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RECENT CASES

CRIMINAL LAW: THE RETREAT FROM MIRANDA—

With a decision handed down February 24, 1971, the Burger Court may have begun the much anticipated roll-back of the procedural rights of the criminal accused. President Nixon’s two recent Court appointees joined with the three dissenters from *Miranda v. Arizona* in upholding the admissibility of an in-custody statement which most authorities previously believed inadmissible. The dramatic change in the Court’s attitude may affect the entire scope of police methods of gathering evidence, including search and seizure, wiretapping, eavesdropping, lineups, secret agents and custodial interrogation. This note will consider a few of the decision’s more immediate implications: the effect on a defendant’s fifth amendment right against self-incrimination, the shift in the Court’s attitude towards the police, the application of the exclusionary rule to real proof and “the fruit of the poisonous tree,” and judicial faith in the curative capacity of jury instructions.

In *Harris v. New York* the Court held that the prosecution may use a statement to impeach a defendant’s credibility, even though the same statement would be inadmissible in the case-in-chief due to noncompliance with the procedural standards required by *Miranda v. Arizona*. The statement’s admissibility is subject only to the legal standards of trustworthiness.

Chief Justice Warren Burger delivered the majority opinion, in which Justices Harlan, Stewart, White and Blackmun joined. Mr. Justice Black dissented. Mr. Justice Brennan filed a dissenting opinion, in which Justices Douglas and Marshall joined.

The police arrested Harris for twice selling heroin to an undercover agent. They interrogated him without advising him of his right to appointed counsel—a clear violation of *Miranda*. Under questioning Harris admitted to selling the narcotics. At the trial, the prosecution did not use his statements in its case-in-chief. However, Harris took the stand and denied that he had sold heroin on the second occasion, claiming that it was baking powder. The trial

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1 384 U.S. 436 (1966) (dissenters were Harlan, White and Stewart).
2 U.S. Const. Amend. V.
5 384 U.S. 436, 444 (1966) (prior to questioning, a suspect must be notified of his right to remain silent, that any statement made may be used against him and that he has a right to the presence of retained or appointed counsel.)
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The court permitted the introduction of the defendant's earlier statements for the limited purpose of impeaching his credibility. The court instructed the jury that the statements attributed to Harris by the prosecution could be considered only in passing on his credibility and not as evidence of guilt.

The Court held that "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances."

The Court's opinion relied on a 1954 case, Walder v. United States. Walder held that a defendant's assertion on direct examination that he had never possessed narcotics removed the bar to evidence of heroin illegally seized in connection with an earlier proceeding against him, provided the evidence was used only to attack his credibility. The Walder opinion (and Justice Brennan's Harris dissent) made much of the fact that the narcotics were used only to attack the defendant's credibility on a collateral issue. Harris's statement, on the other hand, concerned issues directly involving his guilt. However, the Burger Court failed to discern any appreciable difference in principle between Walder and Harris, thus killing the collateral-direct distinction.

THE POST-MIRANDA TREND

A review of the post-Miranda pre-Harris lower court decisions on the question decided in Harris reveals the magnitude of the Supreme Court's recent change of direction. Legal scholars and lower courts hitherto believed that Walder was no longer good law. In United States v. Birrell, a federal district court concluded that the current trend of constitutional developments vitiated the case's rationale, and declined to follow it. The court there ruled that "[t]he Government should be restricted to using untainted evidence in the impeachment of witnesses. . . ."

On the more specific issue of whether Miranda had overruled Walder, the consensus of opinion was almost unanimously in the affirmative. The language of Miranda seemed to leave little doubt that it excluded the use of illegally obtained confessions for any purpose, including impeachment:

Statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove

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9 Id. at 817.
Justice Brennan, dissenting in *Harris*, felt that "[t]his language completely disposes of any distinction between statements used on direct as opposed to cross-examination." He noted that six United States Courts of Appeal and nearly every other court which had considered the issue agreed with him. The United States Court of Appeal for the Second Circuit clearly summarized the general feeling in *United States v. Fox*, and in the process held that illegally-obtained statements may not be used for impeachment purposes. The court recognized that the *Miranda* language quoted above may be "technically dictum." However, the judge there ruled that "[i]t is abundantly plain that the Court intended to lay down a firm general rule with respect to statements unconstitutionally-obtained. . . ."

The *Harris* Court, however, saw no problem in dismissing the plethora of inconsistent post-*Miranda* authority with no more than three sentences. The majority opinion simply noted that discussion of the impeachment issue was not essential to the *Miranda* holding. This fact, in the Court's view, relegated any passing reflections on the question to the status of mere dictum. Therefore "[i]t does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case-in-chief is barred for all purposes. . . ."

The ease with which the *Harris* opinion sweeps aside the

12 United States v. Fox, 403 F.2d 97 (2d Cir. 1968); United States v. Pinto, 394 F.2d 470 (3d Cir. 1968); Breddlove v. Beto, 404 F.2d 1019 (5th Cir. 1969); Groshart v. United States, 392 F.2d 172 (9th Cir. 1968); Wheeler v. United States, 382 F.2d 998 (10th Cir. 1968); Blair v. United States, 401 F.2d 387 (D.C. Cir. 1968).
14 403 F.2d 97, 102 (2d Cir. 1968).
15 Id. at 102.
undeniable logic and prolific authority of the post-*Miranda* cases foreshadows a drastic shift in attitude towards the constitutional rights of the accused.

**THE POLICE**

The decision manifests at least a partial softening of the Court's so-called "mistrust" of the police. Law and order advocates saw *Escobedo v. Illinois*\(^7\) and *Miranda* as symptomatic of the Warren Court's misguided suspicion of the methods and motives of law enforcement officers. One example of the consequences of that trepidation was the strong feeling engendered in the post-*Miranda* lower court decisions that lowering the standards for impeachment admissibility would encourage flagitious interrogation tactics repugnant to the Constitution. Judge Ely of the United States Court of Appeal for the Ninth Circuit articulated this concern eloquently:

There is little doubt that the great majority of the law enforcement officers of our Circuit strive to comply with the mandates of the Constitution. At the same time, they are engaged in a continuing, frustrating battle against lawlessness. If authorized to do so, they could not fairly be criticized for conducting unconstitutional interrogations designed to elicit possible impeachment evidence.\(^8\)

He further expressed the fear that lowering the standard of impeachment admissibility would give rise to a two-step interrogation procedure. Upon making an arrest, police would first illegally question the suspect in hope of obtaining impeachment evidence. They would then conduct an interrogation which conformed to the *Miranda* standards, aimed at producing directly admissible evidence.

It is enlightening to note how little energy Chief Justice Burger expended in dismissing the police misconduct question in *Harris*. He emphasized the value of impeachment evidence in assessing the defendant's credibility. Its advantages are not to be sacrificed, he declared, "because of the speculative possibility that impermissible police conduct will be encouraged thereby."\(^9\)

This remark is more in tune with the views expressed by the *Miranda-Escobedo* dissenters—White, Harlan, and Stewart. Justice White, for example, severely criticized *Escobedo* as reflecting "a deep-seated mistrust of law enforcement officers everywhere, unsupported by relevant data or current material based upon our own experience."\(^10\) Justice Harlan agreed: "Like my brother White, I

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\(^7\) *378 U.S. 478* (1964).

\(^8\) *Groshart v. United States*, 392 F.2d 172, 180 (9th Cir. 1968).


think the rule announced today is most-ill-conceived and that it seriously fetters perfectly legitimate methods of criminal law-enforcement.21 Escobedo also darkened Justice Stewart's skies: "The Court says that what happened during this investigation 'affected' the trial. I had always supposed that the whole purpose of a police investigation of a murder was to 'affect' the trial . . . ."22 The day when the men in blue stop complaining about court decisions which "handcuff" them may not be far off.

HARRIS AND THE HOBSON'S CHOICE

This decision seriously prejudices the fifth amendment right against self-incrimination. Its practical effect is to give the police good reason to procure confessions through illegal methods of interrogation. Indeed, as Judge Ely points out in Groshart, "they could not fairly be criticized for doing so."23 Chief Justice Burger's dismissal of the prospect as "speculative" ignores this simple fact. And Justice White fails to grasp the very basic difference between trusting the police and encouraging them to use illegal methods of gathering evidence.

If the police can provide the prosecution with Harris type evidence, they can put the defendant in a situation both tactically precarious and inimical to his fifth amendment rights. He can refuse to take the stand, in which case the illegal confession cannot be admitted. If he chooses this course, however, he also foregoes the right to testify in his own defense. Furthermore, the prosecution can subtly call the jury's attention to his silence on the issue of his own guilt.24 On the other hand, if the defendant does take the stand, the prosecution can read the confession to the jury. All the defendant is entitled to is a court instruction that the jury must consider the confession only for purposes of determining his credibility and not for purposes of deciding his guilt—a distinction which a jury is highly unlikely to respect in light of an express admission of guilt.25 In other words, the prosecution may now use illegally obtained evidence to discourage the defendant from taking the stand in his own defense.

21 Id. at 493 (Harlan, J., dissenting).
22 Id. at 494 (Stewart, J., dissenting).
23 Groshart v. United States, 392 F.2d 172, 180 (9th Cir. 1968).
24 E.g., the prosecution may point out that the testimony of the prosecution witnesses remains uncontradicted. United States ex rel. Leak v. Follette, 418 F.2d 1266 (2d Cir. 1969).
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THE DOUBLE STANDARD OF ADMISSIBILITY

The fact that Harris did not expressly overrule Miranda indicates that a double standard of admissibility now applies to confessions. Where the prosecution seeks to include a confession in its case-in-chief, the procedures used to obtain it must pass the Miranda test. On the other hand, when the state uses a confession solely to attack a defendant's credibility, the Miranda standard becomes irrelevant.

Harris hails an abrupt departure from the Warren Court's approach to the rights of the accused. However, it is difficult to believe that the Burger Court will endorse a return to the whippings and marathon interrogation sessions condemned in Brown v. Mississippi and Ashcraft v. Tennessee. Therefore, the Court will probably apply some procedural standards in determining a confession's admissibility even for impeachment purposes.

Miranda spells out the case-in-chief admissibility test. But Harris leaves the development of an impeachment admissibility standard to subsequent litigation. Chief Justice Burger redundantly reiterates the "legal trustworthiness" requirement theoretically applicable to any evidence. Other than that, the Court has left the impeachment standard up in the air.

The Court will probably return to the last standard applied before the Escobedo-Miranda revolution. This rule's swan-song came in 1963 in Haynes v. Washington. The Court held there that a confession is admissible unless it can be characterized as "involuntary" in light of the "totality of circumstances" which produced it. Harlan, Stewart and White dissented from Escobedo, all bewailing the demise of the totality-voluntariness standard. These three members of the Harris majority probably favor its resurrection whenever possible.

Apparently, Chief Justice Burger agrees. In Harris, he analyzes the circumstances surrounding the defendant's in-custody statement very briefly, noting only the absence of a warning of the defendant's right to appointed counsel and the "[p]etitioner makes no claim that the statements made to the police were coerced or involuntary." The majority evidently felt that the absence of a claim of coercion rendered further discussion unnecessary. Harris thus sug-

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26 297 U.S. 278 (1936) (petitioner confessed as a result of a severe whipping.)
27 322 U.S. 143 (1944) (confession was obtained after 36 consecutive hours of interrogation.)
gests a return to the "voluntariness" test for impeachment admissibility.

**REAL PROOF**

Illegally seized real evidence clearly falls within the *Walder-Harris* exception to the exclusionary rule. *Walder* directly involved illegally seized physical evidence—narcotics. *Harris* cites it as controlling. Therefore, the fact that physical evidence is tainted by an illegal search and seizure does not bar its use for impeachment purposes.

However, there is probably no double standard of admissibility for real proof. In search and seizure cases, there are no degrees of constitutional protection. Either probable cause was present or it was not. Therefore, *Harris* indicates one admissibility standard for real proof used in the case-in-chief and no standard at all for impeachment admissibility.

**THE FRUIT OF THE POISONOUS TREE**

The "fruit of the poisonous tree" doctrine was given its fullest recent articulation by the Warren Court in *Wong Sun v. United States*.\(^{30}\) The Court held that if a police investigation is based on initial incriminating evidence that was illegally obtained, not only is the evidence suppressed, but so is all other evidence that grew out of, or was subsequently developed from, the original illegal evidence by later police investigation.

*Harris* is a limitation on the exclusionary rule's application to illegally obtained real proof and in-custody statements. Logically, the decision would imply a limitation on that rule's application to the fruit of the poisonous tree. In other words, the admissibility of the fruit may depend on the purpose of the harvest.

A 1968 application of the *Wong Sun* rule would seem to imply the contrary. In *Harrison v. United States*,\(^{31}\) after three confessions made by the petitioner were introduced at his trial, he took the stand and testified to his own version of the facts, making damaging admissions. When his conviction was reversed on the ground that the confessions should have been excluded, the prosecution introduced petitioner's former testimony at the new trial which resulted in a conviction. The Supreme Court reversed, citing Justice Holmes to the effect that the essence of an exclusionary rule is not just that

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certain evidence cannot be used in specific circumstances but rather that "... it shall not be used at all."\(^{32}\)

After *Harrison*, it would seem that evidence obtained in violation of the fruit of the poisonous tree rule could not be used in any way for any purpose. However, there was equal force before *Harris* for the conclusion that *Miranda* excluded illegally obtained confessions for any purpose. If *Miranda* falls, so may *Harrison*. Therefore, the prosecution could also use for impeachment purposes evidence resulting from leads suggested by Harris's confession. Such evidence could be used against Harris or anyone else.

The prospects for such a limitation on *Harrison* loom larger when the attitudes of the dissenters in that case are considered. Justice White is typical. He complained that the holding resulted from the Court's "fuzzy ideology" concerning confessions. He found that ideology "difficult to relate to any provision of the Constitution..." Finally he noted that the Court's attitude excluded "... evidence of the highest relevance and probity."\(^{33}\)

There is thus every reason to believe that *Harris* implies a similar limitation on the *Wong Sun* rule will soon follow, at least with regard to confessions and real proof.

**Curative Jury Instructions**

*Harris* indicates a sudden and dramatic strengthening in the Court's faith in the curative power of jury instructions. The Warren Court seriously doubted a jury's capacity to disregard prejudicial evidence. That skepticism towards the efficacy of judicial admonition was well expressed in *Bruton v. United States*.\(^{34}\) In that case, the petitioner and a co-defendant were tried jointly for armed robbery. The prosecution introduced the co-defendant's confession, which clearly implicated the petitioner. The trial court instructed the jury to disregard the confession for purposes of determining the petitioner's guilt. The Court held that because of the substantial risk that the jury, despite instructions to the contrary, looked to the incriminating extrajudicial statements in determining the petitioner's guilt, admission of the confession violated his sixth amendment right of cross-examination. Justice Brennan, writing for the majority, quoted Justice Jackson in *Krulewitch v. United States*:\(^{35}\) "The naive assumption that prejudicial effects can be overcome by


\(^{33}\) Harrison v. United States, 392 U.S. 219, 228 (1968) (White, J., dissenting).

\(^{34}\) 391 U.S. 123 (1968).

\(^{35}\) 336 U.S. 440 (1949).
instructions to the jury . . . all practicing lawyers know to be an unmitigated fiction.\textsuperscript{36} Common sense reveals that it would be more difficult for a jury to consider a defendant's confession only for purpose of impeaching his credibility than to make the distinction required in Bruton. The jury-instruction problem involved in Harris and the prior inconsistent statement exception to the hearsay rule raise precisely the same issue. The traditional hearsay rule allows the introduction of a witness's prior inconsistent statements solely for the purpose of impeaching his credibility. This rule has been very much criticized as requiring "mental gymnastics" from the jurors. The critics include Professor McCormick:

The only available sanction for our rule is an instruction that the jury must not consider the prior statements of the witness as substantive evidence on the main issue, but solely as bearing on the credibility of the witness. Such an instruction, as seems to be generally agreed, is a mere verbal ritual. The distinction is not one that most jurors would understand. If they could understand it, it seems doubtful that they would attempt to follow it.\textsuperscript{37}

Interestingly enough, the Harris opinion did not even consider the issue. The clear implication of Harris would be an overruling of Bruton. Justice White's dissent in Bruton probably reflects the Court's current attitude towards the curative capacity of jury instructions. He felt that "[r]esponsible judgement would be impossible but for the ability of men to focus their attention wholly on reliable and credible evidence . . . ."\textsuperscript{38} He strongly resented the implication that courts are more capable of making this judgment than juries.

Thus, the clear implication of Harris is that a co-defendant's confession may be introduced at a joint trial if the jury is properly instructed.

CONCLUSION

This decision strongly suggests that the Court now values the swiftness and certainty of criminal sanction above the sanctity of constitutional rights. The days of Miranda may be numbered. Not one member of the Harris majority favored it.

\textsuperscript{38} Bruton v. United States, 391 U.S. 123, 142-43 (1968) (White, J., dissenting).
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The Harris holding touches issues concerning the entire scope of the rights of the accused. However, the four-page majority opinion does not discuss any of them. The majority has kept us in the dark about its feelings on police methods, the curative capacity of jury instructions, the right against self-incrimination and all the other questions the case raises. Perhaps the Court did not want to “handcuff” itself with any in-depth analysis. For the moment, we can only speculate that the Burger Court plans a rocky road for the constitutional rights of the accused.

James R. Carroll


On an early Sunday morning an officer of the California Highway Patrol observed an automobile proceeding on an interstate highway at an excessive rate of speed. When the officer signaled the car to pull over, the driver immediately began to do so. At this point the patrolman observed a "woman's head rise from the passenger portion of the front seat; she turned and put her arm over the back of the seat, then faced forward again, bent down toward the floor and reassumed a normal sitting position." The driver alighted from the car and walked toward the officer. He produced his driver's license and readily acknowledged that he had been speeding.

The officer then approached the passenger side of the car. The officer made no attempt to communicate with the female passenger but immediately opened the car door next to her and looked inside. When questioned at the preliminary hearing, the officer stated he had two reasons for acting as he did. "One was to talk to the passenger and see what had been hidden and I was also concerned about my own safety." When the officer opened the door he observed what appeared to be marijuana lying on the floor mat. He ordered the passenger out of the car and undertook a thorough search of the car. He found additional small quantities of marijuana.

The defendants were charged by information with unlawful possession and transportation of marijuana. Their motion to sup-

2 Id.
3 CAL. H. & S. CODE § 11530 (West 1970): "Every person who possesses any marijuana, except as otherwise provided by law, shall be punished by imprisonment in the county jail . . . not more than one year or the state prison . . . not less than one year or more than ten years."
4 Id. § 11531: "Every person who transports . . . any marijuana shall be
press the evidence on the ground of illegal search and seizure was granted, and the People sought review by writ of mandate.\footnote{5} The California Supreme Court concluded\footnote{6} that the trial court was correct in holding that the search was an unreasonable one within the meaning of the fourth amendment.

The supreme court held that a traffic offense, in itself, did not justify a search of the automobile for contraband or weapons. The court also held that the rule disallowing a search based merely on an individual's "furtive movement" has been honored more in the breach than in the observance.\footnote{7} Accordingly, the court noted that appellate courts have been quick to find probable cause to arrest or search for contraband based upon what the officer regards as a "furtive movement" when "reflective analysis" of the facts and circumstances surrounding this movement would disclose less than probable cause to make an arrest or search. The court also found that the facts did not justify a reasonable belief that the passenger was armed. Consequently, a search for weapons was not justified.

The following is a discussion of the court's rationale. Particular emphasis is placed on the relationship that "furtive movement" plays in the establishment of probable cause to search a car for contraband. The writer will then examine the appellate court cases in this area, analyzing their holdings in light of \textit{People v. Superior Court}\footnote{8} and other recent California Supreme Court cases dealing with "furtive movement." This analysis will demonstrate that when the defendant's actions are as consistent with innocent conduct as they are with criminal conduct, those actions cannot be used to establish probable cause to arrest or search as incident to that arrest.

\textbf{Rationale}

An officer has probable cause to arrest a motorist when the motorist commits a traffic violation\footnote{9} in his presence.\footnote{10} The mere

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\textit{punished by imprisonment in the state prison for . . . five years to life and shall not be eligible for release . . . or on parole . . . until he has been imprisoned for a period of not less than three years in the state prison.}
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\textit{5 CAL. PEN. CODE \S 1538.5(o) (West 1970): "Within 30 days after a defendant's motion is granted at a special hearing in the Superior Court, the people may file a petition for writ of mandate or prohibition, seeking appellate review of the ruling regarding the search or seizure motion."}
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\textit{6 6-1 with Justice McComb dissenting without opinion.}
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\textit{7 People v. Superior Court, 3 Cal. 3d 807, 818, 478 P.2d 449, 455 (1970).}
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\textit{8 Id.}
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\textit{9 There are three classifications of vehicular violations proscribed by the Vehicle}
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fact that there is an "arrest," however, is not sufficient to allow a warrantless search of the vehicle as incident to that arrest. The court in the present case noted that this rule has more often been stated than explained, and, therefore, the court proceeded with a thorough analysis of the reasons for the rule. The court examined the traditional reasons for justifying a warrantless search incident to an arrest and concluded that none of these reasons were applicable either to traffic arrests in general or to the present case in particular.

The court stated that a warrantless search, limited both as to time and place, may be made:

1. for instrumentalities used to commit the crime, the fruits of that crime and other evidence thereof which will aid in the apprehension or conviction of the criminal;
2. for articles the possession of which is itself unlawful, such as contraband or goods known to be stolen;
3. for weapons which can be used to assault the arresting officer or to effect an escape.

Instrumentalities, Fruits and Other Evidence

The court quickly dismissed the first category as not justifying a search of an automobile. Since the offense was speeding and since the instrumentality for this offense was the automobile itself, the court concluded that a search of the car's interior was not


10 Id. § 2409; CAL. PEN. CODE § 836(1) (West 1970).
11 People v. Superior Court, 3 Cal. 3d 807, 812, 478 P.2d 449, 451 (1970); People v. Blodgett, 46 Cal. 2d 114, 116, 293 P.2d 57, 58 (1956); People v. Weitzer, 269 Cal. App. 2d 274, 290, 75 Cal. Rptr. 318, 328 (1969): "[S]earch of a vehicle will not be warranted where it has no relation to a traffic charge for which the defendant has been apprehended."
12 It was stipulated at the suppression hearing that the officer did not have a warrant to search defendants' car; therefore the burden to show proper justification fell upon the prosecution. People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665 (1968).
13 Citing Preston v. United States, 376 U.S. 364, 367 (1964). "Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest."
15 The court citing Warden v. Hayden, 387 U.S. 294, 300-10 (1967). Other exceptions to the requirement of a search warrant, aside from searches incident to an arrest, are where there is danger of "imminent destruction, removal, or concealment of the property intended to be seized or where the evidence is in plain sight, which is in fact, no search for evidence." People v. Marshall, 69 Cal. 2d 51, 56-7, 61, 442 P.2d 665, 668, 671 (1968).
justified. The court also stated that there are no fruits of the speeding offense and, consequently, no search was allowed on that basis. Moreover, since the officer initially arrested the driver for speeding committed in his presence, the evidence, the court said, was not subject to search or seizure because the evidence is solely the arresting officer’s own observations and records.

Weapons Used to Assault or Escape

A search for weapons is another instance where a warrantless search incident to a traffic arrest may be made. This limited search, however, can only be made under certain conditions. While mindful of the dangers faced by traffic officers in approaching even minor offenders, the court in the present case would not authorize a search for weapons on the basis of a traffic arrest alone. The court required a showing of additional facts or circumstances giving rise to a reasonable belief that the traffic offender might be armed.

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16 The court cited Grundstrom v. Beto, 273 F. Supp., 912, 916 (N.D. Tex. 1967). [operating a motor vehicle with a loud muffler] where the federal court stated: "[t]he search of the interior of a motor vehicle bears no relation to seeking the means by which a traffic offense was committed."

17 The court stated that the "vast majority" of traffic offenses, "moving" as well as "equipment" would follow this analysis. People v. Superior Court, 3 Cal. 3d 807, 813 n.2, 478 P.2d 449, 451 n.2 (1970). However, driving under the influence of alcohol or a narcotic would allow the police officer to conduct a reasonable search of the car for corroborating evidence. People v. Robinson, 62 Cal. 2d 889, 894, 402 P.2d 834, 837 (1965). CAL. VEH. CODE § 23102 (West 1970).

18 This note does not purport to survey the law relating to searches and seizures performed a significant time after arrest, which searches are conducted for contraband, for evidence of a crime or for an inventory of the arrestee's effects. Some authorities that deal with this problem: Chambers v. Maroney, 399 U.S. —, 90 S. Ct. 1975 (1970) and authorities cited therein; People v. Williams, 67 Cal. 2d 226, 430 P.2d 30 (1967); People v. Webb, 66 Cal. 2d 107, 424 P.2d 342 (1967); People v. Andrews, 6 Cal. App. 3d 439, 85 Cal. Rptr. 908 (1970); Virgil v. Superior Court, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968). Chambers eliminates any effect Chimel v. California, 395 U.S. 752 (1969) may have had on this area of search and seizure. The car was impounded to secure it against removal. This lack of mobility eliminates the usual rationale for warrantless searches of cars. Carroll v. United States, 267 U.S. 132 (1925). Nor was the car impounded on the basis of a state law requirement. Cooper v. California, 386 U.S. 58 (1967). The issue was strictly the propriety of obtaining a search warrant. The majority concluded it was not necessary. Harlan thought it was. The search conducted in Chambers might be classified as a "continuation of the search lawfully begun at the time and place of arrest." People v. Webb, 66 Cal. 2d 107, 126, 424 P.2d 342, 355 (1967). While the facts are not clear in Chambers as to when the trench coat, answering the description given by the victim, was seized from the car it appears it was taken at the time of arrest, hence the initial search from which the continuation occurred. For the view that Chimel, supra, should play a part see 17 U.C.L.A. L. REV. 626, 648 (1970).


The court concluded that the record disclosed no facts which would reasonably warrant a search for weapons. The driver took no evasive action. He immediately pulled over as directed. No crimes were reported in the area. There was no prior information on the defendants. The driver was cooperative. The court also concluded that if the action of the passenger in bending down and the driver's action in walking to the officer was not sufficient for the officer to believe there was contraband in the car, then neither would those actions reasonably justify a belief that the automobile carried weapons.

The court also noted that, if the officer was still concerned for his safety, he could have taken more reasonable steps to allay this fear than to instigate a search. He could have asked the passenger to roll down her window; or explain her movement; or show what she might have in her hands; or ask her to step out of the vehicle. Furthermore, the court felt that while the officer stated he was concerned for his safety, his actions belied that assertion. When he approached the passenger side of the car and proceeded to search it, the officer turned his back on the driver. The court concluded that the search was exploratory and, consequently, the search was not authorized by the fourth amendment.

Contraband

Scope of Search. The court met a more difficult question when analyzing the search for contraband incident to an arrest. The court asked why a police officer is entitled to conduct a search for contraband incident to any arrest made except a traffic arrest. The court stated that the answer comes from the fourth amendment itself. "The [fourth] amendment does not proscribe 'warrantless searches' but instead it proscribes 'unreasonable searches.'" In addition, "a search may be unreasonable and, hence, unlawful although incident to a lawful arrest." The court also stated, "[t]he

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21 The court stated that if the officer cannot reasonably expect to find contraband upon a traffic violation he cannot expect to find weapons without other facts. People v. Superior Court, 3 Cal. 3d 807, 829, 478 P.2d 449, 464 (1970). As to the discussion of contraband see note 32 and accompanying text infra.


23 Id. at 813, 478 P.2d at 451.

24 U.S. Const. amend. IV provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."

"An automobile has the status of a house, so far as the protection of the fourth amendment is concerned subject to certain limitations arising from its mobility." United States v. Greer, 297 F. Supp. 1265, 1267-68 (N.D. Miss 1969).


principal evil sought to be forestalled . . . is the invasion of individual privacy by wholesale exploratory searches conducted under color of governmental authority.”

Therefore, “the scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.”

The court held that these rules apply to searches of automobiles. Since in a routine traffic case the arresting officer “cannot reasonably expect to discover either instrumentalities or fruits or seizable evidence of the offense;” still less does the arrest give him reasonable grounds to believe, without more, that the vehicle contains contraband. The court laid down the following rule: no matter how persuasive the probable cause to arrest a traffic offender is, there must exist independent probable cause to believe the vehicle contains contraband before it can be searched.

Probable Cause. What does this independent probable cause consist of? Probable cause consists of facts and circumstances within the officer's knowledge or about which he has reasonably trustworthy information that are sufficient in themselves to warrant a man of reasonable caution in the belief that contraband was being transported in the automobile which the officer stopped and searched. “Automobiles, because of their mobility, may be searched without a warrant upon facts not justifying a warrantless search of a residence or office.”

However, this rule “merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause” that the car was carrying contraband. “The validity of an arrest is not necessarily determinative of the right to search a car if there is probable cause to make the search.” Usually, however, in the typical traffic violation case, the circumstances and facts known to a police officer

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28 Id. at 814, 478 P.2d at 452 citing Terry v. Ohio, 392 U.S. 1, 19 (1968).
29 See notes 16-18 and accompanying text, supra.
31 Id. at 815, 478 P.2d at 453 (emphasis added).
32 Carroll v. United States, 267 U.S. 132, 154 (1925). This fulfills the purpose of the fourth amendment to protect individual privacy against indiscriminate governmental intrusions. “[T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.”
that give him probable cause to arrest the driver for another crime, also give the officer probable cause to search the automobile.

Facts and circumstances the officer can use to establish probable cause to search can come from information directed to the police in the form of police broadcasts. While the court in the present case did not discuss it, a police officer may detain a motorist upon information received through "official channels." If an arrest is made subsequent to detention, the source of the officer's information must be based on facts sufficient to establish probable cause. In the present case the officer had no prior information that the defendant's car contained contraband. Such information would be rare in a routine traffic offense, said the court. This is because the officer stops the automobile on account of the manner in which it was driven or its condition and not because of the motorist's identity.

The second source of probable cause to search a car for contraband is based on the officer's observations. The most reliable observation is one of contraband in plain view within the automobile. In the present case, the marijuana discovered by the patrolman was not visible from the outside and did not come within view until he opened the door next to the passenger. The question then arises whether it was reasonable for the officer to search by opening the door.

*Furtive Movement.* The answer to this question turns on whether the officer's observations of the occupant's actions established probable cause to believe contraband was present in the automobile. These actions are characterized as so called "furtive movements." "The theory ... is that although the officer does not actually see any contraband from outside the vehicle, he may rea-

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36 Restani v. Superior Court, 13 Cal. App. 3d 189, 195, 91 Cal. Rptr. 429, 432 (1970). "[E]ven though there are no unusual or suspicious circumstances warranting detention by the detaining officer he may, nevertheless, detain a person for investigation or questioning upon the basis of information received through 'official channels.'"

37 Id. at 196, 91 Cal. Rptr. at 432.

38 Court citing Grundstrom v. Beto, 273 F. Supp. 912, 917 (N.D. Tex. 1967): "A search for contraband is reasonable when conducted incident to a traffic violation only when the arresting officer observes some occurrence other than the traffic offense itself which reasonably leads the officer to believe that the motorist possesses contraband ...." (emphasis added by the court in People v. Superior Court, 3 Cal. 3d 807, 816, 478 P.2d 449, 454 (1970)).

39 Observations of things in plain sight where the policeman has a lawful right to be there to observe is not a "search." The objects may be seized without a search warrant. People v. Marshall, 69 Cal. 2d 51, 442 P.2d 665 (1968).

40 Since the officer had to open the car door to observe the marijuana, which he could not see from outside the car, he conducted a search. *Cf.* People v. Samaniego, 263 Cal. App. 2d 804, 69 Cal. Rptr. 904 (1968).
reasonably infer from the timing and direction of the occupant’s movements that the latter is in fact in possession of contraband which he is endeavoring to hide.” The court said that the theory rests on a sound psychological basis as seen from the viewpoint of the actor. Upon a sudden confrontation it is a natural impulse to hide contraband. It appears from the court’s discussion, however, that probable cause cannot be based on a speculation as to defendant’s motives. Psychology plays no part. Because of the many plausible, yet conflicting, interpretations that can be advanced to explain a “furtive movement,” the movement is ambiguous in meaning. It would require a subjective analysis to attach any meaning to the movement. Yet the establishment of probable cause requires facts and circumstances within the officer’s knowledge. Subjective speculation as to the motives for a furtive act is not a “fact or circumstance” within the knowledge of the officer. It is a conclusion without an adequate foundation in fact. Because of this conflict in interpretation, the law requires more than a mere “furtive gesture” to constitute probable cause to search or arrest.

**Other Facts.** In reviewing the cases in this area, the court felt that this rule had not always been followed by appellate courts. The appellate courts have been quick to find other facts to impart a guilty connotation to the defendant’s “furtive act.” However, the supreme court, by its decision in *People v. Superior Court,* will require “reflective analysis” of these facts in order to determine whether probable cause exists to arrest or search. However, the writer submits that if any one of these facts is equally susceptible to innocent as well as guilty interpretation, it should carry no weight in the establishment of probable cause. These facts should neither add to nor subtract from the determination of probable cause.

*People v. Superior Court* proceeded to give examples of cases where so called “furtive acts,” by the defendant, are more consistent with guilt than with innocence. Those cases justified a finding of probable cause for arrest based upon the observance of a

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42 *Id.* at 817, 478 P.2d at 454-55.
44 *People v. Superior Court,* 3 Cal. 3d 807, 818, 478 P.2d 449, 455 (1970) citing *Sibron v. New York,* 392 U.S. 40, 66-7 (1968) where the Supreme Court said: “... deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered on the decision to make an arrest.” (Italics added by the California Supreme Court).
46 *Id.*
"furtive gesture" combined with one of the following: 1) prior reliable information; or 2) the officer's own observation of contraband; or 3) a deliberate act of concealment under otherwise suspicious circumstances.47

People v. Sanson.48 The court questioned some appellate court cases in which the evidence "assertedly giving sinister meaning to the 'furtive gesture' has been so thin as to stretch [the chain of inferences derived from the evidence] almost to the breaking point."49 The supreme court then discussed People v. Sanson50 as exemplifying a case wherein the appellate court did not engage in "reflective analysis"51 of the facts. In this case the defendant was observed driving his car "very slowly" at 3 a.m.; there was no license plate illumination and the taillight was blue instead of red. When the officer turned on his red emergency light to notify the defendant to stop, the officer observed the passenger appear "to be hiding something under the front seat."51 After the passenger left the car, the officer looked under the seat to see what was placed there. He found a dirty paper bag which he opened and saw contained marijuana. The court of appeal held that there was no error in admitting the evidence after challenge by the defendants.

47 People v. Doherty, 67 Cal. 2d 9, 21-22, 429 P.2d 177, 185 (1967) [observed suspect in the act of deliberately hiding a package or box which, under the circumstances, created probable cause to believe it contains contraband]; People v. Superior Court, 272 Cal. App. 2d 383, 387, 77 Cal. Rptr. 646, 649 (1969) [car stopped for driving without lights, defendant bent forward and officers saw him push a small white box under the front seat]; People v. Mosco, 214 Cal. App. 2d 581, 585-86, 29 Cal. Rptr. 644, 647 (1963) [downward motion of an occupant of a parked car, followed by officer's observation of a marijuana cigarette under the seat]; People v. Jiminez, 143 Cal. App. 2d 671, 673, 300 P.2d 68, 70 (1956) [downward motion of a juvenile sitting with others in a car parked in an area where officers had been told to expect a gang fight].


51 Most appellate court cases on furtive movement invariably cite People v. Blodgett, 46 Cal. 2d 114, 293 P.2d 57 (1956). For instance, Sanson stated that the facts were "strikingly similar to those in Blodgett." The supreme court in People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449 (1970) however, said the analogy was untenable. In Blodgett, defendant was seated with two companions in a taxicab, doubled-parked in front of a hotel, late at night. The police approached the cab to investigate. When they ordered the occupants out, one of the officers saw defendant withdraw his left hand from behind the seat at the juncture of the seat and back cushion. The supreme court in People v. Superior Court, 3 Cal. 3d 807, 819 n.5, 478 P.2d 449, 456 n.5 said Blodgett was a close case and should be limited on its facts and not extended. The crucial fact in Blodgett would seem to be the observation of defendant's hand actually being withdrawn from the seat and cushion juncture. Cf. People v. Moray, 222 Cal. App. 2d 743, 35 Cal. Rptr. 432 (1963). Most furtive acts as seen by the officer consist of the movement of an arm, shoulder, head or other large area of the body that has many more innocent interpretations. The writer prefers to call these acts generalized random gestures.
People v. Superior Court noted that the Sanson court improperly speculated on defendant's motives for his act. The court of appeal and the arresting officer did not have any "knowledge of what the defendants 'realized,' were 'conscious' of, or 'feared,' or what 'impulse' they felt." "Probable cause cannot be based on a belated interpretation of the suspect's conduct which appears reasonable only in light of evidence uncovered in that very search."

The court also concluded that Sanson violated the rule that "probable cause to arrest or to search must be tested by 'facts which the record shows were known to the officers at the time the arrest [or search] was made.'\textsuperscript{54} Assuming that the only facts known to a police officer, besides the traffic offense, are that the driver or other occupant suddenly "leans forward" or "bends down" or otherwise reaches toward the dashboard or floor, is that sufficient probable cause to believe the car contains contraband? The court repeated that it is not. They said there were too many weak links in the officer's chain of deductions, in interpreting a "furtive movement," to support a finding of probable cause. The court then analyzed these deductions based on the two assumptions the policeman might make.

Innocent Behavior. The first assumption the officer might make is that the movements were purposeful, \textit{i.e.}, intentional, responses to the officer's appearance on the scene. However, the court noted that: 1) The defendant may not have seen the police car, therefore, the movement would be irrelevant; 2) If he did, he may not have recognized the police car since many confrontations occur at night; 3) If he did recognize the car for what it was, he may not have understood that the police were attempting to bring his car to a halt; 4) If he knew that the police were attempting to stop his car, his movements might not have been made in response thereto; he may have been on the verge of making them anyway; 5) Even if his movements were in response to the situation, they may not have been \textit{purposeful}. The "furtive movement" may have been an understandable nervousness manifested by random, undirected gestures or movements.\textsuperscript{56}

\textsuperscript{52} People v. Superior Court, 3 Cal. 3d 807, 821, 478 P.2d 449, 457 (1970).
\textsuperscript{53} Id.
\textsuperscript{54} Id.
\textsuperscript{55} Id.
\textsuperscript{56} People v. Weitzer, 269 Cal. App. 2d 274, 292, 75 Cal. Rptr. 318, 330 (1969) as quoted in People v. Superior Court, 3 Cal. 3d 807, 817-18, 478 P.2d 449, 455 (1970). Cf. People v. Moore, 69 Cal. 2d 674, 683, 446 P.2d 800, 806 (1968): "To hold that police officers should in the proper discharge of their duties detain and question all persons . . . who act nervous at the approach of officers would for practical purposes involve an abrogation of the rule requiring substantial circumstances to justify the detention and questioning of persons on the street." If acting nervous at the sight of
The second assumption that might be made by the police officer is that only the guilty will react in the described manner to a policeman's signal to stop. Again the court excepted, saying: 1) The policeman will likely ask to see his driver's license and registration card. The movement might have been a manifestation of an effort to reach for his wallet or for her handbag, or for the glove compartment in order to obtain the license or registration card; 2) Every driver knows the policeman will want to speak to him, therefore, preparation for this may have been made: rolling down the window; leaning forward to turn the radio off; extinguishing a cigarette; laying down food or beverage; 3) The driver may want to alight from the car or expect to upon demand. Therefore, preparation for this might have been made: unbuckling seat belts; removing maps or packages from his lap; adjusting his clothing; 4) He may have applied his parking brake which in some cars is below the dashboard. Therefore, he would have leaned forward or downward to apply it.\(^5\)

All of the above generalized gestures are innocent. However, from the officer's viewpoint, they may be taken as indicating the hiding of contraband.\(^6\) Thus, they are susceptible to innocent as well as guilty interpretations. Therefore, furtive gestures do not establish probable cause to search or arrest. The court also stated that the addition of other "facts" does not necessarily impart a guilty connotation to the "furtive gesture." Nighttime is an example. The fact that "it is night when the police appear is not 'conduct' of the motorist 'in response to' the officer's signal . . . . [I]t does not, without more, transform an innocent gesture into a culpable one furnishing probable cause to search."\(^7\)

Another fact that does not necessarily impart a guilty connotation to a "furtive gesture" is alighting from the car to greet the policeman. The court could conceive of a desire by the defendant to appear helpful in order to ingratiate himself with the policeman. An additional fact is "erratic driving." It could be evidence of alcoholic or narcotic intoxication. It could also be caused by the appearance of the police.\(^8\) The court cited other appellate cases

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\(^{67}\) People v. Superior Court, 3 Cal. 3d 807, 821-23, 478 P.2d 449, 458-59 (1970).

\(^{68}\) The court states the officer's limited opportunity to observe such gestures should be borne in mind. "He views them not only from outside the suspect's car but also 1) from one car to another while both are moving; 2) at a time when a traffic offense has been committed, the vehicles are maneuvering to the side of the road, and the officer will properly be concerned for his own safety and that of others, and 3) most commonly in the nighttime . . . ." Id. at 823 n.9, 478 P.2d at 459.

\(^{69}\) Id. at 825, 478 P.2d at 461.

\(^{70}\) The court cited People v. Goodrick, 11 Cal. App. 3d 216, 89 Cal. Rptr. 866
The court did not, however, examine the additional facts that appellate courts have used to justify a search. The court did note, however, that some are less persuasive than others. In an attempt to fashion a rule for searches, some of these cases will be analyzed in juxtaposition to *People v. Superior Court* and other recent California Supreme Court cases. This rule will reflect an attempt to delineate the minimum requirements to establish probable cause to search for hidden contraband.

**EXAMINATION OF APPELLATE COURT CASES**

**Delay in Stopping**

The court in *People v. Superior Court* said, that of the various circumstances stressed in the appellate cases to impart guilt to a furtive movement, perhaps the most persuasive is a driver's failure to stop his car promptly when an officer signals him to stop. However, this fact is subject to various interpretations. The failure to stop promptly may have been caused by road conditions, speed of the vehicles or traffic congestion. An attorney would be well advised to examine in detail the circumstances surrounding this delay in stopping. Some examples will illustrate this situation.

In *People v. One 1958 Chevrolet Impala* the defendant made several sharp turns and maneuvers with his car after the police gave chase to stop him for driving his car without its headlights on. When defendant's car finally stopped, it blocked the officer's ability to proceed. The driver looked at the officers and then toward the floorboard. His right arm and shoulder went downward toward the floorboard. The officer alighted and met the defendant who had also alighted. Thereupon, the officer opened the partly ajar door of defendant's car. Protruding from under the front seat, the officer saw a brown paper bag which he later discovered contained marijuana. The court of appeal held that there was sufficient probable cause to make the search. As we have seen, a "furtive gesture" alone will not justify probable cause to search. Alighting from a car, to meet the policeman, will not add guilty connotations to the

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(1970) where the court of appeal attached sinister meanings to the driver's actions in bringing her car to a halt after the police observed a "furtive movement." The California Supreme Court could find plausible the defendant's explanation that the police car's spotlight blinded her. Goodrick is also subject to criticism of an improper speculation into defendant's motives. See text accompanying note 52, supra. See also text accompanying note 75, infra.

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61 See the discussion of these cases in the text accompanying note 63, infra.
63 Id.
64 219 Cal. App. 2d 18, 33 Cal. Rptr. 64 (1963).
furtive movement. Therefore, in order to establish that there was probable cause to believe defendant’s car contained contraband, it must be determined if the defendant’s evasive maneuvers in addition to his furtive movement can indicate guilt. A man of ordinary care and prudence would view an apparent attempt to evade the police as support for the assumption that the defendant’s act in bending down upon seeing the police was a guilty act—a deliberate attempt to hide contraband. The act was undertaken after the defendant saw the police. While not a strong case, it would seem that a search based on these facts would be reasonable.

Another case that emphasizes the delay in stopping is Bergeron v. Superior Court. In this case, defendant was observed traveling at an excessive speed. The police followed and directed the defendant to pull over. He pulled over into the next lane and traveled approximately one-quarter of a mile before he yielded to the right and stopped. While traveling this distance, the police officer noticed the defendant’s right arm go to the area of his face and his right shoulder go down four or five inches. The officer also noticed lateral body movements of five or six inches. The police officer thought, that because of these body movements and the delay in stopping, the defendant might have concealed an alcoholic beverage. The officer thereupon searched under the defendant’s car seat and found marijuana. The appellate court did not disturb the trial court’s finding of reasonable cause for the search. The appellate court noted that the weight to be given the testimony as to the unreasonableness in the delay in stopping was for the trial court. This case is highly objectionable in light of People v. Superior Court. Inherent in this case is the conflict between the trial court’s determination of facts and the appellate court’s review of those facts. However, based on Superior Court it would seem that as a matter of law there was no probable cause to search. The only fact used to establish probable cause, other than furtive movement, was the delay in stopping. The arrest report indicated that the traffic was light to moderate. The defendant only traveled one-quarter of a mile, and at freeway speeds, this is not a very long distance. This delay is susceptible to innocent as well as guilty motives. The defendant may have found it difficult to pull over.

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67 As to the ability of the officer to perceive such limited movements see note 58, supra.
69 See also Remers v. Superior Court, 2 Cal. 3d 659, 664, 470 P.2d 11, 13 (1970): “An arrest and search based on events as consistent with innocent activity as with criminal activity is unlawful.”
Closer examination of the circumstances surrounding the delay should be required.

**Erratic or Dangerous Driving**

*People v. Shapiro* is a case that combines an asserted “delay” in stopping with “erratic driving.” In this case, the defendant was driving her car at night with its tail light out. The police followed to arrest her. They turned on their emergency red light, sounded the horn several times and then flashed their large auxiliary spotlight across the back of the defendant’s car. She traveled at most two blocks. Prior to stopping, she leaned over in the seat so far that her head went out of the officer’s view. She testified that she had dropped a cigarette she had been smoking and bent down to pick it up. While making this movement her car turned in toward the curb, hitting it with the front tire of her car. The appellate court attached significance to the fact that the “furtive movement” was made almost immediately upon realizing she was confronted by the police.

The court cited *People v. Jiminez* for the proposition that it is a natural impulse upon confrontation to hide immediately any contraband. The court in *Shapiro* said that the police could reasonably infer that the defendant was exercising this “natural impulse.” However, this carries no weight in determining probable cause to search for contraband. A subjective speculation into the defendant’s motives is not allowed to establish probable cause.

The *Shapiro* court also mentioned the defendant’s delay in stopping. However, there was nothing to indicate that her delay in stopping was unreasonable. She traveled, at most, only two blocks. She might not have noticed the police at first. The “delay” did not enable her to hide anything. If she was going to use the “delay” to hide contraband, she would have made a “furtive movement” during the delay. Yet, the “furtive movement” was made just prior to stopping. Also, defendant’s manner of driving would not have imputed criminality to her “furtive movement.” Contrary to what the supreme court intimates in *People v. Superior Court* there was not any “erratic or dangerous driving” in *Shapiro*. The mere act of hitting the curb upon stopping, without more, cannot be classified as erratic or dangerous driving. Many drivers have hit a curb upon parking or stopping.

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72 See text accompanying note 41, supra.
73 See text accompanying note 52, supra.
People v. Goodrick\textsuperscript{76} is another example of so called "erratic or dangerous driving." In this case, the defendant was stopped at night for driving with only one headlight in operation. The driver, defendant, was observed by the policeman to have leaned forward to the right. As she did this, her right front wheel jumped the curb and the car came to rest. The policeman testified he thought she was concealing something. The defendant testified that she was turning the radio off. In addition, she said that when she bent down, the spotlight from the police car blinded her, causing her to run over the curb. She was asked for her driver's license which she did not have. The police then asked her and her passenger to get out of the car. One of the officers searched under the front seat and found seconal tablets.

The court in Goodrick held that the officers had probable cause to search. The court said that the defendant's "furtive movement" coupled with the manner in which she operated the vehicle generated reasonable suspicion that she: 1) was either under the influence of alcohol or narcotics; or 2) was unfamiliar with the operation of a stolen vehicle; or 3) had a preoccupation with an urgent need to hide contraband. The Goodrick court cited People v. Blodgett\textsuperscript{77} and People v. Sanson\textsuperscript{77} as precedents for establishing probable cause to search for contraband upon seeing a furtive movement. However, People v. Superior Court\textsuperscript{78} in effect overruled Sanson and limited Blodgett to its facts. Therefore, a speculation as to the defendant's reasons in making a "furtive movement," without more, is insufficient probable cause. Furthermore, the defendant's act of hitting the curb with her front wheel is not sufficient to impart guilty significance to a "furtive movement." It is equally susceptible to innocent as well as guilty motives. This is evident from the defendant's testimony that she was blinded by the police car's lights.

Since "probable cause cannot be based on a belated interpretation of the suspect's conduct which appears reasonable only in light of evidence uncovered in that very search,"\textsuperscript{79} it would seem to follow that the defendant's testimony as to her reasons for acting as she did cannot be used to establish that the policeman's interpretation of her act was unreasonable. Yet, this dichotomy seems compelled by our system of government. The police are required to justify a warrantless search. The fourth amendment is

\textsuperscript{76} 11 Cal. App. 3d 216, 89 Cal. Rptr. 866 (1970).
\textsuperscript{77} 46 Cal. 2d 114, 293 P.2d 57 (1956).
\textsuperscript{78} 156 Cal. App. 2d 250, 319 P.2d 422 (1957).
\textsuperscript{79} 3 Cal. 3d 807, 478 P.2d 449 (1970).
\textsuperscript{80} Id. at 821, 478 P.2d at 457.
directed toward them, not the people. Furthermore, the defendant's testimony is not of the same magnitude as an intrusion by the police and, hence, the rule applied to the police should not apply to the people. In addition, the defendant's testimony only shows that there are other equally plausible and wholly innocent motives for her act in hitting the curb.80

Belief the Car is Stolen

The court in Goodrick, however, further held that the defendant's "furtive movement" and manner in which she drove the car coupled with her lack of a driver's license gave the police reasonable cause to believe that the car she was driving was stolen. However, the defendant testified that she was driving her grandmother's car. This testimony is relevant in showing that the police should have countered her assertion by running a check on the car to see if it was stolen, or ask to see the registration card. A missing registration card or an inconsistency between the name on the card and the name of the driver would bear a relation to the possibility that the car was stolen. However, the lack of a driver's license has no such relation to that possibility.81

Recognition of the Defendant

A case decided after People v. Superior Court82 is In re Marshall K.83 In this case, the defendant was driving a car without any illumination over the license plate. A police car followed. When the officer directed the defendant to pull over, the officer saw a passenger look back toward him and then turn back toward the front. The passenger then bent over and "wriggled" his shoulders and raised up. He then put his right hand on the top of the sun visor and pulled it down part way. After this he pushed it back up and then removed his hand. The officer thought the passenger was hiding a weapon, alcohol or contraband. When the officer approached the car he immediately recognized the passenger as someone he had seen before. The officer had also heard that the passenger was a suspect in narcotic activities.84 The officer then recognized the

80 See note 69, supra.
81 For an appropriate illustration of facts and circumstances that justify probable cause to believe a car is stolen see People v. Ceccone, 260 Cal. App. 2d 886, 67 Cal. Rptr. 499 (1968) where the police stopped defendant, he had no operator's license, nor proof of registration, gave conflicting statements as to ownership of the car, and he was unable to describe the identity or whereabouts of recent companions from whom he claimed to have borrowed the car.
84 As to this issue, see Remers v. Superior Court, 2 Cal. 3d 659, 667, 470 P.2d 11, 15 (1970).
defendant's name upon inspecting his driver's license. This recognition was a product of seeing two written statements naming the defendant as allegedly being involved in narcotics. The statements were given by third parties who were charged with possession of marijuana. The officer then questioned the occupants of the car about the sun visor. They denied that anyone had touched it. The officer then pulled down the sun visor and found marijuana. The court held that the officer had reasonable grounds to believe the car contained contraband in view of the facts that he saw a "furtive movement," he had recognized the defendant's name as a person named in narcotics involvement, the denial of any movement toward the sun visor, and the fact that the car could be driven away before a search warrant could be obtained.

The question then arises: At what point in the confrontation did the officer have probable cause to search the car for contraband? Was probable cause established when the officer saw the movements of the passenger? If not, did the prior information possessed by the officer impart guilt to these movements, thereby giving probable cause to search? Finally, assuming there was no prior information possessed by the officer about the defendant, did his denial about the sun visor impart guilt to the movements? As we have seen, generalized furtive movements will not establish probable cause to search. However, there are certain types of specific furtive movements that will. In People v. Blodgett the police saw the defendant withdraw his hand, after a confrontation with the police, from the juncture of the back seat cushion. It was reasonable to conclude that the defendant was hiding contraband. Criminality is attached to this act because it is exercised when the defendant knows the police are present and sticking a hand between the seats is not a normal action. People v. Doherty is similar. The police observed the suspect deliberately hide a package or box. People v. Superior Court, an appellate court case, is another example of a specific furtive movement. The defendant bent forward and the officers saw him push a small white box under the front seat. All of these acts are specific instances of "hiding" versus general body movements which are susceptible to many interpretations.

In Marshall K, the officer saw one of the defendants pull down the visor and push it back up after noticing the police. This act is too generalized to generate, by itself, probable cause to believe

85 Id.
86 46 Cal. 2d 114, 293 P.2d 57 (1956).
87 67 Cal. 2d 9, 429 P.2d 177 (1967).
contraband was present. It is not uncommon to operate a sun visor. Cigarettes, sun glasses and other innocent items can be placed there. Similarly contraband can be hidden above a sun visor. Because of the fact that operating a sun visor is as consistent with innocent behavior as it is with criminal conduct, it cannot establish probable cause to search.90

However, when the occupants of the car denied that anyone had operated the sun visor, this denial transformed an otherwise innocent act into one more closely associated with criminality. If the act of operating the sun visor was innocent there would have been no need to deny it. While the case is close, it would seem that to a reasonable man probable cause to search has been established.91

When the fact that the police officer had reliable information implicating the defendants in previous narcotics dealings is added, the defendant’s movement which was susceptible, initially, to innocent interpretation has now become more susceptible to a criminal connotation. This is because it is reasonable to interpret the passenger’s act in operating the visor as an act of hiding contraband. The passenger had been previously connected with narcotics dealings. In addition, he made the movement after observing the police. Therefore, there was probable cause to search the vehicle.

THE RULE

It appears from the above that the following rules should be used to determine if there is probable cause to search for contraband in a car upon observing a “furtive movement”:

90 See note 69, supra.
91 Compare Gallik v. Superior Court, 15 Cal. App. 3d 548, — Cal. Rptr. — (1971) (2-1) where the petitioner denied that he had placed anything under his car seat. The denial coupled with a furtive movement gave probable cause for the policeman to search the car. This denial differs greatly from that in In re Marshall K, 14 Cal. App. 3d 94, 92 Cal. Rptr. 39 (1970) rev’d on other grounds. In Marshall the occupants denied that anyone had made a furtive movement toward the sun visor. Whereas in Gallik, the defendant did not deny that he had made a movement but he did deny that he had placed anything under his seat. If the rule in Gallik is allowed to stand it will vitiate the import of People v. Superior Court, 3 Cal. 3d 807, 478 P.2d 449 (1970). Based on Gallik, the policeman only has to ask the suspect what he placed under the seat and the response will establish probable cause to search. If the suspect answers “nothing” as in Gallik, the officer can disbelieve him and search under the seat lawfully. Asking the suspect the question, “what did you hide under the seat,” raises the fear that it could be used by the police as a subterfuge to legitimize a search based on a mere hunch. See note 99, infra. In addition, an answer consistent with innocence should not transform an otherwise ambiguous maneuver into one evincing criminality. See note 69, supra. Therefore, as Justice Molinar states in dissent: “... probable cause for the officer’s search for ... contraband ... in traffic violation cases must be predicated on specific facts and circumstances, other than a mere negative reply to the subject inquiry, which gave reasonable grounds to believe that contraband ... [is] present in the vehicle the officer has stopped.” Gallik v. Superior Court, 15 Cal. App. 3d 548, 556, — Cal. Rptr. — (1971).
92 Another fact often mentioned by appellate courts as imparting guilty signifi-
1) If the movement is as consistent with innocent activity as it is with criminal conduct, an arrest and search based on this movement is illegal.

   a) Similarly, neutral facts such as nighttime and rural area do not add to the establishment of probable cause.

2) There will, however, be other facts that will transform this innocent looking movement into one more consistent with guilt. This is when there is a deliberate act of concealment under suspicious circumstances. *People v. Blodgett* suggests the minimum requirements.

   a) The policeman must see the defendant appear to hide something. This is established by seeing the defendant's *hand* enter or leave an area not normally associated with such movement. It also may be established by seeing the defendant actually hide a box or other container.

   b) The second requirement is that the officer must know or have a reasonable belief that the defendant is aware of the policeman's presence. This is required in order to be reasonably certain that the defendant's act was purposeful, *i.e.*, the defendant acted because of the presence of the police.

This test meets the objection raised by *People v. Superior Court* as to the weak links in the officer's chain of deductions in interpreting a "furtive movement." The officer must not merely see a generalized random gesture made by the defendant with his shoulders, arms or other large body area. He must observe a specific act of concealment. Furthermore, the gesture must be made when the defendant knows the police are present. Only then will the defendant's act not be subject to ambiguous interpretations.

The test in interpreting a furtive movement must not be so burdensome as to completely hinder the police in effective law enforcement. The fourth amendment only proscribes unreasonable searches and seizures. Because the rule requires the policeman to
see an act of hiding coupled with reasonable belief by the policeman that the defendant knows of the officer's presence the rule, it is submitted, is reasonable.

CONCLUSION

It has been established from the foregoing that whenever a trial court could reasonably conceive of equally innocent reasons for the suspect's conduct, probable cause to arrest or search for contraband does not arise unless there are other suspicious facts to tip the balance. These include not only the suspect's "furtive movement" but also other facts that the courts of appeal have used to impart guilty significance to this movement. The California Supreme Court by its decision in People v. Superior Court and other recent cases in the area of search and seizure will require the policeman to point to specific facts and circumstances justifying the defendant's arrest and search. The policeman cannot speculate as to the defendant's motives. The requirement that the officer point to specific facts and circumstances justifying his search will eliminate any criticism that the officer uses "furtive movement" as a subterfuge to conduct a search on a mere "hunch." While "circumstances and conduct which would not excite the suspicion of the man on the street might be highly significant to an officer who had had extensive training and experience in the devious and cunning devices

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05 See note 69, supra. Cf. People v. Guy, 145 Cal. App. 2d 481, 487, 302 P.2d 657, 662 (1956): "[T]he term, probable, [as used in the term probable cause], means having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt" (emphasis added).

06 "The near-insufficiency of the evidence of probable cause upheld in certain decisions of the courts of appeal suggests that . . . guilty significance has been claimed for gestures or surrounding circumstances that were equally or more likely to be wholly innocent." People v. Superior Court, 3 Cal. 3d 807, 827, 478 P.2d 449, 462 (1970) (emphasis added).


09 The court cited a study made that would give credence to this fear. In Marijuana Laws: An Empirical Study of Enforcement and Administration in Los Angeles County, 15 U.C.L.A. L. Rev. 1499, 1533-35 (1968) the authors found that the arrest reports were almost uniformly tailored with phrases of "furtive movement" or "furtive gesture." The officers appear to be aware that if they tailor the arrest report as above the judge will almost invariably accept it as sufficient probable cause. This establishes "write in" probable cause. "The nagging question . . . is whether the police are truly interested in the conduct justifying the investigation or whether they are using that conduct merely as an excuse for investigating some other activity for which they have no legal basis. To the extent that the police use these procedures as a subterfuge to uncover marijuana use, they have effectively created a new 'method' of marijuana enforcement." Id. at 1533. "That method, manifestly is unconstitutional." People v. Superior Court, 3 Cal. 3d 807, 827-28 n.13, 478 P.2d 449, 463 n.13 (1970).
used by narcotics offenders to conceal their crimes,\textsuperscript{100} the court will not countenance abuses of that experience. There must be a good faith compliance with the Constitution: "the police officers should remember there is no substitute for patient and thorough investigation, and should avoid drawing a hasty preconceived conclusion that the movements he observes are prompted by guilty motives."\textsuperscript{101} The trial court should make an independent judgment based on common sense and in light of all the facts at the time of the event.

Finally, the appellate courts should not approach search and seizure cases in a dogmatic manner. They must be aware that a person's conduct may be a product of innocent as well as guilty motives. The courts should not strain to find guilty motives. It is understandable that a court would tend to find guilty motives for the defendant's act more plausible than innocent ones; but "probable cause cannot be based on a belated interpretation of the suspect's conduct which appears reasonable only in the light of evidence uncovered in that very search."\textsuperscript{102} The courts must analyze the facts in a "reflective manner" in order to "forestall any encroachment" of the fourth amendment's "fundamental guarantees." Only then will the people be secure in their persons and effects.

\textit{Carl W. Holm}


The term "abortion" recently has become a household word. What was once criminal is now often legal and acceptable. Concomitant with the introduction and implementation of any new law or laws, however, there arise a number of legal questions which never before needed answering.

One of the questions posed by a reading of the Therapeutic Abortion Act of 1967,\textsuperscript{1} as interpreted in the light of prior legislation

\begin{itemize}
\item People v. Superior Court, 3 Cal. 3d 807, 827, 478 P.2d 449, 463 (1970).
\item \textit{Id.}
\item \textit{Id.} at 821, 478 P.2d at 457.
\end{itemize}

\textsuperscript{1} "A holder of the physician's and surgeon's certificate, as defined in the Business and Professions Code, is authorized to perform an abortion or aid or assist or attempt an abortion, only if each of the following requirements is met:

(a) The abortion takes place in a hospital which is accredited by the Joint Commission on Accreditation of Hospitals.
regarding medical care for minors, is: Can an unmarried, unemancipated female minor who is pregnant have her baby if her parents demand that she have an abortion? Any attempt to establish legal grounds upon which such a minor can withhold consent to an unwanted, parent-imposed abortion demands an in-depth study of the instances in which minors can give legal consent to medical care. A recent California case, *Ballard v. Anderson,* holds that a pregnant minor who is living at home cannot procure a therapeutic abortion without parental consent. This note is primarily concerned with the implications of *Ballard.*

**MINOR'S RIGHT TO CONSENT**

It is a generally accepted principle of law that medical services rendered to a minor must first be consented to by his parents. The California Legislature, however, has acknowledged that exceptions to this rule exist, and has enacted several statutes which allow minors to submit to medical care without parental consent. Any male, 18 years of age or over, may consent to give blood. Another statute provides that any lawfully married minor may consent to any medical care during the marriage as well as after the marriage, should it fail by annulment or divorce. Any minor in the armed forces may also consent to hospital or medical care. Still another section of the Civil Code allows a minor with any infectious, contagious or communicable disease to consent to medical care related to it. Similarly, parental consent is apparently never required in an emergency situation where the life of the minor is endangered.

In 1968 California's lawmakers enacted section 34.6 of the

(b) The abortion is approved in advance by a committee of the medical staff of the hospital, which committee is established and maintained in accordance with standards promulgated by the Joint Commission on Accreditation of Hospitals. In any case in which the committee of the medical staff consists of no more than three licensed physicians and surgeons, the unanimous consent of all committee members shall be required in order to approve the abortion.

(c) The Committee of the Medical Staff finds that one or more of the following conditions exist:

(1) There is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother; (2) The pregnancy resulted from rape or incest. *Cal. H. & S. Code* § 25951 (West Supp. 1970).


5 *Id.* § 25.6.

7 *Id.* § 34.7.

California Civil Code enabling minor children 15 years of age or older, who are living apart from their parents, and managing their own financial affairs to give their consent to any medical care. Since parental consent is not required for emancipated minors to secure medical care, strict interpretation of section 34.6 necessarily means that parental consent is required for unemancipated minors.

A probe into the collective intent and motivation underlying any legislature's actions is oft-times both a dangerous and tenuous ground upon which to base a legal argument. Any such attempt will usually be countered by the argument that if the legislature had intended that a particular statute be interpreted in a certain way, it would have said so in the wording of the statute. The very existence of statutes giving a minor power to consent to certain types of medical treatment indicates that the legislature thought it unwise to forbid medical treatment without parental consent in these situations, and that the best interests of the child were served by allowing him to consent in these given instances. Review of the above statutes, however, does little towards answering the question of whether or not an unemancipated, unmarried pregnant minor may have her baby if her parents demand that she have an abortion. The existing statutory law merely evidences a general intent of the legislature in specific instances.

PREGNANCY-RELATED CARE

Further investigation, however, reveals section 34.5 of the Civil Code which allows any unmarried pregnant minor to consent to the furnishing of medical treatment related to her pregnancy. This

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9 "Notwithstanding any other provision of law, a minor 15 years of age or older who is living separate and apart from his parents or legal guardian, whether with or without the consent of a parent or guardian and regardless of the duration of such separate residence, and who is managing his own financial affairs, regardless of the source of his income, may give consent to hospital care or any X-ray examination, anesthetic, or medical or surgical diagnosis or treatment to be rendered by a physician and surgeon licensed under the provisions of the State Medical Practice Act, or to hospital care or any X-ray examination, anesthetic, dental or surgical diagnosis or treatment to be rendered by a dentist licensed under the provisions of the Dental Practice Act. Such consent shall not be subject to disaffirmance because of minority. The consent of the parent, parents or legal guardian of such minor shall not be necessary in order to authorize such hospital, medical, dental, or surgical care and such parent, parents or legal guardian shall not be liable for any care rendered pursuant to this section.

A physician and surgeon or dentist may, with or without the consent of the minor patient, advise the parents, parent or legal guardian of such minor of the treatment given or needed if the physician and surgeon or dentist has reason to know, on the basis of information given him by the minor, the whereabouts of the parents, parent or legal guardian." CAL. CIV. CODE § 34.6 (West Supp. 1970).

10 "Notwithstanding any other provision of the law, an unmarried, pregnant
section specifically provides that parental consent is not required to authorize such care, and it appears to allow a minor to bear her child to term without fear of interference from either the state or her parents. Prior to this statute, a pregnant, unmarried minor had ample reason to fear that she would not receive adequate pregnancy-related medical care. Few doctors would aid her while knowing that they might be sued by her parents. Further, doctors who aided a minor in such a situation bore the added worry that payment for their services might never materialize, as they knew that a minor’s contracts for such services could be disaffirmed. One of the legislature’s obvious intents in the enactment of section 34.5 was to eliminate these understandable fears of the minor, as well as to set aside the medical world’s justifiable apprehensions. The clarity and specificity of this statute seemingly provide for effortless interpretation of its intended meaning. Its purpose appears to be to safeguard the health and welfare of all pregnant, minor, unmarried females by allowing them to consent to any medical services which are related to their pregnancies. Since parental consent is not now required when a minor seeks pregnancy-related care, refusal of the parents to give their consent to such care will clearly have no effect. The legislature apparently felt that without section 34.5, competent medical care might be denied these children for reasons such as a minor’s right to disaffirm contracts, or lack of the requisite parental consent. The lawmakers were merely codifying the inherent duty of the state to provide for the health and welfare of its citizens, and a minor is indeed a citizen of the state. The law demands that the state take a continuing interest in the welfare of children within its borders, and the state unquestionably holds both the power and the duty to care for its young.

An interpretation of the state’s obligation to provide for the health and welfare of its citizens presents a serious conflict: Does the interest of the state in providing for the health and welfare of its pregnant unmarried minors prevail over the state’s interests in

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11 Id. § 34.5 (West 1954).
12 Id. § 35.
13 Id.
RECENT CASES

providing similar protection for the unborn child of that minor? The risks of childbirth, though admittedly small, are definitely present.18 A woman has a right to life. Due to the risk to her life inherent in childbirth, she has the right to choose whether to bear children.19 This right to choose gives a woman the added right to an abortion in many cases.20 Reason and logic, then, give rise to the assumption that a primary intent of section 34.5 is to protect the mother. Such an intention clearly places protection of the life of the unborn child on a secondary level of importance.

The Therapeutic Abortion Act of 1967 further cements this assumption, since it allows a legal abortion where continuance of the pregnancy would result in substantial risk to the mental or physical health of the mother.21 With regard to abortion, the intent of the law is clearly to place the mental and physical health of the mother on a higher level than the health and welfare of the unborn child.

It would seem, then, that a pregnant, unmarried, unemancipated minor could consent to an abortion if section 34.5 of the Civil Code was reasonably construed in connection with section 25951 of the Therapeutic Abortion Act. However, in a recent California case, the Court of Appeals held differently.22

MINOR'S CONSENT TO ABORTION

In the case of Ballard v. Anderson23 the court in essence stated that abortion was not related to pregnancy, and that an unemancipated minor child seeking a therapeutic abortion had to have parental consent. In this case, a 20 year old unmarried, pregnant minor requested a therapeutic abortion, but did not have parental consent. Dr. Ballard was her physician, and he, with her guardian ad litem, sought a writ compelling the therapeutic abortion committee to consider their application for an abortion for the girl under the Therapeutic Abortion Act. Dr. Ballard's professional opinion was that the girl qualified for an abortion under the law, but the committee refused to hear her application because she was unmarried,

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18 In 1967 deaths per 100,000 population due to deliveries and complications of pregnancies, childbirth, and the puerperium totalled 0.5, or 987 deaths nationwide. Table 73, p. 58, Statistical Abstract of the United States 1970. There were 28 deaths per 100,000 live births. Table 69, p. 55, Statistical Abstract of the United States 1970.
23 Id.
unemancipated, and did not have parental consent. The court denied the writ, saying that the primary intent of section 34.5 was "clearly the preservation of the health and life of a pregnant unmarried minor and the health and life of the unborn child." It further states that section 34.5 does not allow abortions without parental consent even if the mother's life is in danger. In addition, the court reasoned that abortion did not constitute "pregnancy-related care" and, hence, an abortion could not be authorized at all under section 34.5.

### AN ATTACK ON BALLARD v. ANDERSON

The Ballard case leaves the law in a somewhat ambiguous state. Obviously the statutory provisions of applicable California law act primarily to protect the health and life of the mother, whether she is a minor or an adult. The Therapeutic Abortion Act makes no mention or distinction between a minor and an adult in determining eligibility for a legal abortion. The only word which the act uses in reference to a potentially eligible woman is the noun "mother."

The legislature, when it enacted the Therapeutic Abortion Act in 1967, was fully aware of the fact that statutes cannot be construed standing alone. It knew that the courts had to consider a statute in its total relation to all other appropriate statutes as well as case law interpretation. Had it intended that the courts should interpret section 34.5 together with the Therapeutic Abortion Act as precluding a minor from giving consent to an abortion, it would have included an appropriate provision in the Act. The majority of the court in Ballard states that a court can only construe the law, not expand it. Had the court properly construed and interpreted the nature and intent of section 34.5 and the Therapeutic Abortion Act, it could not have held that an unemancipated minor could not consent to a therapeutic abortion. Only an expansion of the law could prevent such minors from giving valid consent to a therapeutic abortion.

Were the petitioner in the Ballard case an adult, there would have been no question that she was entitled to an abortion. However, because of the petitioner's minority, she was not extended the same treatment. Ballard states that the purpose of section 34.5 is

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24 Id. at 849, 90 Cal. Rptr. at 470.
25 Id.
26 Id. at 851, 90 Cal. Rptr. at 472.
27 Abortion is allowed if the Committee of the Medical Staff finds that "(T)here is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother;..." Cal. H. & S. Coex § 25951 (West Supp. 1970).
the protection of both mother and child.  

As previously seen, however, this principle does not apply where an emancipated minor or an adult is concerned. Is this to say that the state has a compelling and over-riding interest in the protection of the fetus which rests in the womb of an unemancipated minor child, but not the same compelling interest in the fetus which rests in the womb of an emancipated minor or an adult? Obviously no such distinction is possible.

The court in Ballard infers that an unemancipated minor child does not have the capacity to make a rational, "adult" judgment in determining that she wants an abortion. If this reasoning is followed, the obvious conclusion is that an unemancipated minor does not have the capacity to make a similar judgment in determining that she does not want an abortion. Since "not wanting" an abortion indicates a desire to remain pregnant, the court in Ballard has issued a direct challenge to the nature and intent of existing law by holding, in effect, that an unmarried, pregnant, unemancipated minor may not carry a baby to term without the consent of her parents. While this extension of the decision in Ballard is logically sound, any court would be hard-pressed to uphold such an extension in light of its manifest injustice. Obviously, if every minor, unwed mother-to-be had the blessings and consent of her parent or parents, there would be little need for section 34.5 other than for the provision which disallows disaffirmance because of minority.  

The court in Ballard correctly stated that it is a function of the courts to construe the law, not expand it. The court contends that it would be an expansion of the law to declare that the word "care" in relation to pregnancy necessarily subsumes its termination. It refuses to find any relation between care during pregnancy and abortion. The court said that if the legislature had intended care to encompass abortion then it would have inserted such a provision in its legislation. The court's point has some merit, but its obvious failure to adhere to well recognized restrictions regarding expansion of the law leaves us little reason for upholding the wisdom of its decision. It refuses to "expand" the law for petitioner's benefit, but does not hesitate to expand this same law for its own purposes. The court holds that the purpose of section 34.5 is to protect the mother and the child. In the light of the previously mentioned legislative intent, such an interpretation of section 34.5 would clearly be an expansion of the

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29 Id. at 849, 90 Cal. Rptr. at 470.
32 Id.
33 Id. at 849, 90 Cal. Rptr. at 470.
34 See text accompanying notes 11-20 supra.
law. If the legislature had intended protection of the fetus it could have specifically provided so.

This brings us to the court’s last argument of any possible merit. The majority contends that abortion is not part of pregnancy-related care. If abortion is not related to pregnancy, what is it related to? Abortion is the expulsion of the fetus at a time before it has acquired the power of sustaining an independent life.\textsuperscript{35} The early delivering is the abortion.\textsuperscript{36} In its primary meaning, the word “abortion” means miscarriage.\textsuperscript{37} Pregnancy is “the existence of the condition beginning at the moment of conception and terminating with delivery of the child.”\textsuperscript{38} Pregnancy is not terminated until the child is delivered and free of the womb; the act of delivering is so much a part of pregnancy that it almost seems impossible to think of one without thinking of the other. Since early delivering is an abortion, then it is clearly inescapable that abortion is related to pregnancy. Justice Herndon, dissenting in the Ballard case, found it inconceivable that one could deny that “the hospital, medical, and surgical care necessarily required in the performance of a therapeutic abortion on the consenting minor is ‘related to her pregnancy.’”\textsuperscript{39}

Consequently, under both semantic and logical lines of reasoning, abortion achieves pregnancy-related status, and, thus far, no valid reason appears to have been introduced which would prevent a minor from consenting to such care.

\section*{LOOKING TO THE FUTURE}

Let us assume, however, that the decision rendered in Ballard is not over-ruled by the California Supreme Court. This leaves us with the situation in which a minor’s parents can demand, and quite possibly secure, their child’s abortion. Since a child under the Ballard decision cannot consent to a therapeutic abortion, neither can she refuse one if her parents and the Therapeutic Abortion Committee decree it. It is true that the committee has to approve such an abortion in light of the guidelines set out in the Therapeutic Abortion Act,\textsuperscript{40} but for what reason should the committee be required or even allowed to pass judgment on the child’s case without

\begin{footnotesize}
\begin{enumerate}
\item State v. Magnell, 3 Pennewill (Del.) 307, 51 A. 606 (1901).
\item State v. Loomis, 90 N.J. 216, 100 A. 160, 161 (1917).
\end{enumerate}
\end{footnotesize}
her consent? When an adult wants an abortion, this committee of at least three licensed physicians is called upon to determine the extent of the risk to the mental and physical health of the mother should the pregnancy continue. If this committee does not feel that the danger is great enough, it can forbid the abortion. However, in the case where the parents of a minor demand that she have an abortion, the minor and her wishes would apparently be disregarded, and she would be forced to submit her future and that of her baby to the inquisitions and decision of this same committee. There is great difficulty in imagining a situation in which our legal system would allow such an injustice to occur in the form of an unwanted abortion on a woman solely because of her minority. Surely if one accepts the premise that failure to have an abortion could gravely impair the mental or physical health of the mother, then one is compelled to accept the converse. A law-imposed abortion could just as seriously impair the mental or physical health of an unwilling mother.

Conclusion

While it appears that an answer to this hypothetical problem is apparent under a logical interpretation of the nature and intent of existing law, the decision in Ballard points out the need for a more thorough and explicit solution. The obvious remedy would be a reversal of the holding in Ballard. A sound legal basis for a reversal is clearly and unmistakably present. Section 34.5 of the California Civil Code allows a minor to consent to all pregnancy-related care, and abortion is undeniably “related” to pregnancy. Hence, an enlightened interpretation of section 34.5 would allow any unmarried, pregnant minor to consent to a therapeutic abortion if all requirements of the Therapeutic Abortion Act were met.

The only other alternative is to broaden the consensual powers given to minors to include abortion. This would necessarily limit the existing power of parent over child, but would more fully accomplish our purported intentions to preserve and protect the health and life of our citizens. Recognition of the right of a minor to consent to an abortion would assist greatly in the eradication of the illegal abortion mills now serving this same class of persons. It would enable our minor citizens to secure the best in medical attention if they needed it, rather than seeking out the worst. Mississippi already has a provision which appears to allow a minor to consent to

41 Id.
an abortion. The Legislative Counsel of California is of the opinion that an unmarried, pregnant minor should be allowed to request a therapeutic abortion and consent to one should the committee grant it.

Only by reversal of Ballard or appropriate legislation can we be assured that all pregnant, minor, unmarried females will receive the best of medical attention so vital to their interests and the collective interest of the state. Only by such means can we also be assured that all pregnant, unmarried, unemancipated minors will be allowed to carry their babies to term without fear of interference from the state. And finally, in the situation where the parents of an unmarried, unemancipated minor demand that she have an abortion, we will feel secure in the knowledge that the law will no longer permit such a gross miscarriage of justice.

Colonel F. Betz

PARENT AND CHILD: PARENTAL IMMUNITY IN TORT ABOLISHED: Gibson v. Gibson, 3 Cal. 3d 914 (1971).

James Gibson, an unemancipated minor, was riding at night in a car driven by his father. The father stopped the car on the highway and directed James to get out of the car and fix the position of the wheels on the jeep which they were towing behind the car. James was hit by another car and injured while carrying out his father's directions. James filed a claim against his father alleging negligence. His father filed a general demurrer to the complaint on the ground that a minor child has no cause of action against his parent for simple negligence. The demurrer was sustained without leave to amend.

The key issue facing the court was whether a child may bring an action against his parent for simple negligence. Justice Sullivan, writing the opinion for the court, stated that parental immunity to tort actions instituted by their unemancipated children was now abolished. The rationale of the court was threefold: First, when there is negligence, the rule is liability, not immunity.


1 3 Cal. 3d 914, — P.2d — (January 25, 1971).
2 Id. at 916.
3 Justice McComb dissented with no opinion.
5 Id. at 922.
said that this basic doctrine of compensation for injury proximately caused by the wrongful action of another governs "in the absence of statute or compelling reasons of public policy." Second, the notion that family discord would result if such suits were allowed was held to be unsound. It was the court's position that family tranquility would more likely be disrupted by denying the action than by allowing it. Finally, liability insurance has a cushioning effect on intra-family suits. The court noted that liability insurance plays a key role in negligence actions by carrying the burden of payment with no direct loss to the parents.

The decision of the California Supreme Court in the Gibson case carved out a new area of tort liability and renounced a doctrine long-established in California. An understanding of the full impact of this decision requires a brief history of intra-family immunity.

There is no English common law doctrine of parental immunity in tort. The doctrine was first established in the United States 80 years ago by the Mississippi Supreme Court in Hewlett v. George. That case relied on no precedents and used as its only rationale the public policy of maintaining family harmony. However, a number of the states soon adopted this position. California followed the majority position in Trudell v. Leatherby which established parental immunity in order to minimize family conflict.

This doctrine of parental immunity has gradually eroded in the last several years. Parents have not been immunized from their willful or malicious torts. Moreover, the estate of a deceased parent in one case was held liable in a tort suit by a minor child. Furthermore, where a parent has forfeited his parental position by gross irresponsibility, he is no longer protected. Also, no protection is

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7 Id. at 920.
8 Id. at 919.
9 Id. at 922.
11 68 Miss. 703, 9 So. 885 (1891).
13 212 Cal. 678, 300 P. 7 (1931) (minor child injured while a passenger in a car driven by his stepmother).
17 Wright v. Wright, 85 Ga. App. 721, 70 S.E.2d 152 (1952) (where parent be-
given when another relationship, in addition to the parent-child relationship, exists at the time of the injury to the child.\textsuperscript{18} Finally, the parent as an employee is denied protection when he inflicts injury while in the scope of his employment.\textsuperscript{19} Similarly, the employer is denied protection when the parent-employee causes injury to his child.\textsuperscript{20} It should be noted that in all jurisdictions where intra-family immunity exists, no distinction has been drawn between suits where the child or the parent is the plaintiff.\textsuperscript{21}

California's doctrine of intra-family immunity has been under constant attack almost since its inception, with the courts doing everything but abolishing it. Strong language in \textit{Emery v. Emery}\textsuperscript{22} expressed distaste for the doctrine. Then inter-spousal immunity for intentional and negligent torts was abolished.\textsuperscript{23}

In 1971, the California courts found themselves in this position: spouses could sue each other in tort;\textsuperscript{24} siblings could also sue each other in tort;\textsuperscript{25} children could sue their parents during their minority over property interests.\textsuperscript{26} The \textit{Gibson} court could not find the logic in maintaining the immunity in negligent tort actions only.\textsuperscript{27} That immunity too has now been abolished.

Although the \textit{Gibson} case seems to be the inevitable culmination of the line of cases dealing with intra-family immunity, some of the ramifications of the decision may not have been given proper consideration by the court.

A crucial issue facing the court is public policy. Two conflicting policies compete for predominance: maintenance of family harmony comes intoxicated and inflicts injury to the child intentionally or negligently, he loses immunity).

\textsuperscript{18} \textit{Worrell v. Worrell}, 174 Va. 11, 4 S.E.2d 343 (1939) (carrier-passenger relationship existed which made the parent-child relationship incidental, allowing a cause of action by the child).

\textsuperscript{19} \textit{Lusk v. Lusk}, 113 W.Va. 17, 166 S.E. 538 (1932).

\textsuperscript{20} \textit{Chase v. New Haven Waste Material Corp.}, 111 Conn. 377, 150 A. 107 (1930); \textit{Stapleton v. Stapleton}, 85 Ga. App. 728, 70 S.E.2d 156 (1952). California is \textit{contra}. \textit{Myers v. Tranquility Irr. Dist.}, 26 Cal. App. 2d 385, 79 P.2d 419 (1938) (child was injured by the negligence of his father while the parent was within the scope of his employment. Held: defendant district not liable to the child).


\textsuperscript{22} 45 Cal. 2d 421, 430, 289 P.2d 218, 224 (1955).


\textsuperscript{24} \textit{Id.}


\textsuperscript{26} \textit{Preston v. Preston}, 102 Conn. 96, 128 A. 292 (1925); \textit{Lamb v. Lamb}, 146 N.Y. 317, 41 N.E. 26 (1895).

\textsuperscript{27} "It would be anomalous for us to give greater protection to property rights than to personal rights." \textit{Gibson v. Gibson}, 3 Cal. 3d 914, 919, n.7, — P.2d — (1971).
versus giving the child a remedy for a wrong. In this context the court apparently did not take into account the fact that a child may not bring suit in his own behalf; a guardian must bring suit for him. In most cases this would mean that the other spouse must bring suit for his or her child against the negligent spouse. Yet the court seems to conclude that public policy dictates that the rights of the child, such as keeping his property intact and protecting his physical well-being and potential earning power, must be enforced by the courts through their only available means—money damages.

The recovery of money damages raises the issue of the measure of the damages. The parent-child relationship presents some unique problems in this area. First, the parent must pay for the medical expenses of his minor child if he can afford them. If the parent does pay, it is difficult to see how the child could recover for these expenses in his negligence suit. Secondly, a parent usually may recover for the loss of earning capacity of his minor child before majority is reached where a third party has caused the injury. However, if the parent himself was the negligent party the law would seemingly deny him this recovery on a theory of unjust enrichment.

The Gibson court did not discuss fully the source of the funds to satisfy the judgment. To support its position, the court relied heavily on the availability of auto and home liability insurance to satisfy the child's judgment in most cases. But the court did not deal with the difficulties arising when the child is listed on the policy as an insured along with his parent, and the parent is held liable to the child. Could insurance companies insert clauses in their policies absolving themselves of liability in such cases? If such clauses could be inserted, then conceivably one of the bases for the decision would disappear. The important point to be gleaned from the above discussion is—irrespective of whether there is any problem with two insureds on the same policy, if parents are now liable

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28 "For every wrong there is a remedy." CAL. CIV. CODE § 3523 (West 1970).
30 See Note, 20 CALIF. L. REV. 342 (1931).
33 If the rule in McManus v. Arnold Taxi Corp., 82 Cal. App. 215, 255 P. 775 (1927), is applied to the case of a child suing his parent, the child should be able to recover for pain and suffering plus the loss of earning power after majority; the parent would have no recovery. See Note, 20 CALIF. L. REV. 342, 343 (1931).
to their children for simple negligence, the effect on the already-high insurance rates may be catastrophic. It is not beyond reason to argue that insurance companies could limit the amount of coverage to parents of large families or even deny them protection altogether.

The prevalence of liability insurance increases the possibility for collusion between parent and child. Such a possibility was foreseen by the court and discussed at length. The court observed that the California automobile guest statute was enacted to minimize fraud and collusion in the area of automobile accidents. The court, however, appears to assume that the child would be a guest in his parent’s car. Is it possible that when a parent directs his child to accompany him in the car that the child is a guest? Suppose the child asks his parents to drive him to school as he has no other means to get there. Would the law consider him a guest when his parents have a duty to provide for his education? That a child is a guest in his parent’s car would appear to be an unwarranted assumption. In point of fact, the guest statute seems to have little limiting effect on the possibilities of fraud and collusion when a child is injured in his parent’s automobile.

Another area which apparently escaped the attention of the court is the imputation of negligence concept embodied in Section 17150 of the California Vehicle Code. If the husband is the owner of the automobile, California law imputes negligence to him when his wife is driving with his express or implied permission. If,

37 "It would be a sad commentary on the law if we were to admit that the judicial processes are so ineffective that we must deny relief to a person otherwise entitled because in some future case a litigant may be guilty of fraud or collusion." Gibson v. Gibson, 3 Cal. 3d 914, 920, — P.2d — (1971), quoting with approval, Klein v. Klein, 58 Cal. 2d 692, 696, 376 P.2d 70, 73 (1962).
38 "No person riding in or occupying a vehicle owned by him and driven by another person with his permission and no person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of the vehicle or against any other person legally liable for the conduct of the driver on account of personal injury to or the death of the owner or guest during the ride, unless the plaintiff in any such action establishes that the injury or death proximately resulted from the intoxication or willful misconduct of the driver." CAL. VEH. CODE § 17158 (West 1970).
40 “Every owner of a motor vehicle is liable and responsible for death or injury to person or property resulting from a negligent or wrongful act or omission in the operation of the motor vehicle, in the business of the owner or otherwise, by any person using or operating the same with the permission, express or implied, of the owner.” CAL. VEH. CODE § 17150 (West 1970).
therefore, a child is injured while his mother is driving negligently, the child apparently has a cause of action against both parents.\textsuperscript{42}

A crucial question which underlies this entire area is how far will the courts extend this new right of children. For instance, will a suit lie against the parents for pre-natal injuries negligently inflicted on the fetus? The rule in California is that a child may recover against third persons for injuries inflicted on him before he was born\textsuperscript{43} so long as the suit is brought within six years after birth.\textsuperscript{44} The rationale of the Gibson case may compel extention of this cause of action to parents where they have been the tortfeasors. Here again problems may arise concerning the family harmony when one parent must act as guardian to bring suit against the other in behalf of their child.

Examining the question in another light, will parents now be able to sue their children in tort? The general rule to date is that no such suit will lie.\textsuperscript{45} Will the Gibson decision, however, open the gates to litigation by parents against their children? It should be noted that the child’s lack of assets may minimize the litigation in this area.

Another area into which this new right of children may be extended is into the homes of unusual religious practioners. For example, may a child now sue his Christian Scientist parents for failing to give him a blood transfusion? This area raises some first amendment questions, the existence of which the Gibson court did not discuss.

Finally, it must be asked, may a child now sue his parents for such trivial imprudences such as not taking the child to the doctor when he has a sore throat or to the dentist when he has a tooth ache? If damages are suffered, perhaps a suit will lie. In fact, parents might reconsider having children in view of the new complex legal problems involved.

The existence and extent of these problems will be determined by future decisions. One may only speculate now as to the implications of the Gibson decision. The court felt that the child’s remedy was of greater importance than the problems mentioned in this note. The result remains to be seen.

\textit{Steven D. Siner}

\textsuperscript{42} Id. (husband was driving but the court left unanswered the question if the same rule applies if the wife is driving and the husband is the owner of the vehicle with management and control over it). \textit{See also} Brunn, \textit{California Personal Injury Damage Awards To Married Persons}, 13 U.C.L.A. L. Rev. 587, 601 (1965).


\textsuperscript{45} \textit{See} Shaker v. Shaker, 129 Conn. 518, 29 A.2d 765 (1942).

The case of Majewsky v. Empire Construction Co., Ltd.1 involved a variation on the common middleman escrow situation.2 In that case, Cuslidge, as seller, and Waugh, as purchaser, agreed3 to give escrow instructions to an escrow holder for the sale of Blackacre for $11,000. Waugh, a judgment debtor, hired an agent to find a purchaser for Blackacre for $12,500. Waugh’s agent agreed4 with Majewsky to give escrow instructions on the sale of Blackacre for $12,500. There were technically two escrows, but the escrow holder was the same5 and the two escrows were closed at the same time.6

In reality Waugh is acquiring the land from Cuslidge and reselling it to Majewsky for a $1,500 profit. Since Waugh’s agent signed the agreement with Majewsky as “agent for seller,” Majewsky had no knowledge of Waugh’s part in the transaction. The title search Majewsky ordered showed title free and clear in Cuslidge because the Cuslidge-Waugh agreement had not yet been acted upon.

As a result of Majewsky, problems will now arise where judgment liens have previously been recorded against the middleman. According to Section 674 of the California Code of Civil Procedure,7 a judgment once recorded becomes a lien upon all the real property held or subsequently acquired by a judgment debtor. Thus, the

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2 A common middleman escrow occurs where A, as grantor, and B, as grantee, give instructions to X, the escrow holder, for the sale of Whiteacre. Later B, as grantor, and C, as grantee, also give instructions to X for the sale of Whiteacre. The position of B is that of a middleman, and an escrow is used, thus the term “middleman escrow.” See M. Ogden, California Real Property Law 21.4(4)(c) (1956).
3 In Majewsky, a printed form identical to that used in the Cuslidge-Waugh transaction was used. However, it did not contain the names of Cuslidge or Waugh.
4 In Majewsky, the county recorder’s stamp on both deeds read “1965 Jan. 28 2:24 P.M.” Thus, C’s deed to W preceded W’s deed to Majewsky by less than sixty seconds.
5 M. Ogden, California Real Property Law 21.4(4)(c) (1956).
6 Cal. Code Civ. Proc. § 674 (West 1954) provides in part: “an abstract of judgment or decree of any court of this State including a judgment of any court sitting as a small claims court, or any court of record in the United States . . . may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county owned by him at the time, or which he may afterwards and before the lien expires, acquire.”
property becomes liable for the judgment debt. In *Majewsky* the California Supreme Court applied section 674 so that the creditors of the middleman could attach his transient interest. As a result, the creditors of the middleman, who held title momentarily, were allowed to encumber the title of the subsequent bona fide purchaser who had no knowledge of the middleman's position. In so holding the California Supreme Court may have created a Mecca for judgment creditors.

The purpose of this note is to explore the remedies the court could have applied in order to provide a more satisfactory and equitable disposition of future middleman escrow cases.

**BACKGROUND**

The *Majewsky* court refused to apply or interpret any existing law which would leave the subsequent grantee's title unencumbered. Therefore we must first examine the available remedies.

Prior to *Majewsky*, a California Court of Appeal had held that a judgment lien did not attach to a mere naked title but only to the judgment debtor's actual interest in the real estate.\(^8\) If the debtor held as a trustee, he would possess only naked title and no liens would attach.\(^9\) While recognizing this to be the law, the *Majewsky* court refused to regard the middleman as a trustee with only naked title.\(^10\) The court rejected two theories under which a trust could be imposed—namely the resulting and constructive trust.

The author feels that the court may have been correct in rejecting the resulting trust theory. However, the court was probably wrong in not recognizing that this middleman escrow gave rise to a constructive trust.

**RESULTING TRUST THEORY**

The underlying theory of a resulting trust is that the intent of the parties be carried out. Thus, the general rule\(^11\) regarding resulting trusts in land sale situations is that where a transfer of real property is made to one person and the purchase price is paid by

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9 Id.
10 Furthermore, the courts have held that a judgment creditor does not have the status of a bona fide purchaser and is treated as a purchaser with notice. Therefore he is subject to any latent equities which could be asserted against the debtor. Majewsky, 2 Cal. 3d 478, 490, 85 Cal. Rptr. 819, 827 (1970).
another, a resulting trust arises in favor of the person who paid the purchase price, absent any showing that either party intended that the other take a beneficial interest.

In all types of resulting trusts, intention is an essential element. However, that intention need not be explicitly stated. In fact, when there is a transfer of real property to one and the consideration is paid by another, equity infers that the transferee was not intended to receive and hold title as the beneficial owner. Instead, a trust arises in favor of the party who actually supplies the valuable consideration.

A good example of the resulting trust is found in *Murphy v. Clayton*. There the plaintiff and his deceased friend each paid half the purchase price. Title was taken in the decedent’s name only. At his death, creditors of the decedent tried to assert their claims against the entire property. The creditors argued they had priority over the plaintiff’s secret equity, but the court imposed a resulting trust in favor of the plaintiff as to his one half interest in the property.

Justice Mosk, dissenting in *Majewsky*, felt that *Majewsky* was precisely the type of case in which an intent should be presumed by operation of law under Section 853 of the California Civil Code. The “transfer of real property” that the statute refers to was initially made to the judgment debtor-middleman. And the “consideration thereof” was paid entirely by the subsequent grantee, Majewsky, since his were the only funds deposited into escrow.

To the contrary, the *Majewsky* majority took the position that a resulting trust does not arise solely on the basis that money or property of one person has been used by another to purchase real estate. Instead it is based on the fact that one has intentionally advanced to the other the consideration to make a purchase in the other’s name. The trust arises because it is the natural presumption that the ostensible purchaser should acquire and hold property for the one who paid the purchase price. Thus, the intent must be present, though it need not be expressed.

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15 *Id.*
16 Cal. Civ. Code § 853 (West 1954) provides: “When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.”
18 Lezinsky v. Mason Malt Liquor Distilling Co., 185 Cal. 240, 243, 198 P. 884,
The author feels that the Majewsky majority was correct in its interpretation of Section 853. Although that section does not mention intent, the courts have found intent to be a crucial element. Consequently, it would be straining the doctrine of inferred intent to apply a resulting trust in Majewsky. How could the subsequent grantee intend that the debtor-middleman take title for him when he had no knowledge of the debtor's existence?

**Constructive Trust Theory**

The underlying principle of a constructive trust is the equitable prevention of unjust enrichment due to fraud or the abuse of a confidential relationship. A constructive trust is raised to compel a person who has received property fraudulently to transfer it to the person defrauded.

Thus, if one person uses another's money without the owner's consent, a constructive trust, and not a resulting trust, will be imposed. A constructive trust will also be imposed where property has been transferred to the wrong transferee.

In 1886 a California court said that equity will impress a constructive trust where legal title to property has been obtained fraudulently. A constructive trust will also be imposed where the property is obtained through misrepresentation, concealment or under any inequitable circumstances.

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886 (1921); see Berniker v. Berniker, 30 Cal. 2d 439, 182 P.2d 557 (1947); Treager v. Friedman, 79 Cal. App. 2d 151, 179 P.2d 387 (1947).

19 1 J. PERRY, THE LAW OF TRUSTS AND TRUSTEES § 126 (1929); 4 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 80 at 2964 (1960) [hereinafter cited as WITKIN].

20 See Comment, 19 Hastings L. J. 1268 (1968), for a general discussion of unjust enrichment in constructive trusts.

21 "The trust is passive, the only duty being to convey the property," 4 WITKIN § 87 at 2970 (1960).

22 CAL. CODE CIV. PROC. § 2224 (West 1954) provides that "one who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act, is, unless he has some other right thereto, an involuntary trustee, of the thing gained, for the benefit of the person who would otherwise have had it."

23 It has been called the most important contribution of equity to the remedies for the prevention of unjust enrichment, J. DAWSON, UNJUST ENRICHMENT 26 (1951). A constructive trust is the formula through which the conscience of equity finds expression. Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386, 122 N.E. 378, 380 (1919).

24 RESTATEMENT (SECOND) OF TRUSTS § 440(b) (1950).


In the past a constructive trust has been imposed where a parolee from state prison paid for land and had it placed in the name of a woman who had made fraudulent promises to marry him. Similarly, another court has held that a constructive trust may be imposed where a real estate agent represented that he would obtain land for his principal but instead he purchased it for himself. The court imposed the trust because the agent had acquired property to which he was not justly entitled.

A constructive trust is founded on the principle that no one can take advantage of his own wrong. It extends to practically any case where there is a wrongful acquisition or detention of property. Thus, unlike the resulting trust, intent is not a crucial element. Rather, the question is whether there is any wrongful acquisition or detention of property. Consequently, the applicability of the constructive trust theory is dependent upon a finding of unjust enrichment.

In Majewsky the California Supreme Court found no fraudulent act by the judgment debtor nor any unjust enrichment. The Majewsky majority held that the only possibility of fraud was that of the title company in not requiring the judgment debtor to deposit his own money for the purchase of the property. The court refused to impute fraud to the judgment debtor.

However, this author feels that both fraud and unjust enrichment are evident. As Justice Tobriner points out in his dissent, there was no need to impute wrongdoing to the judgment debtor because it was clear on the record. The judgment debtor submitted a grant deed into escrow. That type of deed warrants, as a matter of law, that the grantee’s estate is “free from encumbrances done, made, or suffered by the grantor. . . .” Since encumbrances include

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33 Majewsky, 2 Cal. 3d 478, 85 Cal. Rptr. 819 (1970).
34 For a definition of fraud see Ward v. Taggart, 51 Cal. 2d 736, 336 P.2d 534 (1959).
36 CAL. CIV. CODE § 1113 (West 1954) provides: “From the use of the word ‘grant’ in any conveyance by which an estate of inheritance or fee simple is passed, the following covenants, and none other, on the part of the grantor for himself and for his heirs, to the grantee, his heirs, and assigns, are implied, unless restrained by express terms contained in such conveyance. . . .” That such estate is at the time of
all liens upon real property, the judgment debtor fraudulently represented that his land was free and clear of liens. Furthermore, the debtor-middleman did not reveal to his grantee or to the title company that seven abstracts of judgments, or liens had been recorded against him. This concealed information was material, and both reliance thereon and injury therefrom are clear. If the judgment debtor knew or should have known of the recorded abstracts of judgments—and the facts in Majewsky indicate he did know of the liens—his failure to disclose this fact constitutes fraud. Accordingly, a constructive trust could be raised.

In Majewsky counsel for the defendant apparently unsuccessfully argued that since defendant's grantee purchased the property in reliance upon an abstract of title which he himself sought, he was not misled by the judgment debtor. However, this is not the law. The courts have held that an independent investigation or an examination of the property does not preclude reliance on representations when the falsity of the statement is not apparent from a reasonable inspection. Likewise, personal inspection is no defense when the conditions are not visible and are known only to the seller. For example, the courts have held that even though a vendee had examined the premises before purchasing, his recovery for damages was not barred because his inspection, no matter how thorough, could not have revealed the defect.

When Majewsky, the debtor's grantee, examined the property, title was still in the original grantor's name (Cuslidge). Therefore, Majewsky could not have found the defect since it did not exist until after his examination. Thus Majewsky's examination of the property would not prevent the imposition of a constructive trust.

the execution of such conveyance free from encumbrances done, made, or suffered by the grantor, or for any person claiming under him."

37 Id. § 1114 provides: "The term 'encumbrances' includes taxes, assessments, and all liens upon real property."


39 The word lien "in its broadest sense and common acceptance, denotes a legal claim or charge on property, either real or personal, as security for payment of some debt or obligation and includes every case in which personality or realty is charged with payment of a debt." Gray v. Horne, 48 Cal. App. 2d 372, 375, 119 P.2d 779, 780 (1942).

40 Cal. Civ. Code § 1710.33 (West 1954) provides: "a deceit, within the meaning of the last section is . . . the suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; . . . "


The cases also demonstrate the invalidity of an argument that his grantee was bound by constructive notice of the seven recorded judgments.\(^4\) It is established that the purpose of the recording act is to protect bona fide purchasers for value.\(^5\) It does not operate to protect those who make fraudulent misrepresentations.\(^4\)

A constructive trust should have been imposed in Majewsky, not only because of the debtor's misrepresentations and fraud, but also because of his unjust enrichment,\(^4\) which is clear from the record. The debtor conveyed land worth $12,500, but encumbered with liens worth $50,000. In effect, the interest he conveyed was valueless.\(^4\) In return the debtor received a $1,500 profit on the sale of the property. Thus, unjust enrichment provides another basis for raising a constructive trust.

**Escrow's Effect on Constructive Trust**

The majority opinion was quick to point out that the decision to use a single escrow was made by the title company and not by the judgment debtor. Apparently the court reasoned that the plaintiff's constructive trust theory was based on the use of a single escrow. The fact that a single escrow was used does make it easier to trace the misappropriated funds, but it neither helps nor hinders the imposition of a constructive trust.

The differences between the single and double escrow are almost inconsequential insofar as they affect the raising of a constructive trust. In the single escrow, the escrow holder simplifies the procedure by treating the two simultaneous conveyances as one. In the more common double escrow arrangement, the dual instructions for the two transactions are kept separate and treated

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\(^4\) The recorded abstracts of judgment are public records. The victims of fraudulent misrepresentations as to title, however, are not denied relief under a theory of constructive public notice of public records. Recovery is barred only if reliance on the representations was not justifiable. Seeger v. Odell, 18 Cal. 2d 409, 414, 115 P.2d 977, 980 (1941); Barder v. McClung, 93 Cal. App. 2d 692, 696, 209 P.2d 808, 811 (1949).

\(^5\) Seeger v. Odell, 18 Cal. 2d 409, 115 P.2d 977 (1941); Annot., 136 A.L.R. 1291.

\(^4\) If the judgment debtor did not know of the abstracts of judgment (the evidence in Majewsky apparently did not suggest this) the transaction would be tainted by mutual mistake. Since section 2224 of the California Civil Code provides an involuntary (constructive) trust may be imposed on grounds of either fraud or mistake, the distinction is moot.

\(^4\) It has been suggested that the requirement of unjust enrichment has engendered a fight between those who want to expand the common law reference to its ultimate ethico-judicial principles and those content to stay clearly in defined paths. A victory for those favoring expansion has seemingly occurred in a recent California decision. See The Necessity for Unjust Enrichment in Constructive Trusts in California: Elliott v. Elliott, 19 Hastings L. J. 1268 (1968).

\(^4\) Majewsky, 2 Cal. 3d 478, 491, 85 Cal. Rptr. 819, 822 (1970).
as two distinct conveyances. No matter which type of escrow was used, a constructive trust could have been imposed in Majewsky.

In Majewsky the fact that a single escrow was used merely makes it easier to trace the misappropriated funds, since the two conveyances were kept together by the escrow. The use of this type of escrow in Majewsky seems more than mere happenstance because, due to the arrangement, the debtor-middleman was not required to put up any money. The outstanding judgments against the debtor totalled $50,000 and one would wonder whether he could have raised the $11,000 needed to complete his purchase from the original grantor (Cuslidge).

It makes no difference who chose to use a single escrow because in Majewsky the unjust enrichment is plain and fraud is also present. Therefore, it would appear the remedy of imposing a constructive trust is available whether a single or double escrow was used.

Throughout its discussion of both resulting and constructive trusts, the court emphasized that the provision of section 674 would be frustrated if its efficacy were conditioned upon the length of time the judgment debtor owned the property. However, a more equitable result can be reached in cases of this kind without frustrating the purpose of section 674 of the California Code of Civil Procedure, as the Majewsky court feared. Section 674 was obviously enacted to protect creditors and put bona fide purchasers from the judgment debtor on notice by way of recording. In Majewsky the liens were recorded, but the bona fide purchaser relied on the preliminary title report showing title free and clear. Thus, at the time Majewsky searched the records, nothing was revealed since title was still in the original grantor (Cuslidge).

In searching for possible remedies such as constructive or resulting trusts, the purpose is not to emasculate section 674 but to avoid an inequitable application of it.

**DUTIES OF THE EScROW**

Since the Majewsky court did not reject the agency liability of the escrow holder, this may be the only relief bona fide pur-

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49 The rules applicable to disclosure of escrow instructions in a middleman escrow situation are as follows:

A is entitled to see B's instructions relative to the purchase from A, but he is not entitled to see information as to the instructions between B and C.

B is entitled to see either A or C's instructions.

C is entitled to see only the instructions concerning the sale from B to C.
chasers presently possess. An escrow holder is the agent of all of the parties to the escrow prior to the performance of the conditions of the escrow. As such he bears a fiduciary relationship to the escrow parties, owing to each the obligation to act according to the ordinary principles of agency.

The escrow holder must comply strictly with the instructions of his principal. If he disposes of the property of his principal in violation of these instructions, or otherwise breaches that duty, he will be liable for any loss occasioned thereby. It is also the duty of the escrow holder to exercise ordinary skill and diligence in his employment. If he acts negligently he is liable for any resulting loss.

Thus, in Majewsky the title company could not disburse the $12,500 deposited by Majewsky until it had received a deed from the debtor (Waugh) to Majewsky. Even though the buyer may have deposited money into the escrow, the buyer retains title to the money until the conditions of the transfer have been performed. If the seller does not comply with the conditions, the money is refundable to the buyer. Until the seller’s compliance with the condition, the escrow must protect the buyer by withholding from the seller the money placed in the escrow and by returning it to the buyer on failure of the prescribed event. Therefore, Majewsky’s funds are his own until disbursed by the escrow.

X, the escrow holder, is under no legal duty to inform A or C as to the terms or existence of the escrow to which either is not a party, assuming no express instructions to the contrary. M. Oden, California Real Property Law § 21.4(4)(c) (1956).

One of the duties of an agent is to disclose relevant facts to his principal, see Cal. Civ. Code § 2020 (West 1954).


Id.


By depositing into escrow a grant deed with warranties of title which were not performed, and by not revealing the existence of the judgment liens, the judgment debtor led the title company into the mistaken belief that he held an unencumbered title. This mistaken belief brought about the wrongful appropriation of Majewsky’s funds. In lieu of the Majewsky holding, the buyer’s only remedy may be in proceeding against the escrow holder on a negligence basis. In Majewsky the negligent act of the escrow would be the failure to disclose to the subsequent grantee (Majewsky) that his grantor was actually a debtor. Another negligent act of the escrow could be its acceptance of a deed whose warranties were defective.

Even if a double escrow were used, the injured party might still be able to proceed against the escrow holder for negligence, since the escrow holder may have violated his fiduciary duty by forwarding a grant deed falsely showing title free and clear.

CONCLUSION

The court in Majewsky failed to find a resulting trust. This conclusion appears to be valid because of the difficulty with the intent element.

The court erred, in the author’s opinion, when it refused to apply a constructive trust when all the elements were present. The plaintiff (Majewsky) payed $12,500 into escrow, presumably to the original grantor (Cuslidge). He was unaware of the judgment debtor’s interest in the property. He never consented to the judgment debtor’s (Waugh) gaining any interest in the property. “To now saddle plaintiff with liens for some $50,000 worth of indebtedness—approximately four times the value of the property—merely because the judgment debtor acquired a theoretical transitory title is the ultimate in exalting form over substance.”

The application of a constructive trust would bring about the most equitable result under the circumstances. The original grantor

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61 As Justice Tobriner’s dissent astutely points out, the argument for constructive trust may seem to rely on circular reasoning because the assumption that the judgment liens would attach to the property is what gives rise to the duty to disclose the liens. However, the raising of a constructive trust prevents the liens from attaching and thus contradicts that assumption.

The land originally conveyed by Cuslidge may also be held in constructive trust, since a portion of the trust fund was paid to Cuslidge in consideration for the title to the land in question. As a result, the subsequent grantee (Majewsky) would have priority over other creditors of the debtors because they are beneficiaries under the trust. 4 WITKIN § 56 at 2941 (1960); RESTATEMENT (SECOND) OF TRUSTS § 202 (1937).


has sold his property for valuable consideration; the judgment
debtor gains nothing and stands to lose more; the position of the
judgment creditors remains unchanged; and the subsequent grantee
(Majewsky) gains the land with an unencumbered title.

If a constructive trust is not applied, the bona fide purchaser
may have some protection on the basis of the agency liability of
the escrow. This, however, shifts the responsibility from the judg-
ment debtor—the real culprit—to the escrow holder, who may
be entirely innocent.

The court, in its zeal to protect judgment creditors, has squan-
dered the rights of the always-to-be-protected bona fide purchaser.
This is a trend which should be curtailed immediately.

The author urges the California Supreme Court to reconsider
its position in Majewsky and overrule it when the opportunity pre-
sents itself. An alternative remedy would be a statutory amendment
to Section 853 of the California Civil Code explaining precisely
what type of intent, if any, is required before a resulting trust will
be imposed.

In any event, a Supreme Court reversal or a statutory amend-
ment is required in order to destroy the Mecca which has been
unjustly created for judgment creditors.

Raymond J. Davilla, Jr.