14] Defendant's principle argument was that by adding

4. 21 Cal. 3d at 567, 580 P.2d at 276, 146 Cal. Rptr. at 861.
5. *Id.* at 572, 580 P.2d at 279, 146 Cal. Rptr. at 864.
6. 11 Cal. 3d 588, 522 P.2d 1058, 114 Cal. Rptr. 250 (1974).
7. 47 Cal. App. 3d 413, 121 Cal. Rptr. 334 (1975).
8. 11 Cal. 3d 738, 523 P.2d 267, 114 Cal. Rptr. 467 (1974).
9. 11 Cal. 3d 784, 523 P.2d 226, 114 Cal. Rptr. 426 (1974).
10. 56 Cal. 2d 459, 364 P.2d 241, 15 Cal. Rptr. 65 (1961).
11. CAL. PENAL CODE § 461 (West 1970) (amended in 1976 to delete great bodily injury enhancement, 1976 Cal. Stats., ch. 1139, § 207).
12. *See* 1967 Cal. Stats., ch. 150, § 1, at 1216.
13. *See id.*, ch. 149, § 1, at 1216.
14. *See id.*, ch. 151, § 1, at 1217.

this provision to all three crimes, the legislature must have intended for a level of injury over and above that normally involved in the ordinary commission of any one of these crimes. The legislature's purpose, defendant contended, was to deter these crimes from being committed in an excessively violent manner.

The court, in considering defendant's contentions, noted that, when the penalty enhancement provisions for burglary, robbery, and rape were enacted in 1967, Penal Code section 209 already provided for an enhanced penalty for aggravated kidnapping (kidnapping for the purpose of ransom or robbery) in the event the victim suffered "bodily harm."[15] Bodily harm had been interpreted judicially to include forcible rape.[16] The court reasoned that the intent of the legislature in substituting the word "injury" for the word "harm" and adding the word "great" in the 1967 provisions was to punish a higher level of injury. The court stated:

> [I]f the legislature had intended in Penal Code sections 213 (robbery) and 411 (burglary) to refer to a level of injury different from that required under section 264 (rape), and one which would include the crime of rape itself . . . the legislature would have chosen language such as is found in Penal Code section 209 (aggravated kidnapping), which would have clearly articulated such an intent.[17]

The court recognized that the decisional law construing "great bodily injury" was in conflict. In *People v. Cardenas*[18] the defendant had evidently raped as well as robbed the victim. In holding that the act of rape was sufficient to sustain the jury's finding of great bodily injury under Penal Code section 213 (robbery), *Cardenas* cited with approval an earlier dissenting opinion subscribing to the view that the outrage to the person and feelings of the female should be considered great bodily injury.[19]

People v. Richardson[20] involved a substantially similar fact situation and construction of the same statute as in *Cardenas*. The *Richardson* court, however, rejected the argu-

15. CAL. PENAL CODE § 209 (West Supp. 1978).

16. *See* People v. Chessman, 38 Cal. 2d 166, 238 P.2d 1001 (1951); People v. Brown, 29 Cal. 2d 555, 176 P.2d 929 (1947).

17. 21 Cal. 3d at 586, 580 P.2d at 288, 146 Cal. Rptr. at 873.

18. 48 Cal. App. 3d 203, 121 Cal. Rptr. 426 (1975).

19. *Id.* at 207, 121 Cal. Rptr. at 429 (citing People v. McIlvain, 55 Cal. App. 2d 322, 334, 130 P.2d 131, 142 (1942) (Schauer, P.J., dissenting)).

20. 23 Cal. App. 3d 403, 100 Cal. Rptr. 251 (1972).

ment that additional injury such as rape, inflicted on a victim during robbery, constituted "great bodily injury" for purposes of penalty enhancement. The court pointed out that rape ordinarily involves violence. Since the legislature had contemporaneously added the penalty enhancement provision to the rape statute, as well as to the robbery statute, the *Richardson* court reasoned that it must have intended an additional substantial injury be inflicted for penalty enhancement.

The court adopted the *Richardson* view and pointed to recent legislation for support of this position. It referred to Penal Code section 12022.7, which, as recently amended, defines great bodily injury as "a significant or substantial physical injury."[21] The court pointed out that the amendment speaks specifically of physical injury. Because of this language, the court concluded, a finding of great bodily injury could not be sustained because rape inflicted primarily psychological and emotional distress upon the victim.[22]

The court concluded that the injuries suffered by the victim in this case were at best "insubstantial in nature."[23] In the court's view, the additional sexual offenses, no matter how heinous, were insufficient because the physical effect upon the victim was transitory and did not result in *serious* physical impairment.[24]

By establishing a strict construction of the term "great bodily injury," the court has precluded the imposition of a fifteen years to life jail sentence *whenever* rape is committed. While this decision demonstrates the court's reluctance to expand the ambit of the criminal sanction, it does little to assuage or address the real fear that the crime of rape evokes.

In a concurring opinion, Chief Justice Rose Bird expressed her "personal repugnance" to this crime but refused to use it as a basis for "rewriting the statute as it was adopted by the Legislature."[25] She pointed out that it is precisely the fact that the subject of rape is such an emotionally charged issue that the court must adhere to legislative intent rather than to its members' personal feelings and beliefs. In her view, the legislature must carry the burden of dealing with a crime which intrudes upon "the most sacred and most private repository of

21. CAL. PENAL CODE § 12022.7 (West Supp. 1978).
22. 21 Cal. 3d at 582, 580 P.2d at 285-86, 146 Cal. Rptr. at 870.
23. *Id.* at 588, 580 P.2d at 290, 146 Cal. Rptr. at 875.
24. *Id.* at 588-89, 580 P.2d at 290, 146 Cal. Rptr. at 875.
25. *Id.* at 589-90, 580 P.2d at 290, 146 Cal. Rptr. at 875.

the self,"[26] leaving the victim with psychological and emotional wounds which long outlast all physical injury.

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26. *Id.* at 589-90, 580 P.2d at 290, 146 Cal. Rptr. at 875 (quoting Bard & Ellison, *Crisis Intervention and Investigation of Forcible Rape*, THE POLICE CHIEF, May, 1974, at 68, 71).