1-1-1979

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Billy Duren fatally shot one person and wounded another during an attempted robbery at a United States Post Office in Jackson County, Missouri. He was convicted of first degree murder and sentenced to life imprisonment. In a pretrial motion to quash the petit jury panel and in a postconviction motion for a new trial, the defendant claimed that the fair-cross-section requirement of the sixth amendment to the United States Constitution was violated by a jury selection process that excluded women. The trial court denied both motions, and defendant appealed to the Missouri Supreme Court. The state supreme court affirmed the denial of both motions.

Missouri law provided automatic exemptions from jury duty for any woman who did not wish to serve. Women could opt out of jury duty at three stages. First, questionnaires listing disqualifications or exemptions were sent to prospective jurors. An exemption could be claimed by returning the questionnaire or by returning a summons subsequently received. In addition, women who did not wish to serve could merely fail

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1. State v. Duren, 556 S.W.2d 11, 13 (Mo. 1977). The defendant killed Carol Riley who attempted to thwart the crime, then turned and wounded Lee Kinnison, a bystander. Sufficiency of the evidence to support the verdict was not challenged. Id.

2. Id. The defendant had previously been charged with “capital” murder, and successfully challenged the statutes requiring that persons convicted of first degree murder be put to death. State v. Duren, 547 S.W.2d 476, 480 (Mo. 1977). He lost his effort to have the indictment reversed, however. Id. Subsequently, Duren challenged the composition of the jury.

3. The requirement that a jury be drawn from a fair cross-section of the community arose in Smith v. Texas, 311 U.S. 128 (1940), where a jury selection process that systematically excluded blacks was held to violate the sixth and fourteenth amendments to the United States Constitution. Duncan v. Louisiana, 391 U.S. 145 (1968), made the federal standards applicable to the states through the fourteenth amendment.


5. Mo. Rev. Stat. § 494.031(2) (Supp. 1978), provided in pertinent part: “The following persons shall, upon their timely application to the court, be excused from service as a juror, either grand or petit: . . . (2) Any woman who requests exemption before being sworn as a juror.”

6. 439 U.S. at 361.
to appear for jury duty, and were customarily excused. Other individuals seeking exemptions at this stage had to apply to the court.7

In ruling against the defendant, the state supreme court distinguished the Missouri selection process from the system deemed unconstitutional by the United States Supreme Court in Taylor v. Louisiana.8 In Taylor, the Supreme Court struck down a provision of the Louisiana state code of criminal procedure requiring that a "woman should not be selected for jury service unless she had previously filed a written declaration of her desire to be subject to jury service."9 The Supreme Court found that the provision systematically excluded women,10 thus contravening the fair-cross-section requirement of the sixth amendment.11

The Missouri high court reasoned that the state selection process did not systematically exclude women.12 Instead, the Missouri procedure provided that state courts could grant an exemption from jury service to any woman who requested one.13 The court reasoned that since the Missouri selection procedure did not require that women affirmatively indicate their availability for jury duty as did the unconstitutional procedure in Taylor, and since the Taylor decision permitted reasonable exemptions from jury service, Missouri’s automatic exemption procedure was constitutional.14

Finally, the Missouri court disapproved the defendant’s use of statistics in challenging the jury selection process. The defendant had argued that based on the 1970 census, 54 percent of the Jackson County residents were women, while only 29.5 percent of all venires summoned and 15.5 percent of those appearing were women during the month of defendant’s trial. The state supreme court felt that the census figures were dated and did not reflect the relevant pool of women eligible to serve on juries, since juries were drawn from voter registration lists. The court emphasized that in Taylor, only 10 percent of the

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7. Id. at 362.
9. Id.
10. The prosecution had stipulated that approximately 53 percent of the population in the district where defendant Taylor was tried were women; but women comprised only 10 percent of the jury wheel. Id. at 524.
11. Id. at 531.
12. 556 S.W.2d at 15.
13. Id. at 13 n.1.
14. Id. at 15-18.
jury wheel was made up of women during the significant time period. The court noted that petitioner failed to account statistically for women who claimed sex-neutral exemptions, such as age over 65 or employment in government service. However, the court felt that, even if defendant had accounted for the sex-neutral exemptions, the numbers of women summoned and appearing “were well above acceptable constitutional standards” as enunciated in Taylor.

After granting certiorari, the United States Supreme Court reversed. Justice White, writing for the Court, stated: “[I]n certain crucial respects the Missouri Supreme Court misconceived the nature of the fair-cross-section inquiry set forth in Taylor.” The Court then enunciated a three-pronged test for demonstrating a prima facie violation of the fair-cross-section requirement:

[D]efendant must show (1) that the group alleged to be excluded is a “distinctive” group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that the underrepresentation is due to systematic exclusion of the group in the jury selection process.

The Court first found that Taylor established women as a distinctive group, such that their elimination from jury service violated the fair-cross-section requirement, thereby satisfying the first element of the prima facie case.

The Court further held that defendant’s statistical evidence clearly established a prima facie case of underrepresentation of women on the venires, contrary to the Missouri court’s holding. The Missouri court had speculated that the 1970 census data might be inadequate for comparison to venire composition because the census was six years old at time of trial and might not precisely reflect the percentage of women registered to vote. The Supreme Court was unimpressed by the state court’s argument for statistical exactitude. In the Court’s view, it was irrelevant whether statistics reflected a pool of women eligible for jury service, as did the statistics in Taylor, or whether the statistics demonstrated the actual number of

15. Id. at 16.
16. Id. at 16-17.
17. 439 U.S. at 363.
18. Id. at 364.
women in the community as a whole. No evidence was introduced establishing that use of the 1970 census “significantly distorted the percentage of women” available for jury duty, and the Court would not accept speculation regarding possible distortion to rebut defendant’s prima facie case. Thus defendant’s statistical proof clearly established the second element of the prima facie case, underrepresentation in comparison to the community. 19

Finally, the Court found that defendant’s proof established that the underrepresentation of women was due to the jury selection process. The defendant demonstrated large discrepancies between the percentage of women in the community and the venires’ composition each week for nearly a year. The Court stated that continuous underrepresentation of the kind demonstrated “was systematic—that is, inherent in the particular jury-selection process utilized.” 20

The defendant’s statistics established, to the satisfaction of the Court, those points in the selection process where exclusion occurred. Women could claim exemptions from jury service upon receipt of the questionnaire, upon receipt of the summons, or by simple failure to appear for service on the appointed day. No indication was given that the canvass of prospective jurors, chosen at random from the voter registration list, resulted in discrepancies. Only 26.7 percent of those summoned, however, were women, which indicated to the Court that many women returned the questionnaire claiming exemption or ineligibility. Since only 14.5 percent of the venires were women, it seemed obvious to the Court that the automatic exemption also promoted underrepresentation at the final stages of the jury selection process. In the Court’s analysis, the consistent, large discrepancies were clearly “due to the system by which the juries were selected . . . . Women were therefore systematically underrepresented within the meaning of Taylor.” 21

Once a prima facie fair-cross-section violation is established, the burden shifts to the state to show that “attainment of a fair-cross-section [is] . . . incompatible with a significant state interest.” 22 The suggestions of the Missouri Supreme

19. Id. at 364-66.
20. Id. at 366.
21. Id. at 367.
22. Id. at 368.
Court that valid, sex-neutral exemptions may have caused the underrepresentation were insufficient to meet that burden. Furthermore, the state could offer no substantial justification for the exemptions, since it was unreasonable to assume that no women could be spared from their jobs for jury service. While the state could legitimately tailor statutes exempting members of families who cared for children, the Court stressed that states must be careful "in exempting broad categories of persons from jury service." 23

In dissent, Justice Rehnquist argued that the majority opinion created a hybrid doctrine amalgamating fourteenth amendment equal protection analysis and sixth amendment analysis. Rehnquist noted that the language of the opinion had strong equal protection overtones, as the majority required a "significant state interest" to be advanced by exemption criteria, and not merely "rational grounds" for a disproportion. 24 He found the statistical analysis of the decision particularly objectionable. Whereas prior cases concerned "outright exclusion" of groups, according to the dissent, Duren involved mere underrepresentation. Thus, the Justice stated,

Eventually the Court either will insist that women be treated identically to men for purposes of jury selection . . . , or in some later sequel to this line of cases will discover some peculiar magic in the number 15 that will enable it to distinguish between such a percentage and a higher percentage less than 50. . . . If it ultimately concludes that a percentage of women on jury panels greater than 15 but substantially less than 50 is permissible even though the State's jury selection system permits women but not men to "opt out" of jury service, it is simply playing a constitutional numbers game. 25

Justice Rehnquist predicted that the majority opinion will wreak havoc with jury selection procedures. In an attempt to avoid conviction reversals on the basis of jury composition, states could be forced to abandon gender and occupation-based classifications relying instead on case-by-case determinations of qualifications for service. According to the Justice's rationale, the administrative cost of such determinations would be wholly out of proportion to the end achieved. 26 In brief, Justice

23. Id. at 370.
24. Id. at 371.
25. Id. at 374-75.
26. Id. at 377.
Rehnquist contended that a criminal defendant is entitled to an impartial tribunal, not a jury perfectly balanced in its composition.

The majority opinion in *Duren v. Missouri* affirmed the Court's earlier stance in *Taylor v. Louisiana*, that exclusionary procedures that significantly reduce or eliminate representation of distinctive groups on venires must serve significant state interests. Whether the Court will tamper with jury composition as much as Justice Rehnquist fears remains to be seen. The decision has a definite undercurrent of equal protection analysis, and, as the dissent suggested, the limit of the analysis is unclear where the primary purpose of the sixth amendment is perceived as trial before an impartial tribunal. Which jury composition guarantees an impartial tribunal or fair trial? The boundaries of the Court's statistical analysis are unclear.

Focusing on the character of the exemption, rather than statistical disparities, could avoid the "constitutional numbers game" abhorred by Justice Rehnquist. The Court simply will not tolerate assumptions regarding the capacity of a particular group to serve on juries. If exemptions from jury service specifically involve incapacity to serve, such as illness, family responsibilities, or hardship, without presuming that a "distinctive group" fits within one of those categories, statistical disparities could be less important to the Court than the dissent believes. Statistical disparities only assume importance where diversity is viewed as an element of impartiality, and that view Justice Rehnquist is not prepared to adopt.

*Evet Abt*
In a multiple count indictment, the San Francisco Grand Jury charged defendants with various crimes including conspiracy and grand theft. Defendants were arraigned and pleaded not guilty on all counts. Their motion for dismissal or post-indictment preliminary hearing was denied. The case reached the California Supreme Court on writ of mandate where the defendants argued that the due process and equal protection clauses of both the federal and state constitutions required granting of an adversarial preliminary hearing. The court concluded that "denial of a post-indictment preliminary hearing deprived defendants herein of equal protection of the laws guaranteed by article I, section 7, of the California Constitution."  

Justice Mosk, writing for the majority, declared that defendants charged by indictments are denied substantial procedural rights that are available to those charged by information. These include rights to a preliminary hearing before a neutral magistrate, representation by counsel, confrontation and cross-examination of hostile witnesses, and the opportunity to personally appear and affirmatively present exculpatory evidence.

The court rejected the Attorney General’s argument that any disparity in procedural rights was effectively eliminated by judicial review of the grand jury’s probable cause determination. The court concluded that judicial review of an ex parte indictment failed to provide the defendant those “pragmatic functions” of an adversarial preliminary hearing that go beyond a mere judicial determination of probable cause. The court specifically mentioned the following: 1) the opportunity to “fashion a vital impeachment tool for use in cross-examination of the State’s witnesses at trial;” 2) the opportunity to “preserve testimony favorable to the accused of a witness
who does not appear at the trial;" 3) the "important discovery function" of an "adversarial preliminary hearing" that would enhance the ability of defense counsel to "evaluate the desirability of entering a plea or to prepare for trial;" and, 4) the early opportunity of defense counsel to argue for psychiatric examination or bail. Nor was the court convinced that such benefits would be secured by the availability of a grand jury transcript, since it would "invariably reflect only what the prosecuting attorney permits it to reflect."

This perceived lack of grand jury independence and objectivity was also fatal to any assumption that a probable cause determination was substantially the same whether found by a grand jury with subsequent judicial review or by a magistrate at a preliminary hearing.

Relying on the modern history of the grand jury, the court observed that because of its inconsistent functions of accuser and impartial fact finder, the role of the grand jury as a protector of the individual against prosecutorial abuse had succumbed to prosecutorial control. The court concluded that this lack of objectivity "affects the grand jurors when they vote to indict [and] infects the record for purposes of review." Moreover, the "lack of defense participation in the development of a reviewable record creates a heavy bias in favor of finding that the grand jury indictment was based on probable cause."

Having found the indicted defendant to be "seriously disadvantaged," the court held that the prosecuting attorney's discretion in choosing the method by which a defendant is to be charged violated equal protection by creating a classification that impaired the fundamental rights of indicted defendants. By impinging on such fundamental rights as the rights to counsel, to confrontation of witnesses, to personally appear, to have a hearing before a judicial officer, and to be free from unwarranted prosecution, the grand-jury-indictment/charge-by-information distinction invoked the strict scrutiny of the courts. Although the Attorney General was able to demon-

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2. 22 Cal. 3d at 588, 586 P.2d at 918-19, 150 Cal. Rptr. at 437-38 (citing Coleman v. Alabama, 399 U.S. 1, 9-10 (1970) as cataloging some of the "pragmatic functions" of the preliminary hearing).


4. 22 Cal. 3d at 591, 586 P.2d at 920-21, 150 Cal. Rptr. at 439-40.

5. The court cited Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), as the basis for its equal protection analysis. Serrano is well known for its assertion that:
strate a state interest in some tactical advantages gained by use of the indictment procedure, the court found that the interests were not compelling so as to justify denial of the pragmatic functions of a preliminary hearing. Nor was the Attorney General able to demonstrate that denial of a preliminary hearing was necessary to preserve the state's tactical advantages.

In fashioning a remedy, the Hawkins court was careful not to intrude directly on the grand jury's indicting function, specifically sanctioned by the California Constitution. Instead, the court made the existing preliminary hearing procedure

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[California] 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 . . . . Accordingly, decisions of the United States Supreme Court defining fundamental rights are persuasive authority . . . but are to be followed by California courts only when they provide no less individual protection than is guaranteed by California law.

Id. at 764, 557 P.2d at 950, 135 Cal. Rptr. at 366 (citing Dept. of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 588, 400 P.2d 321, 322, 43 Cal. Rptr. 329, 330 (1965)). Reliance on Serrano casts considerable doubt on the court's assertion in Hawkins that the "fundamental rights" dealt with there "are expressly or impliedly grounded in both state and federal Constitutions . . . ." 22 Cal. 3d at 593, 586 P.2d at 921, 150 Cal. Rptr. at 440.

6. The Hawkins majority opinion listed the following tactical advantages:

- A prosecutor may proceed by indictment for valid reasons: the prospective defendant cannot be found; witnesses may fear testifying in court; the case may have potential for prejudicial pretrial publicity; publicity may jeopardize a continuing investigation; a preliminary examination may involve prolonged delay because of the number of defendants or the complexity of the case.

22 Cal. 3d at 593 n.6, 586 P.2d at 921-22 n.6, 150 Cal. Rptr. at 440-41 at n.6.

In his separate concurring opinion, Justice Mosk provided a more complete list.

The reasons usually given by prosecutors for choosing to initiate prosecutions by indictment include the following: indictment procedures (1) save time; (2) protect witnesses against embarrassing cross-examination; (3) protect an innocent accused when no indictment is returned; (4) protect the cover of an informant; (5) protect witnesses against harm or intimidation; (6) allow the prosecuting attorney to test his case and obtain a community viewpoint on its strength; (7) permit the evidentiary hearing to be held over an extended period of time; (8) facilitate investigations, e.g., by providing subpoena availability without the initiation of formal proceedings; (9) allow the prosecutor to toll the statute of limitations when the defendant is absent (Pen. Code, §§ 800, 803); (10) protect the defendant from prejudicial pretrial publicity; (11) protect society from the flight of the accused; and (12) permit the prosecuting attorney to share responsibility for the prosecution with the grand jury when there is great public interest in a case.

Id. at 604, 586 P.2d at 529, 150 Cal. Rptr. at 448. Significantly, the requirement of a post-indictment preliminary hearing leaves a number of these tactical advantages still available to the prosecutor.

available to indicted defendants who request it prior to, or at the same time that they enter a plea. Upon such a request, the court may order the prosecuting attorney to refile the indictment as a complaint thereby activating the preliminary hearing procedures of the California Penal Code.8 The court limited the decision to the present case and to indicted defendants who had not entered a plea at the time the opinion became final.

Two aspects of the Hawkins decision are significant.9 First, there will be an obvious inhibitory impact on the prosecutorial use of the grand jury. As a practical matter, however, this impact may be more apparent than real. The decision was limited to the indicting function of the grand jury. The grand jury's investigative role was left untouched. In addition, charge by indictment may still be used where its important tactical advantages are undisturbed by requiring a post-indictment preliminary hearing. For example, the indictment may be used to toll the statute of limitations on an absent defendant.

A more important impact of Hawkins is its treatment of the preliminary hearing as the remedy of choice in securing procedural rights fundamental to the constitutional functioning of the criminal justice system. One author has described the preliminary hearing as "hover[ing] close to being a matter of constitutional right."10 While the court's use of equal protection analysis avoided that conclusion, it did mention that "serious" due process issues were involved. This, coupled with the premise that the purpose of a preliminary hearing is greater than a judicial determination of probable cause, lays the basis for a strong argument that the pragmatic functions of the preliminary hearing have risen to the status of substantive constitutional rights.

Clearly the court's decision should focus attention on the preliminary hearing as an adversarial judicial process for the protection of individual rights against the abuses of prosecu-

9. While not relevant to the result in Hawkins, another feature of the case deserves mention. In an unusual concurrence to his own majority opinion, Justice Mosk urged abandonment of traditional two-tier equal protection analysis for one involving a third, intermediate level of review. Justice Newman joined in this opinion. Chief Justice Bird's concurring opinion argued against adoption of an intermediate scrutiny of equal protection claims. 22 Cal. 3d at 595-610, 586 P.2d at 923-33, 150 Cal. Rptr. at 442-52.
torial discretion and power. Read in this light, *Hawkins* is a ready resource for an attack on perfunctory preliminary hearings which fail to protect the defendant's rights. The message of *Hawkins* is that the preliminary hearing must be adversarial and must be taken seriously if it is to carry the constitutional burden that the court has placed upon it.

*Tom May*

Plaintiff Michael Hoyem, a 10-year-old boy, attended summer session at Foster A. Begg School in the defendant school district. On July 16, 1974, Michael arrived at school to attend classes. Before the end of the scheduled school day, he left the school premises without permission from school authorities. Subsequently, Michael was struck by a motorcycle and seriously injured.¹

Michael and his mother initiated the present action against the school district alleging that the accident and resulting injuries were proximately caused by the school district’s negligent supervision. Michael sought recovery for injuries sustained in the accident. Michael’s mother sought recovery for his medical care as well as damages resulting from the physical and emotional injury she suffered when confronted with his injured state. In the trial court, defendant’s demurrer to all causes of action was sustained and the action was dismissed.²

On appeal, the California Supreme Court reversed the trial court’s dismissal of the cause of action seeking recovery for Michael’s injuries and medical expenses. Mary Ann Hoyem’s cause of action, based on loss of Michael’s “comfort and society,” was held properly dismissed by the trial court.

In ruling that Michael Hoyem’s allegations stated a cause of action, the court initially reiterated that a school district may be held liable for a student’s off-campus injuries if plaintiff can prove the injuries were a result of the school authorities’ negligent supervision of the student while on school premises. The court cited Satariano v. Sleight,³ which held that a school district could be liable for a student’s injury on a public street. The pleading in the instant case was also compared to Dailey

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2. Id. at 512, 585 P.2d at 853, 150 Cal. Rptr. at 3.
3. 54 Cal. App. 2d 278, 129 P.2d 35 (1942). See also Taylor v. Oakland Scavenger Co., 12 Cal. 2d 310, 83 P.2d 948 (1938). In Taylor, the school district had knowledge of a student practice of running out along the playground to the gym. The district was held liable for failing to take adequate precautionary measures to prevent accidents.
v. Los Angeles Unified School District, where a student died as a result of "slap boxing" with another student in the school gym during the noon recess. The court observed that the complaints in both cases alleged the school district's negligence in supervising students while on school premises and that the resulting injury was proximately caused by such negligence.

The school district argued that their acknowledged duty to supervise pupils while on school grounds did not encompass responsibility for assuring that pupils would remain on the school premises during the school day. The court, however, utilized Dailey to point out that the duty to supervise included the duty to "enforce those rules and regulations necessary [for a pupil's] protection." The California Administrative Code at section 303 provides:

A pupil may not leave the school premises at recess, or at any other time before the regular hour for closing school, except in case of emergency, or with the approval of the principal of the school.

This rule, the court reasoned, must have been promulgated for the protection of students.

Defendant also maintained that no school district had been found liable for a student's off-campus injuries in any California case. In addition to finding defendant's argument "simply inaccurate," citing Satariano, the court noted the argument was beside the point in that the case did not concern the scope of defendant school district's off-campus supervisory duty. The alleged negligence concerned the district's duty of supervising while Michael was still on school premises. Further availing itself of Satariano, the court refuted defendant's claim that the off-campus situs of the injury was sufficient to vitiate school district liability. The court in Satariano viewed the street as an extension of the school premises where students remained subject to the control of school authorities.

The defendant also argued for immunity under Education Code section 44808, which provides that a school district is not liable for a student's safety when the student is not on school

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5. 22 Cal. 3d at 513-14, 585 P.2d at 853-54, 150 Cal. Rptr. at 3-4.
6. 2 Cal. 3d at 747, 470 P.2d at 363, 87 Cal. Rptr. at 379.
8. See Calandri v. Ione Unified School District, 219 Cal. App. 2d 542, 33 Cal. Rptr. 333 (1963). In Calandri a school district was liable for injury sustained at home as a result of a dangerous instrument made in shop class.
property unless the school district has provided transportation or has sponsored an off-campus school activity. The court rejected defendant's interpretation and pointed out that the code section explicitly withdraws immunity when the school district "has failed to exercise reasonable care under the circumstances."  

Defendant predicted fortress-like schools and argued that overwhelming policy considerations prohibit holding a school district liable when a student is injured while "playing hooky." Defendant suggested:

Holding a school district liable for such an injury to a truant would lead... to "truant-proof" schools, where, to avoid liability, school personnel would be required virtually to chain students to their desks to keep them from leaving.  

The court called these fears unwarranted since a district is liable only if it is negligent in supervision and injuries proximately result from the lack of due care. Finally, the court rejected defendant's contention that, because the injury occurred during a voluntary summer session, the duty to supervise, required during the school year when attendance is compulsory, should not be imposed. Once a student is enrolled in summer session he or she must attend. Therefore, the trust parents place in a school to supervise their children is not diminished.  

The court next considered the issue of proximate cause. Defendant maintained that, "as a matter of law, negligent on-  

9. CAL. EDUC. CODE § 44808 (West 1978): Notwithstanding any other provision of this code, no school district, city or county board of education, county superintendent of schools, or any officer or employee of such district or board shall be responsible or in any way liable for the conduct or safety of any pupil of the public schools at any time when such pupil is not on school property, unless such district, board, or person has undertaken to provide transportation for such pupil to and from the school premises, has undertaken a school-sponsored activity off the premises of such school, has otherwise specifically assumed such responsibility or liability or has failed to exercise reasonable care under the circumstances.  

In the event of such a specific undertaking, the district, board, or person shall be liable or responsible for the conduct or safety of any pupil only while such pupil is or should be under the immediate and direct supervision of an employee of such district or board.  

10. 22 Cal. 3d at 517, 586 P.2d at 856, 150 Cal. Rptr. at 6.  
11. Id. at 519, 585 P.2d at 857, 150 Cal. Rptr. at 7.  
12. Id.
campus supervision cannot be the proximate cause of an off-campus injury."

In dismissing defendant's argument, the court stated that the question of proximate cause is generally one of fact for the jury and that the trial court could not, as a matter of law, determine whether defendant's negligent supervision was the proximate cause of plaintiff's injuries.

Defendant contended that a school district should not be expected to foresee "that students will take advantage of a lapse in supervision to leave the school premises, and therefore that any off-campus injury is unforeseeable as a matter of law."

In reply, the court reasoned that a jury might conclude that defendant could have readily foreseen the temptation of leaving school premises during a summer session; as such, plaintiff's activity was not unforeseeable as a matter of law. Defendant further argued that the motorcyclist who hit the plaintiff represented a superseding cause, cutting off any liability on the part of the school district. The court rejected this argument, quoting from Dailey: "Neither the mere involvement of a third party nor that party's wrongful conduct is sufficient in itself to absolve the defendants of liability, once a negligent failure to provide adequate supervision is shown."

If the intervening cause was foreseeable by the defendant, or if the injury was of a foreseeable type, the defendant is not relieved of liability. Therefore, the subsequent negligence of the motorcyclist did not preclude liability on the part of the defendant school district.

Finally, the court ruled that Mary Ann Hoyem's cause of action for the loss of Michael's "comfort and society" and for her own injuries was properly dismissed. The court refused to extend the cause of action recognized in Dillon v. Legg, which held that recovery depends on the mother having witnessed the death of or injury to her child.

In dissent, Justice Clark was highly critical of the "insurmountable duties and financial burdens" imposed on a public school district by the decision. He suggested that school districts are forced into a double bind. They must insure truants against third party tortfeasors for injuries sustained off

13. Id. at 520, 585 P.2d at 858, 150 Cal. Rptr. at 8.
14. Id.
15. Id. at 521, 585 P.2d at 858, 150 Cal. Rptr. at 8 (quoting Dailey v. Los Angeles Unified School District, 2 Cal. 3d at 750, 470 P.2d at 365, 87 Cal. Rptr. at 381).
16. Id. at 522, 585 P.2d at 859, 150 Cal. Rptr. at 9.
17. 68 Cal. 2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
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school premises, and/or lower campus size, erect barriers, and increase campus security to police all points of exit in order to reduce truancy. Justice Clark stated:

In view of the tremendous financial impact resulting from adoption of Proposition 13 in the Primary Election of 1978, the majority decision will surely hasten the insolvency of some school districts as predicted by the State Superintendent of Public Instruction.\(^\text{18}\)

Also dissenting, Justice Richardson concluded that, for policy reasons, liability should not be imposed on a school district for injuries suffered by a student who voluntarily leaves the campus during school hours. "A line should be drawn limiting a school's liability to injuries to a pupil which occur on school property, when the pupil is transported to, or participating in, a school sponsored or school related activity . . . ."\(^\text{19}\)

The decision appears to be a retreat from two recent tort liability cases: \textit{Peter W. v. San Francisco},\(^\text{20}\) and \textit{Borer v. American Airlines, Inc.},\(^\text{21}\) in which the court declined to further extend public liability. In \textit{Borer}, the court refused to recognize a new cause of action for loss of consortium in a parent-child relationship and suggested restraints when one seeks to extend public liability. In \textit{Peter W.}, the plaintiff sought to fashion a new area of school district liability for educational malpractice. The court, again taking into consideration the social and financial problems which beset school districts, refused to extend liability. \textit{Hoyem} differs from \textit{Borer} and \textit{Peter W.} in that the plaintiff sought to base liability on a physical injury, a harm more readily ascertainable and comprehensible to the court. The judicial recognition of a new area of tort liability seems to be facilitated by an injury that has an accepted and measurable standard.

The \textit{Hoyem} court maintained that a district will not be liable for a truant's injuries unless they proximately result from the district's failure to exercise reasonable care under the circumstances. Nevertheless, the decision achieves practically the same outcome by imposing a duty which will be almost impossible to satisfy. The court ignores the fact that even an habitual truant cannot be suspended from school:\(^\text{22}\) "The majority thus

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\(^{18}\) 22 Cal. 3d at 524-25, 585 P.2d at 861, 150 Cal. Rptr. at 11.

\(^{19}\) Id. at 527-28, 585 P.2d at 863, 150 Cal. Rptr. at 13.


\(^{22}\) CAL. EDUC. CODE § 48900 (West 1978).
proposes to make a school district the insurer of the safety of such persons although the district lacks the power to control their movements."

The decision in Hoyem will likely have a substantial impact on the current financial crisis confronting California school districts. Despite the California Supreme Court’s contention that its ruling “in no way expands the supervisory obligations of school districts and does not place a new duty upon school authorities to control the conduct of students when they are off school premises, ” it appears that the court has fashioned yet a new area of school district liability.

Sandra Kloster

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23. 22 Cal. 3d at 525 n.2, 585 P.2d at 856 n.2, 150 Cal. Rptr. at 11 n.2. (Clark, J., concurring and dissenting).
24. Id. at 523, 585 P.2d at 860, 150 Cal. Rptr. at 10.
In March, 1976, an information was filed against the defendant Scherling that charged four counts of burglary committed in Santa Clara County in 1966, 1967, and 1968. In July, 1969, defendant had moved to Idaho after losing his job in Santa Clara County. He left a forwarding address with the post office, was listed in the telephone directory, and used his true name at all times.

The Santa Clara police did not even suspect the defendant of having committed the burglaries until at least 1975. Police in Delano, California, had arrested defendant Scherling and another, Ducote, for a burglary committed in Delano on May 30, 1967. The Delano authorities learned of defendant’s illegal activities in Santa Clara. However, the Santa Clara police were not apprised of this, since charges were later dropped by Delano police.\footnote{2}

In 1975, a man named Boyes contacted the California Department of Justice about Ducote’s involvement in other political burglaries. Ducote, contacted by the Department in 1975, confessed to the Santa Clara burglaries and implicated Scherling in the same burglaries. The Department notified the Santa Clara authorities of this information late in 1975. After a preliminary hearing regarding Ducote’s involvement in these crimes, Santa Clara County investigators flew to Idaho where they met with defendant in early 1976. During that year, defendant came to San Jose, California, where he was arrested by Santa Clara police.

After the information was filed against Scherling in 1976,
he brought this action for a writ of prohibition to restrain the trial court from proceeding to trial on the ground that the court lacked jurisdiction. He claimed that the three-year statute of limitations, applicable to burglary under Penal Code section 800, had run before the filing of the information. The prosecution argued that the statute of limitations defense was unavailable because the defendant had left the state in July, 1969, and the running of the statute was halted under Penal Code section 802. The trial court agreed with that argument.

On appeal, the issues presented were: 1) whether section 802 should apply when defendant was not accused of flight from prosecution, no warrant was issued for his arrest before or after his departure, and state officials knew or should have known of his departure; and 2) whether section 802 violated defendant’s constitutional right of travel, equal protection, due process, and the right to a speedy trial, under the United States and California Constitutions. The California Supreme Court held that the section 800 statute of limitations was properly tolled under section 802, and that the trial court could proceed to trial on the information.

The court rejected defendant’s argument that he had been available despite being out of the state and that section 802 was to apply only to assure that the accused was available for prosecution. Instead, the court reasoned that the legislature could

4. CAL. PENAL CODE § 800 (West Supp. 1979) states in pertinent part: “An indictment for any felony [exceptions listed] . . . shall be found, an information filed, or case certified to the superior court within three years after its commission.” The offenses charged occurred in 1966, 1967, and 1968, and the information was not filed until February, 1976, well after passage of the statute of limitations.
5. CAL. PENAL CODE § 802 (West 1970) is the crux of this case:
   If, when or after the offense is committed, the defendant is out of the State, an indictment may be found, a complaint or an information filed or a case certified to the superior court, in any case originally triable in the superior court, or a complaint may be filed, in any case originally triable in any other court, within the term limited by law; and no time during which the defendant is not within this State, is a part of any limitation of the time for commencing a criminal action.

   If § 802 is applied to the defendant’s actions, the information would be filed properly, within the three year statute of limitations for burglary found in § 800. See note 4 supra. Mechanically, the court noted that defendant left the state approximately two years and eight months after committing the first crime and one year, five months after the last offense. The defendant returned to the state, in February, 1976. Since the information was filed in March, 1976, this was within the § 800 three-year limit.
have rationally designed section 802 to increase the likelihood of detection and identification of criminals. Because the result (even if not the intent) of an accused’s departure from the state frustrates these goals, the court held that the statute of limitations should be tolled, even though defendant is “available.”

The court next addressed the allegation that section 802 violated defendant’s freedom to travel and right to equal protection of the laws by imposing residence requirements as a condition to receiving the “benefits” of state law. The court noted that:

[T]here is clearly a distinction between one who, like defendant, leaves the state after committing a crime . . . and one who has committed no crime but is deprived of government benefit merely because he exercises his right to travel.8

In the first situation, there are state interests in making sure the defendant is locally available and in avoiding burdensome extradition proceedings.

The court rejected defendant’s assertion that his equal protection and right-to-travel arguments should be tested by the strict scrutiny standard. Instead, the court applied the less strict rational relationship test.9 The court thus concluded that

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7. U.S. Const. art. IV, § 2, cl. 1; id. amend. XIV, § 1; Cal. Const. art. I, § 7(a).
8. 22 Cal. 3d at 501, 585 P.2d at 223, 145 Cal. Rptr. at 602. The court distinguished In re King, 3 Cal. 3d 226, 474 P.2d 983, 90 Cal. Rptr. 15 (1970). That case involved Cal. Penal Code § 270 (West 1970), which imposed a higher penalty (felony) on non-supporting fathers who remain out-of-state over thirty days, as opposed to those who remain in the state (misdemeanor). The court held that this scheme violated both equal protection and the right to travel because it imposed additional criminal liability upon a person solely because he chose to remain out-of-state.

The court held this case was distinguishable, because in Scherling, the defendant was not subjected to a greater criminal penalty because he left the state. Also, there was a state interest in detecting crime and identifying the criminal not present in King (the identity of the nonsupporting father was not in doubt).

9. “Strict scrutiny” and “rational relationship” are equal protection tests established by the United States Supreme Court. Strict scrutiny involves examination of a suspect classification which must be supported by a compelling state objective. For example, a state statute that discriminates against race will not stand unless necessary to accomplish some compelling state objective, and the discriminatory classification itself must be necessary to achieve that objective. See, e.g., Loving v. Virginia, 388 U.S. 1 (1967). The state statute rarely survives this analysis.


Thus, the Scherling court noted that: “[T]he Legislature could have determined that the detection of the crime and identification of the criminal are more likely if the criminal remains in the state than if he departs.” 22 Cal. 3d at 503, 585 P.2d at 225, 149 Cal. Rptr. at 603 (emphasis added).
the legislature, in passing section 802, could have determined that detection of crime and criminal identification are more likely if an accused remains in the state and that such a restriction on defendant's activity would have a rational relationship to a valid government interest in preventing crime.\textsuperscript{10} Having disposed of the right-to-travel defense, the court similarly held that the tolling of the statute of limitations did not deprive defendant of a fundamental liberty interest.\textsuperscript{11}

The court next examined the defendant's right to a speedy trial.\textsuperscript{12} Although California extends this right to the pre-indictment stage, the court found that the defendant claimed the right even prior to the filing of the complaint—when the state has decided to charge a defendant or has a basis for doing so, but delays the arrest. The court concluded that a delay between the time the crime is committed and a complaint is filed or a formal arrest made, is not to be measured by the right to speedy trial, but rather, by the right to due process of law.\textsuperscript{13}

Under either theory, the test to be applied is a balancing of the prejudice caused by the delay against the justification

\textsuperscript{10} The court acknowledged Zimmerman v. Superior Court, 248 Cal. App. 2d 56, 56 Cal. Rptr. 226 (1967), as a possible limitation to the tolling of the statute of limitations in Scherling. In Zimmerman, the defendant was incarcerated in another jurisdiction. The court held that § 802 did not apply, since the defendant made a request to the Los Angeles district attorney that he be brought to trial at the earliest possible time on the California charges, and the district attorney failed to comply. Also, there was no excuse for the failure of the prosecution to bring extradition proceedings. 248 Cal. App. 2d at 63, 56 Cal. Rptr. at 231.

\textsuperscript{11} The court distinguished defendant's reliance on People v. Olivas, 17 Cal. 3d 236, 551 P.2d 375, 131 Cal. Rptr. 55 (1976), and Cotton v. Municipal Court, 59 Cal. App. 3d 601, 130 Cal. Rptr. 876 (1976). Olivas involved CAL. WELF. & INST. CODE § 1731.5 (West 1972), which penalized misdemeanants between the ages of 16 and 21, by providing for potentially longer terms of incarceration than other misdemeanants. Using strict scrutiny as the test, the court could find no compelling state interest that would justify, \textit{inter alia}, the denial of a fundamental interest in liberty. 17 Cal. 3d at 251-52, 551 P.2d at 385, 131 Cal. Rptr. at 65.

In Cotton, the statute imposed criminal sanctions on nonsupporting fathers under CAL. PENAL CODE § 270 (West Supp. 1978), but not nonsupporting mothers. The court used the strict scrutiny standard since the statute denied the defendant equal protection on grounds of both sex discrimination and invasion of a personal liberty interest. 59 Cal. App. 3d at 605, 130 Cal. Rptr. at 879.

By contrast, Scherling involved neither greater penalties, nor discrimination based on sex, and therefore strict scrutiny would not apply.

\textsuperscript{12} U.S. CONST. amend. VI; CAL. CONST. art. I, § 15.

\textsuperscript{13} 22 Cal. 3d at 505, 585 P.2d at 226, 145 Cal. Rptr. at 604. This principle was derived from People v. Archerd, 3 Cal. 3d 615, 477 P.2d 421, 91 Cal. Rptr. 397 (1970), which involved an eleven-year delay between a murder and the filing of an indictment against the defendant. The delay was caused by the absence of a test to confirm the police's suspicion that defendant murdered his victims by insulin injections.
for the delay. A showing of prejudice, coupled with unjustified delay in prosecution, is a denial of due process. The defendant claimed prejudice from the delay since his memory of the crimes had faded and several witnesses who could have verified his defense had died or were otherwise unavailable. Relying on the findings of the trial court, the supreme court found that defendant's testimony showed no loss of memory, and that the unavailable witnesses would have testified only regarding defendant's intent and other witnesses were available to testify on that issue. Thus, the supreme court found neither deliberate delay in prosecution nor prejudice to the defense, that would justify a finding of denial of due process.

The significance of Scherling lies in its factual setting. Tolling the statute of limitations for criminals in flight is justifiable to further the state's purposes in identifying criminals and detecting crime. However, applying section 802 to an accused who has not attempted to conceal his identity nor his location and has left the state for valid reasons is a quantum leap forward. Equal protection should be a more viable argument in the latter situation, since the difference between the in-state and out-of-state defendant narrows considerably. Indeed, inequality seems apparent where section 802 is applied to an accused who publicly holds himself out, but is not applied when an out-of-state defendant requests that he be brought to trial on charges in California.

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14. 22 Cal. 3d at 505 n.9, 585 P.2d at 227 n.9, 145 Cal. Rptr. at 604 n.9. The court cites Jones v. Superior Court, 3 Cal. 3d 734, 741 n.1, 478 P.2d 10, 15 n.1, 91 Cal. Rptr. 578, 583 n.1 (1970), and People v. Bradford, 17 Cal. 3d 8, 18-19, 549 P.2d 1225, 1231-32, 130 Cal. Rptr. 129, 135-36 (1976), for the application of a balancing test in the pre-indictment situation.
15. 22 Cal. 3d at 506-07, 585 P.2d at 227, 149 Cal. Rptr. at 605.

On separate occasions, two Iranian students were engaged in peaceful demonstrations with other pickets on the sidewalk in front of the Iranian consulate in San Francisco. In the first incident, Farzad Ghafari was arrested for violating California's "mask statute" on the ground that he was picketing in disguise by placing a leaflet between his glasses and face in order to conceal his identity. Appellant Majd was arrested in a subsequent demonstration in front of the consulate for the same reason and under similar circumstances.

The students demurred to the Penal Code section 650a charge, contending that 1) if their identity as members and demonstrators of the Iranian Students Association had become known, serious reprisals might have been taken against them and against their relatives in Iran by agents of the Iranian government, and 2) if they had known that they could not protect their anonymity while picketing they would not have demonstrated or participated in future demonstrations. The municipal court overruled the demurrers, and the students petitioned the superior court for a writ of prohibition. After conducting hearings based on alternative writs in each case, the superior court denied the petitions. The cases were consolidated for this appeal.

In the California Court of Appeals, appellants maintained that section 650a was unconstitutional on its face in three respects. First, the students contended that section 650a was overbroad because it flatly prohibited anonymity for activities

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1. CAL. PENAL CODE § 650a (West 1970) provides:
   It is a misdemeanor for any person, either alone or in company with others, to appear on any street or highway, or in other public places or any place open to view by the general public, with his face partially or completely concealed by means of a mask or other regalia or paraphernalia, with intent thereby to conceal his identity. This section does not prohibit the wearing of such means of concealment in good faith for the purposes of amusement, entertainment or in compliance with any public health order.
protected by the first amendment. As such, the restriction was not required by a compelling state interest nor implemented in the least restrictive manner possible.\(^3\) Second, appellants argued that the “mask statute” was void due to vagueness in two respects: 1) it applied to a face “partially or completely concealed by means of a mask or other regalia or paraphernalia” and 2) it contained an exception for “amusement” or “entertainment” purposes.\(^4\) Finally, appellants argued that the distinction in section 650a between anonymous “entertainment or amusement” and “anonymous public issue communication” was a violation of the equal protection clause of the fourteenth amendment because it favored the former activity over the latter.\(^5\)

The court of appeals agreed with appellants and held that the statute was unconstitutional on its face in all three respects in violation of the first and fourteenth amendments. In addressing the contention that the statute was overbroad, the court relied on the landmark decision of the United States Supreme Court in *NAACP v. Alabama ex rel. Patterson*,\(^6\) which established that under certain circumstances anonymity may be essential to the exercise of constitutional rights. The court rejected respondent’s arguments, holding that since any restraint upon the legitimate exercise of first amendment rights would have come as a result of private action by the Iranian government, there was no direct state action. The court noted that the proper focus is on “the interplay of governmental and private action, for it is only after the initial exertion of state power represented by . . . [enforcing section 650a] that private action takes hold.”\(^7\) Moreover, in citing several Penal Code provisions, the court concluded that the encompassing nature of section 650a serves no legitimate law enforcement function because the state’s interest is fully protected by more narrowly drawn prohibitions.\(^8\)

\(^3\) *Id.* at 260, 150 Cal. Rptr. at 815.

\(^4\) *Id.* at 264, 150 Cal. Rptr. at 817.

\(^5\) *Id.* at 265, 150 Cal. Rptr. at 818.

\(^6\) 357 U.S. 449 (1958).

\(^7\) 87 Cal. App. 3d at 261, 150 Cal. Rptr. at 815-16 (citing Young v. American Mini Theatres, 427 U.S. 50, 60 (1976)) (bracketed material added by Ghafari court).

\(^8\) The court noted that had appellants been masked for criminal purposes, they would have been in violation of Penal Code § 185. In addition, the court pointed out that a number of other penal statutes may have come into play including Penal Code §§ 404 (riot), 406-07 (rout, unlawful assembly), 415 (disturbing the peace), 416 (refusing to disperse), 647(e) (refusal to identify oneself to a police officer), 647(c) (obstruc-
Respondents contended that the students lacked standing to raise the vagueness issue because their conduct was precisely proscribed by statute. The court responded by noting, first, that such an argument simply begs the question and second, that regardless of whether appellants' conduct was precisely proscribed by section 650a, the situation fell within the exception to traditional rules of standing to raise constitutional issues because "the very existence of . . . [§ 650a] may cause persons not before the court to refrain from engaging in constitutionally protected speech or expression." That exception recognizes the overriding importance of maintaining a free and open market for the interchange of ideas. On the merits of the vagueness issue, respondents argued that the statute gave clear notice that appearing in public "with one's face covered by a mask or other means of disguise for the purpose of concealing one's identity" is unlawful. In addressing this argument, the court explained the importance of providing clearly marked parameters of lawful conduct, giving a person "a reasonable opportunity to know what is prohibited," and preventing arbitrary and discriminatory enforcement of such laws. While the court conceded that a narrower interpretation of the "concealed by mask" phrase was possible, it determined that the vagueness of the exception for "amusement" or "entertainment" purposes could not be cured. Pointing to the well-established rule that "communication for amusement and entertainment purposes is protected by the first amendment as fully as is communication for the exposition and exchange of ideas," the court stated that such a rule requires the courts to embrace a wide range of "all forms of communication in order to protect that which is of potential political relevance." Thus, the exception was held to be "inherently vague" because it failed to give notice of what is prohibited, failed to set standards for enforcement, and produced a chilling effect on the exercise of constitutional rights.

The strict scrutiny test was applied to appellants' final
challenge on equal protection grounds because section 650a was seen as clearly intertwined with fundamental first amendment rights. The state failed to meet the burden of showing that the distinctions drawn by the statute were necessary to further a compelling state interest. The court also indicated that the distinction in the statute required differential treatment based upon the content of the masked person's message; a distinction which strikes at the heart of forbidden censorship.

While Ghafari v. Municipal Court does not stand for an absolute right to anonymity for persons engaged in first amendment activities, it underscores the importance of a narrowly drawn statute when the conduct sought to be prohibited by the state is closely interwoven with the exercise of first amendment rights. The opinion in Ghafari expressed an interest in dispelling the "unfounded fear that the mere appearance of anonymous persons in public will inevitably lead to violence and other illegal activities" by pointing to other more narrowly drawn statutes that exist to protect legitimate state interests. However, by its narrow focus on the constitutional construction of Penal Code section 650a, the court left open the issue of whether the masks themselves gain first amendment protection as symbolic expressions of words and ideas.

Ironically, legislation which would have repealed section 650a was passed by the California Legislature in 1978, but was vetoed by the Governor. The veto may have been motivated in part by a fear that the legislation would weaken the state's ability to prevent or prosecute rape crimes where masks were used. Although the court in Ghafari correctly recognized that more narrowly drawn statutes would fully protect the state's interest in situations like the Iranian student demonstrations, the question remains whether section 650a would have been upheld where first amendment rights were not at issue.

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14. Id. at 265, 150 Cal. Rptr. at 818.
15. Id.
16. Id. at 266, 150 Cal. Rptr. at 819.
17. Id. at 266 n.5, 150 Cal. Rptr. at 819 n.5.