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RECENT CASES


The defendant, Donald John Long, age 22, lived near the decedent, a 73 year-old widower, in a trailer park in Yucca Valley. The defendant and the decedent had become friends and spent many hours together watching the decedent's television. On several occasions the defendant had tried to borrow money from the decedent, but without success. The decedent was found on the floor of his living room with a belt and an electric cord wrapped around his neck. Subsequent examination revealed numerous facial lacerations and bruises, all of which were consistent with the pathologist's conclusion that the decedent had been strangled.¹

The day after the decedent was found strangled, the defendant was arrested in Twenty-Nine Palms. At that time he had in his possession a watch, coins and a wallet containing some two hundred dollars in cash and credit cards belonging to the decedent. After a proper Miranda warning and waiver, recorded statements were taken from the defendant and a re-enactment of the crime, in which the defendant participated, was filmed at a local sheriff's substation. Both the statement and the filmed re-enactment were consistent with Long's testimony at trial. Long claimed that he and the decedent had been close friends and spent many hours together; that on the night of the killing the two of them were sitting next to each other watching television; that the decedent placed his hand on the defendant's leg and then grabbed the defendant in the groin area causing severe pain; and that in reaction to this assault the defendant picked up a large metal bolt and struck the decedent several times. In a rage, the defendant then wrapped a belt and a lamp cord around the decedent's neck.

Long denied having gone to the decedent's house with any

intention of either killing or robbing him and claimed the beating was a reaction to the decedent's homosexual approach.\textsuperscript{2} He further claimed that the robbery was an afterthought. A psychiatrist testified for Long, stating that because of the homosexual approach, Long had been overcome with anger rendering him irrational at the time of the beating; however, the psychiatrist believed Long to be rational, that is, to know what he was doing, at the time of the robbery.\textsuperscript{3}

After a jury trial, Long was found guilty of first degree murder.\textsuperscript{4} He appealed on the ground that because the court failed to instruct sua sponte on non-statutory involuntary manslaughter,\textsuperscript{5} the jury's verdict was not based upon a determination of every material issue presented by the evidence.\textsuperscript{6} The issue presented was whether mental defect or mental illness, in the absence of evidence of intoxication, can negate intent to kill so as to reduce homicide to involuntary manslaughter.

Justice Gardner, writing for a unanimous court, approached this issue without retracing the history of the diminished capacity partial defense. Nonetheless, the Long decision is a refinement of a line of cases based on the principles established in the land-

\begin{itemize}
  \item \textsuperscript{2} Id. at 683, 113 Cal. Rptr. at 533.
  \item \textsuperscript{3} Id. at 684, 113 Cal. Rptr. at 533.
  \item \textsuperscript{4} CAL. PEN. CODE § 189 (West 1970).
  \item \textsuperscript{5} In People v. Mosher, 1 Cal. 3d 379, 385 n.1, 461 P.2d 659, 662 n.1, 82 Cal. Rptr. 379, 382 n.1, the court dealt with non-statutory manslaughter as follows:
    
    In People v. Conley, [cite omitted], we pointed out that section 192 [manslaughter] had been adopted before the concept of diminished capacity had been developed and therefore that section's enumeration of non-malicious criminal homicide could not be considered exclusive. We did not thereby create a "non statutory crime," nor could we do so consistently with Penal Code section 6. Rather we gave effect to the statutory definition of manslaughter by recognizing that factors other than sudden quarrel or heat of passion may render a person incapable of harboring malice. [Emphasis by the court].
    
    Both People v. Long, 38 Cal. App. 3d at 684, 113 Cal. Rptr. at 533 and the dissenting opinion of People v. Mosher, supra at 400, 461 P.2d at 673, 82 Cal. Rptr. at 393, indicate that non-statutory manslaughter is not really a new crime, but rather the adding of new elements to the already existing statutory definition of manslaughter. The Long court merely defined those "factors other than sudden quarrel or heat of passion" referred to in the Conley decision.
  \item \textsuperscript{6} In People v. Modesto, 59 Cal. 2d 722, 382 P.2d 33, 31 Cal. Rptr. 225 (1963), the court established the rule that in a first degree murder case, failure to instruct the jury on lesser included offenses will constitute a "miscarriage of justice," and therefore violate Article VI, section 4 1/2 (section 13 in the 1966 revision) of the California Constitution. In People v. Sedeno, 10 Cal. 3d 703, 518 P.2d 913, 112 Cal. Rptr. 1 (1974), the court rejected the Modesto reversible per se rule in favor of a rule which required the defendant to be prejudiced by the court's failure to give the proper jury instructions. See Smith, Reversible Error in First Degree Murder Convictions: The Modesto Rule Re-Examined, 7 U.S.F.L. REV. (1972).
\end{itemize}
mark case of *People v. Wells* and its progeny. Factual situations, however, seldom arise in which a diminished capacity defense based solely on mental defect or mental illness could become an issue; therefore there were no compelling precedents upon which the court could base its decision.

The court in *Long* relied heavily on dictum from *People v. Mosher*, where the jury was instructed that the defendant could not be convicted of murder if malice was rebutted by diminished capacity. Rather than instructing the jury on non-statutory manslaughter, the trial court in *Mosher* proceeded to instruct on statutory manslaughter, that is, it excluded non-statutory elements, which precluded the jury from consideration of manslaughter as the offense for which the defendant could be convicted.

It has been established that when there is sufficient evidence of diminished capacity to negate the requisite elements in a homicide, the court should instruct the jury sua sponte on non-statutory manslaughter. Many homicide cases—particularly those involving intoxication—have followed the doctrine that malice can be rebutted by showing that the defendant's mental capacity was sufficiently diminished to preclude his harboring malice.

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8. *Wells* held that on the trial of the issues raised by a plea of not guilty to a charge of a crime which requires proof of a specific mental state, competent evidence of mental abnormality, not amounting to legal insanity, may be introduced to show that a defendant lacked the specific mental state, but evidence pertaining to insanity is inadmissible.
11. See note 5 supra.
13. The elements of homicide, both murder and manslaughter, are set forth in CALJIC 8.77 (1974 Revision).
cases, extending the doctrine, have suggested that not only malice, but also intent to kill, may be rebutted by a showing of diminished capacity. No case prior to *Long* has held that diminished capacity due to mental defect or illness may reduce murder to involuntary manslaughter, without proof of sufficient intoxication.

The *Long* court cited *Mosher*, in which the supreme court reversed a conviction of first degree murder, stating that the trial court had:

> [P]roceeded to define involuntary manslaughter in such a way as to exclude the jury's consideration of involuntary manslaughter as the offense for which the jury should find defendant guilty if it determined that the defendant's mental capacity was diminished due to mental defect, mental illness, or intoxication such that the intent to kill as well as malice was rebutted.

The court in *Long* viewed the statement in *Mosher* as dictum, because the defendant in that case had had a number of drinks prior to the murder in question. Viewing the statement as dictum, however, overlooks facts showing Mosher's past psychiatric condition and treatment, which might well have indicated that his mental capacity had been diminished by a mental defect or mental illness rather than by unconsciousness due to intoxication.

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17. See note 9 supra.

18. In People v. Roy, 18 Cal. App. 3d 537, 549, 95 Cal. Rptr. 884, 891 (1971), the court took the position that to support a finding of involuntary manslaughter based on voluntary intoxication, such voluntary intoxication must reach the state of unconsciousness.


20. Id. at 390, 461 P.2d at 666, 82 Cal. Rptr. at 386. [Emphasis added].

21. The editors of CALJIC 8.48 and 8.77 (1971) formulated a jury instruction based on what they interpreted as the holding in *Mosher*. In CALJIC 8.77 the court instructs the jury on diminished capacity as it relates to the ability to premeditate, deliberate, harbor malice, or intend to kill. The instruction reads, in part, as follows:

> [I]f you find that his mental capacity was diminished to the extent that he neither harbored malice aforethought nor had an intent to kill at the time the alleged crime was committed, you cannot find him guilty of either murder or voluntary manslaughter.

After CALJIC 8.77 is given, the editors suggest that CALJIC 8.48 should be given to instruct the jury on involuntary manslaughter. CALJIC 8.48 states:

> Involuntary manslaughter is the unlawful killing of a human being without malice aforethought and without an intent to kill.

> A killing is unlawful within the meaning of this instruction if it occurred:
In the instant case, there was no indication of intoxication from any source. The court of appeal was forced to consider whether the requisite "intent to kill" for homicide could be negated by mental defect or mental illness alone. In deciding this issue the Long court held:

[I]f there is substantial evidence of mental illness or mental defect sufficient to negate the ability of the defendant to premeditate, to deliberate, to harbor malice aforethought or to form an intent to kill, it is the duty of the trial judge to instruct the jury sua sponte that the offense can be no greater than involuntary manslaughter.\(^2\)

In support of its holding the Long court stated:

While . . . there have been no cases directly involving mental illness or mental defect, we can find no rational distinction between those situations and that of unconsciousness resulting from voluntary intoxication.\(^2\)

Two questions arise in applying the Long holding to a factual situation: (1) was there substantial evidence of mental illness or mental defect; and (2) was this evidence sufficient so as to alert the trial judge to the necessity of issuing a sua sponte jury instruction on non-statutory involuntary manslaughter?

The court decided that the evidence, including Long's own statement, "In my mind I was trying to kill him," was insufficient to require the issuance of a sua sponte jury instruction on non-statutory involuntary manslaughter.\(^2\) In response to the question of what quantum of evidence is to be required for the issuance of the sua sponte jury instruction on non-statutory manslaughter, the court explained only that the facts in the instant case were insufficient.

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(1) During the commission of a misdemeanor which is inherently dangerous to human life; or

(2) In the commission of an act ordinarily lawful which involves a high degree of risk of death or great bodily harm, without due caution and circumspection.

There is no malice aforethought and intent to kill if by reason of diminished capacity caused by mental illness, mental defect, or intoxication, the defendant did not have the mental capacity to harbor malice aforethought and to form an intent to kill.


23. Id. at 686, 113 Cal. Rptr. at 534 (Emphasis the court's).

24. Id. at 686, 113 Cal. Rptr. at 534-35. It should be noted, however, that had such a jury instruction been requested, the amount of evidence here might have been sufficient. The distinction arises from the quantum of proof required to support a sua sponte instruction as opposed to a requested one. For a sua sponte jury instruction there must be substantial evidence that diminished capacity is an issue in the case before the trial judge has a duty to issue an instruction. If a defendant requests an instruction, however, it must be issued if there is any evidence on diminished capacity deserving of any consideration whatsoever, regardless of how incredible that evidence may be. See People v. Cram, 12 Cal. App. 3d 37, 90 Cal. Rptr. 393 (1970).
It is well established that the difference between diminished capacity and unconsciousness is one of degree only: where the former provides a "partial defense" by negating a specific mental state essential to a particular crime, the latter is a "complete defense" because it negates capacity to commit any crime at all.\(^2\)

In the instant case, not only did the defendant not claim that he was unconscious, but he displayed total recollection of the crime, a traditional indicium of consciousness.\(^2\)

The *Long* court did not explain what would constitute sufficient diminished capacity to negate intent to kill, absent evidence of unconsciousness resulting from voluntary intoxication. One would presume that the standards for application of the diminished capacity in *Long* must be analogous to those for applying diminished capacity due to unconsciousness resulting from voluntary intoxication. However, distinctions arise which indicate that the standards for applying the two types of diminished capacity must be different.\(^2\) In diminished capacity cases involving voluntary intoxication, the element of volition connotes a degree of culpability which distinguishes the resulting unconsciousness from that which is arrived at through involuntary means under the total defense of unconsciousness.\(^2\) In diminished capacity cases aris-


This rule . . . [unconsciousness defense] . . . applies only to cases of the unconsciousness of persons of sound mind as, for example, somnambulists or persons suffering from the delirium of fever, epilepsy, a blow on the head or the involuntary taking of drugs or intoxicating liquor, and other cases in which there is no functioning of the conscious mind and the person's acts are controlled solely by the subconscious mind. CALJIC 4.30 implies that the important feature is one of volition. It is this volitional element which precludes unconsciousness arising from voluntary intoxication from being a complete defense; however, any such volitional element is lacking in the case of diminished capacity arising from mental defect or mental illness.


\(^{27}\). The two types of diminished capacity are: (1) that arising from unconsciousness due to voluntary intoxication; and (2) that arising from mental illness or mental defect.

\(^{28}\). In People v. Graham, 71 Cal. 2d 303, 316-17, 445 P.2d 153, 161, 78 Cal. Rptr. 217, 255 (1969), the court dealt with unconsciousness from voluntary intoxication as follows:

[T]he requisite elements of criminal negligence is deemed to exist irrespective of unconsciousness, and a defendant stands guilty of involuntary manslaughter if he voluntarily procured his own intoxication.

The *Graham* court took the position that a defendant who is unconscious due to voluntary intoxication assumes the risk that he will commit acts which are inherently dangerous to life and limb. It strains logic to apply this approach to culpability in cases of diminished capacity arising from mental illness or defect, since there is no volitional act or assumption of risk on the part of the defendant.
ing from mental illness or mental defect, there is no element of volition to which culpability may attach. Therefore, in cases of diminished capacity due to mental illness or defect, if unconsciousness is the level to which a defendant's capacity must be diminished to negate intent to kill, there is no apparent distinction between this type of diminished capacity and the defense of unconsciousness.  

It is apparent that the court's holding in Long is the next logical step in the refinement of the Wells-Gorshen rule, but what is not so apparent is the degree of mental defect or the extent of mental illness necessary to negate a defendant's ability to form intent to kill. Furthermore, extending diminished capacity to cases in which intent to kill is negated by mental illness or defect is useless unless the standard for application of the defense can be distinguished from the already existing defenses of unconsciousness and insanity.

In People v. Newton, the court took a broad view of unconsciousness. Such a view limits the factual situations in which diminished capacity might be held to negate malice, without falling into an area covered by the defenses of insanity and unconsciousness. The court in the Newton case noted that:

[Unconsciousness] . . . need not reach the physical dimensions commonly associated with the term (coma, inertia, incapability of locomotion or manual action, and so on); it can exist . . . where the subject physically acts in fact but is not, at the time, conscious of acting.

It seems quite likely that if Long had not stated that at the time of the murder he was trying to kill the decedent, and if his recollection of the events surrounding the crime were not so clear, the problem of distinguishing between diminished capacity and unconsciousness might well have been at issue. As the court points out, however, under the defendant's own version of the facts, he could be guilty of nothing less than voluntary manslaughter.

People v. Long will be important for the defense practitioner confronted with the fact situation in which the defendant is legally sane, but has acted in a manner, short of unconsciousness, which

29. It should be noted that in People v. Newton, 8 Cal. App. 3d 359, 379, 87 Cal. Rptr. 394, 407 (1970) the court stated: "The defenses of diminished capacity and unconsciousness are 'entirely separate,' and neither incompatible nor mutually exclusive. . . ."
30. See note 8 supra.
32. Id. at 376, 87 Cal. Rptr. at 405.
might arguably negate the requisite "intent to kill" for homicide. The court in *Long*, exercising judicial restraint, gave little insight into the extent to which a defendant's capacity must be impaired to succeed in reducing homicide to involuntary manslaughter due to diminished capacity arising from mental illness or mental defect. Nevertheless, the court's approach leads the practitioner to two important conclusions: (1) that the diminished capacity defense arising from mental defect or mental illness should not be overlooked in future cases; and (2) that the standard for requiring the sua sponte jury instruction on this defense will have to come from a future case in which the court feels compelled to apply this type of diminished capacity.

This new aspect of the diminished capacity partial defense will give the defense attorney more flexibility in cases where he doubts his client can meet the rigid test of the insanity defense, where there is no evidence of unconsciousness due to voluntary intoxication, and where he does not believe—because of the nature of the offense committed and other practical considerations—that a defense of unconsciousness will succeed.

*Phillip M. Adleson*

**CHOICE OF LAW—WRONGFUL DEATH ACTION—GOVERNMENTAL INTEREST ANALYSIS REQUIRES DELINEATION OF STATE POLICIES AND LIMITATION ON DAMAGES CONCERNS ONLY RESIDENT DEFENDANTS—*Hurtado v. Superior Court*, 11 Cal. 3d 574, 522 P.2d 666, 114 Cal. Rptr. 106 (1974).**

In January, 1969, Manuel Cid Hurtado was operating an automobile in California when it collided with another vehicle. Both drivers were California residents and both vehicles were registered in California. Antonio Hurtado, a cousin to Manuel and passenger in his vehicle, died from injuries received in the collision. Antonio, a resident and domiciliary of the State of Zacatecas, Mexico, was a temporary visitor in California. Antonio's widow and children, residents of Zacatecas and the real parties in interest, commenced a wrongful death action against both drivers in California.

Pursuant to Evidence Code sections 452\(^1\) and 453,\(^2\) the trial

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1. **CAL. EVID. CODE § 452 (West 1973)** states in relevant part:
court granted defendant Hurtado's request that it take judicial notice of the rule of the State of Zacatecas on the limitation on recovery in wrongful death actions. However, the trial court ruled that it would apply a measure of damages in accordance with the California law and not Mexican law.

The defendant sought a writ of mandamus from the court of appeal to direct the trial court to vacate its decision and institute in its place a ruling that would apply the Mexican limitation on damages. The court of appeal issued the peremptory writ of mandamus.

The court predicated its decision to apply the Mexican rule limiting the damages recoverable upon the supreme court's opinion of Reich v. Purcell. In that case the court was confronted with a choice-of-law problem as to the measure of damages in a wrongful death action. The court found that only Ohio had any state interest in the application of its unlimited recovery rule in a wrongful death action based upon a collision involving a California resident and an Ohio resident in Missouri. The supreme court adopted

Judicial notice may be taken of the following matters to the extent that they are not embraced within 451:

(f) The law of an organization of nations and of foreign nations and public entities in foreign nations.

2. CAL. EVID. CODE § 453 (West 1973) states in relevant part:

The trial court shall take judicial notice of any matter specified in Section 452 if a party requests it and:

(a) gives each adverse party sufficient notice of the request, through the pleadings or otherwise, to enable such adverse party to prepare to meet the request; and

(b) furnishes the court with sufficient information to enable it to take judicial notice of the matter.

3. The trial court took judicial notice of:

Section 1889 of the Civil Code of the State of Zacatecas, Mexico, provided that a decedent's survivors may receive a maximum of 25 pesos per day for a period of 730 days. This section expressly makes the Federal Labor Law (of Mexico) applicable in determining the amount of damages recoverable in wrongful death actions. Section 1890 of the Zacatecas Civil Code provides that the court may, in its discretion, award an additional amount, not to exceed one third of the first amount, as extra indemnity.


4. CAL. CIV. PRO. CODE § 377 (West 1973) states in part:

When the death of a person not being a minor . . . is caused by the wrongful act or neglect of another, his heirs . . . may maintain an action for damages against the person causing the death. . . . If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person. . . . In every action under this section, such damages may be given as under all circumstances of the case may be just . . .


6. Since a trial court is under a legal duty to apply the proper law it may be directed to perform that duty by a writ of mandamus. See Babb v. Superior Court, 3 Cal. 3d 841, 851, 479 P.2d 379, 385, 92 Cal. Rptr. 179, 185 (1971); Mannheim v. Superior Court, 3 Cal. 3d 678, 685, 478 P.2d 17, 20, 91 Cal. Rptr. 585, 588 (1970).

7. 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967).

In Reich, the supreme court of California was confronted with a choice-of-law problem as to the measure of damages in a wrongful death action. The court found that only Ohio had any state interest in the application of its unlimited recovery rule in a wrongful death action based upon a collision involving a California resident and an Ohio resident in Missouri. The supreme court adopted
with a choice-of-law problem as to the measure of damages in a wrongful death action. The court renounced its prior holding that in tort actions the law of the place-of-the-wrong governed all substantive matters relating to the cause of action. The court adopted in its place the concept of governmental interest analysis. This approach requires an analysis of the interests of the states involved, the objective of which is "to determine the law that most appropriately, applies to the issue involved." The central focus of an interest analysis is the interpretation of the substantive rule in respect to its purpose in light of the state's concern for the issue and the character of the tort.

The governmental interest analysis approach to resolve the choice-of-law problem between the Missouri and Ohio rules of damages. The court chose not to apply the law of the California forum because it declared that its state interest was absent. California did not have a state interest in protecting the defendant because its law did not protect him by a limitation of damages. The court held, that, since the defendant was not a Missouri resident, Missouri had no interest in extending its limitation on recovery to the defendant. The court characterized the Missouri concern as primarily local and therefore did not include a California defendant. In the absence of a competing state interest, the court applied the unlimited recovery rule of Ohio in order to give effect to Ohio's policies of awarding full recovery to injured plaintiffs.


9. The late Professor Brainerd Currie was a notable advocate of interest analysis. He postulated that in a choice-of-law selection a court must analyze the policies that are the foundation of the rules being considered for application. In the absence of congressional legislation in choice-of-law, which Currie preferred, he offered five guidelines to be considered in an interest analysis: (1) normally, even in cases that involve foreign elements, a court should be expected as a matter of course to apply the law of the forum; (2) when the law of a foreign state is timely invoked by a litigant, the court should determine the governmental policy expressed in the forum. The court should also inquire whether there is a reasonable basis for asserting an interest of a state in the application of its law; (3) the court should apply the law of the interested state if it finds that only one state has a legitimate basis for the application of its policy under the circumstances; (4) if the court finds an apparent conflict between the interests of the two states it should reconsider, since a more restrained interpretation of the policies may avoid the conflict; (5) if the forum is disinterested, but an unavoidable conflict exists between the interests of two other states, and the court cannot decline an adjudication of the case, then the law of the forum should apply, at least if it corresponds with the law of one of the other states.


10. 67 Cal. 2d 551, 555, 432 P.2d 727, 730, 63 Cal. Rptr. 31, 34, citing Leflar, Choice-Influencing Considerations in Conflicts Law, 41 N.Y.U.L. REV. 267, 279-82 (1966). Leflar's analysis of proper choice-of-law rules is founded upon five factors which serve as values that could act as guides to the courts in a choice-of-law process. He ranks the advancement of the forum's governmental interest as fourth in priority in a court's consideration of the proper choice-of-law.

Interest analysis requires that when a litigant invokes foreign law, the forum must inquire whether the foreign state's interest would be advanced before applying any state's law to the facts. As the supreme court said in Hurtado:

When the forum undertakes to resolve a choice-of-law problem presented to it by the litigants, it does not choose between foreign law and its own law, but selects the appropriate rule of decision to apply as its law to the case before it.

Furthermore, it is incumbent upon the invoking party to demonstrate that the rule of decision will further the interest of the foreign state.

Underlying the interest analysis theory is the assumption that a state has a governmental interest in its residents and in the application of its laws for their protection. The forum applies its own law when its relation to the case is a reasonable basis for applying that law. A reasonable basis exists either when the foreign state has no interest or when neither state has an interest in the application of its law. If the forum finds that its state has no interest, but that the foreign state does, then the foreign law should apply.

In Hurtado, the court of appeal stated that it was obliged to reach its decision because of certain guidelines set out in Reich. The court concluded that only the domicile of the decedent and his survivors had an interest in having its law prevail on the issue of the amount of damages recoverable in a wrongful death action.

Reviewing the trial court's decision, the Supreme Court, in a unanimous opinion, authored by Justice Sullivan, denied the writ. The court held that the California measure of damages should apply because Mexico had no interest in the application

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14. Id.
15. See note 9 supra.
16. Reich v. Purcell, 67 Cal. 2d 551, 432 P.2d 727, 63 Cal. Rptr. 31 (1967). The Reich opinion contained two statements which on their face appear to support the issuance of the writ of mandamus: First, "Since California has no limitation of damages, it also has no interest in applying its law on behalf of defendant." Second, "[T]he interest of a state in a wrongful death action insofar as plaintiffs are concerned is in determining the distribution of proceeds to the beneficiaries and that interest extends only to local decedents and beneficiaries." Id. at 556, 432 P.2d at 731, 63 Cal. Rptr. at 35.
of its limitation of damages rule to the case.\(^{19}\)

The supreme court declared that the defendant's contention reflected a serious misreading of *Reich* because he confused what the *Reich* court characterized as two completely independent state interests:\(^{20}\) first, California's interest in creating a cause of action for wrongful death so as to provide some recovery for injured plaintiffs;\(^{21}\) and second, the interest of Zacatecas in limiting that recovery.\(^{22}\) The court noted that "in *Reich* this court carefully separated these two state interests . . . ."\(^{23}\) The defendant's position, which had been adopted by the court of appeal, rested upon an erroneous interpretation of certain language in *Reich* suggesting that only resident plaintiffs may utilize California's unlimited recovery rule.\(^{24}\) *Hurtado* provided the opportunity to rectify this misreading of *Reich* as well as to affirm California's deterrent policy of full compensation.\(^{25}\)

In deciding *Hurtado*, the supreme court delineated the state interest underlying the wrongful death laws of the two jurisdictions involved. As the place-of-the-wrong, California had three distinct policies or interests supporting the unlimited damages rule incorporated in the wrongful death statute. These state interests were: the compensation of survivors, the deterrence of wrongful conduct, and the limitation, or lack thereof, upon the damages recoverable.\(^{26}\) It observed that *Reich* recognized that these interests are primarily local in character.\(^{27}\)

In applying the interests of California to the facts of the case, the court found that since the plaintiffs were not California residents, the policy of compensating local survivors did not pertain. However, the court held that the policies of deterring wrongful conduct and of strengthening this deterrence aspect in a civil action by imposing unlimited liability required the application of California law.\(^{28}\)

The court also pointed out that the limitation on recovery of Zacatecas "modifies the sanction imposed by a countervailing concern to protect local defendants against excessive financial burdens for the conduct sought to be deterred."\(^{29}\) The Mexican rule

\(^{19}\) *Id.* at 579, 522 P.2d at 671, 114 Cal. Rptr. at 111.

\(^{20}\) *Id.*

\(^{21}\) *Id.*

\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) See note 16 supra.

\(^{25}\) 11 Cal. 3d 574, 584, 522 P.2d 666, 672, 114 Cal. Rptr. 106, 112.

\(^{26}\) *Id.*

\(^{27}\) *Id.*

\(^{28}\) *Id.*

\(^{29}\) *Id.*
demonstrates a state concern for the protection of the economic integrity of all Mexican wrongful death action defendants. Since the defendant was not a Mexican resident, his contention that a Mexican law of limitation was available to him was without justification, for he was not within the class to be protected. The court's holding that Zacatecas' interest was local in nature signifies that Zacatecas had no state interest in applying its limitation to non-residents. Moreover, the court stated that Zacatecas had no interest in denying full recovery to its residents injured by non-Mexican defendants. Therefore, the California measure of damages law was properly applied by the trial court in the absence of any compelling Mexican interest.

One of the most significant products of interest analysis in choice-of-law is the identification of false conflicts—cases which appear to involve conflicts of state laws but in which only one state has an interest in the application of its law to the issue. Reich and Hurtado are prime examples of false conflict analysis by the supreme court. Hurtado has reaffirmed the principle which emerged in Reich: if in a multi-state context only one state has an interest in having its law applied, then there is no conflict of laws, and that state's law should apply.

In Hurtado, the supreme court determined the interests of California in a wrongful death action arising out of tortious conduct within that state. It narrowed the holding in Reich by adding an additional element—the fact that defendant's tortious conduct took place in California. Thus it appears that a California forum will apply its unlimited recovery rule when a California resident commits tortious conduct which takes life within that state.

However, the court did not indicate what the proper choice should be where California is a neutral and convenient forum having no interest in the application of its own law, and where the court must select between the competing interests of two other states. Presumably, as a disinterested forum, it would have to

31. Id.
32. "False conflict" may also identify the situation in which the competing rules would yield the same result. See Comment, False Conflicts, 55 CALIF. L. REV. 74, 77 (1967).
33. The supreme court has not encountered a factual situation where California's law is dissimilar to the laws of the other states in an interest analysis. In Reich the court indicated that California was a disinterested forum, but it is arguable that it was not as neutral as it claimed because the recovery law of Ohio was identical to that of California. Such circumstances certainly reinforce the premise that forum law should be applied as the rule of decision in a case.

balance the two competing states' rules. One possibility would be to apply the law of the forum. Another possibility would be to choose the law of one of the competing states. But it is uncertain whether this second process would be entirely satisfactory since it would in fact necessitate the formulation of a standard to which comparisons of the state interests could be independently made. It is suggested that a state's policies cannot be juxtaposed with interests of other states, because the latter's concern can only be deduced from an unannounced standard or from the very rule which is to be ascertained by the proposed weighing of interests. Subsequent case law should give definition to the balancing aspect involved in such circumstances. The court will have to announce some standard which is to be upheld in every choice-of-law problem or provide further direction in the procedures of weighing state interests.

*Clifford Kerry Fields*

**CRIMINAL LAW—CREDIT FOR PRESENTENCE TIME—DENYING RETROACTIVE EFFECT TO A STATUTE GRANTING CREDIT FOR TIME SERVED IN CUSTODY PRIOR TO COMMENCEMENT OF PRISON SENTENCE IS UNCONSTITUTIONAL—*In re Kapperman*, 11 Cal. 3d 542, 522 P. 2d 657, 114 Cal. Rptr. 97 (1974); *In re Grey*, 11 Cal. 3d 554, 552 P. 2d 644, 114 Cal. Rptr. 104 (1974).**

In June of 1971, petitioner Donald L. Kapperman pleaded guilty to two counts of armed robbery. He was sentenced on each count to the term prescribed by law: five years to life, the terms to run concurrently. Petitioner did not appeal. The term of imprisonment fixed by the judgment in a criminal action commences unlimited recovery rule of Michigan. The *Hurtado* court agreed with the application of the Oregon law, but disapproved of the *Ryan* court's identification of the Oregon state interest. The *Ryan* court had misread *Reich* and found that limitations of damages are concerned with compensation of survivors. The *Hurtado* opinion provides no guidance as to how California courts, acting as neutral and convenient forums as in the *Ryan* setting, are to balance the competing state interests.

34. See note 9 supra.
36. Id.

1. CAL. PEN. CODE § 211 (West 1970).
2. Id. § 213.
to run only upon the actual delivery of the defendant into the custody of the Director of Corrections.\(^8\) Kapperman petitioned directly to the California Supreme Court\(^4\) for a writ of habeas corpus, seeking credit on his term for the 304 days he remained in custody between the time of his arrest and his delivery into prison.\(^5\)

In 1971, the California Legislature enacted section 2900.5 of the Penal Code,\(^6\) which gives persons convicted of felony offenses credit on their prison sentences for time served in custody prior to the commencement of their sentences. Subdivision (c) of section 2900.5 makes the statute prospective only, limiting its application to those persons delivered into the custody of the Director of Corrections on or after March 4, 1972, the effective date of the section.\(^7\) Petitioner, having entered prison before March 4, 1972, would not be entitled to such credit.

The court declared subdivision (c) of section 2900.5 unconstitutional.\(^8\) It did not, however, invalidate the entire statute. Only the discriminatory classification set forth in subdivision (c) was eliminated, and the statutory benefits extended to those persons whom the Legislature had improperly excluded.\(^9\)

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3. *Id.* § 2900.
4. *CAL. CONST.* art. 6, § 10 provides in pertinent part: “The Supreme Court, courts of appeal, superior courts, and their judges have original jurisdiction in habeas corpus proceedings.”
5. Although the traditional function of the writ of habeas corpus is to effect the discharge of a person unlawfully confined, the writ is also available for the purpose of vindicating rights of a lawfully confined prisoner. *In re Harrell*, 2 Cal. 3d 675, 682, 470 P.2d 640, 643, 87 Cal. Rptr. 504, 507 (1970).
6. *CAL. PEN. CODE* § 2900.5 (West Supp. 1974) reads:
   \(\text{(a)}\) In all felony convictions, either by plea or by verdict, when the defendant has been in custody in any city, county, or city and county jail, all days of custody of the defendant from the date of arrest to the date on which the serving of the sentence imposed commences, including days served as a condition of probation in compliance with a court order, shall be credited upon his sentence, or credited to any fine which may be imposed, at the rate of not less than twenty dollars ($20) per day, or more, in the discretion of the court imposing the sentence. If the total number of days in custody exceeds the number of days of the sentence to be imposed, the entire sentence shall be deemed to have been served. In any case where the court has imposed both a prison sentence and a fine, any days to be credited to the defendant shall first be applied to the sentence imposed, and thereafter such remaining days, if any, shall be applied to the fine.
   \(\text{(b)}\) For purposes of this section, credit shall be given only where the custody to be credited is attributable to charges arising from the same criminal act or acts for which the defendant has been convicted.
   \(\text{(c)}\) This section shall be applicable only to those persons who are delivered into the custody of the Director of Corrections on or after the effective date of this section.
7. *Id.* § 2900.5(c).
9. *Id.*
The court held that the basic guarantees of equal protection embodied in the fourteenth amendment to the United States Constitution,¹⁰ and the uniform general laws¹¹ and privileges and immunities¹² sections of the California Constitution prohibit the State from arbitrarily discriminating against persons subject to its jurisdiction. Classifications made by the Legislature between those to whom the State accords or withholds substantial benefits must be reasonably related to a legitimate public purpose.¹³

The majority opinion by Justice Burke applies well established principles of equal protection to a classification which necessarily is created whenever the Legislature enacts a law specifying that it shall not apply retroactively. In general terms these principles require that general laws must operate uniformly on all persons in the same category.¹⁴ Although the Legislature has broad discretion in making statutory classifications, such classifications must be reasonable, not arbitrary.¹⁵ The test is whether the classification bears a rational relationship to a legitimate state interest. This test is often alternatively expressed as a requirement that the classification be reasonably related to the object which the legislation seeks to accomplish.¹⁶

The legislative objective in enacting Penal Code section 2900.5 was to reduce the inequities of the bail system. Indigent

¹⁰. U.S. CONST. amend. XIV, § 1 states in pertinent part:
No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

¹¹. CAL. CONST. art. 1, § 11 states: "All laws of a general nature shall have a uniform operation."

¹². CAL. CONST. art. 1, § 21 states:
No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens.


¹⁴. Leland v. Lowrey, 26 Cal. 2d 224, 232, 157 P.2d 639, 645 (1945); Ex parte Smith, 38 Cal. 702, 710 (1869).


defendants awaiting trial must remain in jail while more affluent persons can secure their liberty. While section 2900.5 does not eliminate this injustice, it at least guarantees that upon conviction all persons will serve an equal total period of incarceration regardless of their economic status.

The rationale implicit in *Kapperman* is that granting or withholding the benefits of section 2900.5 according to a prisoner's date of imprisonment clearly has no reasonable relationship to this legislative purpose or to any other legitimate state interest.

After holding that such a legitimate state interest is required, the *Kapperman* court proceeded to dismiss as inadequate four alleged state interests offered by the People to justify a purely prospective application of the statute. Primarily, the People contended that retroactive application of section 2900.5 would interfere with the effective operation of the Indeterminate Sentence Law. The People argued that the Adult Authority cannot observe the prisoner during his presentence custody, and since rehabilitative facilities at county jails are inferior to those in state prisons, presentence jail credit for all present inmates would undermine the ability of the Adult Authority to make a reasoned judgment regarding rehabilitation.

This argument is founded on faulty reasoning. The comparative quality of rehabilitative facilities in local jails and state prisons, and the lack of opportunity for Adult Authority observation of jail inmates were immaterial to the issue before the court. These same considerations apply to inmates who entered prison after March 4, 1972; yet the Legislature, by enacting section 2900.5, elected to waive such considerations with respect to these inmates. The issue was not whether this waiver is proper, but rather whether it ought to apply equally to all inmates regardless of the date of their entry into prison. The People's argument attacked the wisdom of the statute, rather than its retroactive application, and was properly rejected by the court.

In addition, the *Kapperman* court noted that the sentencing

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18. The Adult Authority is the parole board for male prisoners in California. The Authority consists of nine members appointed by the Governor for four year terms. Cal. Pen. Code § 5075 (West 1970).

Under the Indeterminate Sentence Law of 1917, the court in imposing sentence does not fix the term or duration of the period of imprisonment. *Id.* § 1168. Except for certain felonies carrying a mandatory life sentence, a minimum and maximum term of imprisonment is fixed by statute for each offense. After a defendant is sentenced by the court according to the statutory term prescribed for his offense, he is delivered into the custody of the Director of Corrections. *Id.* § 1202a. The actual term which the prisoner will serve is thereafter fixed, and may be refixed, by the Adult Authority. *Id.* §§ 3020, 3021.
19. 11 Cal. 3d at 546, 522 P.2d at 659, 114 Cal. Rptr. at 99.
20. *Id.* at 547, 522 P.2d at 660, 114 Cal. Rptr. at 100.
procedure in California is such that retroactive granting of presentence jail credit rarely will usurp the discretion of the Adult Authority:

[T]he credit operates only to reduce the statutory maximum and minimum commitment terms, but ordinarily would not interfere with the Adult Authority’s discretion in setting the actual parole release date. The credit will advance the parole eligibility date, but would require premature release only in those cases in which the presentence credit combined with the actual prison terms fixed by the Adult Authority exceed the statutory maximum term applicable to the offense. And even though, in rare cases, the discretionary role of the Adult Authority may be curtailed, this result follows from the policy decision already made by the Legislature when it enacted section 2900.5, namely, that for purposes of credit, precommitment detention should be equated with postcommitment imprisonment.21

In their second argument the People contended that the Kapperman holding was inconsistent with the recent decision of the United States Supreme Court in McGinnis v. Royster.22 In McGinnis the Court upheld the constitutionality of a provision of a New York statute which granted “good-time” credit toward parole eligibility for prisoners who exhibited good behavior during their prison confinement. The provision was challenged as violating equal protection principles by denying similar “good-time” credit for good behavior during presentence jail incarceration. The Kapperman court distinguished McGinnis on the ground that the statute in controversy in that case granted or denied credit according to whether an inmate was incarcerated in a county jail or a state prison, while subsection (c) of Penal Code section 2900.5 purports to base the distinction on the date on which the inmate entered prison.23

The People thirdly argued that retroactive application of section 2900.5 would unnecessarily burden the administration of justice.24 In rejecting this argument the court first pointed out that the Kapperman ruling requires no retrying of prisoners.25 In ad-

21. Id. at 547, 522 P.2d at 659, 114 Cal. Rptr. at 99 (emphasis by the court).
23. 11 Cal. 3d at 548, 522 P.2d at 660, 114 Cal. Rptr. at 100.
24. Id. at 548, 522 P.2d at 661, 114 Cal. Rptr. at 101.
25. In this respect the court distinguished People v. Aranda, 63 Cal. 2d 518, 407 P.2d 265, 47 Cal. Rptr. 353 (1965). In Aranda the court refused retroactive application of an amendment to Penal Code section 17 which states that certain juvenile offenses be deemed misdemeanors. Prior to the amendment, whether, in such a case, a juvenile was charged with a felony or a misdemeanor was left to the discretion of the judge. Retroactive application of the amendment would have upset countless discretionary determinations, as well as required retrials in cases
dition, the court noted that its opinion requires that section 2900.5 must be applied to all convicted felons, not only those to whom presentence detention occurred as a result of indigency and inability to post bail. Because of the recent decision of *In re Young*, prisoners have been receiving credit on their sentences only for presentence jail custody resulting from indigency and consequent inability to post bail. Thus the implementation of *Kapperman* is facilitated by the fact that it no longer will be necessary to determine whether the person seeking credit was, in fact, indigent, or whether he was otherwise entitled to bail. Furthermore, implementation could easily be accomplished through slight modification of the “indigency credit” forms which were already being distributed to inmates and parolees in accordance with the *Young* decision.

The fourth and final argument made by the People was that many negotiated pleas may have been entered into with presentence incarceration taken into consideration. The court summarily dismissed this argument with the observation that presentence jail time will, in most cases, be insignificant in relation to the statutory punishment.

The scope of *Kapperman* was limited in the companion case, *In re Grey*. Petitioner Bernard Grey was convicted in 1967 of one count of forgery and sentenced to a term of six months to fourteen years, commencing on April 28, 1967. In 1969 the Adult Authority fixed his term at six years, with parole granted for three of those years beginning April 28, 1970, and terminating April 28, 1973. Shortly before that termination date, on March 16, 1973, petitioner was taken into custody, again on a charge of forgery. He was subsequently charged with violation of parole, a parole hold was placed upon him, and his term was refixed at the statutory maximum of fourteen years.

where such “discretionary felons” were later tried on other charges and the court admitted the prior felony conviction in reliance on the prior law.

26. 32 Cal. App. 3d 68, 107 Cal. Rptr. 915 (1973). In *Young* petitioner had entered prison prior to the effective date of Penal Code section 2900.5. He petitioned for credit on his sentence for the 62 days he had spent in jail prior to sentencing. Petitioner’s presentence incarceration was due solely to his inability to post bail. The court of appeal held that to the extent that it is applied to an indigent defendant confined prior to trial due to an inability to afford bail, Penal Code section 2900, providing that a prison term commences to run upon actual delivery of a defendant into the custody of the Department of Corrections, violates equal protection. As a result of *Young*, prisoners who entered prison prior to the effective date of Penal Code section 2900.5 received presentence jail credit only upon a showing of indigency.

27. *id.* at 549 & n.9, 522 P.2d 677, 661 & n.9, 114 Cal. Rptr. 97, 101 & n.9.
28. 11 Cal. 3d at 550, 522 P.2d at 662, 114 Cal. Rptr. at 102.
30. *id.* at 556, 522 P.2d at 665, 114 Cal. Rptr. at 105.
31. *id.*
32. *id.*
This fourteen year maximum already has been reduced (under the *Kapperman* ruling) by reason of petitioner's credit for time spent in custody while appealing his conviction. Grey maintained in his habeas corpus petition to the California Supreme Court that this credit should have been applied retroactively to advance his April 28, 1973, parole termination date. Under petitioner's theory his parole must be deemed to have terminated before the March, 1973, forgery charge was brought, rendering the subsequent parole hold and resentencing improper.\(^33\)

While the court confirmed that, under the rationale of *Kapperman*, petitioner was entitled to credit for his presentence jail custody, it denied Grey's petition for a writ of habeas corpus.\(^34\) The reasoning in *Grey* merely reiterates the holding in *Kapperman* that Penal Code section 2900.5 will operate only to modify the upper and lower limits of a prisoner's sentence, and has no application to the Adult Authority's discretion in dealing with a prisoner's term within those limits. Thus *Kapperman* will result in parole termination prior to the date fixed by the Adult Authority only in those cases wherein the credit for presentence time, plus the prison and parole time already served or to be served, would exceed the statutory maximum term.\(^35\)

Justices Clark and McComb concurred in denying the writ in *Grey* but, consistent with their dissent in *Kapperman*, dissented from the holding that petitioner Grey was entitled to credit under section 2900.5 for time served in the county jail pending appeal.\(^36\)

Dissenting in *Kapperman*, Justice Clark suggested that, contrary to the majority holding, limiting a statute to prospective application does not require a "legitimate public purpose."\(^37\) Justice Clark's reasoning is unclear here. It is unlikely that he meant that no legislative classification is created by subdivision (c) of Penal Code section 2900.5. The more logical interpretation is that even though the Legislature has created a classification, Justice Clark would hold that the traditional "legitimate state interest" test should not be applied.

The dissent noted the many instances in which the United States Supreme Court has refused to apply retroactively constitutional rules of criminal procedure.\(^38\) Therefore, said Justice

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33. *Id.*  
34. *Id.* at 557, 522 P.2d at 666, 114 Cal. Rptr. 106.  
35. *Id.* at 556, 522 P.2d at 666, 114 Cal. Rptr. 106.  
36. *Id.* at 557, 522 P.2d at 666, 114 Cal. Rptr. at 106 (concurring and dissenting opinion).  
37. 11 Cal. 3d at 552, 522 P.2d at 663, 114 Cal. Rptr. at 103 (1974) (dissenting opinion).  
Clark, it was anomalous for the majority to hold that a strictly statutory right must be given retroactive effect unless purely prospective application is supported by some rational and legitimate state interest.\(^9\)

Justice Clark's analogy to Supreme Court criminal procedure cases is, however, imperfect. These decisions are generally distinguishable in that their retroactive application would have burdened the courts with the herculean task of retrying countless prisoners convicted by unconstitutional means. Avoiding the placement of such a burden on the administration of justice is clearly a legitimate public purpose, and was recognized as such by the Supreme Court in *Michigan v. Payne.*\(^40\)

The minority opinion in *Kapperman* continued with the statement: "The vast majority of courts considering the issue have denied retroactive effect to statutes conferring credit for time in custody prior to commencement of sentence."\(^41\) In support of this statement the dissent cited twelve cases from other jurisdictions. An examination of these cases, however, reveals that the holding of the *Kapperman* majority does not represent the drastic departure from precedent that the dissenters portrayed.\(^42\)


\(^{40}\) *Payne* Court stated the traditional three-prong test used to determine whether newly established constitutional rights will be given retroactive effect. The three considerations which must be weighed are (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standard, and (c) the effect on the administration of justice of a retroactive application of the new standard.

The *Kapperman* dissent cited with approval the dissenting opinion in *Payne,* in which Justice Marshall referred to this three-prong test as a charade and stated that the real criterion for deciding the issue of retroactivity has been whether the new rule either goes to jurisdiction in the traditional sense, or is so fundamental to the guilt determining process that its observance would have resulted in acquittal.

\(^{41}\) *v.* Dail, 337 F. Supp. 731 (E.D. N.C. 1972); *People ex rel. Carroll v. Frye,* 35 Ill. 2d 604, 221 N.E.2d 262 (1966); *Commonwealth v. Snyder,* 427 Pa. 83, 233 A.2d 530 (1967) (language in the statute referring to "any person who has been convicted" construed to indicate legislative intent that the statute be given retroactive effect).

Four cases refused retroactive application of a statute, but are distinguishable
A more compelling argument made by the dissent is that, assuming arguendo that to limit Penal Code section 2900.5 to prospective application requires a legitimate public purpose, the majority supplies such a purpose.\(^4\) The majority opinion initially held that *Kapperman* is not controlled by cases refusing to apply retroactively new statutes which lessen the punishment for a particular offense. "The Legislature," said the court, "properly may specify that such statutes are prospective only, to assure that penal laws will maintain their desired deterrent effect by carrying out the original prescribed punishment as written."\(^4\) According to the dissent this same deterrent rationale justifies preservation of the originally determined parole eligibility date in the case of an inmate entering prison before the effective date of section 2900.5:

Eligibility for parole consideration is as integral to punishment by imprisonment as length of sentence. For a life prisoner like petitioner, the date he becomes eligible for parole is of paramount importance. [Citation omitted.] Therefore, subdivision (c) of section 2900.5 should be upheld to maintain the deterrent effect of punishment imposed on persons delivered to prison prior to the effective date of the statute.\(^4\)

in that the decisions were not based on a holding that purely prospective application of the statute is not a violation of equal protection. United States v. Pruitt, 397 F.2d 502 (2d Cir. 1969); State v. Williams, 262 La. 769, 264 So. 2d 638 (1972); State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970).

Two cases cited by the *Kapperman* dissent are distinguishable in that petitioner was not arguing for retroactive application of a statute on an equal protection ground. Duke v. Blackwell, 429 F.2d 531 (5th Cir. 1970); Shank v. State, 289 N.E.2d 315 (1972).

One case is distinguishable in that the appellate court did not even decide on the merits the issue of presentence jail credit. The court held that this was a matter for the trial court, and not properly raised by a declaratory judgment action. The court did refuse to apply retroactively a statute granting credit for time spent in jail while awaiting appeal. But, although an equal protection argument was made and rejected, it concerned a legislative classification between defendants who could or could not post bail, not between prisoners entering custody before or after a certain date. Sobell v. Attorney Gen., 400 F.2d 986 (3d Cir. 1968).

43. 11 Cal. 3d at 552, 522 P.2d at 663, 114 Cal. Rptr. at 103 (1974).
44. 11 Cal. 3d at 546, 522 P.2d at 659, 114 Cal. Rptr. at 99 (1974). See *In re Estrada*, 63 Cal. 2d 740, 408 P.2d 984, 48 Cal. Rptr. 172 (1965) (dissenting opinion). In *Estrada* dissenting Justice Burke (the author of the majority opinion in *Kapperman*) explained the rationale for this deterrent effect. In concluding that the prescribed punishment in effect at the time of the commission of the offense is the punishment which should be imposed, Justice Burke stated:

The certainty of punishment has always been considered one of the strongest deterrents to crime. ... By changing the rules to make punishment uncertain the risk assumed by those contemplating committing a crime is substantially reduced. ... Thus those contemplating and subsequently committing crime have all to gain and nothing to lose by seeking every avenue of delay through appeals and legal maneuvers of all kinds, for, who knows, the Legislature might in the meantime reduce the punishment.

*Id.* at 753, 408 P.2d at 956, 48 Cal. Rptr. at 180.
45. *Id.* at 552, 522 P.2d at 663, 114 Cal. Rptr. at 103.
Although the majority opinion does not confront this argument, the court can hardly be said to have overlooked it. Justice Burke, who authored the majority opinion in *Kapperman*, also wrote the dissenting opinion in *In re Estrada*, where he articulated the deterrent rationale referred to by the dissent.

A comparison of these two opinions by Justice Burke suggests that, for deterrent purposes, there is a distinction between gratuitously reducing a prisoner's sentence and advancing a prisoner's parole eligibility date by counting all of his days of incarceration, whether spent in a county jail or a state prison, and regardless of the date he entered prison.

As a direct result of the *Kapperman* ruling the Adult Authority must inform all persons under its custody of the availability of presentence credit, and adjust its records in accordance with the majority opinion. The implications of the opinion, however, extend far beyond this immediate result. *Kapperman* lays open the possibility of an equal protection attack on all classifications created by limiting a statute to prospective operation. A future bar to retroactivity of a statute must be justified by a showing that this limitation is reasonably related to a legitimate public purpose.

*Bruce C. Janke*

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**INSURANCE CONTRACTS—MEDICAL INSURER FOUND IN BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING BY FAILURE TO MAKE PAYMENTS DURING PENDENCY OF INSURED'S CLAIM FOR WORKMEN'S COMPENSATION BENEFITS AND WAS LIABLE FOR PHYSICAL AND MENTAL DISTRESS PROXIMATELY CAUSED THEREBY—*Silberg v. California Life Insurance Co.*, 11 Cal. 3d 452, modified, 11 Cal. 3d 678a, 521 P.2d 1103, 113 Cal. Rptr. 711 (1974).**

In March, 1966, Enrique Silberg was issued a medical insurance policy by the California Life Insurance Company which provided that the insurance carrier would pay the cost of hospital care, including surgeon's fees up to $5,000, with $100 deductible. The policy also contained an exclusion clause stating that it did

46. 63 Cal. 2d 740, 408 P.2d 984, 48 Cal. Rptr. 172 (1965).
47. *See* note 42 and accompanying text *supra*.
48. 11 Cal. 3d at 550, 522 P.2d at 662, 114 Cal. Rptr. at 102 (1974).
not cover any loss caused by injury for which compensation was payable under any workmen’s compensation law.¹

At the time the policy was issued and when the injury occurred, plaintiff Silberg owned and operated a dry cleaning business. The premises of the dry cleaning operation was adjacent to a laundromat owned by the plaintiff's landlord. Under an agreement with the landlord, the plaintiff performed incidental maintenance services in connection with the laundromat business.²

On July 16, 1966, Silberg noticed smoke in the laundromat area and climbed onto an operating washing machine to investigate the source. The glass in the lid of the machine broke, and the plaintiff's right foot was severed at the ankle. Silberg underwent surgery for the restoration of his foot at a nearby hospital and notified the defendant carrier of his operation and subsequent hospitalization.³ Upon learning that Silberg had applied for workmen's compensation benefits, California Life refused to make any payments under the policy, notwithstanding the fact that the workmen's compensation carrier was denying liability on the ground that the plaintiff was not an employee at the time of the injury.⁴ California Life maintained, throughout the plaintiff's ordeal,⁵ that it was entitled to wait until the conclusion of the workmen's compensation proceeding before it either paid or denied the claim.⁶

The final resolution of the workmen's compensation question took nearly two years. On April 30, 1968, the Workmen's Compensation Appeals Board approved a compromise and release, settling the case for $3,700. Defendant carrier then denied liability under the insurance policy on the ground that the $3,700 workmen's compensation settlement rendered the exclusion clause applicable.⁷

Silberg initiated suit, alleging two causes of action. The first count sought a declaration that the defendant was liable under the policy, and the second sought damages for physical and mental distress alleging that the defendant was guilty of (1) bad faith, and (2) malicious and oppressive conduct.

The trial court, sitting without a jury, determined in the declaratory relief count that the insurance policy was ambiguous

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² Id. at 457, 521 P.2d at 1106, 113 Cal. Rptr. at 714.
³ Id.
⁴ Id. at 458, 521 P.2d at 1107, 113 Cal. Rptr. at 715.
⁵ See text accompanying notes 27-28 infra.
⁷ Id. at 456, 521 P.2d at 1105, 113 Cal. Rptr. at 713.
and awarded the plaintiff $4,900 under the policy (the policy limits minus the $100 deductible). On the second cause of action, a jury found for the plaintiff and awarded $75,000 in compensatory damages and $500,000 in punitive damages.\textsuperscript{8} The trial judge thereupon granted the defendant's motion for a new trial on the ground that the evidence was insufficient to support a finding that the defendant was guilty of bad faith justifying an award of compensatory damages, or of fraud or oppression justifying an award of exemplary damages.\textsuperscript{9} The plaintiff appealed from the order granting a new trial and the defendant cross-appealed from the judgment.

The California Supreme Court, per Justice Mosk, held that, as a matter of law, the defendant's failure to make payments during the pendency of the plaintiff's claim for workmen's compensation benefits constituted a breach of the insurance contract's implied covenant of good faith and fair dealing for which compensatory damages were justified.\textsuperscript{10} However, the supreme court held that the trial court did not abuse its discretion in ruling that the evidence was insufficient to support an award of exemplary damages.\textsuperscript{11}

The court's ruling in \textit{Silberg} is a logical extension of the principle, rooted in the two landmark decisions of \textit{Communale v. Trader's & General Insurance Co.}\textsuperscript{12} and \textit{Crisci v. Security Insurance Co.},\textsuperscript{13} that every insurance contract contains an implied covenant of good faith and fair dealing requiring that neither party will do anything to injure the right of the other to receive the benefits of the agreement.\textsuperscript{14}

Both \textit{Communale} and \textit{Crisci} involved situations where liability insurers had failed to settle third party claims against their insureds, thereby exposing the insured to a judgment in excess of the policy limits. The court in \textit{Communale} interpreted the implied covenant of good faith and fair dealing to mean that an insurer has a duty to settle a claim in an appropriate case, and that in exercising that duty it is obligated to give the interests of the insured at least as much consideration as it gives its own interests. Any unwarranted refusal of reasonable settlement

\textsuperscript{8} \textit{Id.} at 456, 521 P.2d at 1106, 113 Cal. Rptr. at 714.
\textsuperscript{9} \textit{Id.}
\textsuperscript{10} \textit{Id.} at 460, 521 P.2d at 1108, 113 Cal. Rptr. at 716.
\textsuperscript{11} \textit{Id.} at 457, 521 P.2d at 1106, 113 Cal. Rptr. at 714.
\textsuperscript{12} 50 Cal. 2d 654, 328 P.2d 198 (1958).
\textsuperscript{13} 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967).
would constitute a breach of the implied covenant.\(^{15}\)

In *Crisci v. Security Insurance Co.* the breach of this duty to accept reasonable settlements was held to sound in tort as well as in contract, thereby allowing an insured to recover for all detriment resulting from such breach, including mental distress.\(^{16}\)

*Communale* and Crisci involved actions against insurers for failure to settle third party claims; neither case was concerned with punitive damages. In *Gruenberg v. Aetna Insurance Company*,\(^{17}\) the supreme court first recognized that the duty of good faith and fair dealing encompassed not only the good faith duty to settle third party claims, but also the obligation of an insurer to handle fairly and in good faith the claims of its insured.\(^{18}\) Moreover, *Gruenberg* established the principle that, in an appropriate case, an insurer might be held liable for damages as well as compensatory damages.

Most of the pre-*Silberg* decisions involved conduct on the part of the defendant insurance company of a patently outrageous nature.\(^{19}\) In fact, most involved elements of fraud or malice,

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18. As the court in *Gruenberg* stated:
   
   It is manifest that a common legal principle underlies all of the foregoing decisions; namely, that in every insurance contract there is an implied covenant of good faith and fair dealing. The duty to so act is imminent in the contract whether the company is attending to the claims of third persons against the insured or the claims of the insured itself. Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.
19. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 510 P.2d 1032, 108 Cal. Rptr. 480 (1973) (Defendant insurance company encouraged criminal charges to be brought against the insured by falsely implying that plaintiff had a motive to commit arson and then used plaintiff's failure to appear at an examination during the pendency of the criminal charges as a pretense for denying liability.); Crisci v. Security Ins. Co., 66 Cal. 2d 425, 426 P.2d 173, 58 Cal. Rptr. 13 (1967) (Despite a warning from its attorney that a jury might return a verdict greatly in excess of the policy limits, the insurer refused to accept the claimant's offer to settle within the policy limits. At trial, the jury awarded $101,000. The insurance company paid the $10,000 policy limit, but left the insured to settle the excess portion of the judgment. As a result of the settlement, the insured suffered financial and mental ruin.); Richardson v. Employers Liab. Assurance Corp., 25 Cal. App. 3d 232, 102 Cal. Rptr. 547 (1972) (Defendant automobile insurer deliberately withheld payments of its insureds' claim under the uninsured motorist...
lending confusion to what exactly constituted "bad faith." Silberg, however, did not involve any such blatantly unjust conduct. California Life Insurance Company was, for the most part, proceeding upon the ostensibly genuine belief that the policy as written afforded no coverage. Although undoubtedly grounded in economic motives, its decision did not rest on malice or fraud, but rather on a business judgment that no coverage existed. Thus, after Silberg, there should be no doubt that the implied-in-law duty of good faith and fair dealing can be breached even in the absence of any actual fraud, malice, or oppression. "Bad faith" in Silberg consisted simply in California Life's failure to give the same consideration to the insured's interests as it gave to its own financial interest.

Even though the earlier cases have involved unquestionably outrageous conduct, the California Supreme Court has repeatedly implied that no such severity would necessarily be required in order to breach the covenant of good faith and fair dealing. Although referring to third party claims, the court stated in Communale:

An insurer who denies coverage does so at its own risk, and, although its position may not have been entirely groundless,
if the denial is found to be wrongful it is liable for the full amount which will compensate the insured for all the detriment caused by the insurer's breach of the express and implied obligations of the contract.22

By finding bad faith in the Silberg context, the California Supreme Court has again reckoned with the true economic, social, and legal realities attending the insurer-insured relationship.23 It is a "special relationship" that flows from the nature of the insurance industry's public trust and the adhesion character of its contracts.24 The position of power held by any insurance company, because of its ability vitally to affect the interests of another, brings with it a stringent obligation to deal fairly and in good faith in discharging its responsibilities to the insured. Also underlying this relationship is the "doctrine of reasonable expectations" outlined by the court in Gray v. Zurich Insurance Co.:25

In dealing with standardized contracts courts have to determine what the weaker contracting party could legitimately expect by way of services according to the enterpriser's "calling", and to what extent the stronger party disappointed reasonable expectations based on the typical life situation.26

As stated by Justice Tobriner in Barrera v. State Farm Mutual Automobile Insurance Co., "the reasonable expectation of both the public and the insured is that the insurer will duly per-

22. 50 Cal. 2d at 660, 328 P.2d at 202 (emphasis added).
23. See Fletcher v. Western Nat'l Life Ins. Co., 10 Cal. App. 3d 376, 403, 89 Cal. Rptr. 78, 95 (1970) where in a general discussion of this "special relationship" between the insurer and the insured, the appellate court said:

The insurance business is governmentally regulated to a substantial degree. It is affected with a public interest and offers services of a quasi-public nature. [citations omitted] An insurer has a special relationship to its insured and has special implied-in-law duties toward the insured. [citations omitted] To some extent this special relationship and these special duties take cognizance of the great disparity in the economic situations and bargaining abilities of the insurer and the insured. [citations omitted] To some extent the special relationship and duties of the insurer exist in recognition of the fact that the insured does not contract "... to obtain a commercial advantage but to protect [himself] against the risks of accidental losses, including the mental distress which might follow from the losses. Among the considerations in purchasing ... insurance, as insurers are well aware, is the peace of mind and security it will provide in the event of an accidental loss. ..." (Crisci v. Security Ins. Co., supra, 66 Cal. 2d 425, 434, 58 Cal. Rptr. 13, 19, 426 P.2d 173, 180.) These considerations are particularly cogent in disability insurance. The very risks insured against presuppose that if and when a claim is made, the insured will be disabled and in strait financial circumstances and, therefore, particularly vulnerable to oppressive tactics on the part of an economically powerful entity.
form its basic commitment: to provide insurance;"27 such was Mr. Silberg's expectation. The insurance company's policy application had promised in bold-face type: "Protect Yourself Against the Medical Bills That Can Ruin You." Yet what Silberg suffered in the three years following the accident might have been lifted from the Theatre of the Absurd.

After the initial operation on Silberg's foot, infection developed, requiring him to undergo surgery and hospitalization on three more occasions. He was, however, compelled to go from hospital to hospital as unpaid medical bills precluded him from entering two of the hospitals a second time. To obtain the necessary fourth operation, Silberg had to contrive to enter the hospital on a weekend, so that hospital administrators could not check his coverage with the defendant until after the operation had already been performed. In addition, Silberg had to borrow $2,000 to cover business expenses, yet ultimately lost his business. Unable to pay his rent, he was forced to change residences five times. He had difficulty affording needed medication, and his wheelchair was repossessed! Finally, he suffered two nervous breakdowns.28

Throughout this entire period, the insurance company was aware of the substantial medical bills incurred by the plaintiff, but insisted that there could be no final determination as to its liability under the policy until the conclusion of the workmen's compensation proceeding.29

The evidence was conflicting as to the prevailing practice in the insurance industry regarding the payment of claims under these circumstances.30 Nevertheless, the court found the course of conduct followed by the defendant insurance company in Silberg violative as a matter of law of the duty of good faith and fair dealing implied in every insurance contract. Even if the insurance carrier genuinely believed that no coverage existed, its responsibility to the insured obligated it to consider the insured's interests as much as its own.31 According to the court, it was unreasonable for the company to have withheld the medical payments when it could simply have paid the hospital charges and then asserted a lien on the workmen's compensation award to recover these payments.32 As the Silberg court stated:

27. 71 Cal. 2d at 669, 456 P.2d at 682, 79 Cal. Rptr. at 114.
29. Id. at 461, 521 P.2d at 1109, 113 Cal. Rptr. at 717.
30. Id. at 459, 521 P.2d at 1108, 113 Cal. Rptr. at 716.
31. Id. at 460, 521 P.2d at 1109, 113 Cal. Rptr. at 717.
32. There were other alternatives open to the insurance company as well. In a footnote, the Silberg court suggests that at least one other course could probably have been adopted by the insurance company consistent with its duty under the
No explanation was advanced by defendant as to why it failed to adopt this course in order to vindicate the promise made in the application that the policy was intended to protect the insured against medical bills which could result in financial ruin. Defendant's attitude toward the payment of plaintiff's claim was expressed in the declaratory relief phase of the case: merely that it was entitled to wait until the pending compensation proceeding was concluded before it paid or denied the claim. The company failed to see a conflict with its express promise to protect against ruinous medical bills.  

In the wake of the plaintiff's physical and financial ruin, such callousness hardly seems consonant with what is essentially the insurer's fiduciary duty to its insured.

While the supreme court in *Silberg* further clarified the scope of the duty of good faith and fair dealing in insurance contracts, it left another issue largely unresolved—the question of the evidentiary basis for an award of exemplary damages. For the last fifteen years, a controversy has existed in California as to what constitutes the requisite elements for an award of punitive damages under section 3294 of the Civil Code. That section states in pertinent part:

> Where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

At least one court has taken the position that to prove malice under section 3294, the plaintiff must show hatred and ill will or "the desire to do harm for the mere satisfaction of doing it." This was the standard expounded in *Canady v. Superior Court*, which the California Supreme Court has recently ordered un-

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**implied covenant of good faith and fair dealing:**

Another alternative customarily utilized, according to plaintiff's witness, was for the insurer on the hospital benefit policy to attempt to reach an informal agreement for reimbursement with the workmen's compensation carrier.

*Id.* at 460 n.2, 521 P.2d at 1108 n.2, 113 Cal. Rptr. at 716 n.2.

33. *Id.* at 461, 521 P.2d at 1109, 113 Cal. Rptr. at 717.

34. Gruenberg v. Aetna Ins. Co., 9 Cal. 3d 566, 582, 510 P.2d 1032, 1043, 108 Cal. Rptr. 480, 491 (1973) (Roth, J., dissenting); citing 7A APPLEMAN, INSURANCE LAW AND PRACTICE § 4711, at 553:

> As the champion of the insured, [the insurer] must consider as paramount his interests, rather than its own, and may not gamble with his funds. Its relationship is somewhat of a fiduciary one.


36. CAL. CIV. CODE § 3294 (West 1970).

published. Other courts have read the section differently, allowing an inference of actual malice to be drawn where the defendant's actions were taken recklessly and without regard to their injurious consequences. As stated in *Toole v. Richardson-Merrell Inc.*, "such malice is consistent with a personal intent to injure those affected by the defendant's conduct."

With respect to the punitive damages issue in *Silberg*, the California Supreme Court merely concluded that the trial court did not abuse its discretion in holding that the evidence was insufficient to support an award of punitive damages. It therefore affirmed the trial court's order granting a new trial on that issue. But, by only holding that the trial court did not abuse its discretion, and by not deciding whether the requisite malicious or oppressive conduct existed in this case to support an award of punitive damages, the court failed to grasp the opportunity to resolve any ambiguity surrounding section 3294.

The court did state that the defendant must "act with the intent to vex, injure or annoy, or with a conscious disregard of plaintiff's rights", citing *Wolfsen v. Hathaway* and *Roth v. Shell Oil Company*. However, any clue that could perhaps be gleaned from those cases as to the requisite standard for establishing malice vanishes in light of the fact that each was cited as authority for both the Canady and Toole approaches to the malice controversy.

The importance of *Silberg* lies in the finding of bad faith and unfair dealing on the part of the defendant insurance company, rendering it liable for compensatory damages. In taking the position that it was entitled to wait until the conclusion of the workmen's compensation proceeding before either paying or rejecting the claim, despite its knowledge of the plaintiff's situation, the insurer was found, as a matter of law, to have breached its implied covenant of good faith and fair dealing. Even if coverage were genuinely debatable, California Life could simply have made the
payments under the policy and then asserted a lien in the workmen's compensation proceeding to recover any payments it had made.

In adopting a "wait and see" attitude toward the payment of its insured's claim, California Life failed to recognize the special duty owed its insured. It failed to consider the insured's interests as much as it considered its own. As a quasi-public entity, an insurance company is under a duty to conduct itself in the highest degree of good faith. The result reached in Silberg illustrates just how extensive this good faith duty is.

M. Elaine Mielke


Marvin E. Klepper was employed as a uniformed patrolman by the Housing Authority of the City of Los Angeles. At 9:30 p.m. on May 1, 1973, Klepper was delivering legal papers to a public housing project when he noticed the petitioner, Alvin Lee Dyas, standing on a nearby street corner. Petitioner was talking with two other men and holding a wax paper bag in his hand. Petitioner put the bag in his pocket. A few minutes later, Klepper emerged from the housing project and again observed petitioner holding the same bag. When Dyas hurriedly put the bag in his pocket a second time, Klepper suspected that it contained narcotics and radioed for a back-up unit of the housing authority security force. The guard then ordered petitioner and his companions to stand facing a nearby wall and to place their hands against the wall. As Klepper began a pat-down search of petitioner's jacket, a brief scuffle occurred. Klepper drew his revolver and pushed petitioner back toward the wall. Petitioner reached up and dropped the wax paper bag over the wall. Klepper left petitioner in the custody of a fellow security guard and retrieved the bag, which contained amphetamine pills. Klepper placed petitioner under arrest, handcuffed him, took him

to the security force patrol car, and delivered him into the custody of the Los Angeles Police Department, along with the bag of amphetamines.

Petitioner was charged by an information in Los Angeles County Superior Court with one count of possession of amphetamines for sale.\footnote{1} Petitioner moved to suppress the narcotics, arguing that they were the fruits of an illegal search and seizure.\footnote{2} The motion was denied and petitioner sought review by statutory writ of mandate\footnote{3} before the California Court of Appeal for the Second District. That court denied Dyas' petition for a peremptory writ of mandate,\footnote{4} and he appealed to the California Supreme Court.

The prosecution conceded that Klepper had not obtained an arrest or search warrant prior to the pat-down search of petitioner and that the search lacked the requisite probable cause.\footnote{5} The central issue before the court was whether the evidence secured as a result of the guard's actions should be subject to the exclusionary rule. The prosecution maintained that Klepper had undertaken the search and arrest of Dyas as a private citizen and

\footnote{2. The motion was made pursuant to CAL. PEN. CODE § 1538.5(a) (West 1972) which provides in part: A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a search or seizure on the ground that: (1) The search or seizure without a warrant was unreasonable.}
\footnote{3. The pat-down of petitioner's jacket was not technically a full-blown "search." Nonetheless, the "seizure" of his person short of formal arrest and the exploration of the outer surfaces of his clothing fall within the purview of the fourth amendment and must meet the standards set forth in Terry v. Ohio, 392 U.S. 1, 29-30 (1968). Under Terry, an officer, even though he lacks probable cause to arrest an individual for a crime, may make a reasonable search for weapons for his own and others' protection where he has reason to believe that he is dealing with an armed and dangerous individual. However, it appears that Klepper's pat-down search of Dyas' jacket did not fall within the Terry standard. Klepper acknowledged at the preliminary examination that his suspicions as to the contents of the wax paper bag motivated his stop and frisk of petitioner. He noted that such bags are normally used to carry marijuana. In addition, the guard did not produce any facts which would have supported a reasonable suspicion that Dyas was armed. Dyas v. Superior Court, 11 Cal. 3d 628, 631, 522 P.2d 674, 676, 114 Cal. Rptr. 114, 116 (1974). On its face, holding a wax paper bag does not comprise criminal activity; nor does putting the bag in one's pocket. An arrest and search based on events as consistent with innocent activity as with criminal activity are unlawful. See Remers v. Superior Court, 2 Cal. 3d 659, 470 P.2d 11, 87 Cal. Rptr. 202 (1970); Cunha v. Superior Court, 2 Cal. 3d 352, 357, 466 P.2d 704, 706-07, 85 Cal. Rptr. 160, 162-63 (1970).}
\footnote{5. See note 2 supra. At the hearing on defendant's motion to suppress evidence, the superior court ruled that had Klepper and his partner "been acting as peace officers," the search of Dyas would have been "clearly unreasonable." Dyas v. Superior Court, 11 Cal. 3d at 631, 522 P.2d at 676, 114 Cal. Rptr. at 116.}
for a private purpose. Petitioner argued that security patrolmen employed by the Los Angeles Housing Authority functioned as law enforcement officers "engaged in ferreting out crime for the benefit of the state." Unless the state could show that Klepper's actions were truly "private," the contested pat-down would qualify as an unreasonable governmental search subject to the exclusionary rule.

In Dyas v. Superior Court, the court held that as a matter of law the search of petitioner was conducted neither by a private citizen nor for a private purpose. Therefore, the narcotics obtained by that search were inadmissible as evidence against petitioner.

The California Supreme Court has consistently refused to apply the exclusionary rule to evidence obtained by private citizens. Until 1955, evidence illegally obtained by police officers...
was also admissible in state proceedings. In *People v. Cahan,*
the court adopted the exclusionary rule as a means of enforcing
costitutional guarantees of privacy vis-à-vis unreasonable govern-
ment intrusions.

In *Cahan,* police officers had obtained evidence by means
of illegally installed microphones, which recorded conversations
between the defendant and other members of an alleged book-
making conspiracy. The recordings were held to be inadmissible
as evidence, in light of the overriding policy considerations of (1)
deterring law enforcement officers from engaging in unconstitu-
tional activities and (2) curtailing judicial involvement in the
"dirty business" of illegal search and seizure. The *Dyas* court
seized upon the former policy consideration in weighing the
inadmissibility of the amphetamines.

The court noted that the distinction between a "private"
search and a "government" or "state" search was directly related
to the deterrent function of the exclusionary rule as outlined in
*People v. Botts.* Under the *Botts* rationale, the typical local po-
lice force—well-trained, disciplined, experienced—would be sus-
ceptible to various pressures from conviction-minded prosecutors
and departmental higher-ups. Since criminal convictions would
be jeopardized by failure to heed constitutional restraints, the
court reasoned, courts could be fairly certain that officers would
know of such restraints and comply with them.

A private citizen, on the other hand, would be far less likely
to feel the restrictive grip of the exclusionary rule precisely be-
cause he would not be part of any official law enforcement struc-
ture. As a result, the judicial system would have little or no as-
surance that the suppression of privately obtained evidence would
operate as an effective sanction among members of the general

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12. *People v. McKinnon,* 7 Cal. 3d 899, 911-12, 500 P.2d 1097, 1105-06, 103 Cal.
Rptr. 897, 905-06 (1972); *Stapleton v. Superior Court,* 70 Cal. 2d 97, 100, 102-
03, 447 P.2d 967, 969-70, 73 Cal. Rptr. 575, 577-78 (1969); *People v. Fierro,*
236 Cal. App. 2d 344, 347, 46 Cal. Rptr. 132-34 (1965). More specifically, the
California Supreme Court has held the exclusionary rule applicable to evidence
illegally obtained by such persons. *Stapleton v. Superior Court* supra at 103.
14. *Id.* at 439-51, 282 P.2d at 908-14.
15. *Id.* at 444-45, 282 P.2d at 911. The court was persuaded that existing
citizens' remedies, such as civil actions, administrative sanctions, and criminal
prosecutions, had proved ineffective in curbing police abuses of fourth amendment
provisions.
16. *Olmstead v. United States,* 277 U.S. 438, 470 (1928) (Holmes, J., dis-
senting), cited in *People v. Cahan,* 44 Cal. 2d at 445, 282 P.2d at 912.
18. *Id.* at 482-83, 58 Cal. Rptr. at 415-16.
public. Thus, whether an individual had undertaken a search for evidence as an ordinary citizen or as an arm of the state would depend not only upon his relationship to the government, but also upon his ties with an organization that, on its face, would be responsive to the deterrent effect of the exclusionary rule.

The prosecution asserted that a public housing authority patrolman is not a law enforcement officer since he is not listed in the Penal Code under any of the categories of "peace officers."** In a footnote, the court observed that such classifications, fashioned by the legislature, had no bearing on the applicability of the judge-made exclusionary rule; they merely authorized those persons therein designated "to exercise the statutory powers of a peace officer."

The court instead focused on the circumstances surrounding the search of petitioner and concluded that Klepper was clearly "acting under color of authority."** He was attired in "standard police dress" complete with revolver and handcuffs. He drove a marked patrol vehicle which was outfitted with a two-way radio. In the encounter with petitioner, the guard was quick to use his "indicia of authority in the manner in which they were intended."** Klepper's acts, in the court's opinion, were those of a specially trained and equipped law enforcement officer, not those of an ordinary private citizen.

The People argued that Klepper was not acting to enforce state laws but to protect the interests of a private employer. At the time of the stop and search, the People contended, the patrolman's role was much more akin to that of a store detective protecting persons and property on his employer's premises than that of a police officer.** The court was not receptive to this argument and undertook to expose its inherent weaknesses. Moreover, it seized the opportunity to overturn an appellate court decision, People v. Wright,** which supported the State's positions.**

20. 11 Cal. 3d at 635-36 n.3, 522 P.2d at 679 n.3, 114 Cal. Rptr. at 119 n.3.
21. Id. at 633, 522 P.2d at 678, 114 Cal. Rptr. at 118.
22. Id. As the facts showed, Klepper utilized his radio, revolver, handcuffs, and patrol car in the stop, search, and arrest of petitioner; it can also be presumed that Klepper's uniformed appearance played a substantial role in securing petitioner's compliance with the order to place his hands on the wall.
25. 11 Cal. 3d at 634-35, 522 P.2d at 678-79, 114 Cal. Rptr. at 118-19.
As an employee of the Los Angeles Housing Authority, Klepper was a creature of all three levels of government: federal, state, and local. While technically on the payroll of the City of Los Angeles, he was bonded, funded, and controlled by the United States Housing Authority. In addition, the Los Angeles Housing Authority was instituted as a municipal corporation under the California Health and Safety Code, and it “serves as an administrative agency of the state for the pursuit of state objectives.” Klepper was unmistakably a government employee and an agent of the state.

Relying on People v. Wright, the People maintained that an individual’s status as a state agent was not alone sufficient to bring his unreasonable search of another within the domain of the exclusionary rule. The Wright court held that the exclusionary rule applied to the conduct of a person employed by a government agency only if the “primary mission” of that agency was law enforcement. The Dyas court rejected the Wright opinion as inconsistent with United States Supreme Court decisions compelling municipal health and fire inspectors to comply with the fourth amendment warrant requirements. Recent state court decisions also have held that warrantless searches by county social work-

26. Dyas v. Superior Court, 11 Cal. 3d 628, 634, 522 P.2d 674, 678, 114 Cal. Rptr. 114, 118. The court said:
   Under 42 U.S.C. § 1403 (1970), the United States Housing Authority is an entity within the Department of Housing and Urban Development, and hence part of the federal executive branch. The statute specifically declares the authority to be “an agency and instrumentality of the United States.”

27. Dyas v. Superior Court, 11 Cal. 3d 628, 634, 522 P.2d 674, 678, 114 Cal. Rptr. 114, 118. CAL. HEALTH & SAFETY CODE § 34240 (West 1973) provides in part: “In each county and city there is a public body corporate and politic known as the housing authority of the county or city.” The California Health and Safety Code states that a housing authority “constitutes a corporate and politic public body exercising public and essential governmental functions. . . .” Id. § 34.

The court stated in Housing Authority v. Los Angeles, 38 Cal. 2d 853, 862, 243 P.2d 515, 519 (1952): “Housing authority . . . and the city are separate bodies politic . . . and both function as administrative arms of state in pursuing state concerns and effecting legislative objectives.”

Banks v. Housing Authority of San Francisco, 120 Cal. App. 2d 1, 8, 260 P.2d 668, 672 (1953), held that action taken by a municipal housing authority is state action by one of its official branches within the purview of the fourteenth amendment to the United States Constitution.


29. Id. at 694-95, 57 Cal. Rptr. at 782. In denying Dyas’ petition for a writ of mandate, the court of appeal based its decision on Wright and stated that the primary purpose of the Housing Authority under state law (CAL. HEALTH & SAFETY CODE §§ 34201, 34501) was to clear slums and establish low-income housing.

ers,"31 state agricultural inspectors32 and United States postal workers33 are subject to the exclusionary rule.

The proper test for determining the admissibility of evidence produced by a government employee's unreasonable search34 was not the employer's primary mission as a government agency, but rather the Botts35 standard as applied to the individual employee. Hence, the key consideration for the Dysa court was whether the particular state agent and "all others similarly situated"36 would be dissuaded by the exclusionary rule from making illegal searches of private citizens. Factors such as "training or experience, responsibilities or duties"37 would be taken into account in gauging the government employee's susceptibility to the rule's deterrent effect.38

As indicated above,39 Klepper was uniformed, armed and equipped in the manner of a sophisticated law enforcement officer. His handling of petitioner manifested at least some special training, if not considerable expertise, in the field of arrest and search.40 From these circumstances, the court inferred that one of the patrolman's duties was "to enforce penal statutes and regulations on or about housing authority property,"41 and that he was in the process of discharging that duty when he made the illegal search of Dysa.42

34. An unreasonable search is one which occurs either without a warrant or the requisite probable cause.
36. 11 Cal. 3d at 635, 522 P.2d at 679, 114 Cal. Rptr. at 119.
37. Id.
38. Id.
39. See text accompanying note 21 supra.
40. In a footnote, the court observed that Klepper, by the prosecution's own admission at the preliminary hearing, "ha[d] been educated in the laws of search and seizure." 11 Cal. 3d at 636 n.4, 522 P.2d at 680 n.4, 114 Cal. Rptr. at 120 n.4.
41. Id. at 636, 522 P.2d at 679, 114 Cal. Rptr. at 119. The court was required to make this inference since the State introduced no evidence of Klepper's duties. The Los Angeles Housing Authority is empowered by section 34278(a) of the Health and Safety Code to employ such "officers, agents, and employees as it requires, and to determine their qualifications, duties, terms of employment and compensation." From this the court inferred that since Klepper had been hired by an employer agency having the power to determine his duties, he was acting within the scope of his employment as a government agent, and not of his own private volition, when he searched and arrested the petitioner on or near his employer's property.
42. Id. See People v. Martin, 225 Cal. App. 2d 91, 96, 36 Cal. Rptr. 924, 927 (1964). There, three Los Angeles City policemen, who had made an illegal drug arrest outside their zone of authority (in another city), argued that the ar-
In the view of the court, this type of state agent performing this particular kind of state-related function would be just as responsive to the deterrent effect of the exclusionary rule as the ordinary police officer. Klepper's search of petitioner was thus an unreasonable state search forbidden by both the California and United States Constitutions. Consequently, the fruits of that search were inadmissible as evidence.

The Dyas decision deliberately steered away from promulgating a rigid, general standard for distinguishing "private" and "government," or "state" searches. In holding the Wright court's "primary mission" test invalid, the court left itself free to determine, on a case-by-case basis, which public officials should be subject to the deterrent effect of the exclusionary rule. Although explicitly declining to delve into the issue of whether the exclusionary rule should apply to evidence seized by private security police or private investigators, the opinion leaves the distinct impression that that question, too, may turn on the training, duties, experience, or sophistication of the individual conducting the search. At the core of the Dyas holding is a fundamental concern for safeguarding the privacy of the general citizenry. The court has paved the way for a broadened concept of state action, a concept which may eventually include all private investigators and security agencies. Conceivably, once some threshold test of state involvement is met (such as state licensing of a private security agency, or the mere fact that the fruits of a search and seizure are used in a criminal prosecution), the dimensions of the exclusionary rule will be measured in terms of a security organization's capacity to violate individual privacy. By focusing its analysis

rest was a citizen's arrest under section 837 of the Penal Code, and that the search incident thereto was thus a private search not subject to the exclusionary rule. The court concluded that, although illegal, the arrest was a citizen's arrest. In noting that the resultant search of defendant's premises was tainted by the unlawful arrest, the court added:

The seizure of the evidence during that alleged search must be realistically construed. ... It was in the performance of their duties as officers and as employees and agents of the state. ... Accordingly, the search and seizure must be held ... to have been within the proscriptions of both the state and federal constitutions.

43. See note 9 supra.

44. 11 Cal. 3d 628, 633, 522 P.2d 674, 77-78, 114 Cal. Rptr. 114, 117-18. The Dyas court reiterated the dictum of Stapleton v. Superior Court, 70 Cal. 2d 97, 100-01 n.3, 447 P.2d 967, 969 n.3, 73 Cal. Rptr. 575, 577 n.3 (1968):

We are not called upon to decide whether searches by private investigators and private police forces should be held subject per se to the commands of the fourth amendment on the ground that one of their basic purposes is the enforcement of the law.

45. Dyas can thus be interpreted as setting the stage for further extrapolation of Stapleton’s observation that:

searches by such well financed and highly trained organizations involve a particularly serious threat to privacy. California statutes, moreover,
upon the individual employee, and not the character of the agency which employs him, the *Dyas* court seems to have taken a long step toward holding private police forces to the same constitutional standards imposed on public law enforcement agencies.

*William E. Robinson*

Blur the line between public and private law enforcement. 70 Cal. 2d at 100-01 n.3, 447 P.2d at 969 n.3, 73 Cal. Rptr. at 577 n.3.