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RECENT CASES


Helmut Fred Kindt, the customer of a bar, sued the bar owner for damages which Kindt sustained in an automobile accident caused by his intoxication. Kindt alleged that the bar owner negligently sold him alcoholic beverages while he was obviously intoxicated in violation of Business and Professions Code section 25602. The trial court sustained the bar owner's general demurrer and a judgment of dismissal was entered.

The Third District Court of Appeal affirmed the judgment of the trial court, basing its holding on three California cases which, the court stated, clearly enunciated the established decisional law applicable to the pleadings under attack at the hearing on demurrer. These cases, when taken together, stand for the proposition that a claim against a bar owner for a bar patron's own injury or death resulting from his voluntary intoxication will be denied on the ground that he is contributorily negligent as a matter of law.

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2. *Cal. Bus. & Prof. Code* § 25602 (West 1964) provides: "Every person who sells, furnishes, gives or causes to be sold, furnished, or given away, any alcoholic beverage to any habitual or common drunkard or to any obviously intoxicated person is guilty of a misdemeanor."
3. 57 Cal. App. 3d at 847, 129 Cal. Rptr. at 604.
4. Id. at 861, 129 Cal. Rptr. at 613.
5. See *Cole v. Rush*, 45 Cal. 2d 345, 289 P.2d 450 (1955); *Carlisle v. Kanaywer*, 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972); *Sargent v. Goldberg*, 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972) (by implication). In *Cole*, a wrongful death action, the surviving wife and minor children of the deceased sought to recover damages against the defendant tavern owner for the allegedly negligent furnishing of intoxicating liquor to the deceased which, it was claimed, proximately caused his death. The facts indicated that Bernard Cole was a regular patron of defendant's bar; that defendant knew he was normally of quiet demeanor but, when intoxicated, he became "belligerent, pugnacious and quarrelsome"; that nevertheless defendant sold him enough alcohol to allow him to become intoxicatced; that, as a result he became belligerent, pugnacious and quarrelsome and engaged in a brawl with another patron during the course of which he fell to the concrete floor, receiving a fatal blow to his head. 45 Cal. 2d at 347-48, 289 P.2d at 451. The court held, *inter alia*, that Cole's voluntary consumption of intoxicating liquor contributed directly to his injuries and that that constituted contributory negligence which barred recovery by his heirs. Id. at 356, 289 P.2d at 457.

In *Carlisle*, also a wrongful death action, the defendant's liability was denied when
To begin its analysis the court cited *Vesely v. Sager,* a California Supreme Court case of pivotal significance in the development of the law governing a liquor vendor's civil liability. *Vesely* partially abrogated the common law rule of non-liability of a purveyor of alcoholic beverages for injuries caused by intoxicated patrons. It held that a bar owner who violates Business and Professions Code section 25602 is pre-

he served the intoxicated decedent in violation of Business and Professions Code section 25602, and decedent became ill and died in the bar when he strangled, inhaling his own vomit. The court held: "If the concurrent negligence of the plaintiff is a proximate contributing cause of his injury, his own recovery is barred by his contributory negligence." 24 Cal. App. 3d at 591, 101 Cal. Rptr. at 248.

In *Sargent,* plaintiff, a customer of defendant's liquor store, allegedly approaching a state of drunkenness, made a purchase and immediately thereafter entered a restaurant where he met his death when he struck his head on the ground while being evicted by the restaurant owner. The court, in denying recovery to the plaintiff, based its decision on the fact that the decedent was only approaching a state of drunkenness and that there was no allegation that decedent was "obviously intoxicated" or a "habitual or common drunkard," so as to trigger a violation of Business and Professions Code section 25602, or that the purchase proximately caused the customer's death. 25 Cal. App. 3d at 943-44, 102 Cal. Rptr. at 302. In affirming the trial court's decision to sustain the demurrer of defendant liquor store without leave to amend, the *Sargent* court, citing *Cole v. Rush* and *Carlisle v. Kanaywer,* concluded that it could "conceive of no way plaintiff could amend her complaint to establish a violation of section 25602 that would not also establish contributory negligence of the decedent." Id. at 944, 102 Cal. Rptr. at 302.


7. At common law it was not a tort to furnish intoxicating liquor to an able-bodied adult. In the absence of a statute, there was no cause of action against the purveyor of alcoholic beverages in favor of third party plaintiffs injured by the person to whom such beverages were furnished. 45 AM. JUR. 2d Intoxicating Liquors § 553 (1969). A recovery for injuries caused by intoxication was only possible from the individual consumer. Further, if the vendee was the plaintiff, the vendor could invoke the defense of contributory negligence.

The rationale for the common law rule of non-liability was that consumption, rather than the sale, of liquor was the proximate cause of the injuries sustained as a result of intoxication. See *Cole v. Rush,* 45 Cal. 2d 345, 356, 289 P.2d 450, 457 (1955); *Hitson v. Dwyer,* 61 Cal. App. 2d 803, 809, 143 P.2d 952, 955 (1943); *Pratt v. Daly,* 55 Ariz. 535, 538, 104 P.2d 147, 148 (1940).

*Vesely* rejected the common law view of proximate cause as it applied to its facts. The court found that furnishing an alcoholic beverage to an intoxicated person may be a proximate cause of injuries inflicted by that individual on a third person. Such furnishing is a proximate cause because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent." 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631; see RESTATEMENT (SECOND) OF TORTS §§ 447, 449 (1965).

In many states the common law rule has been substantially abrogated by statutes which specifically impose civil liability upon a purveyor of intoxicating beverages under certain circumstances. See *Keenan, Liquor Law Liability in California,* 14 SANTA CLARA LAW. 46 (1973); Comment, *Dramshop Liability—A Judicial Response,* 57 CALIF. L. REV. 995, 996 & n.6 (1969) (listing 20 states that have such statutes).
sumptively negligent\(^8\) and that a duty of care runs from the owner in favor of third persons who are injured by the intoxicated patron.\(^9\) The Vesely court expressly refrained from deciding the precise issue before the court in Kindt—i.e., whether the person who is served alcoholic beverages in violation of a statute may recover for his own injuries suffered as a result of that violation.\(^10\)

Since Vesely, three California appellate cases have confronted this question, ultimately denying the drunken patron compensation for his own injuries.\(^11\) Two of the cases, Carlisle v. Kanaywer\(^12\) and Sargent v. Goldberg,\(^13\) held that a complaint alleging the intoxication of the plaintiff or plaintiff's decedent showed contributory negligence on its face and was therefore subject to a general demurrer.\(^14\) A third case, Cooper v. National Railroad Passenger Corp.,\(^15\) held that a drunken patron's cause of action is barred "by his voluntary assumption of the known and conspicuous risks incident to the consumption of alcoholic beverages in bars."\(^16\) The foregoing cases reflect the

8. 5 Cal. 3d at 165, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32. In California, a presumption of negligence arises from the violation of a statute which was enacted to protect a class of persons of which the plaintiff is a member against the type of harm sustained as a result of a defendant's prohibited conduct. See Alarid v. Vanier, 50 Cal. 2d 617, 327 P.2d 897 (1958); Satterlee v. Orange Glen School Dist., 29 Cal. 2d 581, 177 P.2d 279 (1947); CAL. EVID. CODE § 669(a) (West Supp. 1976).
9. 5 Cal. 3d at 164-65, 486 P.2d at 159-60, 95 Cal. Rptr. at 631-32.
10. Id. at 157, 486 P.2d at 153, 95 Cal. Rptr. at 625. In 1972, the California legislature deleted an amendment to Assembly Bill No. 1864 which sought to codify and extend the scope of Vesely to include the drunken patron within the scheme of compensability. Kindt v. Kauffman, 57 Cal. App. 3d at 851, 129 Cal. Rptr. at 607. The Kindt court cited this negative act of the legislature as authority for the existence of a legislative intent to deny to an intoxicated patron recovery for injuries proximately resulting from a violation of Business and Professions Code section 25602. Id. at 851, 859, 129 Cal. Rptr. at 607, 612. The weight accorded this inference of intent by the Kindt court, however, becomes significantly diminished with the recognition that a court can have no means of knowing the reasons which influenced the legislature in rejecting an amendment. See 73 AM. JUR. 2d Statutes § 171 (1974). Any number of reasons other than the one advanced by the Kindt court might have prompted this deletion. Reference to such negative action, therefore, although some authority for the court's conclusions, is only secondary authority at best.
12. 24 Cal. App. 3d 587, 101 Cal. Rptr. 246 (1972); see note 5 supra for a discussion of Carlisle.
13. 25 Cal. App. 3d 940, 102 Cal. Rptr. 300 (1972) (by implication); see note 5 supra for a discussion of Sargent.
16. Id. at 393, 119 Cal. Rptr. at 544 (citations omitted). The court's preference for viewing the drinker's conduct as a voluntary assumption of the risk was a conscious
law as it existed in 1975 when the California Supreme Court in *Li v. Yellow Cab Co.*,\(^{17}\) enunciated a system of comparative negligence. The *Kindt* court determined that if *Li* did not alter the judicially well-settled law denying a remedy to the injured drunken patron against the bar owner, the plaintiff would be unable to recover. His contributory negligence in voluntarily becoming intoxicated would bar his recovery for negligence against the bar owner.\(^{18}\)

The court then considered the impact of *Li v. Yellow Cab Co.*\(^{18}\) on the instant controversy. After an exhaustive discussion of the effect of the *Li* decision, the court reached the same result—i.e., *Kindt* could not recover. His inability to recover under *Li* was based on two grounds: the limited retroactivity given the comparative negligence doctrine by the *Li* court and avoidance of the question of the viability of the traditional doctrine of contributory negligence, which question was then before the California Supreme Court in *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). Cooper v. National R.R. Passenger Corp., 45 Cal. App. 3d at 394 n.2, 119 Cal. Rptr. at 544 n.2 (1975).

Two additional grounds for its result were indicated by the *Cooper* court. First, the consumption of alcoholic beverages, rather than their serving, is the proximate cause of any injury to the drinker as a result of his own intoxication. Second, since both the patron and the bartender are violating the criminal law, the bartender, by serving liquor to an obviously intoxicated patron in violation of Business and Professions Code section 25602, and the patron, by being drunk in a public place in violation of Penal Code section 647(f), they are in *pari delicto*, or equal fault. The law, under these circumstances, usually leaves the parties in the condition in which it finds them. *Id.* at 393-94, 119 Cal. Rptr. at 544-45.

18. See cases cited at note 5 supra. Several jurisdictions, although a minority, have permitted recovery to an intoxicated plaintiff on the ground that contributory negligence is no defense to a claim by a person whom a statute was designed to protect against his own inability to exercise self-protective care. Vance v. United States, 355 F. Supp. 756 (D. Alas. 1973); Soronen v. Olde Milford Inn, Inc., 46 N.J. 582, 218 A.2d 630 (1966); Schelin v. Goldberg, 188 Pa. Super. 341, 146 A.2d 648 (1958). California Business and Professions Code section 25602 is similar to the Pennsylvania statute used in *Schelin*, PA. STAT. ANN. tit. 47, § 4-493 (Purdon 1969); the New Jersey regulation in *Soronen*, Regulation 20, Rule 1, adopted pursuant to N.J. STAT. ANN. § 33:1-39 (West 1940); and the Alaska statute used in *Vance*, ALASKA STAT. § 04.15.020(a).

In light of the *Kindt* court's finding that an intoxicated patron is a member of the class for whose protection Business and Professions Code section 25602 was enacted, it can be argued that that statute was intended to protect the intoxicated patron from the hazards of his own consumption and the defendant bar owner should bear the entire responsibility for the harm which has occurred. See *Restatement (Second) of Torts* § 483, Comment c, at 539 (1965).

Now, under comparative negligence, however, the all-or-nothing problem is eliminated and it would seem appropriate to reconsider the above argument in light of the principles of shared responsibility. The plaintiff's recovery should now be diminished in proportion to his own negligence in bringing about his injuries. See text accompanying note 52 infra.

the Kindt court’s conclusion that principles of comparative negligence should not apply to situations involving willful misconduct.

The Li decision was limited by the California Supreme Court to apply only to those cases in which “trial” began after the date the opinion was filed.20 In the present case, the defendant’s demurrer was sustained without leave to amend in May 1974, and a judgment of dismissal was entered September 1974.21 The decision in Li v. Yellow Cab Co. became final on March 31, 1975.22 Since the court in Kindt resolved that a “trial” within the meaning of Li had taken place when a general demurrer to a complaint is sustained without leave to amend and a judgment is entered,23 it is evident that the Li decision could have no application.

Despite its holding on procedural grounds that Li v. Yellow Cab Co. was inapplicable to the case before it, the Kindt court nevertheless analyzed its potential impact. The court concluded that, even if Li were to apply to the instant controversy, the plaintiff would not be entitled to recover.24 In reaching this conclusion the court addressed itself to two issues. First, is the

20. Id. at 829, 532 P.2d at 1244, 119 Cal. Rptr. at 876.
22. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858.
23. 57 Cal. App. 3d at 861-62, 119 Cal. Rptr. at 613-14. In arriving at this conclusion, the court relied on a host of California Supreme Court cases in which “trial” was variously defined. Principal among these decisions is O’Day v. Superior Court, 18 Cal. 2d 540, 116 P.2d 621 (1941), in which the court defined trial as including “all rulings of a court in proceedings before it made in furtherance of the decisions made upon the issues in the case which form the basis of the judgment.” Id. at 544, 116 P.2d at 624 (citations omitted). In Berri v. Superior Court, 43 Cal. 3d 856, 279 P.2d 8 (1955), the court stated, “When the demurrer has been sustained and judgment of dismissal has been entered, there has been a trial and the action is not subject to dismissal under section 583. . . . [It] has been said generally in defining a trial that it is the determination of an issue of law or fact; a demurrer of course calls for the determination of an issue of law only.” Id. at 859, 279 P.2d at 10 (emphasis added) (citations omitted). Finally, in McDonough Power Equip. Co. v. Superior Court, 8 Cal. 3d 527, 503 P.2d 1338, 105 Cal. Rptr. 330 (1972), the court stated, “[I]n defining ‘trial’ we have said ‘that it is the determination of an issue of law or fact’ or ‘the examination . . . of the facts or law put in issue in a cause . . . .’” Id. at 531, 503 P.2d at 1341, 105 Cal. Rptr. at 333 (citations omitted).

Judge Friedman, the lone dissenter in Kindt, sought to discern the meaning of the word “trial” solely with regard to the individualized purpose of the Li court’s declaration of limited retroactivity. Inasmuch as the utterance in the Li opinion on this issue is typically cryptic, and in view of the rather clear precedent defining “trial” to include the sustaining of a demurrer without leave to amend, Judge Friedman’s reliance on his reading of Li seems misplaced. 57 Cal. App. 3d at 864-65, 129 Cal. Rptr. at 616.

24. 57 Cal. App. 3d at 860, 129 Cal. Rptr. at 613.
drunken patron guilty of willful misconduct? Second, if the question is answered in the affirmative, should the Li decision be extended to add a comparative willful misconduct doctrine to comparative negligence?25

In addressing itself to the first question, the court noted that the doctrine of comparative negligence, which abrogated the common law defense of contributory negligence, calls for the diminution of a plaintiff's recovery in proportion to his own negligence.26 The application of this doctrine by the Kindt court may have resulted in a recovery by the plaintiff, reduced only by his own proportionate share of negligence. To avoid this result, the Kindt court found both the plaintiff-patron and defendant-bar-owner guilty not of mere negligence, but of willful misconduct.27 The court reasoned:

Nothing is more elementary than that a person normally becomes intoxicated as a result of his own volition. . . . [T]he drunken patron in reality commits a crime as he sits upon the bar stool. Before imbibing at all, he is fully aware of the debilitating effects of alcohol upon the senses, and of its total effect upon himself. He knows that if he consumes it to excess, his subsequent activities may render him a danger and a menace to himself and others, especially innocent third persons. Yet, despite this prior knowledge, he inexcusably proceeds to consume alcohol in sufficient quantities to bring about the predicted result. This is willful and wanton misconduct as clear as any imaginable.28

25. Id. at 852, 129 Cal. Rptr. at 607-08.
26. Id. at 851, 129 Cal. Rptr. at 607; see Li v. Yellow Cab Co., 13 Cal. 3d 804, 828-29, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975).
27. 57 Cal. App. 3d at 852 & n.1, 129 Cal. Rptr. at 608 & n.1. “Willful misconduct means intentional wrongful conduct, done either with knowledge that serious injury . . . will result or with a wanton and reckless disregard of the possible results . . . .” Reuther v. Viell, 62 Cal. 2d 470, 475, 398 P.2d 792, 795, 42 Cal. Rptr. 456, 459 (1965); see Donnelly v. Southern Pac. Co., 18 Cal. 2d 683, 118 P.2d 465 (1941); BAJI No. 3.52 (1971 re-revision). No other California court, on these or similar facts, has so characterized the wrongful conduct of either a patron who drinks to intoxication or of a bar owner who serves such patron in violation of Business and Professions Code section 25602. Formerly, such conduct was labelled negligent. See, e.g., Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971); Cole v. Rush, 45 Cal. 2d 345, 289 P.2d 450 (1955). But see Cooper v. National R.R. Passenger Corp., 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (1975). Noting that prior to Li, California cases denying plaintiff recovery spoke in terms of negligence, the Kindt court suggested that there was no need to “delve deeper” into the finer distinctions between negligence, willful misconduct or intentional wrongdoing on the part of the plaintiff. 57 Cal. App. 3d at 860, 129 Cal. Rptr. at 613. At that time mere negligence was sufficient to bar his recovery.
28. 57 Cal. App. 3d at 852, 129 Cal. Rptr. at 608. The Kindt court expressly
Having declared the plaintiff guilty of willful misconduct, the court then raised a question of first impression in California. Should Li now be extended to add a comparative willful misconduct doctrine to comparative negligence?29

Prior to Li while a plaintiff’s contributory negligence did not bar his cause of action against a defendant guilty of willful misconduct, his contributory willful misconduct was a complete bar thereto.30 However, the court noted that it did not follow from the Li decision that, because we now have comparative negligence, we also have comparative willful misconduct.31 The court decided that this question turns upon whether a duty of care exists in favor of a willful wrongdoer.32

excluded minors and alcoholics from the scope of its opinion, limiting its discussion to adult plaintiffs who intentionally become intoxicated. Id. at 853, 129 Cal. Rptr. at 608.
29. Id. at 852, 129 Cal. Rptr. at 607-08.
31. 57 Cal. App. 3d at 853, 129 Cal. Rptr. at 608. The supreme court in Li declined to address itself to this question. It did, however, briefly articulate arguments advanced both for and against extension of the doctrine of comparative negligence to the area of willful misconduct. On the one hand, the court suggested that, since the difference between willful misconduct and negligence is thought to be one of kind rather than degree, comparative negligence concept should not be applied. Li v. Yellow Cab Co., 13 Cal. 3d 804, 825, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 873 (1975). On the other hand, the court observed that “a comprehensive system of comparative negligence should allow for the apportionment of damages in all cases involving misconduct short of being intentional.” Id. at 825-26, 532 P.2d at 1241, 119 Cal. Rptr. at 873, citing V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 5.3 (1974). Presumably the Kindt court was more persuaded by the former argument since it was the only one it mentioned in its opinion. 57 Cal. App. 3d at 852, 129 Cal. Rptr. at 607. This distinction between willful misconduct and negligence, although of some moment, was not controlling in the court’s resolution of the foregoing question.
32. Such an assertion, however, begs the essential question. Although the existence of a duty is a sine qua non to a finding of liability on the part of a defendant and therefore to the application of a system of comparative fault, it does not in itself call for the establishment of comparative willful misconduct. The propriety of such a system must be determined from the interpretation of the policies and principles set forth in the Li opinion.

It is difficult to imagine that the court meant to say that which is the clear import of its language. Presumably the court meant that, before it would consider the relative merits of a system of comparative willful misconduct, the existence of the defendant’s duty should first be determined. If the defendant’s duty is affirmed, the court would be squarely presented with the question of extending the doctrine of comparative negligence to willful misconduct. If denied, the entire question is rendered moot and the court need not address it. The Kindt court, after an involved duty analysis, denied defendant’s duty, thereby truncating its own inquiry by avoiding the real question it raised.

On the other hand, the court may have in fact meant precisely what it said—i.e., that a finding of duty in favor of the plaintiff-willful-wrongdoer ipso facto requires application of the comparative negligence doctrine to willful misconduct. Under this reading of the opinion, an affirmation of defendant’s duty would likely result in a
The existence of a duty in California can be arrived at in essentially one of two ways. The first is by application of the doctrine of negligence per se and its recent codification in Evidence Code section 669(a). Under this doctrine, a defendant's conduct is presumed negligent if it violates a statute designed to protect persons against the type of harm caused by the defendant's prohibited conduct. In arriving at the existence of a duty under this approach, a court, in effect, lifts from the legislature its particularized formulation of the duty of care as embodied in the statute and adopts it as its own. The Kindt court, citing Vesely, found that section 25602 was designed to protect "members of the general public from injuries ... resulting from the excessive use of intoxicating liquor," and that the plaintiff, as a patron of defendant's bar, was one of the members of the general public for whose protection section 25602 was enacted. The court next reasoned that such a finding does not ipso facto generate the duty essential for civil liability, since the courts are the final arbiters of the civil scope of a penal statute such as section 25602. It determined that, in this case, the existence of a criminal statute prohibiting a bar owner from serving liquor to an obviously intoxicated pa-

recovery to the plaintiff reduced by an amount equal to his percentage of fault. See note 26 and accompanying text supra. The possibility of such a result might well have been the impetus behind the Kindt court's denial of the requisite duty to the drunken plaintiff. Indeed, the foregoing supposition renders significantly more comprehensible the court's duty analysis.

33. CAL. EVID. CODE § 669(a) (West Supp. 1976) provides:
   (a) The failure of a person to exercise due care is presumed if:
       (1) He violated a statute, ordinance or regulation of a public entity;
       (2) The violation proximately caused death or injury to person or property;
       (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
       (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.


35. 57 Cal. App. 3d at 853, 129 Cal. Rptr. at 608; see CAL. BUS. & PROF. CODE § 23001 (West 1964).

36. 57 Cal. App. 3d at 853, 129 Cal. Rptr. at 608. In so doing the court overruled dicta in Hitson v. Dwyer, 61 Cal. App. 2d 803, 808, 143 P.2d 952, 954 (1943), which stated that an obviously intoxicated patron is not a member of the class for whose benefit the Alcoholic Beverage Control Act was enacted. (The Alcoholic Beverage Control Act currently appears at CAL. BUS. & PROF. CODE § 23000 et seq. (West 1964).)

37. 57 Cal. App. 3d at 854, 129 Cal. Rptr. at 609.
tron is not conclusive evidence of a duty of care but merely one element in the court's analysis.\textsuperscript{38}

The second method of determining the existence and scope of a duty is by employment of the more common tort mechanisms of balancing social interests and policies. This often includes an accounting of a statutory prohibition of the defendant's conduct, but, as already indicated, such a prohibition is not conclusive. The \textit{Kindt} court, exercising its judicial prerogative, adopted this latter approach in its duty analysis.\textsuperscript{39}

Whether a duty of care exists in favor of a particular plaintiff initially depends on the court's determination of the reasonable foreseeability of the harm which he, in fact, suffered.\textsuperscript{40} In the case at bar, the court readily found the plaintiff's injuries to be reasonably foreseeable.\textsuperscript{41} The duty inquiry, however, does not stop there. The concept of duty encompasses an intricate web of social policy considerations as broad as the entire law of negligence. Prosser noted that "'duty' is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection."\textsuperscript{42} The \textit{Kindt} court synthesized into administrative, moral, and socioeconomic categories the policy considerations which it believed to be most significant in the determination of a duty of care and, through it, the extent of protection afforded the plaintiff.

Although the court found the administrative considerations to be weighted against the plaintiff, it nevertheless indi-

\textsuperscript{38} Id.
\textsuperscript{39} Quoting from Raymond v. Paradise Unified School Dist., 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847, 851 (1963), the court summarized the policy factors underlying a duty of care:

"'The social utility of the activity out of which the injury arises, compared with the risks involved in its conduct; the kind of person with whom the actor is dealing; the workability of a rule of care, especially in terms of the parties' relative ability to adopt practical means of preventing injury; the relative ability of the parties to bear the financial burden of injury and the availability of means by which the loss may be shifted or spread; the body of statutes and judicial precedents which color the parties' relationship; the prophylactic effect of a rule of liability; . . . and finally, the moral imperatives which judges share with their fellow citizens—such are the factors which play a role in the determination of duty.'"

\textsuperscript{40} Wierum v. RKO Gen. Inc., 15 Cal. 3d 40, 46, 539 P.2d 36, 39, 123 Cal. Rptr. 468, 471 (1975); Dillon v. Legg, 68 Cal. 2d 728, 739-41, 441 P.2d 912, 919-20, 69 Cal. Rptr. 72, 79-80 (1968).
\textsuperscript{41} 57 Cal. App. 3d at 854, 129 Cal. Rptr. at 609.
\textsuperscript{42} W. PROSSER, LAW OF TORTS 325-26 (4th ed. 1971).
cated that this finding was not the impetus behind its denial of recovery to the drunken patron. It was the moral and socioeconomic factors which ultimately moved the court to conclude "that the requisite duty of the tavern owner to the drunken patron does not exist, that the comparative negligence doctrine of Li does not apply to willful misconduct, and that the Vesely v. Sager rule does not extend to injuries to the drunken patron himself." 44

The court placed a great deal of emphasis on the moral blameworthiness of the intoxicated plaintiff. It found that the self-indulgent act of voluntary intoxication is of such reprehensible character that one engaging in such conduct ought to be held singularly responsible for his own resulting injuries. This is so, regardless of his being provided the intoxicating liquor in violation of section 25602. To allow monetary recovery to a plaintiff would not only be an improper exercise of governmental paternalism which would encourage individual irresponsibility, but would, according to the court, be "morally indefensible." 45

The court seemed uncomfortable facing what it considered to be the practical problem of "favoring," on the one hand, the drunken patron and, on the other, the tavern owner, guilty of violating a penal statute, neither of whom was completely innocent. Purporting not to concede a favor to either one, the court invoked the doctrine of in pari delicto 46 which compelled a denial of recovery to the plaintiff.47

Finally, the court analyzed the socioeconomic considerations underlying a duty of care, finding that they also militate against allowing recovery to the plaintiff. Noting the high in-

43. 57 Cal. App. 3d at 855, 129 Cal. Rptr. at 609-10.
44. Id. at 855, 129 Cal. Rptr. at 610.
45. Id. at 856, 129 Cal. Rptr. at 610.
46. BLACK'S LAW DICTIONARY 1324 (3d ed. 1944), defines in pari delicto as follows: In equal fault; in a similar offense or crime; equal in guilty or in legal fault. See 42 C.J.S. 490 (1944).
47. 57 Cal. App. 3d at 856, 129 Cal. Rptr. at 610. It might well be argued that the application of a comparative fault principle in this case would not actually "favor" the plaintiff-patron but would merely provide a more equitable allocation of the loss in proportion to the respective fault of the parties. The court considered and rejected this argument, reasoning that, since heretofore such a plaintiff would be denied any recovery under the now-rejected doctrine of contributory negligence, to grant any recovery would amount to a "pure and simple financial windfall to an undeserving plaintiff." Id. at 857, 129 Cal. Rptr. at 611. While this temporal comparison of plaintiff's relative posture prior to and after the establishment of comparative negligence does, in fact, indicate a benefit bestowed upon him, this was the very result intended by the adoption of comparative negligence in California.
cidence of automobile accidents caused by drunk drivers who patronize these establishments, the court sought to fashion a rule which would serve as an effective deterrent to this serious problem. The rule which emerged from the court's deterrent theory called for the denial of a bar owner's duty to the intoxicated patron.

Two assumptions, pertaining to the effect of a contrary rule, underly the court's rationale. The first is that a rule granting recovery to the plaintiff would inevitably result in the encouragement of excessive alcohol consumption by the patron, as well as the relaxation of his personal efforts toward self-protection care. The second assumption is that such a rule (i.e., granting recovery) would provide "no converse prophylactic effect on society in terms of a deterrent to a tavern owner." The court was convinced that the evils wrought by a rule of civil liability outweighed any salutary effects by way of deterrence which might result from it.

Judge Friedman, dissenting, departed from the majority on several issues, most significant of which are: (1) the characterization of plaintiff's behavior as willful misconduct, and (2) the analysis of the moral and socioeconomic factors underlying the court's denial of defendant's duty of care.

Speaking to the issue of willful misconduct, the dissent concluded that "the majority approach rests on a usurpation of the jury function." Willful misconduct is normally a ques-

48. Id. at 858, 129 Cal. Rptr. at 611. A recent California statistical report found that "over 40% of all fatal accidents showed the party causing the accident . . . had been drinking." Id. at 871 n.7, 129 Cal. Rptr. at 620 n.7, citing CALIFORNIA HIGHWAY PATROL, 1974 ANNUAL REPORT OF FATAL AND INJURY MOTOR VEHICLE ACCIDENTS 57.

49. 57 Cal. App. 3d at 858, 129 Cal. Rptr. at 612.

50. Id. at 866, 129 Cal. Rptr. at 617. In light of the poverty of facts provided in the opinion, it would appear that by its finding the Kindt court has painted with too broad a brush. Essentially, the court has determined that, in every instance when an ordinary able-bodied adult voluntarily consumes alcohol to the point of intoxication, he is guilty of willful misconduct as a matter of law. Id. at 852, 129 Cal. Rptr. at 608. Similarly, the court found that whenever a tavern owner or his bartender violates Business and Professions Code section 25602, he is also guilty of willful misconduct. Id. at 852 n.1, 129 Cal. Rptr. at 608 n.1. Since willful misconduct normally depends on the facts of a particular case (Studer v. Plough, 179 Cal. App. 2d 436, 440-41, 3 Cal. Rptr. 785, 789 (1960); see 35 CAL. JUR. 2d, Negligence § 201 (1957)), the court, by its over-broad pronouncement, has indeed usurped the jury function. It simply cannot be said that, in all of the varied factual settings encompassed by the court's ruling, reasonable jurors could not differ in finding both a plaintiff-patron and a defendant-bar-owner guilty of willful misconduct. As has been shown, the consequences of so characterizing the conduct of the parties will often operate very harshly on the bar-patron-plaintiff.
tion of fact to be decided not by the court, but by the jury. The dissent noted that no authority was cited by the majority in support of its finding of willful misconduct.

The second major point of departure for Judge Friedman was his application of the doctrine of comparative negligence to the policy factors used to formulate a duty of care. He recognized that a system of comparative fault rearranges the pro and con factors in a duty analysis, resulting in a shift of emphasis to concepts of "split liability" or "shared loss."

In his discussion of the moral factor, the dissent noted that the now defunct contributory negligence defense did not "rest upon the idea that the defendant was relieved of any duty toward the plaintiff" but, rather, that although the defendant breached his duty, the plaintiff's recovery was barred by his own conduct. A court's investigation of a particular defendant's duty assigned little significance to the moral blame of the plaintiff. Under comparative negligence, a plaintiff's negligence does not bar his recovery but permits the jury to reduce his recovery in proportion to his own fault. The dissent suggested that the possibility of a plaintiff's recovery will encounter "expectable judicial-moral resistance." Formerly, when contributory negligence was a complete defense, a court could satisfy its moral disapproval of a drunken plaintiff by charging him with contributory negligence "as a matter of law." However, this "judicial escape route" is no longer available. Now, in order to achieve the same result, a court must attribute controlling significance to the plaintiff's moral blameworthiness in its duty analysis.

Judge Friedman maintained that to take into account the moral blame of the defendant in assessing his liability, would be "giving attention to that which is no real part of the law." Strongly criticizing the majority for injecting into the duty analysis its own subjective moral disapproval of the intoxicated patron, he urged the application of a moral standard set, not by the personal predilections of the individual judges, but by the generally held ethical expectations of society as a whole.

51. 57 Cal. App. 3d at 866, 129 Cal. Rptr. at 617.
52. Id. at 867, 129 Cal. Rptr. at 617.
53. Id. at 868, 129 Cal. Rptr. at 618 (citation omitted).
54. Id.
55. Id. at 869, 129 Cal. Rptr. at 619, citing Bauer, The Degree of Moral Fault as Affecting Defendant's Liability, 81 U. Pa. L. Rev. 586 (1933).
56. 57 Cal. App. 3d at 869, 129 Cal. Rptr. at 619. This judicial tendency of accounting for a party's moral blameworthiness in determining his liability is indeed
These ethical expectations find expression in the normative concept of duty which embodies two “equally forceful” demands: “(1) that each assume responsibility for his own safety, and (2) that each assume responsibility for the safety of others.”

Recognizing that the simultaneous fulfillment of these dual aims is rarely achieved, the dissent explained that comparative negligence places these moral forces in approximate equilibrium, thereby striking an equitable compromise. Comparative negligence recognizes that it is often the case that both plaintiff and defendant are morally culpable. Therefore, the goal of equilibrium can be reached only by forcing both culpable parties to share the loss. The dissent criticized the majority for destroying this equilibrium by utilizing a duty formulation which denounces the plaintiff’s disregard for his own safety while insulating the defendant from responsibility for others. To assert the moral blame of the plaintiff as the reason for rejecting the defendant’s duty completely prevents application of the concept of shared responsibility. The negation of duty when both parties are morally blameworthy only shields the irresponsible liquor vendor. The majority emphasized the moral blame of the intoxicated patron and denigrated that of the tavern owner, while the dissent, finding both parties culpable, focused on the strong legislative disapprobation of liquor sellers who reap profits by selling to intoxicated customers in violation of Business and Professions Code section 25602. The foregoing analysis of the moral factor led the dissent to the conclusion that “the moral pros and cons are at a dead heat.”

Similarly, the dissenting judge’s analysis of the socioeconomic factor refutes the majority position. The majority did not envision any salutary deterrent effect resulting from a rule which holds the tavern owner liable for a drunken patron’s injuries, whereas the dissent theorized that the prospect of a civil damage action against the tavern owner would diminish the indiscriminate flow of drinks by encouraging him to maintain stricter control over the dispensation of alcoholic bever-

57. Id. at 869, 129 Cal. Rptr. at 619; see RESTATEMENT (SECOND) OF TORTS § 463, Comment b (1965).
58. 57 Cal. App. 3d at 869, 129 Cal. Rptr. at 619.
59. Id. at 871, 129 Cal. Rptr. at 620.
60. Id.
ages in his establishment. For this reason, and because effective control of liquor dispensing establishments through criminal and licensing sanctions, such as section 25602, is virtually impossible, the dissent strongly urged the affirmation of the duty.

The majority correctly observed that such a rule of liability will undoubtedly result in higher liability insurance premiums to tavern owners, the cost of which will be passed on to the consuming public in the form of increased liquor prices. This result is not, however, as inexpedient as it might appear at first blush. The dissent indicated that by carrying insurance, a bar owner is in a better position to bear the financial burden of the injury and spread or shift the loss to the public at large. Further, in a system of comparative fault, the loss will almost always be shared because of the frequency of contributory fault in this kind of case. Since the plaintiff will bear a proportion of his damages, recovery and settlement averages will be low relative to other types of enterprise damage payments.

The reasoning employed and the conclusions drawn by the Kindt court in its duty analysis reveal a predisposition to denying the plaintiff a remedy. This fact casts doubt on the court's ruling on both the "trial" issue and the characterization of the parties' behavior as willful misconduct. Judge Friedman, dissenting, maintained a greater degree of objectivity in his approach and exhibited a more profound appreciation of the impact of comparative negligence on the factors comprising a

61. Id. at 873-74, 129 Cal. Rptr. at 622. The majority also assumed that granting plaintiff recovery would encourage patrons to drink to excess and otherwise relax their personal efforts toward self-protective care. Although not specifically addressed by the dissent, this assumption is of dubious validity. To be encouraged toward a particular mode of behavior by a rule of law, a person, first, must be aware of the rule and, second, must act in reliance on it. The court's assumption envisions such a well-informed, rational patron who knows the law and considers the probable legal consequences of his behavior. Does this characterization of a typical bar patron comport with reality? If not, the persuasiveness of the court's rationale is seriously diminished. A bar owner, on the other hand, is much more likely to be aware of his potential criminal and civil liabilities since they are well-known risks of doing business. Consequently, the tavern owner is much more likely to be affected by a rule of liability than the patron would be by a rule of non-liability. It would follow logically that, if there is to be a prophylactic effect on society by way of deterrence, it is best achieved by a rule which allows plaintiff's cause of action.

62. Id. at 873-74, 129 Cal. Rptr. at 622.

63. Id. at 859, 129 Cal. Rptr. at 612.

64. Id. at 874 & n.11, 129 Cal. Rptr. at 622 & n.11.

65. Id. at 860-62, 129 Cal. Rptr. at 613-14.

66. Id. at 852, 129 Cal. Rptr. at 607-08.
duty. Unfortunately, the court's concern with the outcome of the case resulted in harsh consequences for the injured plaintiff.

Thomas L. Hanavan

In 1971, respondent's predecessor, individually and as president of New York's Suffolk County Patrolmen's Benevolent Association, brought an action under the Civil Rights Act of 1871 against the Commissioner of the Suffolk County Police Department, seeking to invalidate certain hair grooming regulations as violative of patrolmen's first and fourteenth amend-

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1. *Dwen v. Barry*, 336 F. Supp. 487 (E.D.N.Y. 1971), is the parent case to *Kelley*. The names were subsequently changed as different individuals filled the positions of Patrolmen's Benevolent Association President and Commissioner of Police.


3. The hair grooming regulations under scrutiny were contained in Order No. 71-1, effective August 1, 1971:

   2/75.0 Members of the Force and Department shall be neat and clean at all times while on duty. Male personnel shall comply with the following grooming standards unless excluded by the Police Commissioner due to special assignment:

   2/75.1 HAIR: Hair shall be neat, clean, trimmed, and present a groomed appearance. Hair will not touch the ears or the collar except the closely cut hair on the back of the neck. Hair in front will be groomed so that it does not fall below the band of properly worn headgear. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear. The acceptability of a member's hair style will be based upon the criteria in this paragraph and not upon the style in which he chooses to wear his hair.

   2/75.2 SIDEBURNS: If an individual chooses to wear sideburns, they will be neatly trimmed and tapered in the same manner as his haircut. Sideburns will not extend below the lowest part of the exterior ear opening, will be of even width (not flared), and will end with a cleanshaven horizontal line.

   2/75.3 MUSTACHES: A short and neatly trimmed mustache may be worn, but shall not extend over the top of the upper lip or beyond the corners of the mouth.

   2/75.4 BEARDS & GOATEES: The face will be clean-shaven other than the wearing of the acceptable mustache or sideburns. Beards and goatees are prohibited, except that a Police Surgeon may grant a waiver for the wearing of a beard for medical reasons with the approval of the Police Commissioner. When a Surgeon prescribes that a member not shave, the beard will be kept trimmed symmetrically and all beard hairs will be kept trimmed so that they do not protrude more than one-half inch from the
ment rights.\(^4\)

Under the department’s standards, beards and goatees were forbidden, sideburns could not extend below the lowest part of the exterior ear opening, and mustaches had to be short and neatly trimmed.\(^5\) Respondent objected to this order on the grounds that, since the general community standards were less restrictive, compliance with the order would set him apart from the community in violation of his first amendment right of free expression and fourteenth amendment rights to due process and equal protection of the law.\(^6\)

Respondent’s attack on the validity of the regulation was dismissed by the district court. Although the district court recognized that application of the regulation to non-uniformed police could constitute an infringement of guaranteed rights, it chose to analogize the uniformed police personnel to the military\(^7\) and refused to overturn the regulation reasoning that such a decision was “better left to the officials who [were] aware of the local customs and taboos.”\(^8\)

The respondent/patrolmen appealed; the court of appeals reversed the district court’s dismissal and remanded the case for further adjudication.\(^9\) Unconvinced by the lower court’s “para-military” rationale, the court reasoned that “the police force [remained] significantly different in character from the military,” thereby implying that patrolmen are entitled to

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\(^2\) WIGS: Wigs or hair pieces will not be worn on duty in uniform except for cosmetic reasons to cover natural baldness or physical disfigurement. If under these conditions, a wig or hair piece is worn it will conform to department standards.


5. See Order No. 71-1, supra note 3.


7. 336 F. Supp. at 488. Although the district court accepted the “para-military” rationale for justification of the regulation in question, the court of appeals pointed out several significant differences between the police force and the military. It noted, for example, that the police force was still locally controlled and organized, and subject to more direct control of the electorate than the military; that although police officials were given broad discretion in running their departments, dismissal of patrolmen was subject to court review; and that although discipline was essential for an effective police force, unquestioning obedience which characterized military discipline was not necessary for an effective police force. Dwen v. Barry, 483 F.2d 1126, 1129 (2d Cir. 1973).


9. The case was remanded to allow the police department an opportunity to prove a nexus between “its regulation and the legitimate interest it sought to promote.” The court of appeals stated that the burden would be on the Commissioner to establish a genuine public need for the regulation. Dwen v. Barry, 483 F.2d at 1131.
greater protection of their personal liberties than are members of the armed forces. Holding that the limitations on respondent's due process rights required some showing of genuine public need, the court remanded the case for a determination of whether the hair grooming regulations were necessary for the purpose of maintaining discipline.

On remand, the district court held that "no proof" was offered to support a genuine public need for the regulation. While acknowledging that "proper grooming [was] an ingredient of a good police department's esprit de corps," the court ruled that petitioner's standards did not pass constitutional scrutiny because they ultimately reduced to "uniformity for uniformity's sake." Following the district court's decision in favor of the respondent, petitioner's appeal was dismissed without opinion by the court of appeals.

"To consider the constitutional doctrine embodied in the rulings of the court of appeals," the United States Supreme Court granted certiorari even though it had in the past consistently declined to hear cases dealing with hair grooming regulations. Holding that the challenged regulation did not violate

10. *Id.* at 1129.
11. *Id.* at 1130-31.
12. On remand, the complaint was amended to reflect the interim renumbering and modification of the hair grooming regulation. Former sections 2/75.0-2/75.3 *supra* note 3, were modified as follows:

   Members of the Force will be neat and clean at all times while on duty.
   Male personnel will comply with the following grooming standards unless excluded by the Police Commissioner due to special assignments:
   A. Hair will be neat, clean, trimmed and present a groomed appearance. Hair will not go below the ears or the collar except the closely cut hair on the back of the neck. Pony tails are prohibited. In no case will the bulk or length of the hair interfere with the proper wear of any authorized headgear.
   B. If a member chooses to wear sideburns, they will be neatly trimmed. Sideburns will not extend below the lowest part of the ear. Sideburns shall not be flared beyond 2" in width and will end with a clean-shaven horizontal line. Sideburns shall not connect with the mustache.
   C. A neatly trimmed mustache may be worn.

   The remaining sections, 2/75.4-2/75.5, see note 3 *supra*, were simply renumbered as 2/2.16, subdivisions D and E, respectively. Although the changes in the above three sections evidenced a slight liberalization of the standards, the differences were irrelevant for the purposes of this decision. *Kelley v. Johnson*, 425 U.S. 238, 242 n.4 (1976).
13. *Id.* at 242-43 (the district court's hearing on remand is unreported).
14. *Id.* at 243-44.
18. According to one commentator, "[I]t may be significant that shortly before granting certiorari to *Dwen*, the Court declined to hear two cases in which state courts
the due process rights guaranteed to the respondent by the fourteenth amendment, the Court reversed the court of appeals' ruling and reinstated the district court's initial holding dismissing the action.

On examination, the majority of the Court appears to have based its decision on two premises. First, the Court distinguished federal and state employees who may be subjected to comprehensive and substantial restrictions upon their activities from the citizenry at large, whose freedoms may not be so substantially curtailed. Second, the Court analogized the county police department's grooming regulation to a legislative act and applied a general presumption of validity.

In a discussion of the first premise vis-à-vis the respondent/state employee, the Court distinguished the liberty interest as affected by the hair grooming regulation from those liberty interests already dealt with by the Court (including procreation, marriage and family life). Although noting its lack of precedent concerning fourteenth amendment claims to matters of personal appearance, the Court briefly stated that


19. Kelley v. Johnson, 425 U.S. 238, 249 (1976). Although respondent's complaint had challenged the regulation by use of first amendment freedom of expression and fourteenth amendment equal protection arguments as well as due process grounds, the court of appeals found sufficient support for its decision under the due process clause. For this reason, the Supreme Court confined its holding to the due process claim.

20. 425 U.S. at 247.

21. The term "liberty interest" is derived from section one of the fourteenth amendment which provides in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." (emphasis added).

As the Kelley Court noted, "This section affords not only a procedural guarantee against the deprivation of 'liberty' but likewise protects substantive aspects of liberty against unconstitutional restriction by the State." 425 U.S. at 244. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975) (student's interest in the damage to his reputation caused by suspension from school); Aptheker v. Secretary of State, 378 U.S. 500 (1964) (interest of citizens in travelling abroad); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (interest of parents in being able to send their children to private as well as public schools).

this particular liberty interest probably exists, but that the determination of this issue was in no way crucial to the decision in this case. Its reasoning for this "immateriality" was based primarily on the respondent/patrolmen's status as a state employee rather than as a member of the citizenry at large.

The Court reasoned that as a member of the police force, respondent had "duties which [had] no counterpart with respect to the public at large," and that the hair grooming regulation was just one of the "myriad" of demands placed upon him. The Court saw the county's choice of a standard for personal appearance as part of its chosen mode of organization, and as one which "necessarily [gave] weight to the overall need for discipline, esprit de corps, and uniformity."

That such regulations would promote the above-stated purposes is a contention worthy of closer scrutiny. Mr. Justice Marshall, speaking for the minority, argued that he could find no rational relationship between the challenged regulation and its goals.

Initially, Justice Marshall had no difficulty in finding a constitutional basis for a right to govern one's personal appearance; he reasoned that such a right was so clear that it has always been taken for granted. In addition, he stated that a policeman does not surrender his right in his personal appearance simply by joining the police force.

"While fully accepting the aims of 'identifiability' and maintenance of esprit de corps," Justice Marshall could find no rational relationship between the challenged regulation and

23. 425 U.S. at 244 (1976). The dissent, however, found the determination regarding the right to choose one's personal appearance to be one of the crucial points in the case. Id. at 250-51 (Marshall, J., dissenting).
24. 425 U.S. at 245.
25. Id.
26. Id. at 246.
27. Id. at 254 (Marshall, J., dissenting).
28. With regard to the individual's right to govern his appearance, Mr. Justice Marshall stated:
   If little can be found in past cases of this Court or indeed in the Nation's history on the specific issue of a citizen's right to choose his personal appearance, it is only because the right has been so clear as to be beyond question. When the right has been mentioned, its existence has simply been taken for granted.
   Id. at 251.
29. Id. at 254 n.5. Justice Marshall stated: "To hold that citizens somehow automatically give up constitutional rights by becoming public employees would mean that almost 15 million American citizens are currently affected by having 'executed' such 'automatic waivers.'"
these goals. As to the "identifiability" justification, he contended that it would be erroneous to assume that the public would automatically associate short hair with policemen; in addition, he reasoned that the use of uniforms would be a more logical and less intrusive means of achieving the goal of identifiability.

In light of the minority's persuasive opinion, it also seems quite debatable whether the regulation in question could contribute to a more heightened esprit de corps. As Justice Marshall astutely pointed out, the fact that it was the President of the Patrolmen's Benevolent Association, in his Official Capacity, who had initiated the suit, would seem to indicate that the regulation would, if anything, decrease, rather than increase the police force's esprit de corps.

The apparent rationale for the majority's decision must therefore be based strongly on the Court's second premise—that is, that the regulation should not be viewed in isolation, but as part of the county's chosen mode of organization for its police force. The Court perceived the regulation to be the result of chosen policy, analogous to other state choices designed to advance various aims within the jurisdiction of the state's police power. Applying this premise, the majority reasoned that the order fixing hair length standards was entitled to some presumption of legislative validity.

The Court then pointed to several of its own decisions in which it accorded the government wide latitude in the dispatch

30. Id. at 254.
31. Id. at 255 n.7.
32. Id. Bolstering Justice Marshall's contention that the regulation in question would decrease rather than increase esprit de corps was the fact that the 25,000 member International Brotherhood of Police Officers filed an amicus brief arguing that the challenged regulation was unconstitutional. Id. at 255 n.6.
33. It may indeed be questioned just how much "rationale" the Court needs to justify its decision in hair regulation cases. As one writer thoughtfully noted:

The difficulty with the substantive due process approach to grooming regulations is the ease with which it can be molded to fit a court's determination of what the result should be. If a court wished to strike down even a reasonable hair regulation, it would need only to find that the plaintiff's interest in maintaining his hirsute appearance was so fundamental as to come under the aegis of the compelling interest test. Alternatively, if a court had a distaste for long hair on males, it could declare the infringement to be a relatively minor one and require only a rational basis for the regulations.

Comment, Long Hair and the Law, supra note 2, at 149 (emphasis added).
34. 425 U.S. at 247.
35. Id.
of its own affairs. Against this background, the majority rejected the court of appeals' test calling for the state to satisfy its duty to establish a "genuine public need" in favor of its own test: "whether respondent can demonstrate that there is no rational connection between the regulation, based as it is on respondent's method of organizing its police force, and the promotion of safety of persons and property." The Court now had before it a test by which it could determine whether the enacted regulation was "rational" or "arbitrary" and whether the state's interest was sufficiently genuine to prevail over the individual's. Viewing the substance of the regulation to be a policy decision, the Court noted the well-established judicial policy not to over-extend its power by passing judgment on "legislative enactments."

The Kelley decision appears to be quite consistent with the present Court's deference to governmental regulations, usually requiring that a statute be clearly "arbitrary" before the Court will rule in favor of the individual. Although Justice Powell mentioned in his concurring opinion that the individual's liberty interest was outweighed by the need for the regulation,

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36. See, e.g., Cafeteria Workers v. McElroy, 367 U.S. 886, 896 (1961) (Navy's authority to exclude private employee from premises); Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) (state's desire to safeguard the right of suffrage is a permissible intrusion into the business-labor field); Prince v. Massachusetts, 321 U.S. 158 (1944) (state statute prohibiting minors from selling merchandise on the streets is permissible exercise of state's police power); Olsen v. Nebraska, 313 U.S. 236 (1941) (state may limit amount of fee which may be charged by a private employment agency).


39. Id. See Comment, Long Hair and the Law, supra note 2, at 149, where the author suggests that the applicable test should be: "Unless the government can show that restrictive grooming regulations bear a reasonable relationship . . . to efficient job performance, it should be constitutionally barred from . . . dismissing an employee for refusal to comply with such regulations."

40. In support of its determination that the regulation was rational and valid, the Court, with approval, referred to Williamson v. Lee Optical Co., 348 U.S. 483 (1955), in which it stated: "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought." Id. at 488.

41. Mr. Justice Powell stated:

When the State has an interest in regulating one's personal appearance, as it certainly does in this case, there must be a weighing of the degree of infringement of the individual's liberty interest against the need for the regulation. This process of analysis justifies the application of a reasonable regulation to a uniformed police force that would be an impermissible intrusion upon liberty in a different context.

425 U.S. at 249 (Powell, J., concurring).
the Court itself seems to have spent a disproportionate amount of its discussion considering the municipality's purpose in enacting the regulation. The majority took only cursory notice of the other side of the traditional balancing test,\footnote{The traditional balancing test, used in both due process and equal protection cases, usually involves weighing the government's legitimate interest in furthering the promulgated legislation against the infringement on the individual's constitutionally protected right. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Roe v. Wade, 410 U.S. 113 (1973); Goldberg v. Kelley, 397 U.S. 254 (1970).} the degree of infringement on the respondent's constitutionally protected right to "reflect, sustain and nourish his personality."\footnote{Kelley v. Johnson is significant in that the Court appears to have put an end to at least part of the hair-length regulation dilemma, a controversy which has taken up much judicial time in recent years and has yielded vague and inconsistent results. Under its narrowest reading, Kelley indicates that members of a uniformed police force will meet with defeat if they decide to challenge a hair grooming regulation on due process grounds, and, as suggested by the Court's dicta, on first amendment grounds as well. Grooming standards have been successfully upheld in both due process and equal protection cases, usually involves weighing the government's legitimate interest in furthering the promulgated legislation against the infringement on the individual's constitutionally protected right. See, e.g., Village of Belle Terre v. Boraas, 416 U.S. 1 (1974); Roe v. Wade, 410 U.S. 113 (1973); Goldberg v. Kelley, 397 U.S. 254 (1970).}

\textit{Kelley v. Johnson} is significant in that the Court appears to have put an end to at least part of the hair-length regulation dilemma, a controversy which has taken up much judicial time in recent years and has yielded vague and inconsistent results. Under its narrowest reading, Kelley indicates that members of a uniformed police force will meet with defeat if they decide to challenge a hair grooming regulation on due process grounds, and, as suggested by the Court's dicta, on first amendment grounds as well.\footnote{The inconsistency of both reasoning and outcome in dealing with hair length regulations is evidenced at both the federal and state levels. Concerning school grooming codes, for example, several circuits have refused to uphold these regulations. See, e.g., Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Massie v. Henry, 445 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969). Contra, Karr v. Schmidt, 460 F.2d 609 (5th Cir.), cert. denied, 409 U.S. 989 (1972); Freeman v. Flake, 448 F.2d 258 (10th Cir.), cert. denied, 405 U.S. 1032 (1972); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971); Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), cert. denied, 400 U.S. 850 (1970). Further, the Third Circuit has shifted its position: compare Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972) with Zeller v. Donegal School Dist. Bd. of Educ., 517 F.2d 600 (3d Cir. 1975) (plurality opinion). See Comment, \textit{Long Hair and the Law}, supra note 2, at 156, n.110. State courts have also reached anomalous results. In New York, for example, one court struck down a grooming regulation for firemen, whereas other courts have sustained the validity of such regulations. Compare Hunt v. Board of Fire Comm'rs, 68 Misc. 2d 261, 327 N.Y.S.2d 36 (1971) with Olazewski v. Council of Hempstead Fire Dep't, 70 Misc. 603, 334 N.Y.S.2d 504 (Sup. Ct. 1972) and Austin v. Howard, 39 App. Div. 2d 76, 332 N.Y.S.2d 434 (1972). With respect to the claims that the regulation infringed upon the respondent's rights under the first amendment, the Court referred to several of its prior decisions in which it "sustained comprehensive and substantial restrictions upon the activities of both federal and state employees lying at the core of the First Amendment." 425 U.S. at 245. See Broadrick v. Oklahoma, 413 U.S. 601 (1973); Civil Service Comm'n v. Letter Carriers, 413 U.S. 548 (1973). These were Hatch Act cases upholding the governmental interest in restricting the political activities of federal employees. In light of this and in consideration of both the nature of the "interest" involved...}

44. The inconsistency of both reasoning and outcome in dealing with hair length regulations is evidenced at both the federal and state levels. Concerning school grooming codes, for example, several circuits have refused to uphold these regulations. See, e.g., Stull v. School Bd., 459 F.2d 339 (3d Cir. 1972); Massie v. Henry, 445 F.2d 779 (4th Cir. 1972); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971); Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970); Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969).

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challenged on other grounds, but it is difficult to determine just how these challenges would fare in light of Kelley. It seems clear, however, that the present Court will display some degree of deference to any regulation promulgated by another branch of the government.

Another arguably limiting factor to be considered in applying Kelley to future challenges of grooming regulations, is the specific emphasis given by the majority to respondent's status as a member of a state-employed uniformed police force. Whether other types of public employees, such as school teachers, will be barred from successfully challenging these standards through use of a similar public employee rationale also remains an open question for future courts to adjudicate. It is apparent, however, that the Supreme Court has, at least so far as policemen are concerned, finally provided a norm for other courts to apply when confronted with regulations restricting the individual's choice of personal appearance.

Lauren Easman-Taal

and the status of respondent as a state employee, the Kelley Court stated: "If such state regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment." 425 U.S. at 245.

46. In addition to first amendment "symbolic speech" and fourteenth amendment due process and equal protection grounds, grooming regulations have been challenged under the Ninth Amendment, right of privacy, and Title VII (claims based on sex discrimination). See, e.g., Baker v. California Land Title Co., 507 F.2d 895 (9th Cir. 1974) (Title VII); Stull v. School Bd., 450 F.2d 339 (3d Cir. 1972) (due process); Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971) (ninth amendment); King v. Saddleback Junior College Dist., 445 F.2d 932 (9th Cir.), cert. denied, 404 U.S. 979 (1971) (symbolic speech); Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970) (equal protection); Breen v. Kahl, 419 F.2d 1034 (7th Cir.), cert. denied, 398 U.S. 937 (1970) (privacy). See Comment, Long Hair and the Law, supra note 2.

47. Arguably, firemen can also be analogized as a para-military organ. In fact, fire department regulations have in the past been easier to support than police grooming regulations because of the dangerous nature of the job. A possible justification was cited in Michini v. Rizzo, 379 F. Supp. 838 (E.D. Pa. 1974), where the court stated that unlike the police, firemen work as a team and therefore military organization may be justified. See Comment, Long Hair and the Law, supra note 2 at 158.

48. Though the "para-military" rationale is inapplicable to school teachers, this group's challenges have not often ended in success. See, e.g., Miller v. School Dist. 167, 495 F.2d 658 (7th Cir. 1974). Contra Lansdale v. Tyler Jr. College, 470 F.2d 659 (5th Cir. 1970). Similarly, students have been for the most part unsuccessful in overturning regulations governing personal appearance. The Ninth Circuit has upheld such regulations in California. See, e.g., King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir.), cert. denied, 404 U.S. 1042 (1972); Olff v. East Side Union High School Dist., 445 F.2d 932 (9th Cir.), cert. denied, 404 U.S. 1042 (1972).

Fifteen lot owners in a subdivision called Sea Ranch,¹ purchased their property prior to approval of the California Coastal Zone Conservation Act (Act)² and obtained permission to build

1. Sea Ranch is located on the coast in northern Sonoma County. Its northern boundary is the Gualala River, from which it extends south about 10 miles along the shoreline. The subdivision touches on approximately one percent of California’s ocean beaches. Originally it was intended that these beaches be available only to Sea Ranch owners. Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission, 55 Cal. App. 3d 397, 407, 129 Cal. Rptr. 57, 62, aff’d on rehearing, 57 Cal. App. 3d 76, 86 (1976). See note 13 infra.

2. The California Coastal Zone Conservation Act, commonly known as Proposition 20, was an initiative measure passed by the state’s electorate in 1972. The stated policy of the Act was the preservation, protection, and restoration of natural resources in the California coastal zone. It is now codified at CAL. PUB. RES. CODE § 27001 (West Supp. 1976).

In order to implement this policy, the Act created the California Coastal Zone Conservation Commission (Commission) and six regional commissions. Id. §§ 27200, 27201. The Act assigned to the Commission the task of preparing the California Coastal Zone Conservation Plan (Plan) and directed that such Plan be submitted to the legislature by December 1, 1975. Id. §§ 27001(b), 27300. The Plan was to be both comprehensive and enforceable, and was intended to guide the long-range management of coastal resources. Id. § 27001(b). More specifically, the Act required that the Plan conform to certain delineated objectives:

(a) The maintenance, restoration, and enhancement of the overall quality of the coastal zone environment, including, but not limited to, the amenities and aesthetic values.

(b) The continued existence of optimum populations of all species of living organisms.

(c) The orderly, balanced utilization and preservation, consistent with sound conservation principles, of all living and nonliving coastal zone resources.

(d) Avoidance of irreversible and irretrievable commitments of coastal zone resources.

Id. § 27302.

Pending adoption of the Plan by the legislature, the Act authorized the Commission and the regional commissions to control the issuance of development permits in the coastal zone. Id. § 27400. Such permits were to be granted only upon a finding by the regional commission. “(a) That the development will not have any substantial adverse environmental or ecological effect; and (b) That the development is consistent with the findings and declarations set forth in Section 27001 and with the objectives set forth in Section 27302.” Id. § 27402.

The Act provided for appeal to the Commission from a decision by a regional

493
from the appropriate Sonoma County authorities. After the Act came into effect, they applied to the proper California coastal zone regional commission for development permits, which were granted.³

Appellants, Natural Resources Defense Council, Inc. (NRDC), and California Coastal Reliance, Inc., appealed the regional commission's decision to the California Coastal Zone Commission (Commission), pursuant to California Public Resources Code section 27423.⁴ Evidence presented at the Commission hearing was to the effect that, even though the fifteen permits at issue would have no significant environmental impact, the Sea Ranch development, at full buildout,⁵ would pose a serious environmental threat. Specifically, the evidence indicated that reliance on septic tanks for sewage disposal would "invite trouble" in a subdivision of this size; that man-induced rainwater and septic tank runoff would cause erosion and cliff retreat; that the projected development at Sea Ranch would ultimately cause severe traffic problems on Highway 1;⁶ and that fishlife and water flow would be jeopardized by the diver-

commission (id. § 27423), and judicial review of Commission rulings was also made available:

Any person, including an applicant for a permit, aggrieved by the decision or action of the commission or regional commission shall have a right to judicial review of such decision or action by filing a petition for a writ of mandate in accordance with the provisions of Chapter 2, (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, within 60 days after such decision or action has become final.

Id. § 27424.

3. 55 Cal. App. 3d at 405, 129 Cal. Rptr. at 61.
4. The Act's provision for appeal of a regional commission decision states that:
   (a) An applicant, or any person aggrieved by approval of a permit by the regional commission, may appeal to the commission.
   (b) The commission may affirm, reverse, or modify the decision of the regional commission. If the commission fails to act within 60 days after notice of appeal has been filed, the regional commission's decision shall become final.
   (c) The commission may decline to hear appeals that it determines raise no substantial issues. Appeals it hears shall be scheduled for a de novo public hearing and shall be decided in the same manner and by the same vote as provided for decisions by the regional commissions.


A "person aggrieved" has been held to be a resident or citizen of the state or a person who has a financial or proprietary interest in the regional commission's decision. See Klitgaard & Jones, Inc. v. San Diego Coast Regional Comm'n, 48 Cal. App. 3d 99, 121 Cal. Rptr. 650 (1975).
5. See note 13 infra.

6. Highway 1 is a winding, two-lane rural road which serves as the only means of access to Sea Ranch. The subdivision straddles the highway, but with most of the lots to seaward. 55 Cal. App. 3d at 407, 129 Cal. Rptr. at 62.
sion of water from wells near the Gualala River. In spite of this evidence, the Commission, after holding a public hearing and adopting both a written report and a statement of findings and decisions, ordered that the permits be granted. Thereupon appellants filed a petition for a writ of mandate to compel the Commission to reverse its decision. The trial court denied the petition and appellants perfected their appeal.

7. Id. at 406, 129 Cal. Rptr. at 61.


9. 55 Cal. App. 3d at 409, 129 Cal. Rptr. at 63. At the time of the trial court proceedings, another action involving the same parties was being heard in federal district court. That case, Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n, 396 F. Supp. 533 (N.D. Cal. 1975), dealt with the constitutional aspects of the controversy. The Sea Ranch Association, a non-profit organization which held large tracts of common land in the Sea Ranch Development and 11 of the 15 landowners who were the real parties in interest in Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n brought suit under 42 U.S.C. § 1983, on the theory that constitutional concepts of vested rights and due process precluded application of the Act to the contested permits. Plaintiffs' permits had been granted, but subject to stringent conditions. Their argument was that the narrow definition of vested rights under the Act ignored certain property rights which had vested before the Act took effect. The Commission, the regional commissions, individual commission members, NRDC, California Coastal Alliance and the Sierra Club were joined as defendants. The district court discussed the concept of vested rights under the Act as interpreted in recent state cases and determined that the crucial section, 27404, was subject to various interpretations. Consequently, the district court chose to abstain until section 27404 should be definitively interpreted, either in Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n or in some other case. The district court nevertheless retained jurisdiction over those questions not resolved in the state court, and reserved all constitutional issues for resolution in federal court. Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n, 537 F.2d 1058 (9th Cir. 1976).

Plaintiffs appealed to the circuit court of appeal. The circuit court upheld the lower court's abstention on the grounds that although the record did not disclose whether the claim of vested rights was to apply to the entire development or just to the individual permits, neither argument could prevail. First, the court observed, the question of vested rights in regard to the entire Sea Ranch development was at issue in a state court proceeding brought by Oceanic California, the Sea Ranch developer. A constitutional interpretation of the Act's vested rights provisions in that case, the court reasoned, would moot the question of exemption for the entire project. Secondly, the vested rights exemption was disallowed as to the individual lots on a finding of no case or controversy since appellants failed to show facts which would entitle any particular lot to such exemption. Sea Ranch Ass'n v. California Coastal Zone Conservation Comm'n, 537 F.2d 1058 (9th Cir. 1976).

Whether the entire Sea Ranch project or any of the individual lots is exempt from the Act's permit requirements has yet to be resolved. The case brought by Oceanic California has not been decided, and the court in Natural Resources Defense Council,
The court of appeal affirmed, finding that the Commission’s determination that the permits at issue would have no substantial adverse environmental or ecological effects was supported by substantial evidence in light of the whole record. This conclusion stemmed directly from the court’s affirmative response to the question of whether the Commission properly disregarded the effects of full buildout at Sea Ranch in deciding to allow the contested permits. It was this basic conclusion, that an evaluation of environmental effect is to be limited to the probable consequences of granting the permits at issue, which directed the court’s analysis of the case and determined the result.

Appellants did not object principally to the issuance of the fifteen contested permits. Instead, they argued that those permits would act as a “foot in the door” which would open the way to more permits, further development and “eventual environmental disaster” at Sea Ranch. Specific objections to Commission proceedings were therefore couched in terms of “projected development,” “full buildout” and “potential impact.”

The court of appeal rejected this approach:

[O]ur inquiry, on this appeal, extends no further than the determination whether the Commission could reasonably find that construction of the 15 permitted homes would “not have any substantial adverse environmental or ecological effect,” and was “consistent with the findings and declarations set forth in Section 27001 and with the objectives set forth in Section 27302.”

The court reasoned that the Commission’s authority to grant permits was merely an interim power, effective only until the adoption of the California Coastal Zone Conservation Plan (Plan), and that the scope of the Commission’s discretion

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Inc. v. California Coastal Zone Conservation Comm’n did not reach the vested rights question.

10. 55 Cal. App. 3d at 411, 129 Cal. Rptr. at 64-65.
11. Id. at 409, 129 Cal. Rptr. at 64.
12. Id.
13. The 15 permits granted by the Commission will increase the number of houses at Sea Ranch from 340 to 355. The original development was planned for 5,200 houses but that number may be reduced to 4,000. Upon full buildout, Sea Ranch would be the largest community on the Pacific Coast between San Francisco and Eureka. 55 Cal. App. 3d 397, 129 Cal. Rptr. 57.
14. Id. at 411, 129 Cal. Rptr. at 64 (emphasis in original).
15. See note 2 supra.
therefore extended only to a decision on the acceptability of the permits at issue. The thrust of this logic seems to be that any long-range determinations fall strictly within the purpose and framework of the Plan and cannot be made until it is enacted.

The court's basic response to the arguments presented by appellants in support of their petition for a writ of mandate was predetermined by its initial decision that only the effects of the fifteen contested permits should be considered. The arguments, as framed by appellants, were that

[1] the Commission refused to adhere to procedures designed to elicit full disclosure and consideration of the environmental consequences of its decision and [2] the reasons for that decision. It ignored its responsibility to prepare written findings in support of its decision in the manner required by law, and [3] it refused to prepare and consider an environmental impact report on further development at the Sea Ranch as required by the California Environmental Quality Act, Public Resources Code §§ 21000 et seq. [4] Another contention is that the conditions

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16. 55 Cal. App. 3d at 410, 129 Cal. Rptr. at 64.
17. It is not clear why the court felt constrained to view the question before it so narrowly. Acting Presiding Judge Sims, in his dissenting opinion, recognized that the issue was really much broader:

The fundamental question here is whether the Commission has properly disregarded the consequences which will result from the total population to be sustained if the subdivision of which applicants' lots are a part is fully built out. It seems to me that at some point a beginning must be made to avoid what appears to be the inevitable conflict between the results of that buildout and the environmental purposes and objectives set forth in the California Coastal Zone Conservation Act of 1972. It would appear preferable to make that beginning at this time. I reluctantly acknowledge that the interim nature of the permit power prevents a permanent solution with these applications.

Id. at 417, 129 Cal. Rptr. at 68.

The Act itself does not limit the Commission to consideration of the permits at issue. Cal. Pub. Res. Code § 27400 et seq. (West Supp. 1976). Rather, the purpose and objectives of the Act suggest a forward-looking approach designed to ensure that the ecology of the California coastline will be carefully protected both now and in the future. Id. §§ 27001, 27302, 27402; see note 2 supra. One commentator has observed that:

As has been amplified by numerous decisions dealing with temporary suspension of construction pending preparation of long-range planning schemes, allowance of unfettered development before planning is completed may severely restrict future options. The California Act, in sections 27001(c) and 27402(b) recognizes this by providing that development which conflicts with the objectives of the ultimate plan should not be allowed in the interim period.

Some Recent Developments in Coastal Protection, 4 E.L.R. 10138, 10140 (1974); see notes 44, 48 infra.
imposed upon the granting of the permits were inadequate and otherwise invalid.\textsuperscript{18}

After an initial determination that Commission action on a permit application is quasi-judicial rather than quasi-legislative,\textsuperscript{19} the court considered appellants' contention that the Commission failed to adhere to procedures designed to elicit full disclosure and consideration of the environmental consequences of its decision. Appellants maintained that the Commission should have investigated and evaluated the consequences of the subdivision's final buildout,\textsuperscript{20} and should have granted the permits only if the evidence showed that the subdivision itself would have no substantial adverse environmental or ecological effect and was otherwise consistent with the findings, declarations and objectives of the Act. Instead, the court found that "there was evidence, and there were reasonable inferences derivable from that evidence, that the adverse environmental impact of the development contemplated by the 15 permits at issue would be minimal."\textsuperscript{21} Consequently, the Commission's decision to grant the requested permits reflected no abuse of discretion, and appellants' argument that the Commission refused to adhere to procedures designed to elicit full disclosure and consideration of the environmental consequences of its decision was without merit.\textsuperscript{22}

Next, the court considered the contention that the Commission failed to prepare written findings in support of its decision to grant the fifteen permits.\textsuperscript{23} Again appellants argued that such findings would have to show that Sea Ranch at full buildout would "not have any substantial adverse environmental or ecological effect."\textsuperscript{24} The court determined that the proper

\textsuperscript{18} 55 Cal. App. 3d at 409, 129 Cal. Rptr. at 63-64.
\textsuperscript{19}  Id. at 406, 129 Cal. Rptr. at 61-62. The respondent Commission had argued that its function in regard to permits was quasi-legislative, and that its decisions should be upheld unless shown to be arbitrary, capricious, or totally lacking in evidentiary support. The quasi-judicial standard requires that Commission decisions be supported by substantial evidence in light of the whole record. Application of the stricter standard was not determinative in this case, and the court briefly based its decision in that regard on the fact that the applicable enabling statute delegated a function which was "essentially judicial."

The same decision was reached on identical facts in Davis v. California Coastal Zone Conservation Comm'n, 57 Cal. App. 3d 700, 129 Cal. Rptr. 417 (1976).
\textsuperscript{20} 55 Cal. App. 3d at 410, 129 Cal. Rptr. at 64.
\textsuperscript{21}  Id. at 411, 129 Cal. Rptr. at 65.
\textsuperscript{22}  Id.
\textsuperscript{23}  Id.
\textsuperscript{24}  Id.
criteria for such findings are that they be adequate to "bridge the analytic gap between the raw evidence and the ultimate decision or order," and that they "record the grounds upon which a judgment or other decision rests, thus to render its legality reasonably, and conveniently, reviewable on appeal." The court briefly summarized the Commission's findings as a determination that, although full buildout at Sea Ranch might pose a serious environmental threat, the granting of the fifteen permits would not. These findings, in the court's opinion, were properly determined by the superior court to be legally adequate since they made sufficiently clear to the reviewing court the reasoning process of the Commission.

The third argument made by appellants concerned the failure of the Commission to prepare and consider an environmental impact report as required by the California Environmental Quality Act (CEQA). The court rejected the contention that such failure invalidated the fifteen permits. In the court's opinion, the Commission's exhaustive staff report was, in essence, an environmental impact report. This opinion was based on findings that the report was an informational document which met the requirements of Public Resources Code section 21061, and that its content conformed to that of an impact report under Public Resources Code section 21100.

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25. Id. at 412, 129 Cal. Rptr. at 65, quoting Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974).
27. 55 Cal. App. 3d at 413, 129 Cal. Rptr. at 66.
28. Id.
29. CEQA reads, in relevant part: "All state agencies, boards and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment." CAL. PUB. RES. CODE § 21100 (West Supp. 1976).
30. 55 Cal. App. 3d at 413, 129 Cal. Rptr. at 66.
31. Id. CAL. PUB. RES. CODE § 21061 (West Supp. 1976) provides:
   An environmental impact report is an informational document which, when its preparation is required by this division, shall be considered by every public agency prior to its approval or disapproval of a project. The purpose of an environmental impact report is to provide public agencies with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which any adverse effects of such a project might be minimized; and to suggest alternatives to such a project.
32. 55 Cal. App. 3d at 413, 129 Cal. Rptr. at 66. CAL. PUB. RES. CODE § 21100 (West Supp. 1976) requires that an environmental impact report include the following information:
The court further stated that the substance rather than the form of such a report was significant.  

Further, the court held that the Commission need not file an impact report because it was an agency whose purpose was not only the drafting of a plan for the protection of the environment, but also, pending the completion of such plan, the actual protection of the environment. In support of its position, the court cited a number of federal decisions involving the Environmental Protection Agency which held that to require the EPA, whose raison d'être is the protection of the environment, to file an impact report in compliance with the National Environmental Policy Act (NEPA) would be redundant and "a legalism carried to the extreme." The court noted that NEPA and CEQA were nearly identical and observed that the rationale used in the federal cases should also excuse the Commission from any obligation to file an environmental impact report in compliance with CEQA regulations.

(a) The environmental impact of the proposed action.
(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
(c) Mitigation measures proposed to minimize the impact including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.
(d) Alternatives to the proposed action.
(e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.
(g) The growth-inducing impact of the proposed action.

33. The court cited CAL. CIV. CODE § 3528 (West 1970), which reads, "The law respects form less than substance;" and Kennard v. Rosenberg, 127 Cal. App. 2d 340, 273 P.2d 839 (1954), in support of this rule. Kennard, however, deals with statutory construction and makes no mention of informational documents such as environmental impact reports.

34. 55 Cal. App. 3d at 414. (This portion of the opinion was not included in the unofficial report.)

35. Id. at 414, citing Anaconda Co. v. Ruckelshaus, 482 F.2d 1301 (10th Cir. 1973); Duquesne Light Co. v. Environmental Protection Agency, 481 F.2d 1 (3d Cir. 1973); International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973).

36. 55 Cal. App. 3d at 415, 129 Cal. Rptr. at 67. In support of this conclusion the court quoted the following dicta:

The federal act became law on January 1, 1970, just a bit short of a year before that of California. The two statutes are so parallel in content and so nearly identical in words that judicial interpretation of the federal law is strongly persuasive in our deciding the meaning of our state statute.


"The resemblance between NEPA and CEQA is so uncanny that the conclusion
Additionally, an environmental impact report was not required for the fifteen permits at Sea Ranch because CEQA demands an impact report only on a project "which may have a significant effect on the environment." Because the Commission cannot issue a permit until it has found that the proposed development will not have a substantial adverse environmental or ecological effect, the court reasoned that CEQA's impact report provisions were inapplicable to a permit action. The validity of this argument depends again on the court's original conclusion that only the effects of granting the fifteen contested permits should be taken into account. The record of the Commission's hearing indicates that full buildout at Sea Ranch might well have serious environmental consequences. If this projected development were taken into account, the proposed project would be one "which may have a significant effect on the environment," and would therefore fall within that class of developments for which CEQA requires an impact report.

Finally, the court dispensed with appellants' contention that the fifteen permits were invalid because the conditions attached to them were inadequate to comply with the standards set forth in section 27403 of the Act. The conditions imposed on the fifteen permits issued by the Commission included establishing programs to monitor the cumulative effects.

is inescapable that CEQA was deliberately modelled after NEPA. Therefore the same consideration ought to govern the applicability of both statutes . . . ." Keith v. Volpe, 352 F. Supp. 1324, 1337 (C.D. 1972).


38. 55 Cal. App. 3d at 415, 129 Cal. Rptr. at 67.

39. See text accompanying note 5 supra.

40. 55 Cal. App. 3d at 415, 129 Cal. Rptr. at 67. CAL. PUB. RES. CODE § 27403 (West Supp. 1976) reads:

All permits shall be subject to reasonable terms and conditions in order to ensure:

(a) Access to publicly owned or used beaches, recreation areas, and natural reserves is increased to the maximum extent possible by appropriate dedication.

(b) Adequate and properly located public recreation areas and wildlife preserves are reserved.

(c) Provisions are made for solid and liquid waste treatment, disposition, and management which will minimize adverse effects upon coastal zone resources.

(d) Alteration to existing land forms and vegetation, and construction of structures shall cause minimum adverse effects to scenic resources and minimum danger of floods, landslides, erosion, siltation, or failure in the event of earthquake.
of septic tanks, to thin and trim trees planted to the west of Highway 1 which interfered with ocean views, to monitor the effects of Sea Ranch water diversions on the fish life in the Gualala River, and to introduce systems of limited public access to the Sea Ranch coastline through the issuance of permits or passes. The court briefly found these conditions to be reasonable, supported by substantial evidence, and otherwise responsive to the Commission's duty under section 27403.

The court, in summation, concluded that the Commission proceedings at issue "were conducted in accordance with law, and otherwise without error or abuse of discretion under the standards of Code of Civil Procedure section 1094.5, subdivision (b)." This conclusion ostensibly rests upon separate findings that the Commission adhered to procedures designed to elicit full disclosure and consideration of the effects of the proposed development, that its written findings adequately supported its decision to allow the contested permits, that the Commission was not required to file an environmental impact report, and that the conditions attached to the permits were adequate and valid. However, the court's decision that the Commission properly disregarded the effects of full build-out at Sea Ranch underlies most of these findings and stands as the most significant aspect of the case.

41. 55 Cal. App. 3d at 409, 129 Cal. Rptr. at 63.
42. Id. at 415, 129 Cal. Rptr. at 67.
43. Id. at 416, 129 Cal. Rptr. at 68.
44. Those authorities who have commented on permit procedures under the Act generally assign to the Commission a "watchdog" role not reflected in the proceedings reviewed in Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Comm'n. In reference to the granting of the Sea Ranch permits, an article in the Environmental Law Institute's Environmental Law Reporter notes that:

These provisions (sections 27402 and 27001), coupled with the fact that the California Act was mandated by the voters of the state as an initiative measure, make it particularly ironic that the California Commission has not shown itself in this case to be an aggressive protector of the coastline.


A similar comment on the permit process in general is found in Jackson & Baum, Regional Planning: The Coastal Zone Initiative Analyzed in Light of the BCDC Experience, 47 Cal. St. Bar J. 426 (1972): "[I]f the proposed project in any way prematurely fixes and establishes a land use or an element the Regional Commission will, in all likelihood, deny the permit." Id. at 490. Another comparison with BCDC reaches the same conclusion:

Drawing upon the experience of the San Francisco Bay Conservation and Development Commission, the most sensible approach would appear to be the granting of such permits as are not in conflict with the spirit
Since the decision in *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission*, the state legislature has passed the California Coastal Act of 1976. The 1976 Act, like that of 1972, provides general guidelines for development in the coastal zone. The new Act more specifically delineates the factors to be considered in analyzing the desirability of proposed development than did the 1972 Act, but even the new criteria are not strict. Beyond providing that no development which would interfere with the ability of a local government to formulate a local coastal program shall be allowed, the 1976 Act does not reveal any legislative attitude and objectives of the act, and the denial of permits where there is any doubt in the matter. Since limited coastal resources may be irretrievably lost, or delicate ecological systems irreparably damaged, it is clearly in the public interest to err on the side of caution.


It has even been suggested that a total moratorium on development pending the adoption of the Plan would be neither unreasonable nor illegal:

If the statewide commission, pursuant to its powers under section 27420(a) directs the regional commissions to assess their regulatory responsibilities in terms of the strongest public policy positions declared in the initiative preamble there would be an effective moratorium on all developments.

Reasonable moratoria pending study and adoption of a plan or zoning ordinance have long been held a valid exercise of the police power.


45. 1976 Cal. Legis. Serv., ch. 1330, §§ 30000 et seq., at 5773. This new Act represents the legislature's enactment of the Plan as submitted by the Commission pursuant to Public Resources Code section 27300.

46. The general standards of the 1976 Act, by which the adequacy of local programs and the permissibility of proposed developments are to be assessed, include guidelines for providing public access to beach areas (1976 Cal. Legis. Serv., ch. 1330, §§ 30210-13), encouraging recreational use of the coastal zone (id. §§ 30220-24), protecting the marine environment (id. §§ 30230-36), preserving land resources (id. §§ 30240-44), and controlling development (id. §§ 30250-55).

47. Id. § 30250, at 5784. Section 30250 requires that, except as otherwise provided, new development:

[S]hall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects either individually or cumulatively on coastal resources . . .

The inclusion of the phrase "individually or cumulatively" suggests that the legislature is aware of the increasing adverse effects of more and more development. However, there is a difference between cumulative effects and the potential effects of ongoing development. The language of the Act does not reach the second of these considerations.
toward the question raised in *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission*. That decision, therefore, remains the sole authority on whether a permit granting body should consider only the effects of the proposed development before it, or whether it must recognize the environmental consequences likely to result from full buildout of a project.48

The result reached in *Natural Resources Defense Council, Inc. v. California Coastal Zone Conservation Commission* would allow the reviewing agency to consider only the possible conflicts between the proposed individual developments and the requirements of the Act. Unless local coastal programs resolve this question by requiring evaluation of the effects of an entire project before any portion of it may be developed,49 at least two serious problems may arise. First, because building will be allowed until such time as it begins to have a deleterious effect upon the environment, piecemeal development will be encouraged. Second, the various reviewing agencies,50 and

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48. There is apparently no case law dealing directly with the question of what factors, beyond the broad directives of the Act, the Commission must consider before granting a development permit. There are many cases which discuss permit requirements and procedures under the Act, but they invariably are concerned with vested rights under section 27404. See, e.g., AVCO Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976); State v. Superior Court (Veta Co.), 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974); San Diego Coast Regional Comm'n v. See the Sea, Ltd., 9 Cal. 3d 888, 513 P.2d 129, 109 Cal. Rptr. 377 (1973); Environmental Coalition of Orange Co., Inc. v. AVCO Community Developers, Inc., 40 Cal. App. 3d 513, 115 Cal. Rptr. 59 (1974); Central Coast Regional Comm'n v. McKeon Construction Co., 38 Cal. App. 3d 154, 112 Cal. Rptr. 903 (1974). Those cases which do touch on the subject suggest a less limited approach than that taken by the court of appeal. The court in State v. Superior Court (Veta Co.), 12 Cal. 3d 237, 524 P.2d 1281, 115 Cal. Rptr. 497 (1974), for example, stated that, "the requirement for a permit is an interim measure to assure that developments in the coastal zone are consistent with the objectives of the Act so that priceless coastal resources are not irreversibly committed to uses which would be inconsistent with the plan ultimately developed." Id. at 253, 524 P.2d at 1292, 115 Cal. Rptr. at 508; see CEEED v. California Coastal Zone Conservation Comm'n, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974).

49. The 1976 Act differs from the 1972 Act in that it provides for formulation of local development programs with the local government serving as the initial reviewing body on permit applications. 1976 Cal. Legis. Serv., ch. 1330, §§ 30500-22, at 5797. The exact nature of these local programs has yet to be determined. The Act suggests that they will be reviewed for conformity with the policies of the Act, and that designated pilot project areas will provide criteria for evaluating programs subsequently developed. See note 45 *supra*; 1976 Cal. Legis. Serv., ch. 1330, § 30521, at 5803. The only strict limitation on such local development programs is that they must provide at least the degree of environmental protection provided by the plans and policies of any state regulatory agency.

50. After a local coastal program has been certified, a coastal development per-
eventually the courts, may be faced with the difficulty of deciding at exactly what point additional development will begin to have adverse environmental consequences.

Judson Thomas Farley