Torts - A Wrongful Death Action Cannot Be Maintained for Death of an Unborn Fetus and Negligent Infliction of Emotional Harm Cannot Be Asserted When Death of Fetus is Hidden from Complainant's Sensory and Contemporaneous Perception Recent Cases

Byron K. Toma
RECENT CASES


Two couples, Jeffrey and Linda Sue Justus and Robert and Karen Powell, suffered the stillbirths of their children at the Goleta Valley Hospital in California. In both instances, Dr. Joseph Atchison was the attending physician, and in both instances, the husband was present during the delivery.

Each couple brought an action against the attending physician, the assisting physician, and the hospital for the wrongful death of their child allegedly caused by the defendants’ negligence and for shock allegedly experienced by the husband in witnessing the stillbirth.¹

At trial, the defendants’ general demurrers were sustained in each case on the two causes of action without leave to amend. In both cases, the plaintiffs appealed from the trial court’s dismissal, and the appeals were ordered consolidated.

In dealing with the consolidated appeals, the California Supreme Court confronted both issues made out by the demurrers: first, whether a stillborn fetus may maintain a cause of action for wrongful death, and second, whether the husband/father may maintain a cause of action based on the emotional shock resulting from witnessing the stillbirth.

With respect to the first issue, the court began by answering the threshold question of whether or not a wrongful death action in California is solely a creature of statute. In answering this question in the affirmative, the court adopted the reasoning of Kramer v. Market Street Railroad Co.² Basically, Kramer determined that the wrongful death cause of action was not recognized at common law, and thus could only be

¹. Justus v. Atchison, 19 Cal. 3d 564, 565 P.2d 122, 139 Cal. Rptr. 97, 99 (1977). In addition, each complaint alleged causes of action on behalf of the wives/mothers for personal injuries.
². 25 Cal. 434 (1864).
maintained if the legislature provided a wrongful death statute.⁴

Moreover, the court was persuaded that the general language of the wrongful death statute⁴ evinced a legislative intention to define the field of recovery for wrongful death, thereby implicitly cutting off any judicial input on the issue.⁵

After deciding that the wrongful death action was purely a creature of statute and that the terms of the statute controlled the right to recover, the court addressed the problem of whether the legislature intended to encompass unborn fetuses within the ambit of the statutory action. To settle this issue, the supreme court focused on the word “person” contained in the wrongful death statute, Code of Civil Procedure section 377. The court looked to various sections of the Civil and Probate Codes⁶ and found that an unborn fetus is deemed to be an existing person in determining its interests only if it is subsequently born alive. Furthermore, the court pointed out that when the legislature wanted to provide protection for an unborn child within a statute, it did so in specific terms.⁷ Thus, the court reasoned that if the legislature had intended to include fetuses within the term “person” in section 377, it would have done so expressly.

In analyzing the emotional shock cause of action, the court looked to the language of its landmark decision in Dillon v. Legg.⁸ The Dillon court, in order to limit potentially “infinite liability,” listed three factors that had to be taken into account before emotional shock could become a basis for recovery. The listed factors were: 1) whether the plaintiff and the victim were closely related; 2) whether plaintiff was present at the scene of the accident; and 3) whether the shock resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence.⁹

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3. See 19 Cal. 3d at 573-75, 565 P.2d at 128-29, 139 Cal. Rptr. 102-03.
4. CAL. CIV. PROC. CODE § 377 (West Supp. 1976) provides in pertinent part:
   (a) When the death of a person is caused by the wrongful act of neglect of another, his or her heirs or personal representatives on their behalf may maintain an action for damages against the person causing the death. . . .
5. 19 Cal. 3d at 575, 565 P.2d at 129, 139 Cal. Rptr. at 104.
6. See 19 Cal. 3d at 578, 565 P.2d at 131, 139 Cal. Rptr. at 106 (citing CAL. CIV. CODE §§ 29, 698, 739 (West 1954); CAL. PROB. CODE § 250 (West 1956)).
7. 19 Cal. 3d at 578, 565 P.2d at 131, 139 Cal. Rptr. at 106.
8. 68 Cal.2d 728, 441 P.2d 912, 69 Cal. Rptr. 72 (1968).
9. Id. at 741, 441 P.2d at 919, 69 Cal. Rptr. at 79.
JUSTUS v. ATCHISON

The court suggested that its guidelines were to be applied on a case-to-case basis in the future.10

Justus v. Atchison concentrated on the third requirement. In applying this requirement to the facts, the court determined that the husband's shock did not occur until he was actually informed by the doctor that the fetus had died. "[L]earning of the accident from others after its occurrence" was expressly held not to support a cause of action in Dillon.11 Pointing out that the death of the fetus was by its very nature hidden from the husband's sensory and contemporaneous perception, the court decided that the Dillon requirements were not met.

In reaching its conclusion that a stillborn fetus cannot maintain a wrongful death action within the terms of Civil Code section 377, the Justus court acknowledged that a fetus may be treated like a person for some purposes but not for others. The fetus status as a person depends on the intent of the legislature at the time it created the statutory right. Apparently, this intent controls regardless of judicial developments in the meantime. As Justice Tobriner noted in his concurring opinion, the court's reliance on the intent of the legislature enabled it to avoid "a difficult policy choice."12 He found nothing in section 377 or its legislative history which "precluded" further judicial development of the class of individuals who might recover under the statute. However, Tobriner offered another rationale for limiting recovery. Relying on the court's opinion in Borer v. American Airlines,13 he argued "that [the court] should not recognize a new cause of action for the wrongful death of a fetus," because it is "a wholly intangible injury to plaintiffs for which any monetary recovery can provide no real compensation. . . ."14

The Justus court's analysis of the negligent infliction of emotional shock issue demonstrates the difficulty of applying the guidelines suggested in Dillon to cases in which the facts are more subtle. The supreme court construed the sensory and contemporaneous perception factor very narrowly. It emphasized the fact that the husband obtained only second hand knowledge of the injury. However, the death of a fetus inside

10. Id.
11. Id.
12. 19 Cal. 3d at 586, 565 P.2d at 136, 139 Cal. Rptr. at 111 (Tobriner, J., concurring).
14. 19 Cal. 3d at 586, 565 P.2d at 136, 139 Cal. Rptr. at 111.
the mother's womb is by its very nature beyond someone's actual perception, whereas an accident involving a car (as in Dillon) is much more likely to be within it. Thus, Justus seems to indicate that in the absence of actual perception of the injury, recovery for emotional shock will not be available.

Following close on the heels of Borer, Justus v. Atchison supplies further evidence that the California Supreme Court is attempting to sharply limit those fact patterns which will generate recovery for nonphysical injuries.

Laurie Moe

In 1972 the city of Los Angeles enacted a municipal ordinance which regulated the size, weight, appearance and placement of newsracks installed and maintained on the city's sidewalks.1 After a number of newsracks had been removed from their sidewalk locations pursuant to the provisions of the ordinance, Kash Enterprises (Kash), a corporation engaged in the publication and distribution of newspapers, instituted an action for declaratory and injunctive relief.

At the hearing on Kash's motion for the preliminary injunction, Kash contended that the provisions of the ordinance were unconstitutional both as written and as enforced. Despite this challenge, the superior court denied the motion.

On appeal to the California Supreme Court, Kash again maintained that the ordinance was unconstitutional on its face in two respects. First, Kash asserted that the ordinance's substantive provisions were so vague and overbroad as to impermissibly infringe on its first amendment rights. Second, Kash argued that the ordinance's summary enforcement procedures were violative of due process, since they did not include a hearing to determine the validity of the seizure.

Responding to these two attacks, the supreme court upheld the substantive provisions of the ordinance but found that the trial court erred in refusing to enjoin the city from acting pursuant to that portion of the ordinance which authorized the seizure, retention and destruction of newsracks.

In considering the substantive challenge to the ordinance, the supreme court initially established that a newsrack, because of its communicative nature, fell within the free speech and press protections of the first amendment. However, the court noted that simply because it fell within the ambit of the first amendment, a newsrack is not totally immune from regulation by local municipalities. Specifically, it asserted that regulations as to the time, place and manner of newsracks were permissible if narrowly drawn to avoid unnecessary infringement and reasonably supported by valid municipal interests.

Based on this conceptual framework, the court concluded that a municipal ordinance prohibiting newsracks in an area which would "unreasonably interfere with or impede" pedestrian or vehicular traffic was not unduly vague and the terms were susceptible to common understanding; that the requirement for placement of newsracks so as not to interfere with sidewalk cleaning was reasonably based on a city interest in cleanliness; and that the restriction that newsracks should not be placed within three feet of "any areas improved with lawn, flowers, shrubs or trees" was acceptable as a valid interest in maintaining greenery in an urban environment.

Additionally, the court cautioned that such limitations were valid only so long as the provisions did not unduly restrict the use of newsracks. The court determined the only doubtful language of the ordinance was "attractive" and construed this potentially vague aesthetic standard as meaning "neat and clean," preserving the constitutionality of the legislation. Thus the court held that the substantive provisions of the ordinance were sufficiently definite and narrowly drawn to avoid vagueness and any unnecessary infringement of first amendment rights.

The court reached a contrary conclusion when analyzing the ordinance's procedure for seizing newsracks. It determined

2. Id. § 42.00 (f)(2).
4. The court rejected Kash's argument that the ordinance was sacrificing first amendment rights in favor of a "mechanically clean" sidewalk by interpreting that portion of the ordinance to merely require more reasonable placement and design of newsracks so as to minimize interference with the city's mechanical sidewalk cleaners. 19 Cal. 3d at 304, 562 P.2d at 1308, 138 Cal. Rptr. at 59.
5. LOS ANGELES, CAL. MUNICIPAL CODE § 42.00(f)(3)(F)(8) (1972).
6. 19 Cal. 3d at 305-06, 562 P.2d at 1309, 138 Cal. Rptr. at 60.
7. Under the general provisions of the Los Angeles Municipal Code, a newsrack owner who violated any of the provisions of the ordinance was guilty of a misdemeanor, punishable by up to a $500 fine or six months imprisonment. LOS ANGELES, CAL. MUNICIPAL CODE § 11.00(m).

In addition to the criminal penalty, the ordinance authorized a public officer to remove any newsrack which the officer subjectively believed to be in violation of the ordinance's size, weight, appearance or location restrictions without prior notice to the owner. Id. § 42.00 (f)(5). There was no provision for a hearing on the merits of the removal at any time. After seizure of the newsrack and upon notification, the owner had to claim the newsrack within 45 days and pay costs of removal as determined by the Board of Public Work Commissioners (at the time of the hearing, the city was charging $25 for each newsrack removed) or the newsrack would be treated as abandoned and thus destroyed.
that these provisions violated both the property owner's procedural rights to due process and the public's first amendment right of access to protected expression. The ordinance's provisions for summary seizure provided no opportunity for a hearing on the merits either before or after the taking. Without them, the court reasoned that the ordinance could not pass the constitutional right to due process when there is a deprivation of property.  

Although city officials sometimes gave a warning before seizing the newsracks, the court determined that such a procedure must be consistently applied to satisfy due process, and that notice by mere chance did not meet constitutional standards. Furthermore, the court noted that the availability of a collateral judicial procedure to recover the property is not an adequate substitute for a hearing, especially when the procedure would place an added financial burden on the party whose property was taken. 

The public's first amendment "due process" rights were equally important to the court's determination that the procedural provisions were constitutionally deficient. Since it permitted blanket seizure of the newsracks and all material in them, the ordinance failed to meet the constitutional requirement that a regulation of protected expression be narrowly drafted to avoid unnecessary infringement with the first amendment. The court found this impermissible level of arbitrary suppression in the ordinance's provisions that enabled a public officer to make a subjective determination of violations and to seize a newsrack for any violation. Such a provision permitted the official to suppress any newspapers in the newsracks, and although only temporary, resulted in the censoring of newsworthy information.

_Kash_ is significant because the court emphasizes that the due process clause protects an individual from seizure of his property irrespective of how deminimus or temporary the tak-

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8. 19 Cal. 3d at 306-07, 562 P.2d at 1310, 138 Cal. Rptr. at 61.
9. Id. at 308-09, 562 P.2d at 1310-11, 138 Cal. Rptr. at 61-62.
10. The concept of first amendment due process is not a new one. While it has traditionally been applied in the obscenity area, the Supreme Court has established a set of specific rules to prevent insensitive procedural devices from strangling first amendment interests. Essentially, under the fourteenth amendment a state cannot adopt whatever procedures it desires in enforcing its laws without considering the potential effects on constitutionally protected speech. Thus, first amendment due process is essentially a body of procedural law created by the courts which delineates how the courts and governmental agencies must evaluate and resolve first amendment claims.
11. 19 Cal. 3d at 310-13, 562 P.2d at 1312-14, 138 Cal. Rptr. at 63-65.
ing. *Absent an emergency situation*, due process requires that when a state seeks to deprive the owner of his property, it must afford notice and opportunity for hearing. Even in emergencies, the opportunity to be heard may only be postponed and not eliminated.

*Kash* also expresses a concern for the procedures to enforce an otherwise valid regulation which involves a first amendment right. The court attempts to clarify what a municipality may constitutionally do to minimize interference with the public's rights. In the event of danger to pedestrians or vehicles, a newsrack may summarily be seized without notice or hearing. In the absence of any danger, a newsrack which violates the ordinance may be seized provided the owner is notified of the impending seizure and given a reasonable opportunity to correct the violation or object to the seizure in an informal administrative forum. The court proposes another less intrusive alternative by means of fines, thereby giving the owner an incentive to comply with the regulations.

The inclusion of newsracks under the protective umbrella of the first amendment indicates the court's recognition that the distribution of newspapers and periodicals on the public streets is deeply rooted in the constitutional guarantees of freedom of speech and freedom of the press. The procedural guarantees are held to be equally as important as the substantive guarantees of the Constitution where sensitive first amendment rights are involved.

*Randy Iris Danto*

Willie C. Henderson defaulted on his automobile financing contract with Security National Bank (the Bank). Since the Bank had retained a security interest in the car, it hired a licensed repossessor, an independent contractor, to take possession of the collateral. Following repossession and the Bank's sale of the automobile, Henderson commenced an action in trespass and conversion against the Bank and the repossessor, seeking compensatory and exemplary damages. He contended that in the process of taking the collateral the repossessor broke the lock of his garage door, and that the Bank either expressly or impliedly authorized or ratified this act.

Henderson settled with the professional repossessor prior to trial. At the trial the Bank was granted a judgment of nonsuit on the trespass cause of action. Thus, only the issue of conversion went to the jury. When a verdict was returned against the Bank, Henderson was awarded both compensatory and exemplary damages. The trial court, on the Bank's motion, entered judgment notwithstanding the verdict, and an order for a new trial on grounds of insufficiency of evidence and errors in law, which was to become effective if the judgment notwithstanding the verdict was reversed on appeal. However, the filing of the specification of reasons for granting the new trial was not timely. Henderson appealed from the judgment of nonsuit, the judgment notwithstanding the verdict, and the order for a new trial.

The court of appeal affirmed the judgment of nonsuit on the trespass action. It also affirmed the judgment notwithstanding the verdict.

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3. California Code of Civil Procedure § 657 requires that the specification of reasons for granting a new trial be filed within 10 days after the filing of the order. In this instance, the lower court filed its specification of reasons 12 days after the filing of its order. Thus, the court of appeal summarily reversed the order granting the new trial. *Henderson v. Security National Bank*, 72 Cal. App. 3d 764, 775-76, 140 Cal. Rptr. 388, 394 (1977).
4. The court of appeal affirmed the judgment of nonsuit on the trespass cause of action, because Henderson failed to make any contention in support of his appeal from the nonsuit. Therefore, the court of appeal deemed the appeal on this issue unmeritorious, and adopted the lower court's findings on the trespass cause. *Id.* at 769, 140 Cal. Rptr. at 390.
standing the verdict on the conversion action, insofar as exemplary damages were denied, but it reversed that part of the judgment notwithstanding the verdict that denied compensatory damages. The court concluded that the Bank was liable in conversion for the wrongful taking of the collateral by the independent licensed repossession.

In rendering its decision, the appellate court in essence determined the nature of a secured creditor’s liability for an independent repossession’s failure to follow the statutory procedure in taking possession of the collateral. California decisional law prior to *Henderson v. Security National Bank* had never dealt with this aspect of self-help repossessions under the California Commercial Code.

The foundation for holding the Bank liable in conversion follows from the trial court’s finding that the professional repossession unlawfully broke the garage lock to take possession of the collateral. A secured party’s right of self-help repossession on default of the debtor is provided for in California Commercial Code Section 9503. This right to take possession without judicial process is conditioned on the ability of the secured party to take possession without engendering a breach of the peace. The appellate court reasoned that this unlawful breaking and entering constituted a breach of the peace in violation of section 9503.

After concluding that the repossession had unlawfully breached the peace in taking the collateral, the court of appeal determined that such a breach gives rise to a conversion cause of action against those who subsequently obtain possession of the collateral from the repossession. The court’s determination stemmed from the nature of the conversion cause of action. Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights in the property. Because the mere act of wrongfully

5. The appellate court affirmed the judgment notwithstanding the verdict on the conversion cause of action, insofar as exemplary damages were denied, on the basis that there was no evidence of a substantial nature supportive of the jury’s award. The award lacked the requisite finding of an intent to injure Henderson. *Id.* at 769, 140 Cal. Rptr. at 390-91.


7. CAL. COM. CODE §§ 9503 (West 1964) provides in relevant part: “Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace . . . .”

interfering with another's property gives rise to a claim of conversion,9 it was of no consequence under the facts of Henderson that the repossessor was an independent contractor. The liability of the Bank proceeded from its own acts in holding and disposing of the collateral.

Whether a taking of collateral in violation of section 9503 resulted in a conversion was an issue of first impression for the court of appeal. In resolving it the court looked to out-of-state authorities.10 These authorities, with one exception,11 held that a conversion occurred when the initial right of self-help repossession was abused by the repossessor's breach of the peace.

The Henderson court adopted the rule in these cases. The self-help right of peaceable repossession enjoyed by the secured party on default does not excuse a tortious repossession involving force, threats, fear or other acts constituting a breach of the peace.12

Thus, the Bank itself could not assert rightful possession under section 9503, on the basis that the initial right of self-help repossession was wrongfully exercised. The Bank's liability followed when it denied Henderson the automobile and subsequently sold it to satisfy the debt owing.

In defining a secured party's liability for an independent repossession's breach of the peace, Henderson underscores the importance of following the self-help provision of section 9503. Its holding accords with the scheme of the California Commercial Code, which gives personal rights priority without reference to the location of title to the collateral.13 In this regard, it contravenes the early pre-Code case of Silverstin v. Kohler & Chase.14 There the California Supreme Court held that where one is entitled to repossess himself of property, even a forcible repossession could not amount to a conversion, although there may be liability for an assault and battery or trespass.

Thus, in order to effect a self-help repossession free of lia-

bility in conversion, a secured party must carefully review the conduct of the repossessor prior to taking possession of the collateral, notwithstanding the independent nature of the relationship. Without knowledge of misconduct during repossession, the secured party accepts the collateral with the intent to discharge the debt by redemption or sale. With knowledge of misconduct, it can avoid liability by rejecting delivery of the collateral, since in this manner it does not exercise dominion over the property.\textsuperscript{15}

However, it remains for future cases to clarify what alternative measures there are for a secured party who wishes to protect the collateral from further acts of the repossessor. Ostensibly, one possibility is to bail the property on account of the debtor.\textsuperscript{16} Yet, short of rejecting delivery of the collateral, it is an issue whether even some dominion on account of the debtor can limit the liability in conversion that flows from the initial breach of the peace committed by the repossessor in taking possession of the collateral.

\textit{J. Enrique Rey}

\textsuperscript{16} Henderson seems to preclude liability in conversion for such bailment, if it can be shown that the secured party did not exercise dominion over the property to the exclusion of the debtor. Cf. Atkinson v. Charles Nelson Co., 41 Cal. App. 304, 182 P. 759 (1919) (merely designating a third party to receive the property is insufficient).

In 1974, the City of Rancho Palos Verdes held an election in which approximately sixty-four percent of the electorate voted for a ballot measure to change the municipality’s name to The City of Palos Verdes. California Government Code section 34507 requires a two-thirds majority for a general law city such as Rancho Palos Verdes to change its name. The city attempted to record the change of name following statutory procedures, but both California state officials and the Los Angeles County Board of Supervisors refused to accept the election results as sufficient to record the change.

Plaintiffs sought a writ of mandate to compel the city, Board of Supervisors, County Recorder, and Secretary of State to take the necessary steps to effect the change in name. In analyzing the request for the writ, the superior court observed that the voters in a chartered city are able to change their city’s name by a simple majority vote. As a result, it found that section 34507 was unconstitutional because it denied general law cities and their electorates equal protection of the law. Based on this finding, the court issued a peremptory writ commanding the defendants to require only a simple majority vote to accomplish a change in the city’s name.

In ruling on the constitutionality of section 34507, the court of appeal was forced to consider whether or not the statute, by requiring a two-thirds favorable vote, impermissibly distinguished between general law and chartered cities, and thus discriminated against an identifiable class of citizens by infringing on their fundamental right to vote. The appellate

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1. CAL. GOV’T CODE § 34507 (West 1968).
2. Section 34507 provides:
   If two-thirds of the total votes cast at the election are in favor of the proposed change of name, the legislative body shall file a statement of the holding of the election and the result with the Secretary of State and with the board of supervisors of the county in which the city is situated.
   From the date of filing, the name is changed.

Id.

4. The courts have established that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction. See Reynolds v. Sims, 377 U.S. 533, 554 (1964).
court concluded that there is no constitutional proscription against a requirement of more than a majority vote to carry a ballot measure in general law cities.

In reaching this conclusion, the court of appeal initially noted that the California Constitution provides for the existence of two distinct classes of cities—chartered cities and general law cities. Under the California Constitution, chartered cities are empowered to "make and enforce all ordinances and regulations in respect to municipal affairs." Thus, a chartered city may exercise "full control over its municipal affairs unaffected by general laws on the same subject matters." On the other hand, general law cities have only those powers conferred upon them by the Legislature. The powers of such cities are strictly construed so that any doubt concerning the exercise of a power is resolved against the city. Unlike chartered cities, then, general law cities are constrained to follow state regulations even on purely municipal matters.

After drawing this distinction, the appellate court focused on the United States Supreme Court's decision in Gordon v. Lance, which recognized the propriety of requiring more than a majority vote in elections dealing with certain municipal affairs. In this regard the Supreme Court noted: "Certainly any departure from strict majority rule gives disproportionate power to the minority. But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue." The Court in Gordon further pointed out that unless the provision discriminated against an identifiable class, the statute did not violate equal protection guarantees.

Relying on Gordon, the court then looked at section 34507 to determine if its two-thirds vote requirement infringed upon the fundamental voting rights of an identifiable class of citizens. The court summarily concluded such rights were not infringed, noting that the California Constitution recognizes the validity of requiring more than a majority vote in an appropriate situation.

5. CAL. CONST. art. 11, § 5.
9. Id. at 5.
10. Id. at 7.
11. 68 Cal. App. 3d at 143, 137 Cal. Rptr. at 93.
Since no fundamental rights were violated, the court tested the constitutional validity of the statute against the "rational basis" standard. It noted that the change of a city's name is a matter of serious consequence and is not to be lightly or frequently undertaken. The requirement of a two-thirds favorable vote prevents the frequent name changes that might result in case of shifts of opinion on the part of a comparatively small number of voters. Thus, the court reasoned the two-thirds vote requirement is not arbitrary but bears a rational relationship to a legitimate state purpose because a "set of facts reasonably can be conceived that would sustain it."13

The court further noted that although section 34507 is not applicable to all cities, the distinction is not arbitrarily made. City elections are purely municipal affairs and in chartered cities the applicable charter provisions prevail over section 34507. However, in the case of general law cities, it is within the province of the Legislature to regulate municipal elections. Since section 34507 is uniformly applied to all general law cities and furthers a legitimate state purpose, the court found the statute does not violate equal protection rights.

Coffineau v. Fong Eu demonstrates that in areas where states have general competence to act, the courts have recognized that states have broad powers to formulate voting requirements. Equal protection guarantees have been limited to two basic areas where voting rights are concerned. First, the "one-man, one-vote" doctrine has been applied to matters of legislative representation. Beginning with Baker v. Carr,14 the United States Supreme Court has held that under a representative form of government, each citizen's vote must be weighted equally with the vote of other citizens in matters of legislative representation.

Secondly, voting requirements which discriminate against an identifiable class of citizens may violate the Equal Protection Clause unless the regulations are based upon a compelling state interest.15 In other local matters, states have exercised broad regulatory powers over voting requirements. Justice

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13. 68 Cal. App. 3d at 145, 137 Cal. Rptr. at 94 (quoting Estate of Horman, 5 Cal. 3d 62, 75, 485 P.2d 785, 794, 95 Cal. Rptr. 433, 442 (1971)).
15. See, e.g., Dunn v. Blumstein, 405 U.S. 330 (1972), where the Supreme Court held registration requirements based on duration of residency violated equal protection rights because other adequate means of ascertaining residency were available.
Black has noted: "[t]he equal protection cases carefully analyzed boil down to the principle that distinctions drawn and even discriminations imposed by state laws do not violate the Equal Protection Clause so long as these distinctions and discriminations are not 'irrational,' 'irrelevant,' 'unreasonable,' 'arbitrary,' or 'invidious.'"

Coffineau indicates that whenever the court can find a rational relation to a legitimate state purpose—an extremely lenient standard—the state may vest in a minority of voters an inordinate power to maintain the status quo. The extent of the state's power to affect voting rights in this manner is still uncertain. Coffineau validated a two-thirds requirement to change a city's name. It must be left for future cases to determine whether more important ballot measures and more severe percentage requirements fall within the state's regulatory power.

Peter Greenwald

ENVIRONMENT—AN ENVIRONMENT IMPACT REPORT IS INSUFFICIENT IF PROJECT DEFINITION VARIES OR IS INACCURATE OR THERE IS FAILURE TO PRESENT TRUE PROJECT ALTERNATIVES—County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 139 Cal. Rptr. 396 (1977).

In 1973 the Third District Court of Appeal, at the instance of Inyo County, issued a writ of mandate ordering the City of Los Angeles to prepare an environmental impact report (EIR) on the city's extraction of subsurface water in Owens Valley. Three years later the city returned the writ and submitted the EIR, which had been approved by the Los Angeles Board of Water and Power Commissioners. Inyo County objected to the return on the grounds that the EIR failed to comply with the California Environmental Quality Act (CEQA).

In County of Inyo v. City of Los Angeles, the court of appeal sustained the county's objection and rejected the EIR on the grounds that it was inadequate in its treatment of project definition and project alternatives. The court however, refused to evaluate the sufficiency of the EIR's assessment of adverse effects potentially resulting from the project.

In reviewing the EIR, the appellate court focused principally on the accuracy of the project description. The court

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1. Environmental impact reports (EIR) are mandated under the California Environmental Quality Act, CAL. PUB. RES. CODE §§ 21000-21176 (West 1977), which directs local and state government agencies to prepare and certify completion of an EIR on any project they intend to conduct or approve which may have a significant impact on the environment. Generally, an EIR describes a project, assesses its potential impact on the environment, evaluates alternatives to the project, and offers recommendations as to whether the project should be carried out, mitigation measures be adopted, an alternative be adopted, or the project be abandoned. A draft version of the EIR is made available to the public and concerned government agencies for comment. The final EIR is supposed to address comments received from the agencies and the public. The final EIR then becomes the basis for administrative decisions regarding the proposed project.

2. Owens Valley is a 3000 square mile area in Inyo and Mono Counties that receives substantial spring run-off from the melting snowpack of the Sierra Nevada. Shortly after 1900, the City of Los Angeles began to acquire water rights and land throughout the valley. The City's subsequent control and exportation of water in Owens Valley has been the center of controversy for over 60 years. By 1973, when the suit in question commenced, 97 percent of all privately owned land in the valley was owned by the City. To transport surface water from the valley to Los Angeles, the City constructed an aqueduct in 1913. Since that time, the City has entered upon a supplementary program of ground water extraction. To transport this additional water, the City constructed a second aqueduct in 1970. At the same time, the City sought to increase ground water extraction in accordance with its plans for the second aqueduct, thus prompting Inyo County to initiate litigation on the necessity of an EIR. County of Inyo v. Yorty, 32 Cal. App. 3d 795, 108 Cal. Rptr. 377 (1973).
noted that the EIR discussed both an officially designated project and a "recommended project." The formally designated project, as described in the EIR, would consist of an increase of 51 cubic feet per second in groundwater pumping, with the additional water to be used within Owens Valley on lands owned by the City of Los Angeles. The "recommended project" discussed elsewhere in the EIR would be far broader in scope. As approved by the Los Angeles Board of Water and Power Commissioners, the "recommended project" in the EIR would include increased exporting of water from Owens Valley to Los Angeles in wet years, construction of a pipeline in the San Fernando Valley to permit underground storage of Owens Valley water in wet years, concrete lining of two canals in Owens Valley to reduce percolation into the groundwater basin, and reduction of stock water in Owens Valley by almost two-thirds.

Terming a precise project description "the sine qua non" of a legally sufficient EIR, the appellate court concluded that this wide variance in project description defeated the purpose of an EIR in two ways. First, the court reasoned that the document failed in its role as an informational document for decisionmaking by officials. The court emphasized that only through an accurate project description can decisionmakers weigh the benefits of a project against its adverse effects and properly consider mitigation measures or cancellation of the project.3

Second, the court maintained that the EIR, through its variance in project description, failed in its role as an informational document for the public. Noting that one of the objectives of CEQA is to encourage intelligent public comment on proposed projects, the court labelled the confused project definition "a red herring across the path of public input."4

In addition to thwarting the informational purpose of an EIR, the court of appeal noted that the varying project descriptions also had the effect, the court noted, of making the EIR a vehicle for official approval by the Los Angeles Board of Water and Power of a broad water management program far exceeding the narrow groundwater increase described in the formal project definition. The court chastised the City of Los Angeles for using the narrower project as the "launching pad" for a far

4. Id. at 197-98, 139 Cal. Rptr. at 405.
Finally, the court also concluded that the EIR's varying project descriptions were insufficient in their failure to define the project in accordance with the findings in the earlier decision of County of Inyo v. Yorty. In that decision the appellate court ordered an EIR directed at Los Angeles' total ground-water extraction activities in the valley. The resulting EIR, under discussion here, contravened the prior court's order by defining the project under evaluation as consisting solely of a 51 cubic feet per second increase in water extraction without regard for the amount already being extracted by the city. Within the EIR, the city contended that the court had not clearly stated what amount of extraction activity was to be evaluated, but the court rejected this argument, noting that Los Angeles had three years in which to seek clarification from the court.

The inadequacy of project description also laid the groundwork for what the court found to be the second major area of inadequacy in the EIR: the treatment of project alternatives. Under CEQA an EIR must address all reasonable project alternatives and include the alternative of "no project." Because the official project definition offered by the City was substantially narrower than that enunciated by the court in County of Inyo v. Yorty, the alternatives to the project as defined by Los Angeles were not alternatives to what the court held to be the actual project at hand.

In addition to this basic flaw, the court found that the alternatives discussed in the EIR failed to include a "no project" alternative as required by CEQA. The proposal labeled by Los Angeles as "no project" was viewed by the court as failing of that purpose by excluding an accurate picture of pre-project conditions. Under the purported "no project" alternatives the city would reduce irrigated acreage within the valley to less than one-tenth the present acreage and severely reduce the existing local cattle industry. Since the project as officially defined by the city was to meet needs "not anticipated" in earlier planning for water use within the valley, the court found it unacceptable that the purported "no project" alternative

5. Id. at 199-200, 139 Cal. Rptr. at 406.
7. 71 Cal. App. 3d at 202-03, 139 Cal. Rptr. at 407-08.
8. Id. at 203, 139 Cal. Rptr. 408.
would deny water to anticipated uses.\textsuperscript{9}

In concluding its review of the project alternatives the court noted that the City had failed to consider an "obvious" alternative: an effective plan for achieving water conservation in Los Angeles. The omission of an obvious alternative, the court stated, alone cast doubt upon the EIR's sufficiency.

In addition to the project description and project alternative questions a third aspect of the EIR at issue was the sufficiency of the assessment of potential environmental damage that might result from the project. Although the official project designation was restricted to a 51 cubic feet per second increase, the EIR's assessment of potential environmental effect was directed at the broader "recommended project." In response to the argument that even this broader assessment failed to adequately portray the potential adverse environmental effects, the court pointed out that conflicting expert testimony had been offered by opposing sides. Since the reviewing agency had made favorable findings after analyzing this testimony, the court refused to rule on the adequacy of the EIR in this area. It viewed the reevaluation of the EIR's environmental conclusions as a task beyond the competency and function of a court.\textsuperscript{10}

\textit{County of Inyo v. City of Los Angeles} is one of the few reported cases under CEQA in which an EIR has been found to be deficient in substance.\textsuperscript{11} The general trend has been for courts to construe the substantial evidence rule imposed by CEQA as strictly limiting judicial review to the question of whether evidence existed in the record to support the findings of an administrative body on the sufficiency of an EIR.\textsuperscript{12}

In assessing the EIR presented by the City of Los Angeles, the court expanded this previously narrow approach and evaluated the accuracy of the contents of the EIR. Significantly, the court's willingness to go this far in its review probably can be attributed to the fact that it had previously, in \textit{County of Inyo v. Yorty}, ordered the EIR initially and set guidelines defining the scope of the project to be evaluated.

\textsuperscript{9} Id. at 202, 139 Cal. Rptr. at 407
\textsuperscript{10} Id. at 197, 139 Cal. Rptr. at 404.
Significantly, in the area of adverse environmental effects where the court was confronted by the expert-versus-expert controversy over potential environmental damage, the court followed the traditional approach and refused to pass upon the correctness of the information contained in the EIR. The reluctance of the court to make findings in this area indicates a belief by the courts that they are not equipped to determine which expert is more credible when controversy arises concerning potential negative effects on the environment. If this reluctance persists, opponents of a proposed project must persuade the reviewing agency that the project will produce significant adverse environmental effects. If they are unsuccessful at this level, the agency finding in this area may be attacked only with great difficulty in a later court review of the EIR should the present attitude of the courts persist.

Finally, County of Inyo v. City of Los Angeles may also be significant insofar as the court evaluated the project alternatives with considerable specificity. This analysis may provide useful standards as to what constitutes sufficiency in an EIR with respect to presentation of project alternatives, and may signal a warning to preparing agencies that they pay close attention to the accuracy of this part of an EIR so it will withstand this newly clarified standard of review.

_Dorothy Gray_

On March 16, 1976, following a plea of guilty before the Superior Court of Los Angeles to a charge of selling heroin, the proceedings against the defendant Garcia were suspended and he was placed on probation for three years. One condition of the probation was that Garcia participate in a drug treatment program at Metropolitan State Hospital. He was not to leave the program without the permission of both the hospital staff and his probation officer. Garcia left the hospital on March 26. It was determined four days later by urinalysis that he had ingested illegal narcotics.

On April 28, a Probation Revocation Hearing was held. Garcia was provided with counsel, informed of his rights to a hearing, to confront and to cross-examine adverse witnesses, to present evidence, and to use the subpoena power of the court. The probation officer's report presented at the hearing outlined the facts of Garcia's case and recommended that probation be revoked and sentence be imposed. After consulting with his client, counsel informed the court that Garcia admitted the violations. On May 12, after a review of the case, the superior court revoked probation and sentenced Garcia.

Garcia appealed, asking the court to rule that due process required a court in a probation revocation hearing to explain, before a probationer admitted a violation of a condition of probation, the penal consequences of such an admission. The court of appeal refused to accept this proposed expansion of due process and affirmed the superior court's imposition of sentence.

In arguing for the extension of due process, Garcia maintained that his revocation hearing did not conform to the due process standards established in *People v. Vickers*. *Vickers* held that the minimum due process requirements for a probation revocation hearing are:

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a) Written Notice of claimed violations.
b) Disclosure of evidence against him.
c) Opportunity to be heard in person and to present witnesses and documentary evidence.
d) Right to confront and cross-examine adverse witnesses.
e) Neutral and detached hearing body.
f) Written statement of the fact-finders as to the evidence relied on and the reasons for revocation.

Vickers, however, did not address the issue of a defendant conceding a violation of probation at a probation revocation hearing. Garcia sought to broaden its scope to include such a case by analogy to the due process required in a criminal trial on the original charge. Recent cases have held that before a guilty plea may be heard, a court in a criminal trial must make certain that the record shows that the accused person understood the nature of the charges and the possible penal consequences of a guilty plea. The record must also clearly indicate voluntariness on the part of the defendant in entering a plea.

The court responded to these arguments by underscoring the difference between a criminal trial and a probation revocation hearing. A criminal trial requires a finding of guilt beyond a reasonable doubt before a defendant can be convicted. A court in a probation revocation hearing may decide to terminate probation if "the interests of justice so require and the court has reason to believe . . . that the person has violated any of the conditions of probation." This standard of proof is not as strict as "beyond a reasonable doubt."

Another distinction is that there is usually no issue of guilt or innocence at a probation revocation hearing because this question can be determined beforehand on the basis of the probation officer's report. Hence, the function of the hearing is usually not to establish guilt or innocence, but rather to decide the fate of a person who has violated probation. Thus, the court summarized the effect of Garcia's admission: "[b]y

4. Id. at 458, 503 P.2d at 1318, 105 Cal. Rptr. at 310.
9. A court in a probation revocation hearing may draw its conclusion "from the report of the Probation Officer or otherwise." Cal. Penal Code § 1203.2 (West 1970).
10. 67 Cal. App. 3d at 138, 136 Cal. Rptr. at 399-400.
admitting what has already been proved, he gave up nothing of substance."

People v. Garcia does not establish that a probationer’s guilt or innocence of a violation is determined solely by a probation officer’s report in all cases. The language of the relevant statute and of this decision indicate that other factors may be involved. In a different case, questions of guilt may remain for determination at the hearing on the basis of other evidence and an uninformed admission by a probationer could be found to amount to an involuntary surrender of substantial rights. In Garcia, however, as in most cases, the probation officer’s report contained solid evidence which was sufficient by itself to establish the alleged violations.

Furthermore, neither Garcia nor his appointed counsel suggested that Garcia was uninformed in any material way. As a result, the question of a probationer who actually suffers injustice as the result of making an uninformed confession is not addressed in this case.

The rule of Garcia is that due process does not require in all cases that a court explain to a probationer at a probation revocation hearing the consequences of an admission of violation before accepting such an admission. The minimum procedures that are outlined in Vickers are all that due process requires.

Kevin McIvers

11. Id., 136 Cal. Rptr. at 400.
13. "The probation officer's report alone, if not rebutted or impeached, is a sufficient showing to support a revocation and sentence." 67 Cal. App. 3d at 138, 136 Cal. Rptr. at 400.
14. See, e.g., id.
15. Particularly a telling urinalysis. Id. at 136, 136 Cal. Rptr. at 398.

In 1973, the Pasadena Unified School District began to operate, in addition to its regular schools, five fundamental schools geared towards the promotion of discipline and academic motivation. Admission to these schools was by special application and long waiting lists reflected their popularity.

In early 1976, school officials mailed letters to the parents and guardians of fundamental school students requesting written permission for school personnel to use corporal punishment as a means of disciplining their children. The letters stated that the parents' consent to such disciplinary measures was a "condition of [the] child's continued enrollment in fundamental schools."

Six parents refused to permit the exercise of corporal punishment upon their children. The school board then requested that the parents accept the transfer of their children to other non-fundamental schools within the district. Following this request, the parents and their children (plaintiffs) brought suit against the Pasadena City Board of Education seeking a preliminary injunction to prevent the proposed transfer. The trial court denied the request, and the plaintiffs sought review of the order in the court of appeal.

Plaintiffs argued that the school board's requirement that parents give permission to school personnel to inflict corporal punishment as a condition of enrollment violated the rights granted all public school parents pursuant to Education Code 1. Burton v. Board of Education, 71 Cal. App. 3d 52, 55, 139 Cal. Rptr. 383, 384 (1977). These five fundamental schools set forth their guiding principles as: 1. Emphasis on fundamentals—reading, writing, spelling and arithmetic. 2. Classes ability grouped. 3. Letter grades given periodically in all basic subjects. 4. Strict discipline maintained. Paddling and detention permitted." Id.

2. The letters requesting that the parents give their consent to corporal punishment were necessary to comply with the requirements of the Education Code. See note 5 infra.

3. 71 Cal. App. 3d at 56, 139 Cal. Rptr. at 385.

4. Five of the adult appellants also sought to prevent the respondent Board from using public funds to transfer any student from a public fundamental school solely on the ground that the student's parents or guardians had refused or withdrawn the permission in question.

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sections 49000 and 49001. Conversely, the school board maintained that conditioning enrollment on the consent requirement was valid based on prevailing California case law, which, it contended, established that a school board has absolute discretion in assigning students to particular schools. Additionally, the school board argued that attendance at a public fundamental school is not a right but a privilege dependent upon the voluntary consent of the applicants to the practices followed in these schools.

In responding to the school board’s initial contention, the appellate court majority rejected outright, without rigorous analysis, the proposition that California case law vested a school board with absolute discretion in making student assignments.

Notwithstanding its apparent agreement with the proposition that attendance in a public fundamental school was not available as a matter of right, the majority dismissed the school board’s second contention. In reaching this decision, the majority focused on the language of the pertinent sections of the Education Code, cited by the plaintiffs. The majority reasoned that sections 49000 and 49001 require that written parental approval be obtained before corporal punishment can be used on any public school student. In support of this observation, it stated that the legislative intent behind the code sections clearly indicated “that every parent or guardian in every public school should have the right to withhold consent to corporal punishment, including the parents of those children attending

The governing board of any school district may adopt rules and regulations authorizing teachers, principals, and other certified personnel to administer reasonable corporal or other punishment to pupils when such action is deemed an appropriate corrective measure except and to the extent that such action is permissible as provided in section 49001.

Corporal punishment shall not be administered to a pupil without the prior written approval of the pupil's parent or guardian. The written approval shall be valid for the school year in which it is submitted but may be withdrawn by the parent or guardian at any time.

6. The school board offered two cases as authority for its position. In the first, San Francisco Unified School Dist. v. Johnson, 3 Cal. 3d 937, 479 P.2d 699, 92 Cal. Rptr. 309 (1971), the court found that in order to end racial separation a school district can exercise the authority to assign students to particular schools. In the second, Stratton v. Bd. of Trustees, 28 Cal. App. 3d 419, 104 Cal. Rptr. 715 (1972), the court upheld the establishment of school attendance zones by local school boards.

7. 71 Cal. App. 3d at 57, 139 Cal. Rptr. at 385.
8. Id. at 54-55, 139 Cal. Rptr. at 384.
fundamental schools. Since the school board's administrative regulation impaired the operation of the code, the court invalidated it, concluding that a child's enrollment in a public fundamental school cannot be conditioned on the consent of a parent to corporal punishment.

Judge Ashby, in his dissent, charged that the majority had incorrectly extended the scope of sections 49000 and 49001 to a fundamental school's right to assign children of non-consenting parents to other public schools within a given district. He argued that "[n]owhere in section [49001] or any other section is there any indication of legislative intent to preclude a school district to assign children, at the request of their parents, to a school on the basis of whether or not their parents have consented to paddling as a form of discipline." He added that paddling as a method of maintaining discipline was a cornerstone of the fundamental school system and that "[i]f the Legislature intended to affect that concept it could easily have made that intention clear by adding to section [49001] the words, 'Nor may attendance at any school be conditioned on consent to corporal punishment.'" Thus, since the legislature did not expressly state that a school district could not assign children of non-consenting parents to other schools within the district, Judge Ashby concluded they should be allowed to do so.

The majority sharply criticized the dissent for failing to note that section 49001 affirmatively denies the use of corporal punishment absent consent. The majority further observed that the legislature undoubtedly considered the problem at issue and determined that the elimination of mandatory corporal punishment does not thwart the objective of strict discipline in fundamental school programs. The majority reasoned that if the legislature had intended that corporal punishment was to be allowed in public fundamental schools, then the legislature could have easily codified that intention by providing directly in the statute that fundamental schools were excepted from the corporal punishment requirement. Finally, as to the dissent's contention that paddling was an essential element in maintaining strict discipline, the majority observed that

9. Id. at 59, 139 Cal. Rptr. at 386.
10. Id. at 58-59, 139 Cal. Rptr. at 386.
11. Id. at 61, 139 Cal. Rptr. at 388.
12. Id.
13. Id. at 59, 139 Cal. Rptr. at 388.
"discipline can be accomplished by other forms of punishment such as detention, suspension, or transfer to a non-fundamental school within the district."14

In reaching its decision, the court in Burton v. Board of Education established that a public school is a public school regardless of its special format, and is consequently subject to all the laws regulating such institutions. Thus, public fundamental schools maintaining similar policies of strict discipline to those of the Pasadena School Board will not be able to evade the requirement of explicit parental consent for the imposition of corporal punishment upon a child.

Practically speaking, Burton may spell the end of corporal punishment in public schools. The administrative difficulties of running a classroom with some students being subject to paddling while others are not may prove insurmountable. The inherent unfairness involved in administering corporal punishment to some and not to others could conceivably lead to dissatisfaction among parents, a resultant withdrawal of consent to corporal punishment by parents, and the eventual termination of corporal punishment as a viable disciplinary measure in the fundamental school program. Thus, the appellate court's decision could serve to significantly diminish the role of corporal punishment in the fundamental school program.

Byron K. Toma

14. Id.