26 Cal. 4th 1013, *; 29 P.3d 797, **;
2001 Cal. LEXIS 5598, ***; 111 Cal. Rptr. 2d 336

1 of 19 DOCUMENTS

GOLDEN GATEWAY CENTER, Plaintiff, Cross-defendant and Appellant, v. GOLDEN GATEWAY TENANTS ASSOCIATION, Defendant, Cross-complainant and Respondent.

S081900

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 1013; 29 P.3d 797; 2001 Cal. LEXIS 5598; 111 Cal. Rptr. 2d 336

August 30, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:
Superior Court of California, San Francisco County. Court of Appeal of California, First Appellate District, Division Three. A082319. Super. Ct. No. 981081. John E. Dearman, Judge.

DISPOSITION:
Affirmed the judgment of the Court of Appeal.

COUNSEL:
Attorneys for Appellant:

Bartko, Zankel, Tarrant & Miller, Glenn P. Zwang and Howard L. Pearlman, for Plaintiff, Cross-defendant and Appellant.

James S. Burling and Harold E. Johnson for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiff, Cross-defendant and Appellant.

Edward J. Sack; Law Offices of Jo Anne M. Bernhard and Jo Anne M. Bernhard for California Business Properties Association and International Council of Shopping Centers as Amici Curiae on behalf of Plaintiff, Cross-defendant and Appellant.

Pahl & Gosselin, Stephen D. Pahl and Karen M. Kubala for California Apartment Association as Amicus Curiae on behalf of Plaintiff, Cross-defendant and Appellant.

Attorneys for Respondent:

De Vries & Gold, Law Offices of Robert De Vries, Carolyn Gold and Robert De Vries for Defendant, Cross-complainant [***2] and Respondent.

Jonathan P. Hiatt; Altshuler, Berzon, Nussbaum, Rubin & Demain and Scott A. Kronland for American Federation of Labor and Congress of Industrial Organizations, as Amicus Curiae on behalf of Defendant, Cross-complainant and Respondent.

Alan L. Schlosser; Morris D. Lipson; Chapman, Popik & White and Susan M. Popik for American Civil Liberties Union of Northern California as Amicus Curiae on behalf of Defendant, Cross-complainant and Respondent.

Michael Somers, Gerald J. Van Gemert and James Arthur Judge for Association of Alternative Postal Systems, Inc., Los Angeles Newspaper Group, Advertising Consultants, Inc., CIPS Marketing Group, Inc., Turtle Ridge Media Group, Inc., and National Directory Company, Inc., as Amici Curiae on behalf of Defendant, Cross-complainant and Respondent.

JUDGES:
BROWN, J. WE CONCUR: BAXTER, J., CHIN, J. CONCURRING OPINION BY GEORGE, C.J. DISSENTING OPINION BY WERDEGAR, J., WE CONCUR: KENNARD, J., KLEIN, J.*

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Three,

assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINIONBY:
BROWN

OPINION:

[*1016] [**798] In a groundbreaking [***3] decision over 20 years ago, we departed from the First Amendment jurisprudence of the United [**799] States Supreme Court and extended the reach of the free speech clause of the California Constitution to privately owned shopping centers. (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 (*Robins*), affd. *sub nom. Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035.) Since then, courts and commentators have struggled to construe *Robins* and determine the scope of protection provided by California's free speech clause. Today, we clarify *Robins* and consider whether a tenants association has the right to distribute its newsletter in a privately owned apartment complex under article I, section 2, subdivision (a) of the California Constitution. n1 We conclude it does not.

n1 All further undesignated article references are to the California Constitution unless otherwise indicated.

BACKGROUND [***4]

Golden Gateway Center (Golden Gateway), a limited partnership, owns a retail and residential apartment complex (Complex) in downtown San Francisco. The Complex consists of four high-rise buildings and a group of townhouses and contains 1,254 residential units. Although the Complex contains a number of retail establishments at the ground level, these retail establishments are separate from the residential units and do not have access to the residential portions of the Complex.

In the residential portion of the Complex, Golden Gateway emphasizes privacy and security. Consistent with this emphasis, Golden Gateway provides doormen during the daytime and 24-hour roving security patrols, and limits access to residential tenants and their invitees. Golden Gateway also [*1017] promulgates building standards incorporated by reference in every residential lease agreement. At all relevant times, these standards banned all solicitation in the building. As part of their lease agreements, all residential tenants agree to abide by these standards, and Golden Gateway retains the right to "make amendments to the Building Standards and adopt further Building Standards as in Owner's opinion are reasonable [***5] or desirable for the proper and orderly care, use and operation of the Apartment and Building and its grounds ...."

In 1982, a group of residential tenants in the Complex formed a tenants association called the Golden Gateway Tenants Association (Tenants Association). Since its inception, the Tenants Association has periodically distributed a newsletter on or under the apartment doors of all residential tenants. For approximately 11 years, building management did not object to the distribution of these newsletters.

In 1993, however, the manager of the Complex asked the Tenants Association to stop distributing newsletters on or under apartment doors. In support, the manager cited the prohibition against "soliciting within the building" found in the building standards in effect at that time. The Tenants Association responded with several letters from attorneys asserting its constitutional right to free speech and threatening legal action. Hoping to avoid litigation, the manager told the Tenants Association that "Golden Gateway Center management will not oppose the distribution of newsletters under apartment doorways by members of the Golden Gateway Tenants' Association provided [***6] it is done in a reasonable manner." Based on this representation, the Tenants Association resumed its "practice of distributing GGTA newsletters to all tenants by sliding them under doors ...." Neither building management nor the Tenants Association, however, discussed or defined what "a reasonable manner" meant.

Golden Gateway hired a new building manager in 1995. In early 1996, the Tenants Association sharply increased its leafletting activity and distributed at least eight separate newsletters and notices from February to May. Because of this increased activity, the new manager asked the Tenants Association to scale back its leafletting and to limit its distributions to newsletters. Citing the First Amendment of the United States Constitution, the Tenants Association refused [**800] and continued to distribute its newsletter to all residential tenants.

Soon after, Golden Gateway revised its building standards. The revised standards stated in relevant part: "Any solicitation within the building is [*1018] absolutely forbidden. This includes, for example, solicitation for profit, political purpose or any other

reason, whether in writing or in person. ... [P] Leafleting within the building [***7] is absolutely forbidden. This includes, for example, posting leaflets or notices anywhere in the buildings other than on the bulletin boards located in the laundry rooms, sliding leaflets or other papers underneath tenants' doors, placing leaflets or other papers on or about tenants' doors, or leaving multiple copies of leaflets or other papers in any common areas. The only exception to this rule is where a tenant specifically requests that papers be delivered to him or her either under or in front of his or her door. ..." Golden Gateway mailed a copy of the new standards to each residential tenant and explained that each tenant must comply with these standards pursuant to his or her lease agreement.

Despite the new building standards, the Tenants Association continued to distribute its newsletter door-to-door. Golden Gateway then filed a complaint, seeking to enjoin the Tenants Association from distributing leaflets "in and around their apartment doors." The Tenants Association responded by filing a cross-complaint for injunctive and declaratory relief. The cross-complaint contended, among other things, that the Tenants Association had a constitutional right to distribute its newsletters. [***8]

The trial court initially issued a preliminary injunction enjoining the Tenants Association from leafletting. After trial, however, the court dissolved the injunction and held that the Tenants Association had "a binding contractual right to distribute its newsletter throughout" the Complex "by placing its newsletters under the doors of all tenants, on the door knobs of tenants, and on bulletin boards that are provided." Upon resolving the case on contractual grounds, the court declined to reach the constitutional free speech issues.

The Court of Appeal reversed. After concluding that Golden Gateway did not enter into "a binding lease agreement modifying its Building Standards" with the Tenants' Association based on the first manager's representation, the court held that the Tenants Association had no right to leaflet in the Complex under the United States or California Constitutions.

We granted review to determine: (1) whether the tenants association of a large apartment complex has the right, under the California Constitution, to distribute its newsletter and other leaflets concerning residence in the complex to tenants in the building; and, if so, (2) whether a ban on the distribution [***9] of these materials to tenants constitutes an unreasonable time, place and manner restriction on free speech.

[*1019] **DISCUSSION**

I

In *Hudgens v. National Labor Relations Bd.* (1976) 424 U.S. 507, 519-520, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (*Hudgens*), the United States Supreme Court held that a union had no federal constitutional right to picket in a shopping center because the actions of the private owner of the shopping center did not constitute state action. *Hudgens*, *supra*, at 518-519, expressly reversed *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968) 391 U.S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (*Logan Valley*), by clarifying and extending the court's ruling in *Lloyd Corp., Ltd. v. Tanner* (1972) 407 U.S. 551, 570, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (*Lloyd*) (holding that political leafletters had no federal free speech rights in a privately owned shopping mall). As acknowledged by both parties, *Hudgens* and *Lloyd* establish that the Tenants Association has no right to distribute its newsletter door-to-door under the United States Constitution. The lack of federal constitutional protection does not, however, "limit the [***10] authority of the State to exercise its police power or its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution." (*Pruneyard Shopping Center v. Robins*, *supra*, [**801] 447 U.S. at p. 81.) Thus, the Tenants Association may still prevail if the free speech clause of the California Constitution protects its leafetting activities. (Art. I, § 2, subd. (a).) As explained below, we conclude it does not.

Article I, section 2, subdivision (a) states: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." Unlike the United States Constitution, which couches the right to free speech as a limit on congressional power (see U.S. Const., 1st Amend.), n2 the California Constitution gives "every person" an affirmative right to free speech (Cal. Const., art. I, § 2, subd. (a)). Accordingly, we have held that our free speech clause is "more definitive and inclusive than the First Amendment ...." (*Wilson v. Superior Court* (1975) 13 Cal. 3d 652, 658, 532 P.2d 116, 119 Cal. Rptr. 468.) [***11]

n2 The First Amendment of the United States Constitution states in relevant part: "Congress shall make no law ... abridging the freedom of speech ...."

Consistent with this more expansive interpretation of California's free speech clause, we have declined to follow the First Amendment jurisprudence of the United States Supreme Court in certain circumstances. Perhaps [*1020] our most noteworthy departure from this jurisprudence occurred in *Robins*. In *Robins*, the majority reversed *Diamond v. Bland* (1974) 11 Cal. 3d 331, 113 Cal. Rptr. 468, 521 P.2d 460 (*Diamond II*), and held that "sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers even when the centers are privately owned." (*Robins*, *supra*, 23 Cal. 3d at p. 910.) In doing so, the majority rejected the approach of *Hudgens* and *Lloyd* and reasserted the independent force of the California Constitution. n3 (See *Robins*, at pp. 908-909.)

n3 In holding that high school students had a state constitutional right to solicit signatures in a privately owned shopping center, *Robins* weighed the students' right to free speech against the property rights of the owner of the shopping center. (*Robins*, *supra*, 23 Cal. 3d at pp. 910-911.) *Robins* did not, however, consider the free speech rights of the owner under the California Constitution. (See *Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th 468, 513 (*Gerawan*) [holding that California's free speech clause grants "a right to refrain from speaking at all as well as a right to speak freely"].) We express no opinion here as to the role of these rights in ascertaining the scope of free speech rights guaranteed by article I, section 2, subdivision (a).

[***12]

Despite the clarity of its ultimate disposition, *Robins* was less than clear "as to the scope of the free speech rights it was recognizing." (Brownstein & Hankins, *Pruning Pruneyard: Limiting Free Speech Rights Under State Constitutions on the Property of Private Medical Clinics Providing Abortion Services* (1991) 24 U.C. Davis L.Rev. 1073, 1090 (*Pruning Pruneyard*).) For example, *Robins* did not address the threshold issue of whether California's free speech clause protects against only state action or also against private conduct. (See *Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal. App. 3d 816, 838, 182 Cal. Rptr. 813 (*Laguna Publishing*) [finding *Robins* "intriguing" because it never discussed or impliedly dealt with "the phenomenon of *state action*"].) *Robins* also provided little guidance on how to apply it outside the large shopping center context. (*Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. at p. 1092 [*Robins* did not provide "useful guidance on how this new constitutional journey was to proceed"].) Not surprisingly, numerous legal commentators have pointed out and questioned [***13] these curious omissions in *Robins*. n4 Moreover, most of our sister courts interpreting [**802] state constitutional provisions similar in wording to California's [*1021] free speech provision have declined to follow *Robins*. n5 Indeed, some of these courts have been less than kind in their criticism of *Robins*. (See, e.g., *Shad* [*1022] *Alliance v. Smith Haven Mall*, 66 N.Y.2d 496, 488 N.E.2d 1211, 1214 n.5, 498 N.Y.S.2d 99 (1985); *Jacobs v. Major*, 139 Wis. 2d 492, 407 N.W.2d 832, 841 (1987).)

n4 (See, e.g., Friedelbaum, *Private Property, Public Property: Shopping Centers and Expressive Freedom in the States* (1999) 62 Alb. L.Rev. 1229, 1239 (*Private Property, Public Property*) ["It is difficult to understand how a threshold issue [state action] of such importance could have been overlooked except for the fervency of both federal and state courts to attain other objectives" (fn. omitted)]; Kelso, *California's Constitutional Right to Privacy* (1992) 19 Pepperdine L.Rev. 327, 413 (*California's Right to Privacy*) ["the court in *Pruneyard* does not resolve whether the free speech clause applies to *all* private conduct which burdens speech or only to private conduct imbued with public elements sufficient to trigger the protections of the Declaration of Rights"]; *Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. at pp. 1090, 1092 [expressing surprise at *Robins*'s failure to address the state action issue and noting other analytical problems]; Devlin, *Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal* (1990) 21 Rutgers L.J. 819, 832 (*Constructing an Alternative*) ["the [*Robins*] court was less explicit about its reasons for applying the state constitution ... [and] did not clarify whether it rejected a state action requirement or simply broadened the federal definition of 'state action' to embrace the peculiar facts of the case" (fn. omitted)]; Simon, *Independent but Inadequate: State Constitutions and Protection of Freedom of Expression* (1985) 33 U.Kan. L.Rev. 305, 325-

336 (*State Constitutions and Protection of Freedom of Expression*) ["The *Pruneyard* court did not explain why this [free speech] burden applied to private parties ... [and] did not attempt to delineate the scope of California's affirmative right of freedom of expression"]; Comment, *State Constitutional Rights of Free Speech on Private Property: The Liberal Loophole* (1982/1983) 18 Gonz. L.Rev. 81, 94 (*State Constitutional Rights of Free Speech*) ["The California Supreme Court in *Robins*, however, never expressly rejected this [state action] prerequisite and in fact simply avoided the issue"]; Comment, *Transforming the Privately Owned Shopping Center into a Public Forum: Pruneyard Shopping Center v. Robins* (1981) 15 U.Rich. L.Rev. 699, 720 [*Robins* is "confusingly broad" (fn. omitted)]; Note, *Robins v. Pruneyard Shopping Center: Free Speech Access to Shopping Centers Under the California Constitution* (1980) 68 Cal. L.Rev. 641, 645 (*Free Speech Access to Shopping Centers*) [suggesting that the court was not prepared to address the state action issue in *Robins*]; but see, e.g., Ragosta, *Free Speech Access to Shopping Malls Under State Constitutions: Analysis and Rejection* (1986) 37 Syracuse L.Rev. 1, 21 (*Free Speech Access to Shopping Malls*) [observing that "only California has completely and clearly rejected a state action limitation upon free speech" (fn. omitted)]; Utter, *The Right to Speak, Write, and Publish Freely: State Constitutional Protection Against Private Abridgment* (1985) 8 U. Puget Sound L.Rev. 157, 169 ["Although the [*Robins*] court did not expressly state that the California Constitution had no state action requirement, the Washington court has interpreted *Robins* as impliedly abandoning any state action requirement for the California Constitution" (fn. omitted)].) [***14]

n5 (See, e.g., *Fiesta Mall Venture v. Mecham Recall Committee* (Ariz.Ct.App. 1988) 159 Ariz. 371, 767 P.2d 719, 724 (*Fiesta Mall Venture*) [finding no state constitutional right to free speech in a privately owned shopping center]; *Cologne v. Westfarms Assocs.* (Conn. 1984) 192 Conn. 48, 469 A.2d 1201, 1210 (*Cologne*) [same]; *Cahill v. Cobb Place Associates* (Ga. 1999) 271 Ga. 322, 519 S.E.2d 449, 450-451 (*Cahill*) [same]; *Eastwood Mall, Inc. v. Slanco* (Ohio 1994) 68 Ohio St. 3d 221, 626 N.E.2d 59, 61-62 (*Eastwood Mall*) [same]; *Woodland v. Michigan Citizens Lobby* (Mich. 1985) 423 Mich. 188, 378 N.W.2d 337, 358 (*Woodland*) [same]; *Minnesota v. Wicklund* (Minn. 1999) 589 N.W.2d 793, 802 (*Wicklund*) [same]; *S.O.C., Inc. v. Mirage Casino-Hotel* (Nev. 2001) 23 P.3d 243, 250 (*S.O.C.*) [declining to adopt the rationale of *Robins*]; *Shad Alliance v. Smith Haven Mall* (1985) 66 N.Y.2d 496, 498 N.Y.S.2d 99, 102, fn. 5 [488 N.E.2d 1211, 1214] (*Shad Alliance*) [finding no state constitutional right to free speech in a privately owned shopping center]; *Southcenter Joint Venture v. National Democratic Policy Com.* (Wash. 1989) 113 Wn.2d 413, 780 P.2d 1282, 1292 (*Southcenter Joint Venture*) [same]; *Jacobs v. Major* (Wis. 1987) 139 Wis. 2d 492, 407 N.W.2d 832, 841 (*Jacobs*) [same]; but see *Bock v. Westminster Mall Co.* (Colo. 1991) 819 P.2d 55, 61-63 [finding a state constitutional right to leaflet in a privately owned shopping center]; *New Jersey Coalition Against War v. J.M.B. Realty Corp.* (N.J. 1994) 138 N.J. 326, 650 A.2d 757, 780 (*New Jersey Coalition Against War*) [same].)

Various state courts have also held that a state constitutional provision concerning the right to petition does not protect the solicitation of signatures in a privately owned shopping center. (See, e.g., *Stranahan v. Fred Meyer, Inc.* (Or. 2000) 331 Ore. 38, 11 P.3d 228, 243 [finding no state constitutional right to petition in a privately owned shopping center]; *Citizens for Ethical Gov. v. Gwinnett* (Ga. 1990) 260 Ga. 245, 392 S.E.2d 8, 9-10 [same]; but see *Batchelder v. Allied Stores Intern., Inc.* (Mass. 1983) 388 Mass. 83, 445 N.E.2d 590, 595 [finding a state constitutional right to solicit signatures in a privately owned shopping center pursuant to a clause in the Massachusetts Constitution concerning freedom and equality of elections].)

[***15]

Nonetheless, *Robins* has been the law in California for over 20 years. Whether or not we would agree with *Robins*'s recognition of a state constitutional right to free speech in a privately owned shopping center if we were addressing the issue for the first time, we are obliged to follow it under principles of stare decisis. " 'Even in constitutional cases, the doctrine [of stare decisis] carries such persuasive force that we have always

required a departure from precedent to be supported by some 'special justification.' " (*Dickerson v. United States* (2000) 530 U.S. 428, 443, 147 L. Ed. 2d 405, 120 [**803] S. Ct. 2326, quoting *United States v. International Business Machines Corp.* (1996) 517 U.S. 843, 856, 116 S. Ct. 1793, 135 L. Ed. 2d 124.) Because *Robins* is embedded in our free speech jurisprudence with no apparent ill effects, no such justification exists here.

We are, however, mindful of the ambiguities in *Robins*. In the hopes of clarifying *Robins* and providing some guidance as to the scope of the free speech rights guaranteed by the California Constitution, we now answer some of the questions left open by *Robins*. Based on these answers, we hold that the Tenants [***16] Association has no state constitutional right to leaflet in the Complex.

II

"Before state courts can fully resolve ... substantive free speech ... issues, a proper constitutional analysis requires that they first address the threshold issue of whether the ... suits are barred by a state action requirement." (Note, *Post-Pruneyard Access to Michigan Shopping Centers: The "Malling" of Constitutional Rights* (1983) 30 Wayne L.Rev. 93, 97, fn. omitted (*Post-Pruneyard Access*); see also *Private Property, Public Property*, *supra*, 62 Alb. L.Rev. at p. 1239 [state action question should be "a threshold issue" in any analysis of constitutional free speech rights].) Thus, by neglecting to mention state action, *Robins* created a noticeable gap in its reasoning and left the existence of a state action limitation on California's free speech clause in doubt. (*California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 413; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. at p. 645.) Indeed, our lower courts have commented on this "intriguing" [*1023] omission. (*Laguna Publishing*, *supra* [***17] , 131 Cal. App. 3d at p. 838.) Not surprisingly, the uncertainty surrounding the fate of the state action limitation has spawned a debate over the wisdom of extending our free speech clause to private actors. n6 We now fill this gap and conclude that California's free speech clause contains a state action limitation.

n6 (See, e.g., Eule & Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse* (1998) 45 UCLA L.Rev. 1537; Chemerinsky, *More Speech is Better* (1998) 45 UCLA L.Rev. 1635; Varat, *When May Government Prefer One Source of Private Expression Over Another?* (1998) 45 UCLA L.Rev. 1645; *Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. 1073; Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?* (1989) 17 Hastings Const. L.Q. 111 (*Private Actors*); Sundby, *Is Abandoning State Action Asking Too Much of the Constitution?* (1989) 17 Hastings Const L.Q. 139; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. 641; *Free Speech Access to Shopping Malls*, *supra*, 37 Syracuse L.Rev. 1; Cohen, *Pruneyard Shopping Center v. Robins: Past, Present and Future* (1981) 57 Chi.-Kent L.Rev. 373 (*Pruneyard Shopping Center*).)

[***18]

As an initial matter, we note that the first sentence of article I, section 2, subdivision (a) contains no explicit state action limitation. The California Constitution gives every person the right to "freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (Art. I, § 2, subd. (a).) The breadth of this language combined with the framers' arguable understanding of its ramifications suggest an intent to protect the right to free speech against private intrusions. (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at pp. 119-121.) The express prohibition against a "law" restraining or abridging free speech found in the second sentence of the clause arguably bolsters such an interpretation. (Art. I, § 2, subd. (a).)

Nonetheless, the absence of an explicit state action limitation in article I, section 2, subdivision (a) is not dispositive. In the past, we have found a state action requirement even though the language of the California constitutional provision in question--article I, section 7--did not expressly state such a requirement. (*Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 468, 156 Cal. Rptr. 14, 595 P.2d 592 [***19] (*Gay Law Students Assn.*); see also *Jones v. Kmart Corp.* (1998) 17 Cal. 4th 329, 333, 949 P.2d 941 [stating that the search and seizure provision of the California Constitution--article I, section 13--contains a state action limitation even though the provision contains no such limiting language].) We declined to apply that provision "without regard to any state action doctrine [**804] whatsoever" absent some "suggestion" in the provision's history for abandoning such a limitation. (*Gay Law Students Assn.*, at p. 468.)

Thus, "the omission [of state action language] ... does not necessarily evince an intent to apply constitutional guarantees to private parties." (Margulies, *A* [*1024] *Terrible Beauty: Functional State Action Analysis and State Constitutions* (1988) 9 Whittier L.Rev. 723, 729 (*A Terrible Beauty*).)

Moreover, the language of article I, section 2, subdivision (a) equally supports a state action limitation. The second sentence of the clause--which prohibits any "law" from restraining or abridging "liberty of speech" (*ibid.*)--indicates an intent to protect against only state actions. "Adding this prohibition on oppressive laws might [***20] mean that, although the delegates wished to declare generally the sanctity of free expression, they feared only government intrusions." (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 121.) Such a reading is consistent with the view courts take of the Fourth Amendment, which is similar in structure to California's free speech clause. (*Ibid.*)

Thus, as acknowledged by the primary scholar cited by the dissent, the language of California's free speech clause is ambiguous and supports *either* the presence or absence of a state action limitation. (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 125 ["The text does not compel a finding that private parties are bound; it only creates an opportunity to do so"]; see *id.* at p. 121; see also *A Terrible Beauty*, *supra*, 9 Whittier L.Rev. at p. 729.) Where, as here, the text is "not conclusive" (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 121), we must look to the history behind California's free speech clause for guidance (see *Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal. 4th 1, 16, 865 P.2d 633 [***21] (*Hill*)). This history indicates that the framers intended to impose a state action requirement. (See *Gay Law Students Assn.*, *supra*, 24 Cal. 3d at p. 468 [finding a state action limitation based on the history behind the due process and equal protection clauses of the California Constitution].)

We initially note that the debates over the California Constitution do not show an intent to extend the reach of its free speech clause to private actors. Although "the designation of article I's free speech clause has changed appreciably over the years ... its language has not." (*Gerawan*, *supra*, 24 Cal. 4th at p. 489.) Thus, the current incarnation of California's free speech clause is virtually identical to the free speech clause in the original California Constitution adopted in 1849. (Compare Cal. Const., art. I, § 2, subd. (a), with Cal. Const. of 1849, art. I, § 9.) The original framers adopted this language with *no debate*. (See Browne, Rep. of Debates in Convention of Cal. on Formation of State Const. (1973 ed.) p. 41 (Browne); see also *Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 119.) In fact, "the debates, which [***22] on other provisions are quite detailed, contain[] no record of any 'original intent' of these delegates in regard to the private/public distinction." (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 119.) Thus, [*1025] the debates over California's free speech clause give *no* indication that the framers wished to guard against private infringements on speech.

Meanwhile, the historical antecedents of our free speech clause strongly suggest that the framers of the California Constitution intended to include a state action limitation. Many of the framers of the 1849 California Constitution came from New York. (See Browne, *supra*, at pp. 478-479.) Not surprisingly, in drafting the free speech clause, the framers borrowed from the free speech clause of the New York Constitution. (Browne, *supra*, at p. 31.) Because they adopted New York's free speech clause virtually unchanged and with no debate (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 119), the history behind New York's clause is relevant to interpreting California's free speech clause (see *Citizens for Parental Rights v. San Mateo County. Bd. of Education* (1975) 51 Cal. App. 3d 1, 25-26, fn. 26, 124 Cal. Rptr. 68 [***23] [finding the history behind the New York Constitution relevant to interpreting a clause of the California Constitution based on a clause in the New York Constitution]).

[**805] A review of this history reveals that the framers of the New York Constitution intended its free speech clause "to serve as a check on governmental, not private, conduct." (*Shad Alliance*, *supra*, 488 N.E.2d at p. 1214.) The free speech clause of the New York Constitution was adopted in 1821 as part of that Constitution's Bill of Rights and remained essentially unchanged after New York revised its Constitution in 1846. n7 "The explicit reason [behind the adoption of New York's free speech clause] was to prevent the legislature from restricting these freedoms by statute." (Galie, The New York State Constitution (1991) p. 51, fn. omitted.) As one of the delegates to New York's 1821 constitutional convention explained, the free speech clause "was doubtless intended to secure the citizens ... against the arbitrary acts of the legislature ...." (Carter & Stone, Reports of the Proceedings and Debates of the Convention of 1821 (1821) p. 167 (Reports of the Proceedings).) In addition, the delegates to the 1821 [***24] New York constitutional convention viewed the free speech clause as protection against the "usurpations by our judiciary" of libel actions from the jury. (*Id.* at p. 490; see also *id.* at p. 167.) The framers of New York's

free speech clause, however, were not concerned with private interference with speech. "While [*1026] most of the delegates were eager to defend the public's rights against official or legal interference, they were unwilling to countenance unlimited freedom of expression ...." (Casias, The New York State Constitutional Convention of 1821 and its Aftermath (Colum. U. 1967) p. 139.)

n7 (See 5 Thorpe, The Federal and State Constitutions (1909) pp. 2648, 2654; see also Reiner & Size, *The Law Through a Looking Glass: Our Supreme Court and the Use and Abuse of the California Declaration of Rights* (1992) 23 Pacific L.J. 1183, 1197 ["In order to appreciate the intellectual origins of our California Declaration of Rights, it is necessary to understand, first, that it was the 1846 New York Constitution ... which our delegates were looking at in Monterey in 1849. Second, the provisions of the 1846 bill of rights for the most part trace their language to the 1821 constitution"].)

[***25]

Indeed, the framers of the 1821 New York Constitution viewed the Constitution's Bill of Rights, including its free speech clause, as a bulwark against government oppression, not private conduct. (See Reports of the Proceedings, *supra*, at pp. 59, 163, 171-172.) As one delegate explained, "[a] bill of rights setting forth the fundamental provisions of our government, has always been held sacred, and I have seen, as other gentlemen familiar with legislation must have seen, the utility of this bill of rights ... one calculated to restrain useless and improvident legislation." (*Id.* at p. 163.) Another delegate later reiterated this understanding: "[A] bill [of rights] like this reported, is not a bill enumerating the rights of the people, but restricting the power of the legislature." (*Id.* at p. 172.) According to this same delegate, a "bill of rights, setting forth the privileges of the people would be useless, nay, might be injurious; because in purporting to set forth the rights of the people, if any were omitted, they might be considered to be yielded." (*Ibid.*)

This elucidation of the intent behind New York's free speech clause also conforms with the framers' [***26] understanding of the overarching purpose behind the 1821 New York Constitution. "The intent of the constitution that we are framing, and of every constitution, is to distribute to these [government] agents the power thus derived from the people:--to mark the limits of their authority, and provide the means of restraining them in its exercise, within their appropriate sphere." (Reports of the Proceedings, *supra*, at p. 110.)

Pre-1849 judicial statements regarding the scope of New York's free speech clause further confirm that the framers of the New York Constitution intended to protect against only government encroachments. As the Chancery Court of New York observed, "that great principle of a free government[,] the liberty of speech and of the press, is very wisely guarded by a constitutional provision against the encroachment of *either legislation or judicial power*." (*Wetmore v. Scovell* (N.Y.Ch. 1842) 3 Edw. Ch. 543, 562, italics added.)

Thus, the framers of the New York Constitution undoubtedly intended that New York's free speech clause protect against only state [**806] action--and not private conduct. Because the framers of the California Constitution adopted [***27] New York's free speech clause almost verbatim, we reasonably conclude they had the same intent as their New York counterparts. (Cf. *Stockton Civic* [*1027] *Theatre v. Board of Supervisors* (1967) 66 Cal. 2d 13, 21, 56 Cal. Rptr. 658, 423 P.2d 810 [finding that statutory language taken verbatim from a constitutional provision must be given the same meaning as the language in the constitutional provision "unless a clear legislative intent to the contrary appears"].)

This conclusion follows logically from the mindset of the framers of the 1849 California Constitution during its drafting. General Bennett Riley issued the call for the 1849 convention "for the purpose of providing such a government as California might need." (Coy & Jones, California's Constitution (1930) p. 12; see also Browne, *supra*, at pp. 3-4.) Thus, the framers of the 1849 California Constitution were focused on defining the scope of the *government's* power. Consistent with this focus, various delegates observed that the Constitution should protect against governmental action. (See, e.g., Browne, *supra*, at pp. 92, 130 ["the object of this Convention is to limit the powers of the Legislature"; [***28] "We are guarding here against bad Legislatures"].) As a result, the California "Constitution of 1849 was not a grant of power to the Legislature but a *limitation* upon it." (Conmy, The Constitutional Beginnings of California (1959) p. 23, fn. 48, italics added.) "It is abundantly clear that the draftsmen of the 1849 and 1879 constitutions regarded the California Constitution as the principal bulwark protecting the liberties of Californians *from*

governmental encroachment." (Grodin et al., The Cal. State Constitution (1993) p. 21, italics added.)

In any event, our extensive review of the history behind the adoption of California's free speech clause reveals *no* evidence suggesting that the framers intended to protect against private encroachments. The lack of such evidence is hardly surprising given the prevailing perception of state constitutions in 1849, as expounded by the United States Supreme Court: "Each state established a constitution for itself, and in that constitution, provided such limitations and restrictions *on the powers of its particular government*, as its judgment dictated." (*Barron v. City Council of Baltimore* (1833) 32 U.S. 243, 247, 8 L. Ed. 672, [***29] italics added.) Indeed, "common law and civil law" historically "regulated *private conduct*," while constitutional law regulated "public or governmental conduct." (*California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 409, italics added.) Thus, "it would ... be natural to expect that a declaration of rights contained in a state constitution pertains primarily to restrictions upon what the state may do to its citizens." (*Id.* at p. 407, fn. omitted.) Based on the historical evidence suggesting that the framers of California's free speech clause intended to protect against governmental--and not private--encroachments, and the absence of any evidence to the contrary, we see no grounds for reaching a [*1028] different conclusion. (See *Gay Law Students Assn.*, *supra*, 24 Cal. 3d at p. 468.)

Robins does not alter our conclusion. Contrary to the dissent's unsupported assertion, *Robins* did not necessarily reject a state action limitation. It could have "simply broadened the federal definition of 'state action' to embrace the peculiar facts of the case." (*Constructing an Alternative*, *supra*, 21 Rutgers L.J. at p. 832.) [***30] Over the past 20 years, numerous commentators have explicitly and implicitly recognized such a possibility and noted that *Robins* left open the issue of whether California's free speech clause required state action. n8

n8 (See *Private Property, Public Property*, *supra*, 62 Alb. L.Rev. at pp. 1238-1239; *California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 413; *Pruning Pruneyard*, *supra*, 24 U.C. Davis L.Rev. at p. 1090; *Constructing an Alternative*, *supra*, 21 Rutgers L.J. at p. 832; *A Terrible Beauty*, *supra*, 9 Whittier L.Rev. at p. 731; *State Constitutional Rights of Free Speech*, *supra*, 18 Gonz. L.Rev. at pp. 94-95; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. at p. 645; see also *Laguna Publishing*, *supra*, 131 Cal. App. 3d at p. 838 [declining to interpret *Robins* as rejecting a state action limitation].)

Indeed, our refusal to [***31] abandon the state action requirement is fully consonant with *Robins*. Although *Robins* did not address [**807] the state action issue, it did rely heavily on California cases applying the pre-*Lloyd* decisions of the United States Supreme Court (*Robins*, 23 Cal. 3d at 908-909)--which, as *Robins* itself recognized, imposed a state action requirement (*id.* at 904). Moreover, the reasoning of *Robins* bears a "close similarity" to the reasoning of the United States Supreme Court in *Logan Valley*. (*Pruneyard Shopping Center*, *supra*, 57 Chi.-Kent L.Rev. at p. 389.) Finally, *Diamond v. Bland* (1970) 3 Cal. 3d 653, 666, fn. 4, 91 Cal. Rptr. 501, 477 P.2d 733 (*Diamond I*), one of the decisions cited as persuasive authority in *Robins*, expressly acknowledged the need for state action in order to trigger constitutional free speech protections. Thus, *Robins* is wholly consistent with a state action requirement. (See *California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 413; *Free Speech Access to Shopping Centers*, *supra*, 68 Cal. L.Rev. at p. 665.)

Our recent statement [***32] in *Gerawan* that California's free speech clause "runs against the world, including private parties as well as governmental actors" does not dictate a contrary result. (*Gerawan*, *supra*, 24 Cal. 4th at p. 492.) In *Gerawan*, we considered "whether a marketing order issued by the Secretary of Food and Agriculture of the State of California implicates any right to freedom of speech under either the First Amendment or article I by compelling funding of generic advertising." (*Id.* at 476.) Because the presence of a state actor was undisputed, we did not carefully consider [*1029] whether California's free speech clause requires state action. Therefore, the language in *Gerawan* suggesting that our free speech clause protects against private action is nonbinding dictum. (See *Santisas v. Goodin* (1998) 17 Cal. 4th 599, 620, 951 P.2d 399 [A decision "is not authority for everything said in the ... opinion but only 'for the points actually involved and actually decided' "].) The absence of any analysis renders this dictum unpersuasive. (See *People v. Mendoza* (2000) 23 Cal. 4th 896, 915 [" 'we must view with caution seemingly categorical directives [***33] not essential to earlier decisions and be guided by this dictum only to the extent it remains analytically persuasive' "].) In any event, the express repudiation of

this language by one of the four signatories to *Gerawan* removes any impediment to reaching a different conclusion based on our careful consideration of the clause's text and history here.

Nor does our decision in *Hill* to reject a state action limitation on California's privacy clause compel a different result. Our decision in *Hill* was based *solely* on the official ballot pamphlet--which clearly contemplated that the constitutional right to privacy "may be enforced against private parties ...." (*Hill*, *supra*, 7 Cal. 4th at p. 18, 26 Cal. Rptr. 2d 834, 865 P.2d 633; see *id.* at pp. 16-18, 19, 26 Cal. Rptr. 2d 834, 865 P.2d 633.) In contrast, the history behind California's free speech clause contains no such indication and strongly suggests the contrary. (See *ante*, 2001 Cal. LEXIS 5598, *22, 111 Cal. Rptr. 2d at pp. 344-347, 29 P.3d at pp. 803-806.)

Likewise, the existence of a clause in the 1849 Constitution granting wives a separate property right against their husbands does not support the rejection of a state action limitation. (Cal. Const. of 1849, art. XI, § 14.) Unlike the free speech clause, section 14 of article XI was [***34] not part of the Declaration of Rights--which historically set forth general principles of governance and established limitations on governments, not private individuals. (See *California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 407.) Because the marital property rights provision is more analogous to particularized legislation, literal adherence to the words of that provision may be sufficient. However, where, as here, the constitutional provision announces a broad principle of government, we necessarily look beyond the text and consider the context and history of that provision. (See, e.g., *Gay Law Students Assn.*, *supra*, 24 Cal. 3d at pp. 468-469; *Kruger v. Wells Fargo Bank* (1974) 11 Cal. 3d 352, 366-367, 113 Cal. Rptr. 449, 521 P.2d 441.) Thus, the existence of the marital property rights provision does not make irrelevant the fact that California's free speech clause derives almost [**808] verbatim from a clause in the New York Constitution with a state action limitation. (See *ante*, 2001 Cal. LEXIS 5598, *22.)

[*1030] Finally, including a state action limitation comports with the decisions of most of our sister courts. (See *State Constitutions and* [***35] *Protection of Freedom of Expression*, *supra*, 33 U.Kan. L.Rev. at p. 318 ["The notion that free expression can, and potentially does, mean something slightly different in each state even when provisions read identically is not fully supportable"].) Virtually every state court construing a state constitutional provision with language similar to California's free speech provision has found a state action requirement. n9 Although their reasoning varies somewhat, they all explicitly or implicitly invoke the venerable principle that "state constitutions ... serve as limitations on the otherwise plenary power of state governments." (*Woodland*, *supra*, 378 N.W.2d at p. 347.) Under this principle, "the fundamental nature of a constitution is to govern the relationship between the people and their government, not to control the rights of the people vis-a-vis each other." (*Southcenter Joint Venture*, *supra*, 780 P.2d at p. 1286, fn. omitted.)

> n9 (See, e.g., *Fiesta Mall Venture*, *supra*, 767 P.2d at p. 723 [holding that the state free speech clause did not restrain private conduct]; *Cologne*, *supra*, 469 A.2d at p. 1209 [same]; *Cahill*, *supra*, 519 S.E.2d at p. 450 [same]; *Iowa v. Lacey* (Iowa 1991) 465 N.W.2d 537, 540 [same]; *Eastwood Mall*, *supra*, 626 N.E.2d at p. 61 [same]; *People v. DiGuida* (Ill. 1992) 152 Ill. 2d 104, 604 N.E.2d 336, 344, 178 Ill. Dec. 80 [same]; *Woodland*, *supra*, 378 N.W.2d at p. 348 [same]; *Wicklund*, *supra*, 589 N.W.2d at p. 801 [same]; *S.O.C.*, *supra*, 23 P.3d at p. 251 [same]; *Shad Alliance*, *supra*, 488 N.E.2d at p. 1214, fn. 5 [same]; *Western Pennsylvania Socialist Workers v. Connecticut General Life Ins. Co.* (Pa. 1986) 512 Pa. 23, 515 A.2d 1331, 1335 [same]; *Southcenter Joint Venture*, *supra*, 780 P.2d at p. 1292 [same]; *Jacobs*, *supra*, 407 N.W.2d at p. 841 [same]; but see *New Jersey Coalition Against War*, *supra*, 650 A.2d at p. 771 [holding that "the State right of free speech is protected ... from unreasonably restrictive and oppressive conduct by private entities"].)

[***36]

Like our sister courts, we recognize that this careful differentiation between government and private conduct has been a hallmark of American constitutional theory since the birth of our nation and serves two important purposes. First, this demarcation is necessary to preserve private autonomy. "By exempting private action from the reach of the Constitution's prohibitions, [the state action limitation] stops the Constitution short of preempting individual liberty--of denying to individuals the freedom to make certain choices. ... Such freedom is basic under any conception of liberty, but it would be lost if individuals had to conform their conduct to the Constitution's demands." (Tribe, American Constitutional Law (2d ed. 1988) p. 1691.)

Second, a state action limitation safeguards the separation of powers embodied in every American constitution by recognizing the limited ability of courts "to accomplish goals which are essentially legislative and political." (*Woodland*, *supra*, 378 N.W.2d at p. 347.) "Without a state action [*1031] limitation, the courts will possess the same authority as the legislature to limit individual freedoms, but will lack the degree of accountability [***37] which should accompany such power." (*Post-Pruneyard Access*, *supra*, 30 Wayne L.Rev. at p. 117.) As a result, absent a state action requirement, "the 'rule of law' would approach in Sir Ivor Jennings' caustic but realistic phrase, 'rule by the judges alone.' " (Harvey, *Private Restraint of Expressive Freedom: A Post-Pruneyard Assessment* (1989) 69 B.U. L.Rev. 929, 967, fn. omitted (*Private Restraint*).) Indeed, "it is not the role of [courts] to strike precise balances among the fluctuating interests of competing private groups which then become rigidified in the granite of constitutional adjudication." (*Cologne*, *supra*, 469 A.2d at p. 1210.)

Neither the text of California's free speech clause nor our case law reveals an intent to depart from these bedrock principles of constitutional jurisprudence. At the same time, the history behind the clause supports the inclusion of a state action limitation and contains *nothing* even suggesting a contrary possibility. Accordingly, we hold that article I, section 2, subdivision (a) only protects against state action. n10 (See *Gay Law Students* [**809] *Assn.*, *supra*, 24 Cal. 3d at p. 468.) [***38]

n10 Contrary to the dissent's characterization (see dis. opn., at p. 22), Chief Justice George expressly declines to reach the state action question and expresses no opinion as to whether California's free speech clause requires state action (see conc. opn., at pp. 9-10).

III

Of course, finding a state action limitation does not end our inquiry. We must still determine the scope of this limitation. *Robins* established that state action for purposes of California's free speech clause is not the same as state action for purposes of the First Amendment. (See *Robins*, 23 Cal. 3d at 905-906 [federal free speech decisions do not preclude a different result under the California Constitution].) In particular, California's free speech clause, unlike its federal counterpart, runs against certain privately owned shopping centers. (Compare *Robins*, *supra*, 23 Cal. 3d at p. 910, with *Hudgens*, *supra*, 424 U.S. at pp. 519-520.) *Robins* did not, however, define [***39] the requisite state action or delineate the scope of free speech rights recognized by the California Constitution. Today, we take the first step in rectifying this situation and conclude that no state action exists here because the Complex is not freely open to the public.

Although *Robins* did not mention state action and did not clearly define the scope of California's free speech clause, we can still look to its reasoning for guidance. To support its holding that the California Constitution protects [*1032] free speech in a privately owned shopping center, *Robins* relied heavily on the functional equivalence of the shopping center to a traditional public forum--the

" ' "downtown[]" ' " or "central business district[]." (*Robins*, *supra*, 23 Cal. 3d at pp. 910, fn. 5, 907; *id.* at pp. 910-911.) In finding this functional equivalence, *Robins* emphasized, among other things, the shopping center's open and unrestricted invitation to the public to congregate freely. (See *id.* at pp. 909-910.) Indeed, *Robins* implicitly exempted " 'an individual homeowner' " from the purview of California's free speech clause, presumably because individual [***40] homes are not freely and openly accessible to the public. (*Id.* at p. 910.) In doing so, *Robins* indicated that the applicability of California's free speech clause depends in part on the public character of the property.

The importance of the public character of the property in determining the scope of California's free speech clause derives support from *Robins*'s reference to earlier California decisions finding a right to free speech on private property. Although all of these cases relied on the First Amendment and the pre-*Lloyd* decisions of the United States Supreme Court-- *Marsh v. Alabama* (1946) 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (*Marsh*) and *Logan Valley*, *supra*, 391 U.S. 308 n11 -- *Robins* found many of the principles enunciated in these cases persuasive in interpreting California's free speech clause. (See *Robins*, *supra*, 23 Cal. 3d at pp. 908-909.) One such principle emphasized by *Robins* was the public's unrestricted access to the privately owned property. n12 (See *Robins*, [**810] at pp. 909-910.)

n11 (See *Diamond I*, *supra*, 3 Cal. 3d at p. 661 [relying on the First Amendment and *Logan Valley*]; *In re Lane* (1969) 71 Cal. 2d 872, 878, 79 Cal. Rptr. 729, 457 P.2d 561 (*Lane*) [same]; *In re Hoffman* (1967) 67 Cal. 2d 845, 849-850,

64 Cal. Rptr. 97, 434 P.2d 353 (*Hoffman*) [relying on the First Amendment and *Marsh*]; *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal. 2d 766, 771, 40 Cal. Rptr. 233, 394 P.2d 921 (*Schwartz-Torrance*) [relying on *Marsh* and other First Amendment precedents].) [***41]

n12 (See *Diamond II*, *supra*, 11 Cal. 3d 331, 342-343 (dis. opn. of Mosk, J.) [emphasizing the public's unrestricted access to the shopping center]; *Diamond I*, *supra*, 3 Cal. 3d at pp. 659-660 [same]; *Lane*, *supra*, 71 Cal. 2d at pp. 877-878 [emphasizing the public nature of the sidewalk and store]; *Hoffman*, *supra*, 67 Cal. 2d at pp. 847, 851 [emphasizing that the railway station was open to the public and contained a "spacious area" with numerous retail establishments where the public could and would congregate]; *Schwartz-Torrance*, *supra*, 61 Cal. 2d at pp. 768, 772 [emphasizing the public nature of the shopping center].)

Indeed, the reference in *Robins* to California cases relying on *Marsh* and *Logan Valley* suggests an implicit approval of the reasoning in these federal decisions. (See *Pruneyard Shopping Center*, *supra*, 57 Chi.-Kent L.Rev. at p. 384 [noting that *Robins* "resurrected the rationale of *Logan Valley*"].) Because both *Marsh* and *Logan Valley* partially relied on the public's unrestricted access in [***42] extending the reach of the First Amendment to certain [*1033] privately owned properties, they bolster the conclusion that private property must be public in character before California's free speech clause may apply. For example, *Marsh* held that a sidewalk in the business district of a privately owned town may be treated as publicly owned property for First Amendment purposes based, in part, on the public's unrestricted access to the town's business district. (*Marsh*, *supra*, 326 U.S. at pp. 508-509.) "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." (*Id.* at p. 506.) Similarly, *Logan Valley* held that a shopping mall should be treated as publicly owned for First Amendment purposes because, among other things, the public had "unrestricted access to the mall property." (*Logan Valley*, *supra*, 391 U.S. at pp. 318, 321, 325.)

In light of the above, we conclude that the actions of a private property owner constitute state action for purposes of California's free speech clause only if the property is freely and openly accessible [***43] to the public. By establishing this threshold requirement for establishing state action, we largely follow the Court of Appeal decisions construing *Robins*. For example, our Courts of Appeal have consistently held that privately owned medical centers and their parking lots are not functionally equivalent to a traditional public forum for purposes of California's free speech clause because, among other things, they are not freely open to the public. (See, e.g., *Feminist Women's Health Center v. Blythe* (1995) 32 Cal. App. 4th 1641, 1661 (*Blythe*); *Allred v. Harris* (1993) 14 Cal. App. 4th 1386, 1392-1393; *Planned Parenthood v. Wilson* (1991) 234 Cal. App. 3d 1662, 1672, 286 Cal. Rptr. 427; *Allred v. Shawley* (1991) 232 Cal. App. 3d 1489, 1504-1505, 284 Cal. Rptr. 140.) Our lower courts have also suggested that an apartment complex does not resemble a traditional public forum because it "is a place where the public is generally excluded." (*Cox Cable San Diego, Inc. v. Bookspan, Inc.* (1987) 195 Cal. App. 3d 22, 29, 240 Cal. Rptr. 407.)

Here, the Complex is privately owned, and Golden Gateway, the owner, [***44] restricts the public's access to the Complex. In fact, Golden Gateway carefully limits access to residential tenants and their invitees. Thus, the Complex, unlike the shopping center in *Robins*, is not the functional equivalent of a traditional public forum. Accordingly, Golden Gateway's actions do not constitute state action for purposes of California's free speech, and the [*1034] Tenants Association has no right to distribute its newsletter pursuant to article I, section 2, subdivision (a). n13

n13 Consequently, we do not reach the issue of whether Golden Gateway's ban on leafletting is a reasonable time, place and manner restriction on free speech.

In reaching this conclusion, we note that judicial enforcement of injunctive relief does not, by itself, constitute state action for purposes of California's free speech clause. Although the United States Supreme Court has held that judicial effectuation of a racially restrictive covenant constitutes state action (see *Shelley v. Kraemer* (1948) 334 U.S. 1, 20, 92 L. Ed. 1161, 68 S. Ct. 836), [***45] it has largely limited this holding to the facts of those cases (Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine* (1990) 24 Ga. L.Rev. 327, 353). We therefore decline to extend it to this particular case, where the private property owner merely seeks

judicial enforcement of a neutral lease provision. n14 Indeed, a contrary [**811] holding would effectively eviscerate the state action requirement because private property owners, for the most part, enforce their property rights through court actions. We also see no basis for conditioning a finding of state action on whether a party invokes California's free speech clause as a sword or a shield. Therefore, we decline to follow the dictum in *Blythe*, *supra*, 32 Cal. App. 4th at page 1665 ("Free speech concerns may be raised as a shield against injunctive relief only because the effectuation of such relief entails government action").

n14 (See, e.g., *Linn Valley Lakes Property Owners Assn. v. Brockway* (Kan. 1992) 250 Kan. 169, 824 P.2d 948, 951 [judicial enforcement of a constitutionally permissible restrictive covenant is not state action]; *Midlake on Big Boulder Lake v. Cappuccio* (Pa.Super.Ct. 1996) 449 Pa. Super. 124, 673 A.2d 340, 342 [same]; *Washington v. Noah* (Wash.Ct.App. 2000) 103 Wn. App. 29, 9 P.3d 858, 870 [judicial enforcement of a voluntary settlement agreement is not state action]; cf. *CompuServe Inc. v. Cyber Promotions, Inc.* (S.D. Ohio 1997) 962 F. Supp. 1015, 1026 ["the mere judicial enforcement of neutral trespass laws by the private owner of property does not alone render it a state actor"]; *Commonwealth v. Hood* (Mass. 1983) 389 Mass. 581, 452 N.E.2d 188, 193 [judicial enforcement of neutral trespass statute is not state action]; but see *Franklin v. White Egret Condominium, Inc.* (Fla.Dist.Ct.App. 1977) 358 So. 2d 1084, 1087-1088 [finding enforcement of a restrictive covenant barring children under the age of 12 unconstitutional], affd. by (Fla. 1979) 379 So. 2d 346; *West Hill Baptist Church v. Abbate* (Ohio Ct. Common Pleas 1969) 24 Ohio Misc. 66, 261 N.E.2d 196, 200 [judicial enforcement of restrictive covenant excluding houses of worship constitutes state action].)

[***46]

Martin v. City of Struthers (1943) 319 U.S. 141, 87 L. Ed. 1313, 63 S. Ct. 862 and *Van Nuys Pub. Co. v. City of Thousand Oaks* (1971) 5 Cal. 3d 817, 97 Cal. Rptr. 777, 489 P.2d 809 are also inapposite. Although *Martin* and *Van Nuys* found the prohibition of door-to-door leafletting to private residences unconstitutional, both cases involved municipal ordinances enacted by a governmental entity. (*Martin*, at p. 142; *Van Nuys*, at p. 819.) Here, the owner of the Complex is a *private* entity, and its actions do not constitute state action. (See *ante*, 2001 Cal. LEXIS 5598, *42.)

[*1035] Likewise, defendant's reliance on *Inganamort v. Merker* (N.J. Super.Ct.Ch.Div. 1977) 148 N.J. Super. 506, 372 A.2d 1168 is misplaced. *Inganamort* only held that tenants had the right to distribute noncommercial written material in an apartment building pursuant to their leaseholds under New Jersey law. (*Id.* at p. 1170.) It did not consider any constitutional right to free speech. Moreover, the New Jersey Supreme Court has declined to impose a state action limitation on the free speech clause of New Jersey's Constitution. (*New Jersey Coalition Against* [***47] *War*, *supra*, 650 A.2d at p. 771.) Therefore, New Jersey decisions are not relevant to our interpretation of the California Constitution.

Finally, *Laguna Publishing*, *supra*, 131 Cal. App. 3d 816, is distinguishable. In *Laguna Publishing*, the Court of Appeal found the discriminatory enforcement of a ban on distributing commercial newspapers in a private, gated community unconstitutional. (*Id.* at p. 844.) In contrast, the instant case does not involve a discriminatory limitation on speech activities. Because this case does not raise the same issue raised in *Laguna Publishing*, we decline to address it here and leave its resolution for another day.

In closing, we emphasize that our decision today does not give apartment owners carte blanche to stifle tenant speech. Tenants may still have remedies under conventional property law principles. (See Lobsenz & Swanson, *The Residential Tenant's Right to Freedom of Political Expression* (1986) 10 U. Puget Sound L.Rev. 1, 45.) Moreover, many statutes and ordinances serve to protect tenants against unreasonable lease provisions and restrictions. (See, e.g., Civ. Code, § § 1942.5, [***48] 1942.6, 1953.) Finally, tenants may always seek a legislative solution tailored to their particular concerns. Indeed, "the common law and statutes are always sufficient if a state court has the desire and will to protect private rights from private infringement." (*California's Right to Privacy*, *supra*, 19 Pepperdine L.Rev. at p. 409.) Our decision today merely seeks to avoid "rigid rectitude in stultifying, imposed uniformity" by declining to constitutionalize a private dispute. (*Private Restraint*, *supra*, 69 B.U. L.Rev. at p. 969.)

[**812] DISPOSITION

We affirm the judgment of the Court of Appeal.

BROWN, J.

WE CONCUR:

BAXTER, J.

CHIN, J.

CONCURBY:
GEORGE

CONCUR:

CONCURRING OPINION BY GEORGE, C.J.

I concur in the determination that article I, section 2, subdivision (a) of the California Constitution (section 2(a) or the free speech clause) does not afford defendant tenants association a right to distribute [*1036] unsolicited pamphlets in the interior hallways of privately owned apartment buildings from which the general public is excluded.

As I shall explain, the particular category [***49] of free speech claim here at issue -- the right to *distribute unsolicited pamphlets* on another's property -- is applicable only with respect to locations that, whether publicly or privately owned, are freely open to the general public. Because a recognition of the appropriate limit of this substantive right of free speech is sufficient in itself to resolve this case, I believe it is unnecessary to reach out to decide the much broader question of whether section 2(a)'s right of "every person [to] freely speak, write and publish his or her sentiments on all subjects" affords individuals, *as a general matter and in all circumstances*, protection against *only* "state action" and not against the conduct or actions of private parties.

Neither the parties nor the lower courts focused upon the broad issue of whether the state constitutional free speech clause applies, as a general matter, only to state action, and there is no reason to undertake to resolve that question here. Even if the apartment complex at issue had been publicly owned (and thus the state action doctrine clearly satisfied), the state constitutional right of free speech would not extend to the unsolicited distribution [***50] of pamphlets in the interior hallways of an apartment building that is not generally open to the public. Accordingly, although I concur in the judgment, I do not join the lead opinion's discussion or conclusions with regard to the state action doctrine.

I.

More than a half century ago, the New York Court of Appeals, in *Watchtower Bible & Tract Soc., Inc. v. Metropolitan Life Ins. Co.* (N.Y. 1948) 297 N.Y. 339, 79 N.E.2d 433 (*Watchtower*), unanimously declined to recognize either a state or federal constitutional right to solicit or distribute unsolicited pamphlets in the closed areas of a large private apartment complex. The court in *Watchtower* observed that "[a] narrow inner hallway on an upper floor of an apartment house is hardly an appropriate place at which to demand the free exercise of" such rights (79 N.E.2d at 436), and that "no case we know of extends the reach of the Bill of Rights so far as to proscribe the reasonable regulation, by an owner, of conduct *inside* his multiple dwelling." (*Id.*, at pp. 436-437, italics added.) Likewise, no decision of which I am aware, before or since *Watchtower* [***51] , has recognized a constitutional right to distribute unsolicited pamphlets in the closed interior hallways of privately owned apartment buildings or, for that matter, in any other analogous area that is closed to the general public.

[*1037] The United States Supreme Court has found a First Amendment free speech right to picket or distribute literature on public streets and sidewalks, and in doing so it has emphasized the open nature of those locations as a basis for its conclusion. (E.g., *Thornhill v. Alabama* (1940) 310 U.S. 88, 105-106, 84 L. Ed. 1093, 60 S. Ct. 736 (*Thornhill*); see also *Hague v. C.I.O* (1939) 307 U.S. 496, 515-516, 83 L. Ed. 1423, 59 S. Ct. 954 [public streets and parks have been traditional grounds for exercise of free expression]; *Lovell v. Griffin* (1938) 303 U.S. 444, 82 L. Ed. 949, 58 S. Ct. 666 [finding First Amendment right to distribute religious pamphlets on public sidewalks].) In *Marsh v. Alabama* (1946) 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (*Marsh*), the high court extended this rule to the business district of a private "company town." The court in *Marsh* found a free speech [***52] right to distribute religious literature, and emphasized that the [**813] private town's business district was "freely accessible and open" to the public. (*Id.*, at p. 508.) n1

n1 The court observed: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it. [Citation.] Thus, the owners of privately held bridges, ferries, turnpikes and railroads may not operate them as freely as a farmer does his farm. Since these facilities are built and operated

primarily to benefit the public and since their operation is essentially a public function, it is subject to state regulation." (*Marsh, supra,* 326 U.S. at p. 506.)

In *Schwartz-Torrance Investment Corp. v. Bakery & Confectionery Workers' Union* (1964) 61 Cal. 2d 766, 40 Cal. Rptr. 233, 394 P.2d 921 (*Schwartz-Torrance*), this court, citing *Thornhill* and *Marsh,* found a right [***53] to peacefully picket at a privately owned shopping center. In so concluding, we emphasized the public nature of the shopping center (*Schwartz-Torrance,* 61 Cal. 2d at 772-773, and cases cited) and distinguished *N.L.R.B. v. Babcock & Wilcox Co.* (1956) 351 U.S. 105, 100 L. Ed. 975, 76 S. Ct. 679, in which the high court upheld an employer's right to prohibit picketing in a company parking lot. We explained: "Unlike the ... property in the present case, the Babcock & Wilcox parking lot was not generally open to the public." (*Schwartz-Torrance, supra,* 61 Cal. 2d at p. 774.)

Subsequently, in *In re Hoffman* (1967) 67 Cal. 2d 845, 64 Cal. Rptr. 97, 434 P.2d 353, we found a right to peacefully and unobtrusively distribute leaflets protesting the Vietnam War, in the privately owned Union Station of Los Angeles. In reaching our conclusion we emphasized that the railway station was a "spacious area open to the community as a center for rail transportation" (*id.*, at p. 847) and that in this respect it was analogous to a "public street or park" (*id.*, at p. 851).

Consistently with *Schwartz-Torrance,* [***54] in *Amalgamated Food Employees Union v. Logan Valley Plaza* (1968) 391 U.S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601 (*Logan Valley*), the [*1038] high court found a free speech right to peacefully picket and distribute handbills in a privately owned shopping mall, and in so concluding emphasized the public's "virtually unrestricted access" to the mall property. (*Id.*, at p. 321, 88 S. Ct. 1601; see also *id.*, at pp. 313, 325, 88 S. Ct. 1601.) The court in *Logan Valley* observed that in circumstances in which "property is *not* ordinarily open to the public, this Court has held that access to it for the purpose of exercising First Amendment rights may be denied altogether." (*Id.*, at p. 320, 88 S. Ct. 1601, italics added.) n2

n2 The high court reversed *Logan Valley* in *Hudgens v. National Labor Relations Bd.* (1976) 424 U.S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196.

In *In re Lane* (1969) 71 Cal. 2d 872, 79 Cal. Rptr. 729, 457 P.2d 561, we found a right to peacefully distribute labor union handbills [***55] on a private sidewalk abutting a large "stand alone" supermarket. In so concluding we cited and followed the above cases and emphasized that the private sidewalk was "open to the public" and that "the public is openly invited to use it." (*Id.*, at p. 878.)

Robins v. Pruneyard (1979) 23 Cal. 3d 899, 153 Cal. Rptr. 854, 592 P.2d 341 (*Robins*) followed this same approach, finding a right under section 2(a) to seek petition signatures and to speak with patrons on a matter of public interest in a privately owned shopping center. Our decision in *Robins* emphasized that the center was freely open to the public (*id.,* at pp. 902, 909-911), and indeed we implicitly exempted " 'an individual homeowner' " from our holding (*id.*, at p. 910), presumably, as the lead opinion notes, "because individual homes are not freely and openly accessible to the public." (Lead opn., *ante*, 2001 Cal. LEXIS 5598, *39.)

California decisions filed since *Robins,* finding a state constitutional free speech right to distribute pamphlets or to picket, have continued to emphasize the open nature of the location where the rights were to be exercised. (E. [***56] g., *Sears, Roebuck & Co. v. San Diego District Council of Carpenters* (1979) 25 Cal. 3d 317, 328, 332, 158 Cal. Rptr. 370, 599 P.2d 676 [upholding union's free speech right to picket on employer's privately [**814] owned sidewalks surrounding its store; court emphasized that the sidewalk was open to the general public and was a "traditional and accepted place where unions may, by peaceful picketing, present to the public their views respecting a labor dispute with that store"]; *Prisoners Union v. Department of Corrections* (1982) 135 Cal. App. 3d 930, 932, 185 Cal. Rptr. 634 [recognizing the right to distribute pamphlets in a prison parking lot "open to [*1039] members of the general public"]; *Westside Sane/Freeze v. Hahn* (1990) 224 Cal. App. 3d 546, 552-556, 274 Cal. Rptr. 51 [upholding political group's free speech right to distribute leaflets at a privately owned shopping center; court asserted that the shopping center, to which the public was invited, was a public forum for exercising free speech rights]; see also *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal. 4th 352, 363, 364, 993 P.2d 334 [ordinance [***57] that regulated and banned solicitation of funds in "public places," including sidewalks, bus stops, and restaurants, "plainly

implicated" section 2(a)'s free speech right].)

Sister-state decisions that have found a state constitutional free speech right to distribute pamphlets in private shopping centers likewise have stressed the open and public nature of the forum. (See *Bock v. Westminster Mall Co.* (Colo. 1991) 819 P.2d 55, 61-63; *New Jersey Coalition Against War v. J.M.B. Realty Corp.* (N.J. 1994) 138 N.J. 326, 650 A.2d 757, 771-774.) Similarly, state court decisions that have recognized other state constitutional rights (distinct from a free speech right) to solicit signatures at private shopping centers also have emphasized the open and public nature of the forum. (See *Batchelder v. Allied Stores Intern., Inc.* (Mass. 1983) 388 Mass. 83, 445 N.E.2d 590, 595 (*Batchelder*) [finding right to solicit signatures under state constitution's "freedom and equality of elections" provision]; n3 *Alderwood Associates v. Washington Environmental Council* (Wash. 1981) 96 Wn.2d 230, 635 P.2d 108, 116-117 (*Alderwood* [***58]) [finding right to solicit signatures under state constitution's initiative provision].) n4

n3 The court in *Batchelder* observed: "We are not discussing signature solicitations *in* stores but only unobtrusive and reasonable solicitations in the common areas of the mall, areas that have been dedicated to the public as a practical matter." (*Batchelder, supra*, 445 N.E.2d at p. 595, italics added.)

n4 In *Southcenter Joint Venture v. National Dem. Policy Comm.* (Wash. 1989) 113 Wn.2d 413, 780 P.2d 1282, 1290, the Washington Supreme Court subsequently reaffirmed this aspect of *Alderwood*, while at the same time rejecting other facets of that decision.

As these decisions suggest, the acts of distributing unsolicited pamphlets, picketing, and soliciting signatures or funds traditionally are performed in places open to the general public -- that is, in places sometimes referred to as public forums. n5 In light of [**815] this tradition, when one speaks of a "constitutional right" to engage [***59] in such conduct, one cannot reasonably have in mind [*1040] an asserted right to invade the *interior hallways* of a private business structure, home, or apartment complex, in order to proffer an unsolicited flier, placard or petition. Under the foregoing decisions, there is no state or federal constitutional right to *distribute unsolicited pamphlets* in a location (whether publicly or privately owned) not open to the general public, such as the closed interior hallways of the apartment buildings here at issue. (*Watchtower, supra,* 79 N.E.2d 433, 436-437, quoted *ante*, 2001 Cal. LEXIS 5598, *3; *Hall v. Virginia* (Va. 1948) 188 Va. 72, 49 S.E.2d 369, 375-378 [there is no constitutional right to distribute unsolicited pamphlets in the interior hallways of an apartment complex]; Annot., Right of Owner of Housing Development or Apartment Houses to Restrict Canvassing, Peddling, Solicitation of Contributions, etc. (1949) 3 A.L.R.2d 1431, 1432-1433 ["Regulations of ... apartment house owners, which have the effect of restricting ... solicitation, etc., will not be held ... unconstitutional as violating constitutional guaranties of others to freedom of [***60] religion, speech, or press, where the activities are curtailed in places ... not public or quasi-public in nature, and where the rights of persons to privacy in their dwelling places are protected from infringement by such regulations"]; see also *Batchelder, supra,* 445 N.E.2d 590, 595, quoted *ante*, at fn. 3.)

n5 Decisions upholding a right to distribute pamphlets door-to-door (e.g., *Martin v. City of Struthers* (1943) 319 U.S. 141, 87 L. Ed. 1313, 63 S. Ct. 862; *Van Nuys Pub. Co. v. City of Thousand Oaks* (1971) 5 Cal. 3d 817, 97 Cal. Rptr. 777, 489 P.2d 809) recognize that unless the occupant of a dwelling announces a desire not to receive unsolicited material, members of the general public are permitted to traverse a private walkway, and leave pamphlets on or near any dwelling door that is located in an area not closed to the general public. Accordingly, in situations contemplated in those decisions, unlike the present case, the area leading to and immediately surrounding the door is *not* closed to the general public.

Laguna Publishing Co. v. Golden Rain Foundation (1982) 131 Cal. App. 3d 816, 182 Cal. Rptr. 813 (*Laguna Publishing Co.*) is distinguishable from the present case. In that case, a newspaper publisher was barred by the homeowner's association of a private gated community from entering the community and depositing unsolicited copies of its free newspaper at the doors of the residents of the community. At the same time, the association permitted another newspaper publisher to deliver its competing free and unsolicited newspaper to the doors of the community residents. The excluded publisher sued in order to establish its

right to distribute on an equal footing with the preferred publisher. Although the Court of Appeal found that the excluded publisher had a right under article 2(a) to distribute its newspapers to the doors of the community residents on an equal basis with the other publisher, that court's decision rested upon the discriminatory nature of the challenged policy. (See *Laguna Publishing Co.*, 131 Cal. App. 3d at 840-845.) The Court of Appeal in *Laguna Publishing Co.* concluded that the dispute presented was "purely and simply a discrimination case with substantial economic consequences," and "not one truly involving the resolution of rights of free speech in conflict with the vested rights of private property." (*Id.* at 847-848 n.14.)

[***61]

In the case now before us, the landlord has limited hallway access to residential tenants and their invitees, and has excluded the general public. Accordingly, this case is quite different from *Robins, supra,* 23 Cal. 3d 899, and the other free speech cases discussed above. A free speech right to distribute unsolicited pamphlets *in places open to the general public* simply is not triggered on the facts presented.

It is thus apparent that the state action doctrine is irrelevant to this case. Had the apartment complex been owned by the state and had the apartment [*1041] been operated in the same manner as here -- that is, by restricting access to interior hallways to tenants and their invitees -- the tenants *still* would have no section 2(a) free speech right to distribute unsolicited pamphlets in the buildings' interior hallways, because, as noted above, the constitutional right conferred by section 2(a) to distribute unsolicited pamphlets is inapplicable to the interior hallways of apartment buildings that are closed to the general public.

II.

It is important to emphasize what we do *not* consider or decide in this case. We do not face any effort by a [***62] landlord to ban all discourse by tenants in the closed hallways. Tenants remain free to speak with each other in the hallways or elsewhere about anything they wish. Tenants may knock on the doors of other tenants and speak with them. They may telephone or fax each other, or correspond by letter or e-mail. Pursuant to the landlord's rules, they may post fliers on the bulletin boards of the laundry rooms, and they may even, *upon request*, deliver, and leave at the door of another tenant, the very same pamphlets whose intended distribution triggered this case. As relevant here, the landlord's rule simply prohibits the tenants association from leaving *unsolicited* pamphlets on or under the hallway doors of fellow tenants, or in a pile for the taking in the hallway.

Furthermore, although I conclude for the reasons discussed above that the tenants association possesses no *constitutional* right to leave the unsolicited pamphlets here at issue in the hallways or on or under the hallway doors of fellow tenants, it does not necessarily follow that tenants have *no* right of any sort to do so. Tenants in fact may have such rights, depending upon the terms of the applicable lease [***63] or a statute, or based upon general principles of landlord-tenant law. (See, e.g., Civ. Code, § § 1942.5, 1942.6, 1953; Lobsenz & Swanson, *The Residential Tenant's Right to Freedom of Political Expression* (1986) 10 U. Puget Sound L.Rev. 1, 39-41, 45-49.) Because the only issue upon which we granted review is whether the state constitutional right of free speech extends to [**816] the distribution of pamphlets in the interior hallways of an apartment building that is not open to the public, we have no occasion to decide whether tenants or a tenants association may derive such a right from some other source.

III.

There is much to be said for taking an incrementalist approach to appellate decision making, and such jurisprudential considerations apply especially when, as here, we face the significant task of defining the contours of an [*1042] aspect of the state constitutional right of free speech that we have not addressed for more than two decades. The analysis set forth above affords a fully adequate basis upon which to resolve this matter, and I believe the court can, and should, leave to another day and [***64] another case the difficult task of further defining and clarifying the scope of section 2(a)'s free speech right. I note that one such case, *Waremart, Inc. v. Progressive Campaigns* (2000) 85 Cal. App. 4th 679, review granted March 14, 2001, S094236, already is pending before our court.

Instead of resolving this case narrowly on the basis of the issue discussed above, the lead opinion proposes to hold that state action or its equivalent must be established in order to raise *any* claim under section 2(a)) (lead opn., *ante*, 2001 Cal. LEXIS 5598, *37), and further suggests that "*private property must be public in*

character before California's free speech clause may apply." (*Id.*, 2001 Cal. LEXIS 5598, *42, italics added.) But even if one were to accept the lead opinion's assertion that a finding of state action or its equivalent is required with regard to the *specific subcategory* of free speech here at issue -- the right to distribute unsolicited pamphlets -- such a determination would not, in my view, necessarily control *other* types of free speech claims that might be asserted under section 2(a). By proposing to reach the state action issue, and by speaking broadly and asserting [***65] that as a general matter, section 2(a) can afford no type of free speech right with regard to a forum that is both privately owned and closed to the general public, the lead opinion says more than it needs to, and more than is supported by our prior decisions.

When, in a future case, this court does address and decide whether, and in what circumstances, section 2(a) should be construed as requiring a showing of state action, it will be helpful to consider the diverse circumstances in which the free speech clause might be implicated. I have in mind circumstances in which a private person or entity may attempt to utilize its power or authority in one sphere to censor or undermine what might be viewed as another individual's "core" free speech rights. Consider a private landlord who, under penalty of eviction, precludes his or her tenants from displaying in the windows of their apartments the campaign poster of a particular political candidate supported by the tenant -- or requires the tenants to display in the windows of their homes a poster of the candidate supported by the landlord. Or consider a union or employer that attempts to utilize its power over an individual by precluding [***66] certain bumper stickers on vehicles parked in the employer's or union's parking lot, or by requiring that the employee place a certain bumper sticker on his or her vehicle or attend a rally and make a political contribution, unconnected to employment-related issues, in support of a candidate favored by the union or employer but not supported by the employee.

[*1043] If we were to hold, as the lead opinion broadly would, that *all types of section 2(a) free speech claims* require state action (or its equivalent, shown by establishing that the location where the speech is exercised is the "functional equivalent of a traditional public forum") (lead opn., *ante*, 2001 Cal. LEXIS 5598, *44, 111 Cal. Rptr. 2d at p. 352, 29 P.3d at p. 810), we effectively would remove any state constitutional obstacle to any such action by a landlord, union, or employer. I see no reason to prejudge the resolution of such questions.

Given the variety of circumstances in which free speech concerns may come into play, and the difficulty of predicting how the presence or absence of a "state action" requirement might affect the practical protection conferred by the free speech right embodied [**817] in the California Constitution's free speech clause, I believe we should proceed cautiously [***67] and limit our decision to the context presented by the facts before us.

IV.

I join in the judgment of the court, because I believe that section 2(a) of the California Constitution has no application in the context presented here. I would decide no more.

GEORGE, C.J.

DISSENTBY:
WERDEGAR

DISSENT:

DISSENTING OPINION BY WERDEGAR, J.

A majority of this court, while divided in their reasons for so doing, today join in immunizing from state constitutional scrutiny a commercial residential landlord's suppression of speech among its tenants. Guided by our precedents and the clear language of our state Constitution, I respectfully dissent.

Background

Plaintiff Golden Gateway Center (Golden Gateway) is landlord of a multi-building commercial and residential apartment complex containing 1,254 residential units; defendant Golden Gateway Tenants Association (Tenants Association), formed in 1982, is a group of residential tenants in the complex. Golden Gateway incorporates by reference in each of its residential lease agreements certain "Building Standards." Among these, at relevant times through June 1996, was a provision entitled "Soliciting," which read, in its entirety: [***68] "Any soliciting within the building is absolutely forbidden. Should a solicitor appear, please notify the Owner so that appropriate action may be taken."

From the time of its formation in 1982 until 1993, the Tenants Association periodically distributed a newsletter on or under the apartment doors of Golden Gateway's residents. For these approximately 11 years, Golden [*1044] Gateway did not object to the Tenants

Association's leafleting. Golden Gateway, for its part, also distributed papers under residents' doors (and posted them in common areas, such as the elevators), when such modes of communication served its management's needs and interests.

In 1993, citing the Building Standards, Golden Gateway asked the Tenants Association to stop distributing newsletters at tenants' doors. The Tenants Association refused, inter alia, on constitutional free speech grounds, and continued to distribute its newsletters.

In 1996, shortly after the Tenants Association filed a lawsuit against Golden Gateway opposing "hotelization" of the complex and distributed some leaflets critical of Golden Gateway's management, Golden Gateway demanded that the Tenants Association cease "dissemination of politically [***69] based material." When the Tenants Association refused, Golden Gateway revised its Building Standards expressly to forbid all "leafleting," stating that any such within the building "is absolutely forbidden" other than "on the bulletin boards located in the laundry rooms" or at the specific request of a tenant. The Tenants Association continued its distribution practices, and Golden Gateway ultimately sought the injunction that is the subject of this litigation. The Tenants Association cross-complained, seeking a declaration that it could continue leafleting at tenants' doors.

The trial court preliminarily enjoined the Tenants Association from leafleting. After trial, however, the court dissolved the injunction, ruling that the Tenants Association had a contractual right to distribute its newsletter at tenants' doors and on laundry room bulletin boards. The Court of Appeal reversed, and we granted review on petition of the Tenants Association.

Discussion

Our state Constitution provides that "every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right." (Cal. Const., art. I, § 2, subd. (a); hereafter section [***70] 2(a) or the state free speech clause.) n1 This unambiguous language should afford California apartment complex dwellers the [**818] freedom, subject to reasonable regulation, to communicate in writing with each other on their residential premises, including, as relevant in this case, at each others' front doors, about matters in their common interest as tenants.

n1 In its entirety, section 2(a) provides: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

[*1045] At the outset, it is important to emphasize the narrowness of the question we are called upon to decide. No question is raised as to whether the Tenants Association or its members have waived their leafleting or other communicative rights. Nor do we have before us a landlord's attempt to curb purely commercial or nontenant activity. Finally, Golden Gateway's property rights are not those " 'of an individual homeowner or [***71] the proprietor of a modest retail establishment' " (*Robins v. Pruneyard Shopping Center* (1979) 23 Cal. 3d 899, 910, 153 Cal. Rptr. 854, 592 P.2d 341 (*Robins*), affd. *sub nom. PruneYard Shopping Center v. Robins* (1980) 447 U.S. 74, 64 L. Ed. 2d 741, 100 S. Ct. 2035). We need not decide today, therefore, what result an appropriate constitutional analysis would generate in such cases. The sole question we face is whether the residents of a large multi-building apartment community have the right, as against the landlord's wishes, to communicate with each other through the distribution at their front doors of leaflets, subject to reasonable time, place, and manner regulations and the right of any resident who so wishes to opt out of receiving such communications. I would hold that they do.

I.

In providing that all Californians "may freely speak, write and publish" their sentiments, the framers of the state free speech clause drew no distinction, among those who might seek to obstruct such activities, between state and private actors. They specified instead, in plain language, a right of free speech that runs against both--and protects against [***72] interference by either. Thus, as we observed only last year, section 2(a)'s "right to freedom of speech, unlike the First Amendment's, is unbounded in range. It runs against the world, including private parties as well as governmental actors." (*Gerawan Farming, Inc. v. Lyons* (2000) 24 Cal. 4th 468, 492 (*Gerawan*), citing *Robins*, *supra*, 23 Cal. 3d at pp. 908-911; Fritz, *More Than "Shreds and Patches": California's First Bill of Rights* (1989) 17 Hastings Const. L.Q. 13, 31; Friesen, *Should California's Constitutional Guarantees of Individual Rights Apply Against Private Actors?* (1989) 17 Hastings Const. L.Q. 111, 118, 119-122 (*Private*

Actors).)

Section 2(a) also, as the lead opinion emphasizes, provides that "[a] law may not restrain or abridge liberty of speech or press," thus explicitly prohibiting state legislative, and implicitly prohibiting state executive and judicial, suppression of protected speech. But the latter proviso neither grammatically nor legally qualifies the simple and sweeping free speech guarantee with which section 2(a) begins. Nor, contrary to the lead opinion, does that proviso indicate an intent [***73] that the clause as a whole protect against [*1046] only state actions (lead opn., *ante*, 2001 Cal. LEXIS 5598, *19). Rather, as the lead opinion concedes and as commentators have observed, that the "express prohibition against a 'law' restraining or abridging free speech" (*ibid.*) resides in (and on its face purports to govern) the second sentence, alone, "arguably bolsters such an interpretation" (*ibid.*) of the clause as a whole as would infer "an intent to protect the right to free speech against private intrusions" (*id.*, 2001 Cal. LEXIS 5598, *18, citing *Private Actors*, *supra*, 17 Hastings Const. L.Q. at pp. 119-121).

In consequence of section 2(a)'s plain language, we consistently have rejected any suggestion that California's free speech clause carries a state action limitation. We first held more than 20 years ago that it carries no such limitation. (*Robins*, *supra*, 23 Cal. 3d at p. 910.)

In *Robins*, we stated "that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers *even when the centers are privately owned.*" (*Robins*, *supra*, 23 Cal. 3d at p. 910, italics added.) Although our rejection in *Robins* [***74] of a state action requirement [**819] was only implicit, the lead opinion is mistaken in asserting we there did not address whether California's free speech clause protects against only state action or against private conduct as well. (Lead opn., *ante*, 2001 Cal. LEXIS 5598, *12.) We had no choice *but* to address that issue, as the conduct complained of in *Robins*--a commercial landlord's policy "not to permit any tenant or visitor to engage in publicly expressive activity" (*Robins*, *supra*, 23 Cal. 3d at p. 902)--was "that [of] a *private individual*" (*Laguna Publishing Co. v. Golden Rain Foundation* (1982) 131 Cal. App. 3d 816, 838, 182 Cal. Rptr. 813). We properly treat courts' implicit holdings as equivalent, legally and logically, to their explicit ones (see, e.g., *Chapman v. Pitcher* (1929) 207 Cal. 63, 68, 276 P. 1008; *People v. McCoy* (2001) 25 Cal. 4th 1111, 1121), and no reason appears why we should treat *Robins* differently.

Some commentators apparently, at least for a time, found *Robins*'s applicability outside its context of a large shopping center uncertain because we there discussed "the role of the centers in our society" [***75] and emphasized the case did not implicate " 'the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment' " (*Robins*, *supra*, 23 Cal. 3d at p. 910). But any questions left open by *Robins* on the state action question were laid to rest in *Gerawan*, where we stated unambiguously that the right of free speech granted by the state free speech clause "runs against the world, including private parties as well as governmental actors" (*Gerawan*, *supra*, 24 Cal. 4th at p. 492). Indeed, we cited *Robins* (23 Cal. 3d at pp. 908-911, 153 Cal. Rptr. 854, 592 P.2d 341) for that very proposition.

[*1047] The lead opinion dismisses *Gerawan*'s discussion of state action as "nonbinding dictum." (Lead opn., *ante*, 2001 Cal. LEXIS 5598, *32.) Nevertheless, for many of the same reasons, presumably, as led the author of the lead opinion only eight months ago to sign the majority opinion in *Gerawan*, I disagree that *Gerawan*'s dictum is unpersuasive. *Gerawan* based its rejection of a state action requirement on section 2(a)'s plain language (*Gerawan*, *supra*, 24 Cal. 4th at pp. 489-492), buttressed by "the *peculiar character* of constitutions [like California's] [***76] dating to the 19th century, which are not so narrow" as to restrain only governmental actors (*id.* at p. 492). The *Gerawan* majority cited textual proof that the California Constitution must be counted among those that were drafted to protect against private, as well as governmental, intrusion on constitutional rights. (See *Gerawan*, *supra*, 24 Cal. 4th at p. 493 [citing constitutional grant to wives of a separate property right as against their husbands and to husbands and wives a similar right as against one another].) I continue to find *Gerawan*'s analysis persuasive--its plain-language rationale for the reasons earlier stated, and its constitutional-character rationale on the basis of the scholarly authorities and textual examples that *Gerawan* provided. n2

n2 The lead opinion suggests that the justices in *Gerawan*'s majority "did not carefully consider whether California's free speech clause requires state action" (lead opn., *ante*, 2001 Cal. LEXIS 5598, *32) when they stated that it "runs against the world, including private parties" (*Gerawan*, *supra*, 24 Cal. 4th at p. 492), but that the statement may have been dictum does not

mean it was ill considered. As explained above, moreover, and contrary to the lead opinion's further assertion, the *Gerawan* majority provided ample analytical support (lead opn., *ante*, 2001 Cal. LEXIS 5598, *32) for its statement.

[***77]

Gerawan's progenitor, *Robins*, as the lead opinion recognizes, "has been the law in California for over 20 years" and is "embedded in our free speech jurisprudence with no apparent ill effects" (lead opn., *ante*, 2001 Cal. LEXIS 5598, *15). Principles of stare decisis, therefore, oblige us to follow its holding. As explained above, that holding logically implies that section 2(a) carries no state action limitation.

Concededly, the *result* in *Robins* might be reconcilable with a rule--similar, perhaps, to that the lead opinion proffers--that would make free and open accessibility to the public [**820] a "threshold requirement" for applying the state free speech clause to the actions of a private property owner. (Lead opn., *ante*, 2001 Cal. LEXIS 5598, *42) But our *analysis* in *Robins* would not be so reconcilable.

Thus, when we referred in *Robins* to Court of Appeal cases citing the United States Supreme Court's decisions in *Marsh v. Alabama* (1946) 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 and *Amalgamated Food Employees Union v. Logan Valley Plaza* [*1048] (1968) 391 U.S. 308, 20 L. Ed. 2d 603, 88 S. Ct. 1601, we did so not with implicit approval of any state action [***78] reasoning in those underlying federal decisions (see lead opn., *ante*, 2001 Cal. LEXIS 5598, *41); rather, we believed the Court of Appeal opinions to be useful in illustrating "the strength of 'liberty of speech' in this state." (*Robins*, *supra*, 23 Cal. 3d at p. 908.) Irrespective of federal principles, we noted, "the duty of this court is to help determine what 'liberty of speech' means *in California*." (*Id.* at p. 909, italics added.)

Ultimately, we explained our holding in *Robins* as "providing greater protection than the First Amendment now seems to provide" (*Robins*, *supra*, 23 Cal. 3d at p. 910), affirming the long-standing principle that a " 'protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee' " (*id.* at p. 908).

Our decision in *Robins* rested expressly on our understanding "that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised," even on private property (*Robins*, *supra*, 23 Cal. 3d at p. 910) and *not* on any "functional equivalence of the shopping center to a traditional public forum" (lead opn., *ante*, [***79] 2001 Cal. LEXIS 5598, *39). In *Robins*, far from finding this functional equivalence, we found, much more modestly, that " '[a] handful of additional orderly persons soliciting signatures and distributing handbills in connection therewith, under reasonable regulations adopted by defendant to assure that these activities do not interfere with normal business operations [citation] would not markedly dilute defendant's property rights.' " (*Robins*, *supra*, 23 Cal. 3d at p. 911.) In considering the competing constitutional rights at stake, we nowhere referred, categorically, to "the public character of the property" (lead opn., *ante*, 2001 Cal. LEXIS 5598, *40). n3 Rather, we considered the interest in "speech and petitioning, reasonably exercised," and "the role of [shopping] centers in our society" (*Robins*, *supra*, 23 Cal. 3d at p. 910) in facilitating the exercise of such rights as against the " 'defendant's property rights' " (*id.* at p. 911), emphasizing that our result, in favoring free speech, might be different if " 'we ... had under consideration the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment' " (*id.* at p. 910). We also expressly [***80] preserved property owners' right, despite constitutional constraints, to impose " 'reasonable regulations' " (*id.* at p. 911), avoiding any implication "that those who wish to disseminate ideas have free rein" (*id.* at p. 910).

n3 Actually, the private property involved in *Robins*, contrary to the lead opinion's implication, was not open to the public without qualification, but only at certain times and "for the purpose of patronizing the many businesses." (*Robins*, *supra*, 23 Cal. 3d at p. 902.)

In *Robins* we thus followed "the familiar and well-established constitutional analysis--applicable to other constitutional rights, such as freedom of [*1049] speech ...--under which a court considers the extent to which a defendant's actions infringe or intrude upon the plaintiff's constitutionally protected interest and 'balances' or 'weighs' such infringement against the relative importance or 'compelling' nature of the defendant's justifications for its actions (taking into account whether there are other, [***81] less intrusive means by which the defendant could achieve its objectives)." (*Hill v. National Collegiate Athletic* [**821] *Assn.* (1994) 7 Cal. 4th 1, 62, 865 P.2d 633 (conc. & dis. opn. of George, J.).) n4

n4 See, e.g., *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal. 4th 121, 166, 980 P.2d 846 (conc. opn. of Werdegar, J.) ("balancing ... First Amendment free speech rights with the equally weighty right of plaintiffs to be let alone at their jobsite, free of racial discrimination"); *Sommer v. Metal Trades Council* (1953) 40 Cal. 2d 392, 401-402, 254 P.2d 559 (noting the " 'effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and "the power of the State to set the limits of permissible contest open to industrial combatants" ' "); *Gill v. Hearst Publishing Co.* (1953) 40 Cal. 2d 224, 228, 253 P.2d 441 (holding the "right 'to be let alone' and to be protected from undesired publicity is not absolute but must be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press").

[***82]

We should adhere to our established constitutional jurisprudence in this case. Consequently, unless we conclude Golden Gateway's leafleting ban is a reasonable regulation of the speech at issue, we must balance the private and societal interest in that speech against any competing constitutional concerns that would be implicated were we to rule that section 2(a) forbids enforcement of that ban. (See, e.g., *Robins, supra*, 23 Cal. 3d at pp. 910-911 [balancing signature gatherers' "wish to disseminate ideas" with concern " 'that these activities do not interfere with normal business operations' " and " 'property or privacy rights' " of occupants and owners].) We must also take into account the ban's impact on the right of Californians, generally, to receive unsolicited communications. (See generally *Van Nuys Pub. Co. v. City of Thousand Oaks* (1971) 5 Cal. 3d 817, 825-826, 97 Cal. Rptr. 777, 489 P.2d 809 (*Van Nuys*); see also *Martin v. City of Struthers* (1943) 319 U.S. 141, 148-149, 87 L. Ed. 1313, 63 S. Ct. 862.) n5

n5 *Martin v. City of Struthers, supra*, 319 U.S. 141 and *Van Nuys, supra*, 5 Cal. 3d 817 both were cases decided in the First Amendment context, but the free speech interests they involved were similar to those with which this case deals. "As a general rule, [moreover, California's] free speech clause and its right to freedom of speech are not only as broad and as great as the First Amendment's, they are even 'broader' and 'greater.' " (*Gerawan, supra*, 24 Cal. 4th at p. 491, citing numerous authorities.)

[***83]

A. Is the ban a reasonable regulation of affected speech?

Golden Gateway unquestionably retains the right to impose reasonable time, place, and manner restrictions on expressive activity at its premises. [*1050] (*Robins, supra*, 23 Cal. 3d at pp. 910-911; *In re Hoffman* (1967) 67 Cal. 2d 845, 852-853, 64 Cal. Rptr. 97, 434 P.2d 353.) Such restrictions must, however, be " ' "justified without reference to the content of the regulated speech, ... narrowly tailored ...,and ... leave open ample alternative channels for communication of the information." ' " (*Savage v. Trammell Crow Co.* (1990) 223 Cal. App. 3d 1562, 1573, 273 Cal. Rptr. 302, quoting *Clark v. Community for Creative Non-Violence* (1984) 468 U.S. 288, 293, 82 L. Ed. 2d 221, 104 S. Ct. 3065.)

1. Does the ban afford ample alternative channels for communication?

Even assuming Golden Gateway's leafleting ban can be considered content neutral, n6 the record demonstrates that it fails to leave open ample alternative channels of communication, in that its only allowance for distribution of unsolicited printed matter is posting on laundry room bulletin boards.

n6 The assumption may be faulty. The current version of Golden Gateway's ban, the first expressly to prohibit "leafleting," was promulgated shortly after the Tenants Association distributed flyers criticizing Golden Gateway's management and discussing a Tenants Association lawsuit against Golden Gateway. The record, moreover, suggests that Golden Gateway construes its ban as not restricting its *own* communicative prerogatives.

[***84]

Neither that the Tenants Association can use the public mails nor that it can distribute its leaflets off

Golden Gateway's premises provides a constitutional alternative to door-to-door leafleting. Mailing a single leaflet to each address, the record suggests, would cost [**822] the Tenants Association more than $ 500, even assuming it could muster the volunteers to assemble, stuff, and address 1,254 envelopes. (See generally *City of Watseka v. Illinois Public Action Council* (7th Cir. 1986) 796 F.2d 1547, 1558 [mail and telephone not sufficient because "more expensive and less effective than in-person solicitation at the citizen's residence"].) Nor would standing on the sidewalk near the complex afford Tenant Association speakers a reasonable opportunity to "directly communicate their message to their targeted audience" (*Planned Parenthood v. Wilson* (1991) 234 Cal. App. 3d 1662, 1674, 286 Cal. Rptr. 427), some of whom (e.g., automobile drivers) may not use those sidewalks at all and all of whom, presumably, use them at most intermittently. As the United States Supreme Court has noted, "the most effective way of bringing [informational materials] to the [***85] notice of individuals is their distribution at the homes of people." (*Schneider v. New Jersey* (1939) 308 U.S. 147, 164, 84 L. Ed. 155, 60 S. Ct. 146; accord, *Van Nuys*, *supra*, 5 Cal. 3d at pp. 823-825.)

[*1051] Although oral communication among tenants may be permitted, as the concurring opinion suggests (conc. opn., *ante*, 2001 Cal. LEXIS 5598, *49), n7 the Building Standards forbid all unrequested *published discourse* by tenants except in the laundry rooms. As the state free speech clause protects the freedom of Californians to "write and publish" equally and identically with their right to "speak" their sentiments on all subjects, the Building Standards banning written and published discourse offend the clause equally and identically as would a rule that entirely forbade tenants to speak with each other on the premises except in the laundry rooms.

n7 But such communication is not without restriction. Under the Building Standards' solicitation ban, tenants may not even *speak* with each other in the common areas of the building if to solicit membership in the Tenants Association, engage in religious proselytizing, distribute campaign literature, seek political or charitable contributions, or, indeed, seek support for causes of any kind.

[***86]

2. *Is the ban narrowly tailored to accomplish its legitimate objectives?*

The record also establishes that Golden Gateway's ban on solicitations and leafleting goes much further than is necessary to address its asserted legitimate concerns for tenant safety, tenant privacy, or cleanliness of the premises. As Golden Gateway conceded at trial, no breaches of security have occurred as a result of leaflet distribution. With respect to litter concerns, Golden Gateway acknowledged the Tenants Association already has agreed to retrieve from around tenants' doors, within 24 hours of distribution, any of its newsletters or leaflets that have not been collected by their intended recipients.

Nor would enforcing Golden Gateway's ban necessarily significantly enhance tenant privacy. While one of Golden Gateway's property managers opined at trial that unsolicited leafleting constituted an invasion of tenant privacy, he conceded that the only available alternative under Golden Gateway's ban, unrequested mail or telephone calls, would equally be so. And Golden Gateway conceded at trial that the Tenants Association already has agreed not to distribute leaflets or newsletters to any tenant who [***87] indicates a desire not to receive them. Were Golden Gateway's regulations more narrowly tailored in that direction, a tenant who prefers not to receive leaflets could simply post a "no leafleting" sign or appropriately advise the Tenants Association.

Golden Gateway's ban thus operates far more broadly than is necessary to effect its legitimate purposes. It may not, therefore, be enforced as merely a reasonable regulation of the time, place, or manner of the speech it would affect. (*Savage v. Trammel Crow Co.*, *supra*, 223 Cal. App. 3d at p. 1573.)

[*1052] B. Balancing of affected constitutional interests

Since Golden Gateway's ban is not a reasonable regulation, we must, in order to resolve this matter, balance the competing constitutional interests implicated in its efforts to prohibit the Tenants Association's leafleting. (See *Robins*, 23 Cal. 3d at [**823] 910-911.) Such interests include, on the one hand, the Tenants Association's interest in freely speaking, writing and publishing to tenants at Golden Gateway Center and those tenants' interest in receiving the Tenants Association's written communications. They include, on the other hand, [***88] the privacy interests of individual tenants and Golden Gateway's property interests.

1. Free speech

The Tenants Association understandably desires to communicate regularly with the tenants of Golden Gateway about Tenants Association business and tenants' issues, generally. As previously noted, moreover, Golden Gateway tenants have a recognized interest in receiving even unsolicited communications. (See generally *Martin v. City of Struthers*, *supra*, 319 U.S. at pp. 147-148; *Van Nuys*, *supra*, 5 Cal. 3d at pp. 825-826.) We should be mindful of the "paramount and preferred place" that free speech enjoys in the hierarchy of rights in this state (*In re Lane* (1969) 71 Cal. 2d 872, 878, 79 Cal. Rptr. 729, 457 P.2d 561) and also should strive to avoid any balancing of constitutional interests that would relegate California apartment dwellers, as a group, to inferior status among speakers.

2. *Property rights*

Plaintiff, as landlord, complains its property rights will be diminished if its leafleting ban is not enforced. Such concerns, legitimate in the abstract, would seem overblown in this case to the extent that the tenants of Golden [***89] Gateway *already have undisputed rights* to be present in the hallways and throughout the common areas of their complex. Pursuant to their lease agreements, the tenants have the contractual right to be present in the hallways and throughout the common areas of the Golden Gateway Center. They also possess property rights entitling them to occupy and utilize the premises. Leaseholds possessed by tenants are as much estates in property as is a landlord's remaining ownership interest. Therefore, to construe section 2(a) to require of Golden Gateway a more appropriately tailored approach to regulation of tenant leafleting, as a matter of both law and fact, " 'would not markedly dilute [the landlord]'s property rights' " (*Robins*, *supra*, 23 Cal. 3d at p. 911).

[*1053] 3. *Tenant privacy*

Golden Gateway makes much of the insulation from unsolicited appeals (and the high rents assertedly paid for such insulation) that the Building Standards purportedly are designed to preserve. As demonstrated, however, Golden Gateway's policies go far beyond reasonable regulation directed to such insulation. Even assuming that privacy concerns loom as large, practically speaking, as plaintiff would [***90] have us believe, n8 we should remain mindful that "a community may not suppress ... the dissemination of views because they are unpopular, annoying or distasteful." (*Murdock v. Pennsylvania* (1943) 319 U.S. 105, 116, 87 L. Ed. 1292, 63 S. Ct. 870.)

n8 While Golden Gateway's property managers testified in general terms to tenant concern about leafleting, the record reveals that Golden Gateway ultimately could document only one resident complaint about door-to-door leafleting in over 15 years.

Enforcement of Golden Gateway's leafleting ban, which forbids the provision to any tenant of any leaflet not specially requested in advance, significantly would impact "the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home." (*Martin v. City of Struthers*, *supra*, 319 U.S. at pp. 148-149.) The net effect of enforcing Golden Gateway's total ban will be to deprive the [***91] residents of this sizable community of a traditional and important means of communicating with each other.

Ultimately, the appropriate "balance is tipped in favor of the right to voice ideas as opposed to the property rights or mere naked title of the owners" (*Allred v. Shawley* (1991) 232 Cal. App. 3d 1489, 1496, 284 Cal. Rptr. 140) of Golden Gateway Center. n9 And [**824] in my view, "proper accommodation of the competing [free speech] and privacy values at issue requires that the initial burden be placed on the homeowner to express his objection to the distribution of material." (*Van Nuys*, *supra*, 5 Cal. 3d at p. 826.) n10

n9 This is not to say, of course, that free speech rights, when implicated, always must prevail over competing considerations. As we observed in *Robins*, for example, appropriate constitutional balancing of free speech interests against " 'the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment' " (*Robins*, *supra*, 23 Cal. 3d at p. 910) might come out differently.

n10 Golden Gateway's ban does not distinguish between, and is not tailored separately to address, commercial and noncommercial speech. Moreover, Golden Gateway's Building Standards by their terms bar, and the injunction Golden Gateway seeks would

burden, only tenant speech. We need not decide, therefore, what result an appropriate balancing of constitutional considerations would generate in a case implicating only commercial or only nontenant speech.

[***92]

[*1054] II.

The lead opinion never engages in a traditional analysis along the lines of the foregoing, arguing rather that Golden Gateway's restrictions on tenant speech do not implicate the state free speech clause in the first place. It takes as its fundamental premise that the state free speech clause protects only against state action, defining "the scope of this limitation" (lead opn., *ante*, 2001 Cal. LEXIS 5598, *38) as encompassing "the actions of a private property owner ... only if the property is freely and openly accessible to the public" (*id.*, 2001 Cal. LEXIS 5598, *42-43). n11

n11 For convenience, the discussion that follows occasionally employs the lead opinion's apparent shorthand expression "state action" for the "state or state-like action" limitation on state free speech rights the lead opinion would impose. As will appear, however, I disagree that *Robins* stands for the proposition that "private property must be public in character before California's free speech clause may apply" (lead opn., *ante*, 2001 Cal. LEXIS 5598, *42). Still less am I willing to embrace the logically incoherent notion that "the actions of a private property owner constitute state action ... if the property is freely and openly accessible to the public" (*id.*, 2001 Cal. LEXIS 5598, *42-43).

[***93]

For support, the lead opinion cites *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592, apparently for the proposition that state constitutional provisions carry a state action limitation "absent some 'suggestion' in the provision's history" to the contrary. (Lead opn., *ante*, 2001 Cal. LEXIS 5598, *19) But this court neither expressly nor impliedly addressed in *Gay Law Students* the question whether some kind of presumption of that nature might exist. Further, in *Gay Law Students* we spoke only to "the equal protection clause of the California Constitution" (24 Cal. 3d at p. 466) and its "predecessor provision" (*id.* at p. 468). Similarly, in *Jones v. Kmart Corp.* (1998) 17 Cal. 4th 329, 333, 949 P.2d 941, the other case cited by the lead opinion on this point, we spoke to the state search and seizure provision. As the lead opinion's own authority notes, the question of "whether to apply constitutional restraints on private actors" is properly approached "only by reference to the text, history and purpose of individual clauses of the California Declaration of Rights. It must [***94] be answered separately for each clause, not generally for the entire constitution." (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at pp. 111-112.)

Next, while acknowledging the absence from section 2(a) of an explicit state action limitation, the lead opinion asserts the state free speech clause nevertheless is ambiguous as to the implicit presence or absence of such a limitation. (Lead opn., *ante*, 2001 Cal. LEXIS 5598, *18.) The lead opinion finds such ambiguity in the second sentence of the clause, asserting that its reference to [*1055] "law" abridging the liberty of speech or press might mean the framers feared only government intrusion, thus indicating an intent to protect only against state actions. (*Id.*, 2001 Cal. LEXIS 5598, *19.) Such an inference is neither logically nor grammatically supportable.

First, although a type of state action requirement might be discerned in the clause's [**825] second sentence if it stood alone or purported to qualify the first sentence, as noted it does neither. The second sentence is preceded by and makes no reference to the first sentence; the first sentence, in turn, grants the free speech right without any limitation except that of responsibility for abuse [***95] of the right. The presence of the second sentence, with its express reference to state action in the form of "law," in fact bolsters the case for construing the first sentence in accord with its plain language, i.e., in accord with its lack of any such reference, and for construing the entire clause in accord with *its* plain language, i.e., in accord with the lack of any qualification on the scope of the free speech right it confers.

Second, scholars have recognized that the phrase "being responsible for the abuse of this right" in the first sentence of section 2(a) offers contextual evidence the framers' were aware the state free speech clause would limit private conduct. The reasoning is that the phrase likely was intended to preserve common law defamation actions for abusive speech, with the corollary that *non*abusive speech "should not be suppressed by a private suit for injunctive or damage relief. This, then, is evidence of awareness that the constitution could not

only shield conduct (nondefamatory speech) from civil liability but also limit other private conduct (damage suits for nondefamatory speech) .... At the very least, its inclusion in 1849 supports the argument [***96] that the document's drafters ... did not have a fixed notion that only the conduct of public actors could be affected by constitutional guarantees." (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 122.)

Third, were it accurate that the framers " 'feared only government intrusions' " (lead opn., *ante*, 2001 Cal. LEXIS 5598, *20), the proffered conclusion--that in drafting the state free speech clause as a whole the framers "intended to impose a state action requirement" (*id.*, 2001 Cal. LEXIS 5598, *21)--would not follow, for, as the lead opinion itself notes, the framers, regardless of what type of intrusion they feared most, evidently also " 'wished to declare generally the sanctity of free expression' " (*id.*, 2001 Cal. LEXIS 5598, *20) as against the world. (See also *Gerawan*, *supra*, 24 Cal. 4th at pp. 492-493.) The language they employed does just that.

Plain English is not ambiguous unless "there are two meanings which may reasonably be attributed to the term in question." (*Reserve Insurance Co. v.* [*1056] *Pisciotta* (1982) 30 Cal. 3d 800, 815, 180 Cal. Rptr. 628, 640 P.2d 764 [contract provision]; see also *Davis v. City of Berkeley* (1990) 51 Cal. 3d 227, 235, 272 Cal. Rptr. 139, 794 P.2d 897 [***97] [constitutional provision].) Applying this fundamental principle of construction, we previously have held that a constitutional liberty conferred without qualification is neither " 'ambiguous or doubtful' " in scope but, rather, " 'applies to all ... substantial ... impairments' " of the right conferred and " 'is not aimed solely at' " (*Meriweather Invest. Co., Ltd. v. Lampton* (1935) 4 Cal. 2d 697, 703, 53 P.2d 147) any subset thereof. (See also *Welsh v. Cross* (1905) 146 Cal. 621, 624, 81 P. 229.) n12 Ultimately, the same principle applies here. In light of its unqualified statement of the free speech right, section 2(a) is not susceptible of being construed as applicable only against state or state-like action.

n12 Specifically, in *Meriwether* we held that, in forbidding " 'any "law" impairing the obligation of contract,' " former article I, section 16 of the California Constitution plainly was " 'not aimed solely at laws which expressly destroy or annul contracts.' " (*Meriwether Invest. Co., Ltd. v. Lampton*, *supra*, 4 Cal. 2d at p. 703.) In *Welsh*, we reasoned that, as that clause by its terms "is not aimed solely at" laws which *expressly* annul contracts, it "applies to all laws which in any substantial degree" have that effect. (*Welsh v. Cross*, *supra*, 146 Cal. at p. 624.)

[***98]

In short, the lead opinion fails to demonstrate that, despite its plain language and contrary to our pronouncements in *Robins* and *Gerawan*, section 2(a) contains ambiguities regarding state action the resolution of which requires recourse to extrinsic sources concerning the framers' intent. But even were such ambiguities present, I would conclude, based on section 2(a)'s history and context, that--as *Robins* impliedly held and *Gerawan* confirmed--our Constitution grants [**826] a free speech right running against private parties as well as state actors.

The state free speech clause first appeared as article I, section 9 of the original California Constitution of 1849: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions for libels, the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted; and the jury shall have the right to [***99] determine the law and the fact." (Cal. Const. of 1849, art. I, § 9.)

The clause next appeared as article I, section 9 of the present California Constitution of 1879. It was identical to its predecessor but for the addition of a sentence further relating to criminal libel. (See Cal. Const., art. I, former [*1057] § 9, as adopted May 7, 1879.) n13 In 1974, the clause was revised by the addition of new section 2 to article I and the deletion of old section 9: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. I, § 2, added Nov. 5, 1974.) n14 Finally, the clause was redesignated in 1980 as article I, section 2, subdivision (a).

n13 The additional sentence read: "Indictments found, or information laid, for publications in newspapers shall be tried in the county where such newspapers have their publication office, or in the county where the

party alleged to be libeled resided at the time of the alleged publication, unless the place of trial shall be changed for good cause." (Cal. Const., art. I, former § 9, as adopted May 7, 1879.) [***100]

n14 This revision retained, without substantial change, the state free speech clause at its core and removed the provisions relating to procedure in prosecutions for criminal libel as more suited to statute than constitution. (See Ballot Pamp., Gen. Elec. (Nov. 5, 1974) analysis of Prop. 7 by Legis. Analyst, p. 26.)

Thus, like the present clause, the state free speech clause as originally drafted drew no distinction between state actors and private parties, impliedly therefore granting a free speech right that runs against both. Also like the present clause, the original clause expressly noted speakers' responsibility for "abuse" of the free speech right, language that--to the extent it may be read as preserving the right of aggrieved private parties to sue for defamation (see *Lundquist v. Reusser* (1994) 7 Cal. 4th 1193, 1203, 875 P.2d 1279)--the lead opinion's proffered state action requirement would render superfluous.

Examination of the constitutional context of the original state free speech clause, as originally enacted and as it appears today, buttresses the conclusion [***101] that it grants a right of free speech running against private parties as well as state actors. Enacted together with the free speech clause in the Constitution of 1849 was a clause that granted to wives a separate property right as against their husbands, who were obviously private parties. (Cal. Const. of 1849, art. XI, § 14.) This separate-property clause clearly illustrates that the free speech clause was not unique, in 1849, in granting rights against private parties as well as state actors.

Today the state free speech clause appears in the same article as the privacy clause: "All people are by nature free and independent and have inalienable rights. Among these [is] ... privacy." (Cal. Const., art. I, § 1.) The right of free speech and the right of privacy complement each other, the former dealing with communication to others (see *Spiritual Psychic Science Church v. City of Azusa* (1985) 39 Cal. 3d 501, 510-511, 217 Cal. Rptr. 225, [*1058] 703 P.2d 1119 [implying speech "communicates a message" from speaker to audience]), the latter dealing both with conduct apart from others and information kept from others (see *Nahrstedt v. Lakeside Village Condominium Assn.* (1994) 8 Cal. 4th 361, 387, 878 P.2d 1275; [***102] *Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal. 4th at pp. 35-36). Just as the right of privacy runs against private parties as well as state actors (*Hill v. National Collegiate Athletic Assn.*, *supra*, 7 Cal. 4th at pp. 15-20), [**827] so too, as demonstrated, runs the right of free speech.

Given that the history and context of the California free speech provision sufficiently confirm its meaning, any excursion into the history of the New York Constitution from which the clause derived is unnecessary. Nor is the relevance of that history clear. The lead opinion posits no evidence that the framers of California's Constitution were aware of or indeed intended to adopt those aspects of the New York history that relate to state action. Nor does it persuade that the framers of the New York Constitution "intended its free speech clause 'to serve as a check on governmental, not private, conduct.' " (Lead opn., *ante*, 2001 Cal. LEXIS 5598, *23.) The authorities underlying *SHAD Alliance v. Smith Haven Mall* (1985) 66 N.Y.2d 496, 498 N.Y.S.2d 99, 488 N.E.2d 1211, cited by the lead opinion, as well as the lead opinion's other authorities, tend upon [***103] examination to support only the first half of that claim, i.e., that the New York framers wished to guard against government encroachments on speech, not the latter half, i.e., that they wished not to guard against private encroachments. (See, e.g., *SHAD Alliance*, *supra*, 66 N.Y.2d at p. 502 [citing various scholars for the truism that "a Bill of Rights is designed to protect individual rights against the government"].) One commentator, noting that the New York "minutes do not reveal why the delegates chose to declare an open-ended right rather than simply to prohibit oppressive 'laws,' " reasons that "perhaps [the broader language] was more attractive precisely because it secured a precious liberty against the entire world." (*Private Actors*, *supra*, 17 Hastings Const. L.Q. at p. 120.)

Finally, whatever the decisions of most of our sister courts (see lead opn., *ante*, 2001 Cal. LEXIS 5598, *34), what matters is the meaning of *California's* free speech clause. Any assertion that there exists a uniform and unchanging "American constitutional theory" (lead opn., *ante*, 2001 Cal. LEXIS 5598, *36) is not supportable. (See generally Baum & Fritz, *American Constitution-Making: The* [***104] *Neglected State Constitutional Sources* (2000) 27 Hastings Const. L.Q. 199, 199-201; Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*

(1994) 25 Rutgers L.J. 945, 952-956, 964-971.)

[*1059] Ultimately, neither the text of the state free speech clause, the history of its adoption, our prior pronouncements, nor considerations of constitutional theory supports judicial imposition of a state action limitation on Californians' free speech rights. Consequently, I join with the Chief Justice in rejecting the lead opinion's discussion and conclusions with regard to the state action doctrine (conc. opn., *ante*, 2001 Cal. LEXIS 5598, *50) and would adhere to our traditional understanding that, even when a restriction on speech "does not implicate any right to freedom of speech under the First Amendment, [it may nevertheless] implicate such a right under [California's free speech clause]" (*Gerawan*, *supra*, 24 Cal. 4th at p. 476).

III.

Regrettably, four justices of this court join today in denying constitutional protection to the tenant speech at issue here. The concurring opinion, [***105] like the lead opinion, emphasizes that Golden Gateway's premises are not open to the public. To that extent, I agree this case is different from *Robins* factually. I disagree the distinction is dispositive. Rather, that the owner of private property may exclude members of the general public from entry onto the premises without necessarily implicating their free speech rights says little about the rights of those who are lawful members of a community occupying units of the property as their residences.

Both opinions, moreover, overlook a critical respect in which this case is factually *similar* to *Robins*: The private property owner seeking to restrict speech already has for its own purposes surrendered to those whose speech it would restrict much of its interest in retaining exclusive control over the premises. Golden Gateway seeks to enjoin [**828] tenant speech (as the owners of the shopping center in *Robins* sought to restrict some patrons' speech), but it already has surrendered to tenants, for virtually the entire range of activities and uses associated with daily living, the hallways and other common areas of the building. Similarly, as the lead and concurring opinions acknowledge, [***106] the owners of the shopping center in *Robins* had "invited [the public] to visit for the purpose of patronizing the many businesses" (*Robins*, *supra*, 23 Cal. 3d at p. 902).

The concurring opinion concludes that the tenant speech Golden Gateway's leafleting ban would affect lies outside "the appropriate limit of the substantive right of free speech" (conc. opn., *ante*, 2001 Cal. LEXIS 5598, *49). But contrary to the concurring opinion, Golden Gateway's ban is not a " 'reasonable regulation, by an owner, of conduct inside [its] multiple dwelling' " (*id.* at p. 2, quoting *Watchtower Bible & Tract Soc., Inc. v. Metropolitan Life Ins. Co.* [*1060] (1948) 297 N.Y. 339, 79 N.E.2d 433, 436-437, italics in conc. opn. omitted). As explained above, the ban goes much further than is necessary to address any legitimate concerns Golden Gateway may have about tenant safety, tenant privacy, or cleanliness of the premises.

With the concurring opinion, therefore, I reject a view of our state free speech clause that "effectively would remove any state constitutional obstacle to any ... action by a landlord, union, or employer" implicating an individual's core free speech rights. (Conc. [***107] opn., *ante*, 2001 Cal. LEXIS 5598, *66.) But I also reject the concurring opinion's approach, which would do much the same with respect to published communications, despite their constitutionally equal--and traditionally cherished--status in this state as protected expressive activity.

Conclusion

For the foregoing reasons, I would reverse the judgment of the Court of Appeal.

WERDEGAR, J.

WE CONCUR:

KENNARD, J.

KLEIN, J. *

* Presiding Justice of the Court of Appeal, Second Appellate District, Division Three, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

2 of 19 DOCUMENTS

MANUEL TORRES et al., Plaintiffs and Appellants, v. PARKHOUSE TIRE SERVICE, INC., et al., Defendants and Respondents.

S084105

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 995; 30 P.3d 57; 2001 Cal. LEXIS 5599; 111 Cal. Rptr. 2d 564; 2001 Cal. Daily Op. Service 7641; 2001 Daily Journal DAR 9391

August 30, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:
Superior Court of California, San Diego County. Court of Appeal of California, Fourth Appellate District, Division One. D031296. Super. Ct. No. 704571. S. Charles Wickersham, Judge.

DISPOSITION:
Reversed the Court of Appeal's judgment and remand the matter for proceedings consistent with this opinion.

COUNSEL:
Attorneys for Appellant:

Moreno & Associates, Andres Moreno and William Baker, for Plaintiffs and Appellants.

Law Offices of Martina A. Silas and Martina A. Silas, for Worksafe! and Communities for a Better Environment, as Amici Curiae on behalf of Plaintiffs and Appellants.

Attorneys for Respondent:

Post Kirby Noonan & Sweat and David B. Oberholtzer, for Defendant and Respondent Roy G. Naas.

Wolfe Axtmann, David G. Axtmann; Booth, Mitchell & Strange and Richard F. Wolfe, for Defendant and Respondent Parkhouse Tire Service, Inc.

Latham & Watkins, Joel E. Krischer and Kathryn M. Davis for Employers Group, as Amicus Curiae on behalf of Defendants and Respondents.

JUDGES:
CHIN, J. WE CONCUR: GEORGE, C. J., KENNARD, J., BAXTER, J., BROWN, J. CONCURRING OPINION [***2] BY BROWN, J. DISSENTING OPINION BY WERDEGAR, J.

OPINIONBY:
CHIN

OPINION:

[*1000] [**58]

Under an exception to the exclusivity of workers' compensation remedies, an injured employee may bring a civil action against another employee "when the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee." (Lab. Code, n1 § 3601, subd. (a)(1).) The question we address is whether, as a general rule, a trial court [**59] properly may instruct the jury that the injured employee must prove that the other employee had an intent to injure in order to satisfy section 3601, subdivision (a)(1)? We conclude the answer is yes.

n1 All statutory references are to the Labor Code unless otherwise indicated.

FACTUAL AND PROCEDURAL BACKGROUND

The facts are taken largely from the Court of Appeal opinion.

Manuel Torres worked for Parkhouse Tire Service, Inc. (Parkhouse), repairing and installing tires. Roy Naas, a sales representative for Parkhouse, approached Torres from behind while he was on his [***3] knees working on a tire. Naas grabbed Torres's back support belt, lifted him off the ground several times, and finally dropped him on his knees. n2 Suffering a back injury, Torres did not return to work for Parkhouse. Torres claimed the incident was malicious, while Naas countered it was innocent horseplay.

n2 At oral argument, Naas's counsel disputed this account. He argued that contrary to the Court of Appeal's opinion, the jury found that Naas did not lift Torres off his knees. "As a matter of policy" this court will not consider "any issue or any material fact that was omitted from or misstated in the opinion of the Court of Appeal, unless the omission or misstatement was called to the attention of the Court of Appeal in a petition for rehearing." (Cal. Rules of Court, rule 29(b)(2).) Counsel for Naas conceded his client did not request correction in a petition for rehearing to the Court of Appeal. Therefore, we will not consider any factual complaints here.

Torres and his wife (plaintiffs) sued Parkhouse [***4] and Naas seeking damages for personal injury and loss of consortium. The complaint alleged that Naas committed a "willful and unprovoked physical act of aggression" against Torres so as to render Naas subject to civil suit under section 3601, subdivision (a)(1). The complaint also alleged that employer Parkhouse condoned and ratified Naas's tortious actions, making it also subject to suit. n3 The trial court instructed the jury that in order to impose liability, the jury must find that (1) Torres's "injury was caused by a wilful and unprovoked physical act of aggression on the part of [Naas]," and (2) Naas "committed the act with the intent to cause injury."

n3 An employee may bring an action against an employer "where the employee's injury or death is proximately caused by a willful physical assault by the employer." (§ 3602, subd. (b)(1).)

[*1001] The jury returned a special verdict finding that Naas did not "commit a wilful and unprovoked act of physical aggression against plaintiff Manuel Torres with the intent [***5] to cause injury."

Plaintiffs appealed. Reversing the trial court's judgment, the Court of Appeal majority held that plaintiffs were not required to prove Naas's specific intent to injure in order to recover damages under section 3601, subdivision (a)(1). The majority found that this statutory exception to workers' compensation exclusivity "does not state that the injury must be 'intentionally' or 'willfully' caused by the physical act of aggression." The majority expressly disagreed with *Soares v. City of Oakland* (1992) 9 Cal. App. 4th 1822, 1826-1829 (*Soares*), which held to the contrary. The dissenting justice (Kremer, P.J.), however, concluded that an intent to injure requirement comported with this court's decision in *Mathews v. Workmen's Comp. Appeals Bd.* (1972) 6 Cal. 3d 719, 100 Cal. Rptr. 301, 493 P.2d 1165 (*Mathews*).

We granted review. Several days before the scheduled oral argument, Naas's counsel informed the court that the parties had reached a settlement. However, no party requested dismissal of the appeal. Although the settlement may have rendered this case technically moot, "we instead follow the well-established line of judicial [***6] authority recognizing an exception to the mootness doctrine, and permitting the court to decline to dismiss a case rendered moot by stipulation of the parties where the appeal raises issues of continuing public importance." (*Lundquist v. Reusser* (1994) 7 Cal. 4th 1193, 1202, fn. 8, 875 P.2d 1279.)

Discussion

A. Exclusivity rule

As a general rule, an employee who sustains an industrial injury "arising out of [**60] and in the course of the employment" is limited to recovery under the workers' compensation system. (§ 3600, subd. (a); *Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 708, 872 P.2d 559 (*Fermino*).) We have observed that this rule of exclusivity is based on the " 'presumed "compensation bargain," pursuant to which the employer assumes liability for industrial personal injury or death without regard to fault in exchange for limitations on the amount of that liability. The employee is afforded relatively swift and certain payment of benefits to cure or relieve the effects of industrial injury without having to prove fault but, in exchange, gives up the wider range

of damages potentially available in tort.' " (*Fermino*, *supra* [***7] , 7 Cal. 4th at p. 709, quoting *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 16, 276 Cal. Rptr. 303, 801 P.2d 1054.)

[*1002] To prevent employees from circumventing the exclusivity rule by bringing lawsuits for work-related injuries against coemployees, who in turn would seek indemnity from their employers, the Legislature in 1959 provided immunity to coemployees. (§ 3601, subd. (a), as amended by Stats. 1959, ch. 1189, § 1, p. 3275 [amending § 3601 to substantially its current version].) In other words, the purpose of the exclusivity rule would be defeated if employees could bring actions against fellow employees acting in the scope of employment such that the fellow employees' negligence could be imputed to their employers. (*Saala v. McFarland* (1965) 63 Cal. 2d 124, 130, 45 Cal. Rptr. 144, 403 P.2d 400.) Therefore, workers' compensation was also made the exclusive remedy against fellow employees acting within the scope of employment. (*Ibid.*) The words " 'acting within the scope of his [or her] employment' " should be interpreted in light of the purpose of section 3601, so as not to extend immunity beyond respondeat superior situations. (*Ibid.*; *Hendy v. Losse* (1991) 54 Cal. 3d 723, 734, 819 P.2d 1.) [***8] For conduct committed within the scope of employment, employees, like their employers, should not be held subject to suit. (*Ibid.*; see also 6 Larson, Workers' Compensation Law (2001) § 111.03[2], p. 111-11 [because employees give up the right to sue for industrial injuries as part of the compensation bargain, employees should also be entitled to freedom from suit for industrial accidents in which employees are at fault].)

There are, however, statutory exceptions to coemployee immunity. As relevant here, a civil suit is permissible when an employee proximately causes another employee's injury or death by a "willful and unprovoked physical act of aggression" (§ 3601, subd. (a)(1)) or by intoxication. (§ 3601, subd. (a)(2).) n4 If an employee brings a lawsuit against a coemployee based on either of these exceptions, the employer is not "held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee ...." (§ 3601, subd. (b).) This provision is consistent with the view that a coemployee is immune from suit to the extent necessary to prevent an end-run against the employer under the exclusivity rule. (*Saala v. McFarland*, *supra*, 63 Cal. 2d at p. 130.) [***9] "It is self-evident that Labor Code section 3601 did not establish or create a new right or cause of action in the employee but severely limited a preexisting right to freely sue a fellow employee for damages." (*Miner v. Superior Court* (1973) 30 Cal. App. 3d 597, 600, 106 Cal. Rptr. 416.)

n4 Section 3601, subdivision (a) previously contained a third exception to workers' compensation exclusivity, for a coemployee's act "which evinces a reckless disregard for the safety of the employee injured, and a calculated and conscious willingness to permit injury or death to such employee." (§ 3601, former subd. (a)(3), added by Stats. 1959, ch. 1189, § 1, p. 3275.) The Legislature deleted this subdivision in 1971. (Stats. 1971, ch. 1751, § 1, p. 3780.)

[*1003] With this background in mind, we address whether the trial court properly instructed the jury that plaintiffs were required to prove that Naas acted with the intent to cause injury in order to establish that Naas had committed [***10] a "willful and unprovoked physical act of aggression" against Torres under section 3601, subdivision (a)(1).

B. Section 3601, subdivision (a)(1)

In interpreting a statute where the language is clear, courts must follow its plain meaning. (*Droeger v. Friedman, Sloan &* [**61] *Ross* (1991) 54 Cal. 3d 26, 38, 283 Cal. Rptr. 584, 812 P.2d 931.) However, if the statutory language permits more than one reasonable interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. (*Wilcox v. Birtwhistle* (1999) 21 Cal. 4th 973, 977, 987 P.2d 727.) In the end, we " 'must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.' [Citation.]" (*Id.* at pp. 977-978.)

Like the Court of Appeal, plaintiffs assert that the exception's language is plain and expressly does not include an intent to injure element. (See § 3601, [***11] subd. (a)(1).) Thus, they assert that a court may only instruct a jury on the words of the statute without defining its terms, and without recognizing an intent to injure requirement.

We disagree that the meaning of section 3601, subdivision (a)(1)'s statutory language is clear on its face. The Labor Code does not specifically define the phrase "willful and unprovoked physical act of

aggression." (§ 3601, subd. (a)(1).) Indeed, past decisions demonstrate that the facts of a particular case may raise questions as to the proper interpretation and application of this statutory language. For example, issues have included whether a "physical act of aggression" applies only in instances in which the coemployee makes physical contact with the injured employee (e.g., *Iverson v. Atlas Pacific Engineering* (1983) 143 Cal. App. 3d 219, 225, 191 Cal. Rptr. 696 (*Iverson*); cf. *Mathews*, *supra*, 6 Cal. 3d at p. 727), or whether a coemployee engages in a "willful ... physical act of aggression" only when the coemployee acts with an intent to injure as in *Soares*, *supra*, 9 Cal. App. 4th 1822, and the present case.

Contrary to the dissent's suggestion, a jury instruction [***12] that clarifies the application of statutory language in a particular context does not "add to [*1004] the words of a statute." (Dis. opn., *post*, 2001 Cal. LEXIS 5599, *29) It is a court's duty and responsibility to determine the meaning and scope of statutory language that is ambiguous. " 'An instruction in the language of a statute is proper only if the jury would have no difficulty in understanding the statute without guidance from the court. [Citations.] It is not proper if reasonable men might differ as to the construction of the statute, for it would delegate to the jury the function of statutory interpretation that belongs to the court. [Citation.]' " (*People v. Thomas* (1945) 25 Cal. 2d 880, 895, 156 P.2d 7.) In considering the proper interpretation of the statute, we look to both the statutory phrase as a whole ("willful and unprovoked physical act of aggression"), and the legislative purpose behind the provision. (§ 3601, subd. (a)(1).)

In *Iverson*, the Court of Appeal found that the willful and unprovoked physical act of aggression exception was similar to section 3600, former subdivision (g) (now subdivision (a)(7)), n5 barring compensation for injuries to an "initial physical [***13] aggressor." (*Iverson*, *supra*, 143 Cal. App. 3d at p. 225.) Relying on our decision in *Mathews*, *supra*, 6 Cal. 3d at page 727, *Iverson* observed that an "initial physical aggressor" was defined as " 'one who first engages in physical conduct which a reasonable man would perceive to be a " 'real, present and apparent threat of bodily harm.' " ' " (*Iverson*, *supra*, 143 Cal. App. 3d at p. 225.) The aggressor need not commit a battery because bodily contact is not a significant factor. (*Ibid.*) Under certain circumstances, clenching a fist or pointing a gun may be sufficient to trigger section 3600, subdivision (a)(7). (*Iverson*, *supra*, 143 Cal. App. 3d at p. 225.) Thus, the *Iverson* court concluded that a "willful and unprovoked physical act of aggression" under section 3601, subdivision (a)(1) is "obviously intended [**62] to permit a civil action for damages whenever a coemployee commits an intentional tort by aggressive physical conduct." (*Iverson*, *supra*, 143 Cal. App. 3d at p. 225.)

n5 An employee may not receive compensation for an injury that "arises out of an altercation in which the injured employee is the initial physical aggressor." (§ 3600, subd. (a)(7).)

[***14]

Although we found that *Iverson* was overbroad insofar as it suggested that "all intentional torts are categorically excepted from the exclusivity rule" (*Fermino*, *supra*, 7 Cal. 4th at p. 718), we find persuasive its reliance on the definition of an "initial physical aggressor" (§ 3600, subd. (a)(7)) to interpret, in part, the "willful and unprovoked physical act of aggression" exception here. (§ 3601, subd. (a)(1).) The provisions' similar language strongly suggests that they are complementary and should be construed consistently. Indeed, an employee may bring an action against another employee for a willful physical act of aggression only if it is "unprovoked." (§ 3601, subd. (a)(1).) This is consistent with section 3600's bar of compensation for an [*1005] " '*initial* physical aggressor' " who "*first* introduces an element of physical violence into the confrontation, thus creating the risk of injury." (*Mathews*, *supra*, 6 Cal. 3d at p. 728.) " 'When words used in a statute have acquired a settled meaning through judicial interpretation, the words should be given the same meaning when used in another statute dealing with an analogous subject matter; this is particularly [***15] true, where ... both statutes were enacted for the welfare of employees and are in harmony with each other.' [Citation.]" (*Ventura County Deputy Sheriffs' Assn. v. Board of Retirement* (1997) 16 Cal. 4th 483, 496, fn. 16, 940 P.2d 891.)

Consistent with these authorities, we conclude an "unprovoked physical act of aggression" (§ 3601, subd. (a)(1)) is unprovoked conduct intended to convey an actual, present, and apparent threat of bodily injury. (*Mathews*, *supra*, 6 Cal. 3d at p. 727.) A "threat," of course, is commonly understood as "an expression of intention to inflict evil, injury, or damage" (Webster's New Collegiate Dict. (9th ed. 1990) p. 1228; see also American Heritage Dict. (new college ed. 1981) p. 1340) and as "[a] communicated intent to inflict harm or

loss on another ...." (Black's Law Dict. (7th ed. 1999) p. 1489, col. 2.) Thus, "unprovoked physical act of aggression" (§ 3601, subd. (a)(1)) logically contemplates intended injurious conduct. By adding the term "willful," the Legislature has underscored the need for an intent to bring about the consequences of that expression, i.e., an intent to inflict injury or harm. (See *Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal. 2d 102, 118, 251 P.2d 955 [***16] [" 'while the word "wilful" implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done' "].)

Standing alone, "aggression" is itself a powerful term defined as "an unprovoked attack; the first attack in a quarrel; an assault; an inroad" (1 Oxford English Dict. (2d ed. 1989) p. 254), and as "a forceful action or procedure (as an unprovoked attack) esp. when intended to dominate or master." (Webster's New Collegiate Dict., *supra*, p. 64.) Indeed, at least one out-of-state decision has required evidence of "some offensive action or hostile attack" to prove aggression. (*Kearney v. Denker* (Idaho 1988) 114 Idaho 755, 760 P.2d 1171, 1173-1174 [citing Idaho Code, § 72-209(3): "willful or unprovoked physical aggression" exception to workers' compensation exclusivity requires "an intention to injure the employee"].) The term "aggression," therefore, suggests intentional harmful conduct.

Contrary to the Court of Appeal's analysis, the Legislature's use of the term "intentionally" and the phrase "willfully and deliberately" in other provisions of the workers' compensation scheme does not alter [***17] our conclusion. These provisions exclude compensation to employees whose injuries [*1006] were "intentionally self-inflicted" (§ 3600, subd. (a)(5)), or whose deaths were "willfully and deliberately caused" by themselves. (§ 3600, subd. (a)(6).) The fact that the Legislature used these words in those provisions and not in section 3601, subdivision (a)(1), does not necessarily indicate that it intended to omit from this section the requirement that the coemployee intentionally or willfully injured another. Unlike the term "willful" in section [**63] 3601, subdivision (a)(1), "intentionally" and "willfully and deliberately" do not modify an already intentional or deliberate act, such as a physical act of aggression, but describe the manner in which the employees' own injuries or deaths are caused. (§ 3600, subd. (a)(5) & (6).) Thus, the Legislature's use of the modifying word "willful," rather than "intentional" or "willful and deliberate," in section 3601, subdivision (a)(1) does not mandate a contrary conclusion.

We conclude, as a general rule, that a "willful and unprovoked physical act of aggression" includes an intent to injure requirement. (§ 3601, subd. (a)(1).) n6

n6 Because the issue is not presented by the facts of this case, we need not decide whether there may be some circumstances in which an intent *to threaten to inflict physical injury* would be sufficient to bring a coemployee's conduct within the reach of the statute. For example, suppose a coemployee, angered over a work-related incident and acting within the scope of employment, pointed a gun in a threatening manner at another employee in the workplace. If that employee, reasonably fearing being shot, dove for cover and thereby sustained injury, a trier of fact might reasonably find that the resulting injury was proximately caused by the coemployee's "willful and unprovoked physical act of aggression" under section 3601, subdivision (a)(1), even if the coemployee's subjective intent was only to threaten physical injury rather than inflict it.

[***18]

C. Horseplay

In general, if an employer condones what courts have described as "horseplay" among its employees, an employee who engages in it is within the scope of employment under section 3601, subdivision (a), and is thus immune from suit, unless exceptions apply. (*Oliva v. Heath* (1995) 35 Cal. App. 4th 926, 933; but see *Pacific Emp. Ins. Co. v. Ind. Acc. Com.* (1945) 26 Cal. 2d 286, 294, 158 P.2d 9 [holding a nonparticipating employee's injury from a coemployee's horseplay is compensable under § 3600].)

Although horseplay in the workplace is characterized by a lack of animosity, it may be committed under circumstances involving an obvious and significant risk of injury. (See, e.g., *Pacific Emp. Ins. Co. v. Ind. Acc. Com.*, *supra*, 26 Cal. 2d 286 [busboys throwing hard rolls at each other and striking another employee]; *Oliva v. Heath*, *supra*, 35 Cal. App. 4th at p. 933 [employees lowering coemployee's chair as a prank]; *Hodges v. Workers' Comp.* [*1007] *Appeals Bd.* (1978) 82 Cal. App. 3d 894, 898-899, 147 Cal. Rptr. 546 [employees' friendly sparring match]; *Argonaut Ins. Co. v. Workmen's Comp. App. Bd.* (1967)

247 Cal. App. 2d 669, 672, 55 Cal. Rptr. 810 [***19] [ranch employees chasing each other around bunkhouse].) Thus, by defining "willful and unprovoked physical act of aggression" in terms of an intent to injure element, the Legislature has ensured that section 3601, subdivision (a)(1)'s reach would not extend to acts traditionally viewed as horseplay that are otherwise subject to exclusive coverage under the workers' compensation system.

Given the "the propensities and tendencies of mankind and the ordinary habits of life, it must be admitted that wherever human beings congregate, either at work or at play, there is some frolicking and horseplay." (*Pacific Emp. Ins. Co. v. Ind. Acc. Com.*, *supra*, 26 Cal. 2d at p. 294.) We doubt the Legislature intended to permit employees to sue each other based on conduct arguably inherent in the workplace. Indeed, that result would be inconsistent with section 3601's aim to "severely limit[] a preexisting right to freely sue a fellow employee for damages." (*Miner v. Superior Court*, *supra*, 30 Cal. App. 3d at p. 600.)

At oral argument, however, plaintiffs asserted that the horseplay doctrine is irrelevant in this case. They emphasized that jurors understand [***20] the distinction between horseplay and aggression, and that imposing an intent to injure requirement is unwarranted and unnecessary. To that end, they argued that the exception requires only a "hostile intent," which they did not clearly define, to commit a physical act of aggression.

We are unpersuaded. Because horseplay is characterized by a lack of animosity (*Mathews*, *supra*, 6 Cal. 3d at p. 726), jurors, in distinguishing between horseplay and aggression, must still consider the presence of any "bitter hostility or open enmity ... [or] active hatred." (American Heritage Dict., [**64] *supra*, at p. 52 [defining "animosity"].) Moreover, as discussed, the term "aggression" also suggests intentional harmful conduct. (See *ante*, 2001 Cal. LEXIS 5599, *16) Although plaintiffs underscore that the phrase "intent to injure" is not contained in the exception, they fail to discern the full import of the phrase "willful and unprovoked physical act of aggression." (§ 3601, subd. (a)(1).) Finally, plaintiffs fail to show how a "hostile intent" to commit a physical act of aggression has any practical difference from an intent to injure in this context.

D. Case law

Contrary to plaintiffs' contention, [***21] *Fermino* does not suggest that an intent to injure is not required under section 3601, subdivision (a)(1). In *Fermino*, [*1008] we held that an employer who falsely imprisons an employee to investigate possible theft is not immune from suit under the exclusivity rule. (*Fermino*, *supra*, 7 Cal. 4th at p. 723.) Although we observed that false imprisonment does not "entail an intent or motive to cause harm" (*id.* at p. 716), we did not hold that an employer's intent to injure is irrelevant to prove whether certain misconduct falls outside the exclusivity rule's protection. Instead, we held that like "those classes of intentional employer crimes against the employee's person by means of violence and coercion," an employer's false imprisonment of an employee is *always* outside the compensation bargain. (*Id.* at pp. 723, fn. 7, 721-722.) In that respect, "any inquiry into an employer's motivation is undertaken not to determine whether the employer intentionally or knowingly injured the employee, but rather to ascertain whether the employer's conduct violated public policy and therefore fell outside the compensation bargain." (*Id.* at pp. 714-715.)

Iverson also does not [***22] support plaintiffs' argument. As discussed, we found that the *Iverson* Court of Appeal's suggestion that section 3601, subdivision (a)(1) permits a civil action whenever a coemployee commits an intentional tort by aggressive physical conduct (*Iverson*, *supra*, 143 Cal. App. 3d at p. 225) was too broad. (*Fermino*, *supra*, 7 Cal. 4th at p. 718; see *ante*, 2001 Cal. LEXIS 5599 *14.) We noted, moreover, that the *Iverson* case, "even without the elements of assault, would seem to be outside the compensation bargain because [it was] nothing more than personal attacks on the employee, unmotivated by any legitimate employer concerns." (*Fermino*, *supra*, 7 Cal. 4th at p. 721.) Contrary to plaintiffs' assertions, *Iverson* supports our conclusion that an intent to injure is required under section 3601, subdivision (a)(1) in order to file a civil suit.

E. Other issues

Recognizing an intent to injure element under this exception is consistent with the exclusivity rule, which immunizes employees' acts committed within the scope of employment. (§ 3601, subd. (a).) We have held generally that employees' "willful, malicious and even criminal torts" may be committed within the scope [***23] of employment, thus rendering their employers liable under respondeat superior. (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal. 4th 291, 296, 907 P.2d 358 [sexual molestation of patient is not within scope of employment]; see also *Carr v. Wm.*

C. Crowell Co. (1946) 28 Cal. 2d 652, 654, 171 P.2d 5 [throwing hammer at person is within scope of employment].) To be within the scope of employment, the incident giving rise to the injury must be an outgrowth of the employment, the risk of injury must be inherent in the workplace, or typical of or broadly incidental to the employer's enterprise. [*1009] (*Lisa M. v. Henry Mayo Newhall Memorial Hospital*, *supra*, 12 Cal. 4th at p. 298.)

Flare-ups, frustrations, and disagreements among employees are commonplace in the workplace and may lead to "physical acts of aggression." (See *Carr v. Wm. C. Crowell Co.*, *supra*, 28 Cal. 2d at p. 656; *Hodges v. Workers' Comp. Appeals Bd.*, *supra*, 82 Cal. App. 3d at p. 902.) [**65] " 'In bringing [people] together, work brings [personal] qualities together, causes frictions between them, creates occasions for lapses into [***24] carelessness, and for fun-making and emotional flareup. ... These expressions of human nature are incidents inseparable from working together. They involve risks of injury and these risks are inherent in the working environment.' [Citations.]" (*Carr v. Wm. C. Crowell Co.*, *supra*, 28 Cal. 2d at p. 656.) Because an employee's willful acts, including aggressive physical acts, may be considered within the scope of employment--thus subject to the exclusivity provision of section 3601, subdivision (a)--it follows that the Legislature envisioned this exception from exclusivity as requiring something more. (§ 3601, subd. (a)(1); see also *Johns-Manville Products Corp. v. Superior Court* (1980) 27 Cal. 3d 465, 476, 165 Cal. Rptr. 858, 612 P.2d 948 [trend toward allowing actions against employer who "acts deliberately for the purpose of injuring the employee"].)

Contrary to plaintiffs' and amici curiae's assertions, the statute's intent to injure requirement will not shield violent employees from civil suit. In situations where employees acting within the scope of employment commit violent, injurious acts against coemployees, triers of fact could reasonably [***25] infer an intent to injure to take the actions outside the exclusivity rule's protection. (See § 3601, subd. (a)(1); *Soares*, *supra*, 9 Cal. App. 4th at p. 1831.) We reject plaintiffs' contention that the intent to injure element is an impossible burden to meet because juries must "get inside a person's head." As with other mental states, plaintiffs may rely on circumstantial evidence to prove the intent to injure. (See, e.g., BAJI No. 7.34 ["malice, like any other fact, may be proved by direct or circumstantial evidence"]; CALJIC No. 2.02 [specific intent "with which an act is done may be shown by the circumstances surrounding the commission of the act"].)

Finally, we reject plaintiffs' and amici curiae's argument that based on language in *People v. Colantuono* (1994) 7 Cal. 4th 206, 220, 865 P.2d 704, the Legislature intended to adopt a "conscious disregard of human life and safety" standard under section 3601, subdivision (a)(1). They maintain that this standard, adopted from the concept of "acting willfully" under criminal law (*People v. Colantuono*, *supra*, 7 Cal. 4th at p. 220), achieves a balance between a narrow construction of the [***26] workers' compensation law, and protection of workers' rights.

[*1010] We have long rejected the suggestion to import rules of criminal law into workers' compensation law. (*Mathews*, *supra*, 6 Cal. 3d at p. 727, fn. 4.) "Had the Legislature intended to adopt those rules, it surely would have used the technical terms of the criminal law rather than the words it chose. Although there may be a highly developed body of law covering criminal assault, it was designed to meet different problems and effectuate different policies." (*Ibid.*) And we decline to judicially create any exceptions to the coemployee immunity granted under section 3601, subdivision (a). (*Hendy v. Losse*, *supra*, 54 Cal. 3d at p. 738.)

Disposition

We reverse the Court of Appeal's judgment and remand the matter for proceedings consistent with this opinion. n7

n7 Based on our conclusion, we need not and do not address Naas's and Parkhouse's additional claims.

CHIN, J.

WE CONCUR:

GEORGE, C. J.

KENNARD, [***27] J..

BAXTER, J.

BROWN, J.

CONCURRING OPINION BY BROWN, J.

DISSENTING OPINION BY WERDEGAR, J.

CONCURBY:
BROWN

CONCUR:

CONCURRING OPINION BY BROWN, J.

I sign the majority opinion with the understanding that the intent-to-injure requirement it articulates is limited to cases like this one where the determinative factual issue is whether the plaintiff's injury was caused by a coemployee's "willful and unprovoked physical act of aggression" (Lab. Code, § 3601, subd. (a)(1)) or, instead, by horseplay--even rough horseplay--for which workers' compensation would be the exclusive remedy. Where this distinction is critical--that is, [**66] where the conduct in question is aggressive but might also be characterized as horseplay--the language of section 3601, subdivision (a)(1), provides insufficient guidance to juries. For such cases, we must find some appropriate measure for the jury to apply, and though we might direct juries to consider whether or not the conduct was marked by hostility or ill-will, these factors ultimately turn on whether the actor harbored an intent to injure. On the other hand, where the conduct in question clearly exhibits hostility, [***28] not merely high spirits or recklessness--such as in the case of a credible threat of injury (see maj. opn., *ante*, 2001 Cal. LEXIS 5599, *17 n.6)--I see no reason to superimpose an intent-to-injure gloss on the statutory language, and I do not read the majority opinion as doing so.

BROWN, J.

DISSENTBY:
WERDEGAR

DISSENT:

DISSENTING OPINION BY WERDEGAR, J.

Workers need not, as a general rule, fear being sued for causing injury to coworkers. The Workers' Compensation Act, which protects employers from civil liability for on-the-job injuries, also protects employees. (Lab. Code, § 3601, subd. (a).) Under this system employees still report to work with an incentive to use due care, but [*1011] sanctions for carelessness come in the form of discipline and termination rather than civil liability.

The statute at issue here, Labor Code section 3601, reflects the Legislature's judgment that an exception to the general rule barring suits against employees is warranted when an employee causes injury or death through "intoxication" (*id.*, subd. (a)(2)) or a "willful and unprovoked physical act of aggression" (*id.*, subd. (a)(1)). Both situations involve behavior [***29] that is unacceptable in the workplace and sufficiently blameworthy to justify the additional deterrent of personal liability. The former situation, intoxication, presents no difficulties. What concerns us is the latter. The majority sees the phrase "willful and unprovoked physical act of aggression" (*ibid.*) as ambiguous and purports to resolve the ambiguity by construing the phrase to refer only to those situations in which the offending employee acted with an intent to injure. I see no ambiguity. Willful and unprovoked physical aggression sometimes involves an intent to injure and sometimes does not, as when a bully uses force to intimidate without meaning to cause real injury. To declare the statute ambiguous because it does not state whether the perpetrator must intend to injure is like saying the speeding laws are ambiguous because they do not state whether they apply to drivers who are late for work. Silence on an extraneous concept does not necessarily render a statute ambiguous.

We often observe that courts should not add to the words of a statute. (See Code Civ. Proc., § 1858 ["In the construction of a statute or instrument, the office of [***30] the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted"].) The wisdom behind this maxim of construction is that statutory language embodies fine policy judgments and legislative compromise and is, for that reason, best left alone by courts. By adding to the statute the words "intent to injure," the majority in effect rejects a legislative policy judgment and replaces it with a judicial one. If the plain language of a statute seemed to have very disturbing consequences, we might be justified in looking for another construction. Unlike the majority, however, I see no plausible justification for adding to Labor Code section 3601 the concept of an intent to injure. No such requirement is necessary to shield the employer from liability, because the Legislature has already provided that whenever the employee is civilly liable, the employer is not. n1 Perhaps the majority feels an intent to injure requirement is necessary to establish a level of blameworthiness high enough to justify civil liability. But that is not for us to say; it is [*1012] exclusively a legislative matter. In any event, aggressive [***31] physical bullying is one of the common tools of racial and gender-based harassment and sometimes leads to injury, whether or not injury is specifically intended. [**67] That the Legislature might wish to deter this

obnoxious behavior by the threat of civil liability should not trouble us. Finally, there is no reason to believe the Legislature foresaw, or would endorse, the tortured path the majority must take through dictionaries, out-of-state cases, and unrelated statutes to reach its destination.

n1 "In no event, either by legal action or by agreement whether entered into by the other employee or on his or her behalf, shall the employer be held liable, directly or indirectly, for damages awarded against, or for a liability incurred by the other employee under paragraph (1) or (2) of subdivision (a)." (Lab. Code, § 3601, subd. (c).)

For all of these reasons, I cannot join the majority in holding "as a general rule" that the language of section 3601 "includes an intent to injure requirement." [***32] (Maj. opn., *ante*, 2001 Cal. LEXIS 5599, *17) Furthermore, in view of that holding, I am baffled by the majority's suggestion in footnote 6 that "there may be some circumstances" in which section 3601 does *not* require an intent to injure. (*Ibid.*) The statute cannot bear both interpretations simultaneously.

WERDEGAR, J.

26 Cal. 4th 779, *; 29 P.3d 197, **;
2001 Cal. LEXIS 5480, ***; 111 Cal. Rptr. 2d 114

3 of 19 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. LEBARRON KEITH WILLIAMS, Defendant and Appellant.

S076262

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 779; 29 P.3d 197; 2001 Cal. LEXIS 5480; 111 Cal. Rptr. 2d 114; 2001 Cal. Daily Op. Service 7342; 2001 Daily Journal DAR 9071

August 23, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:
Court of Appeal of California, Third Appellate District. Sacramento County. C025458. Super. Ct. No. 95 F07383. Rothwell B. Mason, Judge. *

* Retired judge of the Sacramento Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISPOSITION:
Reversed the judgment of the Court of Appeal and remanded for further proceedings consistent with this opinion.

COUNSEL:
Attorneys for Appellant: Madeline McDowell, under appointment by the Supreme Court; and Arthur L. Bowie, under appointment by the Court of Appeal, for Defendant and Appellant.

Attorneys for Respondent: Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson and David P. Druliner, Chief Assistant Attorneys General, Robert R. Anderson, Assistant Attorney General, W. Scott Thorpe and David A. Rhodes, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES:
BROWN, J. WE CONCUR: GEORGE, C.J., BAXTER, J., CHIN, J. DISSENTING OPINION BY KENNARD, J. I CONCUR: WERDEGAR, J.

OPINIONBY:
BROWN

OPINION:

[*782] [**199]

Thirty years ago, we examined the mental state for assault and [***2] concluded assault requires only a general criminal intent and not a specific intent to cause injury. (*People v. Rocha* (1971) 3 Cal. 3d 893, 899, 92 Cal. Rptr. 172, 479 P.2d 372 (*Rocha*).) Seven years ago, we reaffirmed *Rocha* and reiterated that assault was a general intent crime. (*People v. Colantuono* (1994) 7 Cal. 4th 206, 215-216, 865 P.2d 704 (*Colantuono*).) We further explained that the "mens rea [for assault] is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery." (*Id.* at p. 214.) Today, we once again clarify the mental state for assault and hold that assault requires actual knowledge of the facts sufficient to establish that the defendant's act by its nature will probably and directly result in injury to another. In light of this clarification, any technical error in the instructions given was harmless.

FACTS

Gregory King and Deborah Nicholson married in 1989. Their marriage lasted only about two weeks, but

they continued to have sexual relations. In 1992, Nicholson became romantically involved with defendant [***3] Lebarron Keith Williams. Nicholson had a son in November 1994, but did not know which of the two men had fathered the child. After the child's birth, defendant and King continued to compete for Nicholson's affections. Their rivalry resulted in several confrontations culminating in this case.

Prior to the confrontation at issue here, King repeatedly telephoned Nicholson, trying to persuade her to accompany him and his two teenage sons on an outing. When Nicholson disconnected her phone, King drove to Nicholson's home with his sons and parked his compact pickup truck at the front curb. Defendant's pickup truck was in the driveway. King walked up to Nicholson's front door and put a note on the door. He then knocked and returned to his truck, hoping Nicholson would come out and talk to him.

Defendant opened the door and told King to stay away from Nicholson. Defendant then walked to his own truck and removed a shotgun, which he loaded with two 12-gauge shotgun rounds. Defendant walked back toward the house and fired, in his words, a "warning shot" directly into the rear [*783] passenger side wheel well of King's truck. Defendant testified that, at the time he fired the shot, King's truck was [***4] parked between him and King, and that he saw King crouched approximately a foot and a half away from the rear fender well of the truck. Defendant further testified that he never saw King's sons before he fired and only noticed them afterwards standing on a curb outside the immediate vicinity of King's truck. King, however, testified that both of his sons were getting into the truck when defendant fired.

Although defendant did not hit King or King's sons, he did hit the rear tire of King's truck. The shotgun pellets also left marks on the truck's rear wheel well, its undercarriage, and its gas tank.

Defendant was charged with one count of shooting at an occupied motor vehicle (Pen. Code, § 246) n1, and three counts of assault with a firearm (§ 245, subd. (a)(2)), one count each for King and his two sons. Each count carried an allegation of personal firearm use. (§ 12022.5, subd. (a)(1).) The trial court gave the standard jury instruction on assault. (Former CALJIC No. 9.00 (1994 rev.) (5th ed. 1995 supp.).) That instruction provides in pertinent part that the crime of assault requires proof of these elements: "1. A person willfully and unlawfully committed [***5] an act that by its nature would probably and directly result in the application of physical force on another person; and [P] 2. At the time the act was committed, such person had the present ability to apply physical force to the person of another." (*Ibid.*) The jury convicted [**200] defendant of assaulting King with a firearm, but deadlocked on the remaining counts. The trial court later dismissed the deadlocked counts in the interests of justice.

n1 All further statutory references are to the Penal Code.

On appeal, the Court of Appeal found the assault instruction erroneous because the instruction incorrectly stated the mental state required for the offense. After finding the instructional error prejudicial, the court reversed defendant's assault conviction.

We granted review to clarify the mental state for assault.

DISCUSSION

I

The trial court instructed the jury that defendant was guilty of assault only if he "willfully and unlawfully committed an act that by its nature would probably and directly result [***6] in the application of physical force being applied to the person of another." (See former CALJIC No. 9.00, *supra.*) The Court [*784] of Appeal found this instruction erroneous because it described a mental state of negligence and allowed the jury to find defendant guilty if "under an objective view of the facts

... an application of physical force on another person was reasonably foreseeable." Concluding that the instruction misstated the mental state for assault, the court held that assault requires either a desire to cause an application of physical force or substantial certainty that such an application would result. (See *People v. Smith* (1997) 57 Cal. App. 4th 1470 (*Smith*).)

The People urge us to reverse. They contend assault only requires general criminal intent, and the Court of Appeal improperly transformed assault into a specific intent crime by injecting the concepts of purpose and knowledge. As explained below, we agree that the Court of Appeal's description of the mental state for assault is erroneous and that assault is a general intent crime. We further conclude that assault requires actual knowledge of those facts sufficient to establish that the [***7] offending act by its nature would probably and directly

result in physical force being applied to another.

Section 240--unchanged since its initial enactment in 1872--defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Over the decades, we have struggled to fit this 1872 definition of assault into our constantly evolving framework of criminal mental states. We first recognized this struggle in *People v. Hood* (1969) 1 Cal. 3d 444, 452-459, 82 Cal. Rptr. 618, 462 P.2d 370 (*Hood*), where we held that a jury may not consider voluntary intoxication when determining whether a defendant committed assault. In *Hood*, we noted that the concepts of general and specific intent "were not yet terms of art" in 1872, and acknowledged that courts had struggled to fit the historic definition of assault into the modern framework of general and specific intent. (*Id.* at pp. 457-458.) Nonetheless, we declined to classify assault as a general or specific intent offense, because the "distinction between specific and general intent" did not resolve the issue of whether voluntary intoxication should [***8] be a defense to assault. (*Id.* at p. 458.)

Approximately one year later, we confronted the issue of the mental state for assault head-on. In *Rocha*, *supra*, 3 Cal. 3d at page 899, we held that assault does not require the specific "intent to cause any particular injury [citation], to severely injure another, or to injure in the sense of inflicting bodily harm .... [Fns. omitted.]" Rather, assault required "the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another." (*Ibid.*)

Twenty-three years later, we once again attempted to decipher "the requisite intent for assault and assault with a deadly weapon ...." (*Colantuono*, [*785] *supra*, 7 Cal. 4th at p. 213.) In *Colantuono*, we noted that "*Rocha* accurately focused on the violent-injury-producing nature of the defendant's acts, rather than on a separate and independent intention to cause such injury" but may have left a "measure of understandable analytical uncertainty." (*Colantuono*, at p. 215.) [**201] Hoping to resolve this uncertainty, we reaffirmed that assault "is a general intent crime"--and [***9] not a specific intent crime. (7 Cal. 4th at p. 216, fn. omitted.) "The pivotal question is whether the defendant intended to commit an act likely to result in such physical force, not whether he or she intended a specific harm." (7 Cal. 4th at p. 218, fn. omitted.) We also reiterated that " 'reckless conduct alone does not constitute a sufficient basis for assault or for battery even if the assault results in an injury to another.' " (7 Cal. 4th at p. 219, quoting *People v. Lathus* (1973) 35 Cal. App. 3d 466, 469, 110 Cal. Rptr. 921; see also *People v. Carmen* (1951) 36 Cal. 2d 768, 776, 228 P.2d 281.)

Although we conclusively classified assault as a general intent crime in *Colantuono*, we have recently recognized that such a classification, by itself, may not fully describe the requisite mental state for every criminal offense. (See 1 Witkin & Epstein, Cal. Crim. Law (3d ed. 2000) Elements, § 2, pp. 199-201 [despite "universal acceptance of the principle that general criminal intent is required," courts have often struggled to define the requisite mental state for criminal offenses].) Thus, in *People v. Hering* (1999) 20 Cal. 4th 440, 445, 976 P.2d 210 [***10] (*Hering*), we cautioned against the rote application of the general/specific intent framework. We have also suggested that "such classification of offenses is necessary 'only when the court must determine whether a defense of voluntary intoxication or mental disease, defect, or disorder is available ....' " (*People v. Rathert* (2000) 24 Cal. 4th 200, 205.) The apparent confusion engendered by *Colantuono* suggests that assault may be such a case.

With this in mind, we revisit the mental state for assault. As always, we begin with the statute and seek to ascertain the Legislature's intent at the date of enactment. (See, e.g., *People v. Garcia* (2001) 25 Cal. 4th 744, 758 [courts must determine the drafter's intent at the time of enactment].) Assault is "an unlawful *attempt*, coupled with a present ability, to commit a violent injury on the person of another." (§ 240, italics added.) Because section 240 was enacted in 1872 and has not been amended, we must construe the Legislature's intent as of 1872.

To ascertain the mental state for assault, we must first determine the meaning of the term "attempt." In 1872, attempt apparently had three [***11] possible definitions: (1) "an endeavor to accomplish a crime carried beyond mere preparation, but falling short of execution of the ultimate design [*786] in any part of it" (1 Bouvier's Law Dict. (1872) p. 166); (2) "an intent to do a thing combined with an act which falls short of the thing intended" (*ibid.*); and (3) "an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences" (*ibid.*). With respect to mental states, the third definition requires only an intent to commit the act--and not a specific intent to obtain some further objective--and focuses on the objective nature of that act. The first definition is ambiguous. It focuses on the nature of the act but may or may not require an intent to "accomplish a crime." (*Ibid.*) The second definition

appears to describe the traditional formulation of criminal attempt later codified in section 21a, which requires a specific intent.

In determining which meaning of attempt the Legislature intended to use in section 240, we must look to the historical "common law definition" of assault. (Code commrs., note foll., Ann. Pen. Code, § 240 [***12] (1st ed. 1872, Haymond & Burch, commrs. annotators) pp. 104-105.) " 'The original concept of criminal assault developed at an earlier day than the doctrine of criminal attempt in general

....' " (*Colantuono*, *supra*, 7 Cal. 4th at p. 216, quoting Perkins on Criminal Law (2d ed. 1969) ch. 2, § 2, pp. 118-119.) Assault "is not simply an adjunct of some underlying offense [like criminal attempt], but an independent crime statutorily delineated in terms of certain unlawful conduct immediately antecedent to battery." (*Colantuono*, at p. 216.) Unlike criminal attempt where the " 'act constituting an attempt to commit a felony may be more remote,' " " 'an assault is an act done [**202] toward the commission of a battery' " and must " 'immediately' " precede the battery. (Perkins on Criminal Law (3d ed. 1982) ch. 2, § 2, p. 164 (Perkins).) Indeed, our criminal code has long recognized this fundamental distinction between criminal attempt and assault by treating these offenses as *separate and independent* crimes. (Compare § 240 with § § 663, 664.)

Consequently, criminal attempt and assault require different mental states. Because the act constituting a criminal attempt "need [***13] not be the last proximate or ultimate step toward commission of the substantive crime," criminal attempt has always required "a specific intent to commit the crime." (*People v. Kipp* (1998) 18 Cal. 4th 349, 376, 956 P.2d 1169.) In contrast, the crime of assault has always focused on the nature of the act and not on the perpetrator's specific intent. An assault occurs whenever "the next movement would, *at least to all appearance*, complete the battery." (Perkins, *supra*, ch. 2, § 2, at p. 164, italics added.) Thus, assault "lies on a definitional ... *continuum of conduct* that describes its essential relation to battery: An assault is an incipient or inchoate battery; a battery is a consummated assault." (*Colantuono*, *supra*, 7 Cal. 4th at p. 216, italics added.) As a result, a specific intent to injure is not an element of assault because the assaultive act, by its nature, subsumes such an intent. [*787]

The term "attempt" as used in the 1872 assault statute therefore does not refer to a definition of attempt that requires a specific intent, such as the definition later codified in section 21a. n2 Rather, the Legislature, consistent with the historical understanding [***14] of assault, presumably intended to adopt the third 1872 definition of attempt: "an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences ...." (1 Bouvier's Law Dict., *supra*, at p. 166.) Thus, we explained in *Colantuono* that "the mental state for assault ... is established upon proof the defendant willfully committed an act that *by its nature will probably and directly result* in injury to another, i.e., a battery." (*Colantuono*, *supra*, 7 Cal. 4th at p. 214, italics added; see also *Rocha*, *supra*, 3 Cal. 3d at p. 899 ["the criminal intent which is required for assault ... is the general intent to wilfully commit an act *the direct, natural and probable consequences of which, if successfully completed*, would be the injury to another" (italics added)].)

n2 In reaching this conclusion, we acknowledge that parts of the code commissioners comment to section 240 suggest that assault requires a specific intent to injure. (See Code commrs., note foll., Ann. Pen. Code, § 240, *supra*, at pp. 104-105.) We do not, however, find these parts of the comment compelling in light of the historic conception of assault and the Legislature's decision to make assault a statutorily distinct crime from criminal attempt. (See *ante*, at pp. 6-8.) Indeed, the Legislature could have omitted assault from the Penal Code and allowed prosecutors to charge defendants with " 'attempted battery,' " if it wished to make assault a specific intent crime. (*Colantuono*, *supra*, 7 Cal. 4th at p. 216.)

[***15]

Although *Colantuono*'s description of the mental state for assault reflects the meaning of attempt intended by the Legislature in 1872, its exclusive reliance on the concept of general intent has resulted in some confusion. (See *Hering*, *supra*, 20 Cal. 4th at p. 445.) We may attribute much of this confusion to the fact that "the gravamen [of assault] ... is the *likelihood* that the force applied or attempted to be applied will result in great bodily injury." (*People v. McCaffrey* (1953) 118 Cal. App. 2d 611, 618-619, 258 P.2d 557, original italics.) Because assault criminalizes conduct based on what *might* have happened--and not what *actually* happened--the mental state for assault incorporates the language of

probability, i.e., direct, natural and probable consequences. This language, however, arguably implies an objective mental state consistent with a negligence standard. (See *Smith*, *supra*, 57 Cal. App. 4th at p. 1480.)

Recognizing that *Colantuono*'s language may have been confusing, we now clarify the mental state for assault. Based on the 1872 definition of attempt, a defendant [**203] is only guilty of assault [***16] if he intends to commit an act "which would be indictable [as a battery], if done, either from its own character or that of its natural and probable consequences." (1 Bouvier's Law Dict., *supra*, at p. 166.) Logically, a defendant cannot have such an [*788] intent unless he actually knows those facts sufficient to establish that his act by its nature will probably and directly result in physical force being applied to another, i.e., a battery. (Cf. § 7, subd. 5 [actual knowledge means "a knowledge that the facts exist which bring the act or omission within the provisions of this code"].) In other words, a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct.

He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur. n3

> n3 For example, a defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery.

[***17]

In adopting this knowledge requirement, we do not disturb our previous holdings. Assault is still a general intent crime (see *Colantuono*, *supra*, 7 Cal. 4th at pp. 215-216; *Rocha*, *supra*, 3 Cal. 3d at p. 899), and juries should not "consider evidence of defendant's intoxication in determining whether he committed assault" (*Hood*, *supra*, 1 Cal. 3d at p. 459). Likewise, mere recklessness or criminal negligence is still not enough (see *Colantuono*, at p. 219), n4 because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know (see *Walker v. Superior Court* (1988) 47 Cal. 3d 112, 136, 253 Cal. Rptr. 1, 763 P.2d 852 ["criminal negligence must be evaluated objectively"]).

> n4 In stating that reckless conduct cannot constitute an assault, *Colantuono* relied on *People v. Lathus*, *supra*, 35 Cal. App. 3d at page 469, which in turn relied on our 1951 decision in *People v. Carmen*, *supra*, 36 Cal. 2d at pages 775-776, which in turn relied on even older case law. Thus, *Colantuono* meant "recklessness" in its historical sense as a synonym for criminal negligence, rather than its more modern conception as a subjective appreciation of the risk of harm to another. (See Dressler, Understanding Criminal Law (2d ed. 1995) Mens Rea, § 10.04[D][3], pp. 115-116 ["In the past, 'recklessness' was a synonym for 'criminal negligence' "].)

[***18]

We also reaffirm that assault does not require a specific intent to injure the victim. (See *Rocha*, *supra*, 3 Cal. 3d at p. 899.) As explained above, our rejection of a specific intent requirement is consistent with the statutory language and the historic conception of criminal assault. In any event, even if we erred 30 years ago in *Rocha* and compounded this error seven years ago in *Colantuono*, the Legislature's subsequent conduct strongly militates against any belated correction of this "error" today.

First, the legislative history behind section 21a--which codified the elements of criminal attempt for the first time--strongly suggests that the Legislature approved of *Rocha*. Section 21a provides that "an attempt to commit a crime consists of two elements: a specific intent to commit the [*789] crime, and a direct but ineffectual act done toward its commission." By enacting section 21a in 1986--15 years after our decision in *Rocha*--the Legislature merely intended to codify "the attempt definition now used in jury instructions." (Assem. Com. on Public Safety, Rep. on Sen. Bill No. 1668 (1985-1986 Reg. Sess.) as amended May 28, 1986, p. 5.) The Legislature [***19] did not intend to affect other jury instructions or overturn *Rocha* and its rejection of a specific intent requirement for assault. Indeed, the Legislature apparently intended section 21a to be "consistent with case law and other relevant authority"--which presumably included *Rocha*. (Assem. Com. Rep., *supra*, at p. 5.) Thus, the Legislature, by enacting section 21a, implicitly recognized that assault and criminal attempt were two statutorily independent

offenses with different requisite mental states.

Second, the amendment of section 22 in 1982 provides additional evidence that the [**204] Legislature approved of *Rocha*. In 1982, the Legislature amended section 22 to make clear that voluntary intoxication could only negate specific intent and not general criminal intent. (Stats. 1982, ch. 893, § 2, p. 3317; see *People v. Whitfield* (1994) 7 Cal. 4th 437, 448, 868 P.2d 272 (*Whitfield*).) In making this amendment, the Legislature intended to preserve existing law, including *Hood*, which held that involuntary intoxication is not a defense to assault. (See *Whitfield*, at p. 448.) Thus, under the plain language of section 22, assault could not require [***20] a specific intent to cause injury. Otherwise, evidence of voluntary intoxication would be admissible to negate the requisite mental state for assault in contravention of *Hood*.

The Legislature's subsequent enactment of section 21a bolsters this conclusion. Section 21a unequivocally states that criminal attempt requires a specific intent. Thus, under section 22, evidence of voluntary intoxication would be admissible with regard to whether a defendant had the requisite intent for a criminal attempt. If section 21a now defines the mental state for assault, then voluntary intoxication would be a defense to assault under section 22. Because the Legislature undoubtedly did not intend such a result (see *Whitfield*, *supra*, 7 Cal. 4th at p. 448), the 1982 amendment of section 22 implicitly affirms *Rocha* and its rejection of a specific intent requirement.

Finally, the Legislature has had 30 years to amend section 240 and overturn *Rocha*, but has not done so. While legislative inaction is not necessarily conclusive, the longevity of our holding in *Rocha*, our subsequent reaffirmation of *Rocha* seven years ago in *Colantuono*, and the existence of other legislative enactments [***21] implicitly approving *Rocha* indicate that the Legislature has acquiesced in our conclusion that assault does not require a specific intent. (See *Cel-Tech Communications, Inc. v. Los Angeles Cellular* [*790] *Telephone Co.* (1999) 20 Cal. 4th 163, 178, 973 P.2d 527 [declining to overrule a judicial interpretation after decades of legislative inaction and the unanimity of our decisions restating that interpretation].) Under these circumstances, we "believe it is up to the Legislature to change it if it is to be changed." (*Ibid.*)

Accordingly, we hold that assault does not require a specific intent to cause injury or a subjective awareness of the risk that an injury might occur. Rather, assault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another.

II

We now turn to the jury instruction at issue in this case and find this instruction potentially ambiguous. Because "the test of natural and probable consequences is an objective one" (*Smith*, *supra*, 57 Cal. App. 4th at p. 1480), merely requiring the jury to find that [***22] a defendant willfully and unlawfully committed an act that by its nature would probably and directly result in physical force being applied to the person of another may permit a conviction premised on facts the defendant *should have known but did not actually know*. Thus, under the instruction given, a jury could conceivably convict a defendant for assault even if he did not actually know the facts sufficient to establish that his act by its nature would probably and directly result in a battery.

Nonetheless, any instructional error is largely technical and is unlikely to affect the outcome of most assault cases, because a defendant's knowledge of the relevant factual circumstances is rarely in dispute. Indeed, this case corroborates this observation. Here, defendant admitted he loaded his own shotgun with two shotgun rounds. He further testified that he knew that King, the alleged victim, "was crouched on the far side of the truck between the rear fender and the cab." Finally, defendant admittedly fired a warning shot at King's truck even though he knew that King was in the near vicinity. In light of these admissions, defendant undoubtedly knew those facts establishing that his [***23] act by its nature would directly, naturally and probably result in a battery. The jury's deadlock on the other assault counts, in [**205] which defendant denied actual knowledge that the victims were near the truck when he fired his shotgun, further confirms that the jury was not misled. Accordingly, any minor ambiguity in the instruction was harmless beyond a reasonable doubt. (*Neder v. United States* (1999) 527 U.S. 1, 7-10, 144 L. Ed. 2d 35, 119 S. Ct. 1827.) [*791]

DISPOSITION

We reverse the judgment of the Court of Appeal and remand for further proceedings consistent with this opinion.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

CHIN, J.

DISSENTBY:
KENNARD

DISSENT:

DISSENTING OPINION BY KENNARD, J.

I dissent.

This court last tried to define the mental state required for the crime of assault in *People v. Colantuono* (1994) 7 Cal. 4th 206, 865 P.2d 704 (*Colantuono*). There, a majority of this court held that assault, as defined in Penal Code section 240, is *not* a specific intent crime and does *not* require proof that the defendant intended to injure another person. (*Colantuono,* 7 Cal. 4th at pp. 217-219.) [***24] I disagreed with that holding. Based on the plain meaning of the statutory definition of assault -- "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" (Pen. Code, § 240) -- and on the 1872 code commissioners' note to Penal Code section 240 (code commrs., note foll. Ann. Pen. Code, § 240 (1st ed. 1872, Haymond & Burch, commrs. annotators) p. 104) (stating that "if there is no present purpose to do an injury, there is no assault"), I concluded that assault requires proof of an intent to injure another and that, for this reason, assault is a specific intent crime. (*Colantuono, supra,* at p. 226 (conc. & dis. opn. of Kennard, J.); 7 Cal. 4th at pp. 225-228, 26 Cal. Rptr. 2d 908, 865 P.2d 704.)

Because the *Colantuono* majority never clearly explained what the required mental state for assault *is*, but only what it *is not*, this court is again faced with the task of defining the mental state required for assault. Reexamining the issue, the majority now compounds the error in *Colantuono* by holding that a defendant, to be guilty of assault, need only be aware of facts [***25] that would lead a reasonable person to realize that a battery would directly, naturally, and probably result from the defendant's conduct, even though the defendant honestly but mistakenly believes that no battery is likely to result. (Maj. opn., *ante*, 2001 Cal. LEXIS 5480 at p. *13-14 & fn. 2.) Once again, I disagree.

I

The majority begins its analysis by reciting the statutory definition of assault -- "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another" (Pen. Code, § 240) -- and declaring that we should "seek to ascertain the Legislature's intent at the date of enactment." (Maj. opn., *ante*, 2001 Cal. LEXIS 5480 at p. *10.) Because the current statutory definition of assault is unchanged since the Penal Code's enactment in 1872, [*792] the majority asserts that "we must ascertain the Legislature's intent as of 1872, when it sought to codify the historic 'common law definition' of assault." (*Ibid.*)

I agree with this approach. Indeed, it is the one I used in my dissent in *Colantuono, supra,* 7 Cal. 4th 206.

To ascertain the Legislature's intent in 1872 when it enacted the statutory definition of assault as part of the original [***26] Penal Code, the majority relies on *the third of three definitions* of "attempt" in the 1872 edition of Bouvier's Law Dictionary as " 'an intent to commit some act which would be indictable, if done, either from its own character or that of its natural and probable consequences ....' " (Maj. opn., *ante*, 2001 Cal. LEXIS 5480 at p. *11.) The majority asserts that this definition of "attempt" supports its conclusion that in 1872 the Legislature intended to require, as the mental state for assault, an intent to commit an act that would, if successfully completed, result in the injury of another as a direct, natural and probable consequence. (*Ibid.*)

[**206] The majority quickly dismisses the first and second definitions of "attempt" appearing in the 1872 edition of Bouvier's Law Dictionary, because these definitions inconveniently do nothing to support its position. Indeed, as applied to the crime of assault, both of these definitions of "attempt" lead to the conclusion that assault requires an intent to inflict a battery -- that is, an intent to injure n1. The majority has chosen Bouvier's third definition of attempt to construe Penal Code section 240 because that definition appears [***27] on quick reading to support this court's mistaken holding in *Colantuono, supra,* 7 Cal. 4th 206. Whether it actually supports it, however, is questionable. If an "attempt" requires an "intent" to commit an act that "would be indictable if done," and if an assault is an "attempt" to commit a battery, then an assault must require an intent to commit an act that would be punishable as a battery -- that is, an intent to apply force unlawfully to another or, in other words, an intent to injure the other.

n1 In the context of assault and battery, the term "injure" does not require bodily harm and includes any "least touching" that is wrongful or

offensive to the person who receives it. (*Colantuono, supra,* 7 Cal. 4th at p. 214, fn. 4.)

Tellingly, the majority fails to cite one appellate decision or one text writer from the 1872 period applying Bouvier's third definition of attempt to the crime of assault, or any other evidence that any member of the 1872 Legislature was aware of or relied [***28] upon this definition of attempt as explaining that term's meaning in Penal Code section 240. The majority also must acknowledge that the meaning it gives to the term "attempt" in Penal Code section 240 cannot be given to the same word in other sections of the original 1872 Penal Code, such as sections 663 and 664. (Maj. opn., *ante*, at [*793] pp. 7-8.) In those sections, which apply to the crime of criminal attempt, the word "attempt" requires a specific intent or purpose to commit the target crime. (See Pen. Code, § 21a; *People v. Kipp* (1998) 18 Cal. 4th 349, 376, 956 P.2d 1169.) The majority thus acknowledges its failure to apply a normal rule of statutory construction: " ' " 'Identical words used in different parts of the same act are intended to have the same meaning.' " ' " (*Department of Revenue of Ore. v. ACF Industries, Inc.* (1994) 510 U.S. 332, 342, 114 S. Ct. 843, 127 L. Ed. 2d 165; accord, *Wilcox v. Birtwhistle* (1999) 21 Cal. 4th 973, 979, 987 P.2d 727; *California Teachers Assn. v. Governing of Rialto Unified School Dist.* (1997) 14 Cal. 4th 627, 643, 927 P.2d 1175.) The majority [***29] asks us to believe, contrary to this rule, that the 1872 Legislature, when in adopted the original Penal Code by a single legislative act, intended that "attempt" would mean one thing in sections 663 and 664, and something quite different in section 240.

The majority dismisses as mistaken the code commissioners' comment to Penal Code section 240. (Maj. opn., *ante*, 2001 Cal. LEXIS 5480 at p. *13-14, fn. 2.) In so doing, it flouts another rule of statutory construction: "When a statute proposed by the California Code Commission for inclusion in the Penal Code of 1872 has been enacted by the Legislature without substantial change, the report of the commission is entitled to great weight in construing the statute and in determining the intent of the Legislature." (*People v. Wiley* (1976) 18 Cal. 3d 162, 171, 133 Cal. Rptr. 135, 554 P.2d 881.)

When they submitted their draft of the Penal Code to the Legislature, the code commissioners provided an extensive comment describing the crime of assault. Because the Legislature adopted without change the recommendation of the code commissioners, their comment deserves this court's attention and consideration. Their note to Penal [***30] Code section 240 states in relevant part: "INTENT TO STRIKE.--An assault has also been said to be an intentional attempt, by violence, to do an injury to the person of another. It must be *intentional.* If there is no present purpose to do an injury, there is no assault. There must also be an *attempt.* A purpose not accompanied by an effort to carry into immediate execution falls short of an assault. Thus no words can amount to an assault. But rushing towards another with menacing [**207] gestures, and with a *purpose to strike,* is an assault, though the accused is prevented from striking before he comes near enough to do so.--[Citations.] ... So, where an Embassador exhibited a painting in the window of his house which gave offense to the crowd without, and defendant, among the crowd, fired a pistol at the painting at the very time when the Embassador and his servants were in the window to remove it, but did not intend to hurt any of them, and in fact did not. *Held,* that there being no intent to injure the [*794] person there could be no conviction for an assault. [Citations.]" (Code commrs., note foll. Ann. Pen. Code, § 240, *supra,* [***31] pp. 104-105, italics in original.) Thus, the code commissioners have unambiguously declared their understanding that the crime of assault as codified in Penal Code section 240 requires the mental state of a *purpose to injure.*

The majority mentions the code commissioners' comment only as evidence that the Legislature sought to codify "the historical 'common law definition' of assault." (Maj. opn., *ante*, 2001 Cal. LEXIS 5480 at p. *11.) The majority ultimately rests its argument about the intent of the 1872 Legislature on its assertion that the common law definition of assault did not require an intent to injure. But the majority is mistaken. As the commissioners' comment accurately indicates, at common law the crime of assault "was an attempt to commit a battery and nothing else" and therefore "the need for an intent to inflict such harm has been emphasized." (Perkins & Boyce, Criminal Law (3d ed. 1982) pp. 159, 161.) The authors of another criminal law treatise make the same point: "An attempt to commit any crime requires a specific intent to commit that crime; and so assault of the attempted-battery sort requires an intent to commit a battery, i.e., an intent to cause physical [***32] injury to the victim." (LaFave & Scott, Criminal Law (2d ed. 1986) p. 692, fns. omitted.)

Turning to the majority opinion in *Colantuono, supra,* 7 Cal. 4th 206, the majority here correctly observes that it "has resulted in some confusion." (Maj. opn., *ante*, 2001 Cal. LEXIS 5480 at p. *15.) Seeking to

end the confusion, the majority states that the mental state required for assault is knowledge of "those facts sufficient to establish that [the defendant's] act by its nature will probably and directly result in physical force being applied to another, i.e., a battery." (2001 cal. LEXIS 5480 at p. *16.) Acknowledging that the *Colantuono* majority stated that merely reckless conduct cannot constitute an assault (*Colantuono, supra,* at p. 219; see also *People v. Rocha* (1971) 3 Cal. 3d 893, 898, 92 Cal. Rptr. 172, 479 P.2d 372 (*Rocha*)), the majority here assures us that under the standard it adopts "mere recklessness or criminal negligence is still not enough" (maj. opn., *ante*, 2001 Cal. LEXIS 5480 at p. *17, fn. omitted), and this is because "a jury cannot find a defendant guilty of assault based on facts he should have known but did not know" (2001 Cal. LEXIS 5480 at p. *17). I do not agree that [***33] the majority's formulation requires a mental state more culpable than criminal negligence or recklessness.

Criminal negligence is determined by an objective standard based on whether a reasonable person *in the defendant's position* would have been aware of the risk of harm to another. (*Williams v. Garcetti* (1993) 5 Cal. 4th 561, 574, 853 P.2d 507.) To be "in the defendant's position" means, among other things, to be aware of the facts that the defendant knew. (*Albrecht v. Broughton* (1970) 6 Cal. App. 3d 173, 179, 85 [*795] Cal. Rptr. 659; see BAJI No. 3.11 (8th ed. 1994).) Thus, criminal negligence requires actual knowledge of facts that would lead a reasonable person to conclude that the conduct in question involved a high risk of injury to another. (See LaFave & Scott, Criminal Law, *supra*, at pp. 235-237.) Recklessness, a mental state more culpable than criminal negligence, requires not only knowledge of the facts making the conduct excessively dangerous, but also a subjective appreciation of the risk of harm to another. (*Id.* at p. 239; see also Pen. Code, § 450, subd. (f) [" 'Recklessly' means a person is [***34] aware of and consciously disregards a substantial and unjustifiable risk ...."]; *People v. Budish* (1982) 131 Cal. App. 3d 1043, 1047, 182 Cal. Rptr. 653; Perkins & Boyce, Criminal Law, *supra,* at p. 851.)

[**208] Thus, the *Colantuono* majority, in requiring *more than* criminal negligence or recklessness, must have intended to require not only knowledge of facts making the conduct dangerous and a subjective appreciation of the risk of injury to another, but also an awareness of a *higher degree of risk* than that required for ordinary criminal negligence or recklessness. The majority here, in holding that a subjective appreciation of the risk of harm is *not* required, is not faithful to *Colantuono*, much less to the plain meaning of the statutory definition of assault or the intent of the 1872 Legislature that enacted that definition, as reflected in the code commissioners' comment to Penal Code section 240.

As its last line of defense, the majority asserts that the Legislature has twice signaled its approval of this court's muddled decision in *Rocha*, *supra*, 3 Cal. 3d 893 holding that assault with a deadly weapon was not a [***35] specific intent crime and stating that the intent required for assault is "the intent to attempt to commit a battery." (3 Cal. 3d at p. 899.) The majority declares that the Legislature implicitly approved *Rocha* in 1982 when it amended Penal Code section 22 to clarify that voluntary intoxication is admissible only on "whether or not defendant actually formed a required specific intent," and again in 1986 when it adopted Penal Code section 21a, defining the elements of criminal attempt. (Maj. opn., *ante*, at pp. 9-10.)

But the definition of attempt in Penal Code section 21a -- as requiring "a specific intent to commit the crime" -- is entirely inconsistent with the majority's construction of the same word in Penal Code section 240 defining assault. How the Legislature's adoption of this inconsistent definition of a key term in Penal Code section 240 constitutes an approval of *Rocha* or of what the majority does here today escapes me entirely. Nor do I see anything in Penal Code section 22 that supports the majority's decision here or suggests that [***36] the Legislature was thinking of the definition of assault in 1982 when it amended that section. [*796]

Finally, and unlike the majority, I attach no significance to the Legislature's failure to amend Penal Code section 240 after this court's decisions in *Rocha, supra,* 3 Cal. 3d 893, and *Colantuono, supra,* 7 Cal. 4th 206. Legislative inaction is normally a poor indicator of legislative intent. (*Harris v. Capital Growth Investors XIV* (1991) 52 Cal. 3d 1142, 1156, 278 Cal. Rptr. 614, 805 P.2d 873; *Gutierrez v. Mofid* (1985) 39 Cal. 3d 892, 902, fn. 5, 218 Cal. Rptr. 313, 705 P.2d 886 ["the Legislature's mere failure to respond to a judicial construction of its statute is no evidence of its acquiescence in the ruling"].) This is especially true in this instance. Since it first defined the crime in 1850 (Stats. 1850, ch. 99, § 49, p. 234), using language that passed unchanged into the 1872 Penal Code, the Legislature has never amended its definition of assault. It did not do so after this court defined assault to require a purpose to injure (*People v. Bird* (1881) 60 Cal. 7, 8; *People v. Dodel* (1888) 77 Cal. 293, 294, 19 P. 484; [***37] *People v. McCoy* (1944) 25 Cal. 2d 177, 189-190, 153 P.2d 315; *People v. Wilson* (1967) 66 Cal. 2d

749, 765, 59 Cal. Rptr. 156, 427 P.2d 820; *People v. Coffey* (1967) 67 Cal. 2d 204, 221-222, 60 Cal. Rptr. 457, 430 P.2d 15), and it has not done so since this court has held assault does not require a purpose to injure. Throughout this contradictory course of judicial construction, the Legislature has allowed the statutory definition of assault to remain an attempt to commit a violent injury. In 1850, "attempt" meant what it meant at common law, namely that one "commits an attempt when, with intent to commit a particular crime, he performs an act which tends toward but falls short of the consummation of such crime." (4 Wharton's Criminal Law (15th ed. 1996) § 693, p. 580.) n2

n2 I do not mean to suggest that the Legislature should not reexamine its definition of the crime of assault. Given developments in other jurisdictions, and this court's own difficulties with the existing definition, such an examination may be overdue. As the authors of a treatise on criminal law in this country have observed, the common law definition of assault, as codified in Penal Code section 240, was once very common but now "is rarely found in the modern codes." (LaFave & Scott, Criminal Law, *supra,* at p. 691.)

[***38]

[**209] How far this court has strayed from the Legislature's definition of assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another"! (Pen. Code, § 240.) Under the definition of assault that the majority approves today, as the Attorney General was forced to acknowledge at oral argument in this case, a trial court instructing a jury in the exact words of this statute would not accurately define the crime of assault.

II

Here, the instruction that the trial court gave to the jury to explain the requirements for the crime of assault failed to state that assault requires either an intent to injure or a subjective awareness of the risk of injury. (See [*797] maj. opn., *ante*, at p. 3.) In my view, therefore, the instruction was erroneous.

On the evidence presented here, this error was prejudicial. Defendant testified that when he fired his shotgun he was aiming at the rear passenger side wheel well of Gregory King's truck, and not at King, and it was undisputed that none of the shotgun pellets hit King, who was standing on the opposite side of his truck. The defense plausibly argued that in discharging the shotgun [***39] defendant lacked any purpose to injure King or any awareness that King was in any danger of being injured.

An instruction that omits or misdescribes an element of a charged criminal offense violates the right to jury trial guaranteed by our federal Constitution, and the effect of this violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824. Under that test, an appellate court may find the error harmless only if, after conducting a thorough review of the record, the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. (*Neder v. United States* (1999) 527 U.S. 1, 7-10, 144 L. Ed. 2d 35, 119 S. Ct. 1827.) Applying that test here, after a thorough review of the record, I cannot say beyond a reasonable doubt that if the trial court had correctly instructed on the mental state required for an assault, the jury would have found that defendant had that mental state. Accordingly, I agree with the Court of Appeal that the instructional error requires reversal of defendant's assault conviction.

KENNARD, J.

I CONCUR:

WERDEGAR, [***40] J.

4 of 19 DOCUMENTS

LACHI DELISA RICHARDS, Plaintiff and Respondent, v. CH2M HILL, INC., Defendant and Appellant.

S087484

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 798; 29 P.3d 175; 2001 Cal. LEXIS 5481; 111 Cal. Rptr. 2d 87; 2001 Cal. Daily Op. Service 7347; 2001 Daily Journal DAR 9059; 12 Am. Disabilities Cas. (BNA) 129

August 23, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:
Court of Appeal of California, Third Appellate District. Sacramento County. C027848. Super. Ct. No. 538663. Cecily Bond, Judge.

DISPOSITION:
The judgment of the Court of Appeal is reversed. The cause is remanded with directions to remand to the trial court for reconsideration of CH2M Hill's motion for a new trial on statute of limitations grounds in light of this opinion.

COUNSEL:
Attorneys for Appellant:

Seyfarth, Shaw, Fairweather & Geraldson, Seyfarth Shaw, Mark H. Van Brussel, Mark P. Grajski; Sherman & Howard and Theodore A. Olsen for Defendant and Appellant.

Paul, Hastings, Janofsky & Walker, Katherine C. Huibonhoa and Paul W. Cane, Jr., for California Employment Law Council as Amicus Curiae on behalf of Defendant and Appellant.

Gibson, Dunn & Crutcher, David A. Cathcart, Timothy S. Lykowski and Annette M. Gammon for The Employers Group as Amicus Curiae on behalf of Defendant and Appellant.

Attorneys for Respondent:

Christopher H. Whelan; Joseph Posner; Law Offices of Ellen Lake and Ellen Lake for Plaintiff and Respondent.

JUDGES:
WERDEGAR, J. WE CONCUR: GEORGE, [***2] C. J. KENNARD, J. CHIN, J. DISSENTING OPINION BY BROWN, J.

OPINIONBY:
WERDEGAR

OPINION:

[*801] [**176]

Plaintiff, a disabled employee, resigned from her job after a five-year period during which she claimed her employer was unwilling to effectively accommodate her disability. She sued her employer for disability discrimination and harassment and the jury found in her favor, awarding substantial sums as damages to compensate for severe emotional distress and lost salary. Many of the incidents of disability discrimination [*802] introduced at trial occurred outside the one-year limitation period for filing Fair Employment and Housing Act actions. (Gov. Code, § 12960.) n1

n1 All statutory references are to the Government Code unless otherwise specified.

This case raises the following question of interpretation of the Fair Employment and Housing Act (the FEHA; Gov. Code, § 12900 et seq.): May an employer be held liable for unlawful actions occurring outside the limitations period? In addressing [***3] this question, we must determine the scope of the "continuing violation doctrine." That doctrine, described at greater length below, allows liability for unlawful employer conduct occurring outside the statute of limitations if it is sufficiently connected to unlawful conduct within the limitations period. We conclude, consistent with the language and purposes of the FEHA, as well as federal and California case law, that an employer's series of unlawful actions in a case of failure to reasonably accommodate an employee's disability, or disability harassment should be viewed as a single, actionable course of conduct if (1) the actions are sufficiently similar in kind; (2) they occur with sufficient frequency; and (3) they have not acquired a degree of "permanence" so that employees are on notice that [**177] further efforts at informal conciliation with the employer to obtain accommodation or end harassment would be futile. We will accordingly reverse the judgment of the Court of Appeal and direct it to remand the cause to the trial court for application of this three-pronged test.

STATEMENT OF FACTS n2

n2 These facts are taken largely from the Court of Appeal opinion. Since the issue before us, at least in part, is whether there was sufficient evidence for the trial court to have concluded that Richards's claims were timely, the facts are set forth in the light most favorable to her, unless specified otherwise. (*Nestle v. City of Santa Monica* (1972) 6 Cal. 3d 920, 925, 101 Cal. Rptr. 568, 496 P.2d 480.)

[***4]

Plaintiff Lachi Delisa Richards was hired by CH2M Hill, Inc., a nationwide engineering firm, as a civil engineer and began work in 1984 in the water resources division at its Redding office. By all accounts, Richards was an outstanding engineer, who consistently generated favorable performance evaluations and continued, even during the period of her illness discussed below, to be a dedicated employee.

In late 1987 Richards began experiencing tremors and difficulty walking. Although she could still walk, she began using a wheelchair in April 1988 as a means of conserving energy. In October 1988, Richards was diagnosed with multiple sclerosis (MS). n3 Richards's supervisors initially agreed to her request that she be given a part-time schedule, that she not be required to [*803] perform any fieldwork, and that she be permitted to work out of the Sacramento office. Dr. Swank, Richards's treating physician and an international expert on MS, testified that MS is a fluctuating disease in which a patient's symptoms may come and go, depending in large part on the level of stress and exertion that the patient sustains.

n3 MS is a slowly progressive, debilitating disease of the central nervous system. (Merck Manual (17th ed. 1999) p. 1474.) "The disease is characterized by various symptoms and signs of [central nervous system] dysfunction, with remissions and recurring exacerbations." (*Ibid.*)

[***5]

Richards's symptoms continued to worsen. On her doctor's advice, Richards took an indefinite leave of absence, which ultimately lasted 10 months, beginning in March 1989.

On January 2, 1990, Richards returned to work in the Sacramento office. As her condition improved, she eventually worked an average of 20 to 25 hours per week. She performed some of her work at the office and some of her work at home -- a routine that continued until February 1993, when she tendered her resignation.

Both before and after Richards was diagnosed with MS, a number of issues arose regarding CH2M Hill's accommodation of her disability. We summarize these issues below.

A. Richards's Transfer

When Richards began her 10-month leave of absence in March 1989, she requested a formal transfer from the Redding office to the Sacramento office, both because it offered her closer proximity to her doctors, and because the Redding office was not wheelchair-accessible. Although the transfer approval process normally takes 60 to 75 days, approval of Richards's transfer took 11 months. It was not approved by the regional district manager, Robert Harding, until February 1990 -- one month after Richards's [***6] return from her leave of absence. Nonetheless, Richards reported to work at the

Sacramento office when she returned from her leave on January 2, 1990 -- and in fact, had been working there prior to her leave of absence.

The evidence suggested the approval of Richards's transfer was delayed primarily because Harding believed Richards had lied on her employment application about her medical condition, despite the lack of evidence of such misrepresentation. He was not inclined to accommodate an employee whose candor he questioned, a viewpoint he unhesitatingly expressed to some of the supervisors in the Redding and Sacramento offices. In 1990, Mike Kashiwagi, the civil engineering department manager, told Richards that despite her good work, Harding [**178] and those in the corporate office wanted her to resign.

[*804] *B. Computer Issues*

During her 10-month leave of absence, Richards undertook to teach herself a new computer software program. To assist Richards in this endeavor, Grant Davids, Richards's Sacramento office supervisor, would bring a company computer to her home on weekends. In August 1989, Richards asked Davids if the company would lend her a computer to keep at home following [***7] her return to work. Davids informed her that CH2M Hill was not likely to lend her a computer and encouraged her to buy her own. He did, however, give his approval to Richards to work at home parttime following her return from her leave of absence. Richards proceeded to contact the California Department of Rehabilitation and several private organizations, seeking funding to purchase a computer. When two private organizations distributed flyers asking for contributions in Richards's name and identifying CH2M Hill as her employer, Richards's other supervisors told her that the solicitations had embarrassed the company. Richards was requested to ask the private organizations to withdraw the solicitations. In November 1989, at the urging of one of CH2M Hill's managers, Richards met with Stan Smith, the Redding regional manager, to seek authorization to perform computer work at her home and to ask that CH2M Hill provide her with a computer. Smith told Richards that while the company was not asking her to resign, it was having difficulty comprehending how it could accommodate her disability. By the end of the meeting, Smith told Richards that the Sacramento office would have to make the decision [***8] on the computer. In fact, Richards never received an answer. As a result, in December 1989 -- while still on leave -- Richards informed CH2M Hill it no longer needed to provide her with a computer because she had secured funding assistance from the Department of Rehabilitation. Richards then purchased her own computer.

During the August to December 1989 period in which plaintiff was seeking a computer, plaintiff sought legal advice from a lawyer and a private organization that advocates for the disabled, Resources for Independent Living, in an effort to determine whether her computer request was "reasonable," as well as to determine her rights in general to "reasonable accommodation" under the law. They advised her that her request was reasonable and provided additional information regarding the reasonable accommodation of her disability.

C. The Cot

In November 1988, while she was already working out of the Sacramento office, Richards, acting on her doctor's advice, asked Carol Uhouse, the [*805] regional administrative manager responsible for facilities in the Sacramento office, to purchase a bed so that she could rest during her breaks and at lunchtime.

Instead of purchasing [***9] a bed, the company purchased a folding army cot. Uhouse insisted that Richards help pay for items such as a mattress and sheets, while the company paid for blankets and a pillow.

Uhouse vetoed Richards's request that the cot be placed in any of several vacant offices, believing that the cot would be visible to, and look unprofessional to, clients and other visitors. Uhouse suggested that the cot be placed in an unheated and uncooled storage area known as the "black hole." Richards vetoed that suggestion.

Following Richards's return from her leave of absence in January 1990, the cot was set up in a drafting room next to Richards's office. However, Uhouse would periodically move the cot without notice when the space was needed for other purposes. This scenario continued until the spring or summer of 1990, when Richards's department manager, Loren Bottorff, moved the cot to a vacant office next to a new office into which Richards had recently moved. Richards considered the new location unsatisfactory, primarily because the room had a pole in the middle that prevented her from closing the door if her wheelchair was in the room, although Bottorff testified Richards had made no complaint [***10] to him about the cot's new location. In [**179] any case, from that point forward, Richards dropped the cot issue and would go home whenever she needed to

rest.

D. Location of Richards's Office

Upon Richards's return from her leave of absence, Uhouse led Richards past her old office -- which remained intact, with all of her personal belongings still inside -- to the back of a "storage/layout kind of all-purpose junk room area" where there was nothing but a rug, and pointed to the area, stating, "This is your office." One of the engineers was asked to put a desk together for Richards; Richards "found" a telephone; and various coworkers and friends assisted Richards in furnishing and arranging her storage room office. Two days later, Richards returned to her old office. Another employee had moved into it. All of her personal items were gone. It took several weeks for her to regain her property. Even then, some of the items, such as design manuals and books, were missing.

According to Richards, Davids remarked that Uhouse put Richards's office in the "storage area" because Uhouse thought Richards "was milking [*806] the company and milking people because [Richards] had MS; that [Richards] [***11] was trying to get sympathy from people by asking for the computer; ... [and that Uhouse] felt that the company was bending over backwards to let [Richards] in the door, and ... was not going to do another thing for [Richards]." Davids suggested that Richards meet with Uhouse in an effort to improve their relationship. In the summer of 1990, after about six months in the storage area office, Richards was permitted to move into a new office in the water resources area of the building.

E. Richards's Meeting in January 1990 to Request Reasonable Accommodation

In January 1990, Richards prepared a document which discussed why she wanted her own computer and which requested "accommodations in the area of a flexible time schedule" and permission "to work partially at home."

Richards then met with Uhouse and Steve DeCou, the Sacramento office manager. DeCou and Uhouse rejected Richards's request that she be allowed to work parttime at home. Despite the lack of permission, Richards did in fact begin working part-time at home, and in October or November of 1990, Bottorff gave Richards permission to do so without seeking authorization from Uhouse.

F. Access Issues

1. [***12] Office Doors

Shortly after Richards returned from her leave in January 1990, she told Uhouse that some of the doors in the building were hard to open and asked that they be adjusted. Uhouse said that she would take care of the problem. She did not. The following month, February 1990, Richards took care of the problem with the assistance of her boyfriend and other friends.

2. Gary Dobson's Furniture and Equipment

From January to June 1990, Richards had a problem maneuvering her wheelchair into her office because of furniture and equipment kept in the hallway by Gary Dobson, the surveying department manager. Richards requested Dobson to move the offending items. He refused. Whenever Richards moved the items herself, Dobson would move them back. The problem continued until June 1990, when Richards was relocated to her new office in the water resources area.

[*807] 3. Richards's October 1990 Memo to Uhouse Concerning Access

On October 3, 1990, Richards wrote a memo to Uhouse, complaining about various impediments to access within the office.

a. The Reception Area Door

Richards accessed CH2M Hill's offices through a particular reception area door. In September 1990, Uhouse [***13] decided to keep it closed because the receptionist claimed that she could not do her job over the noise of a nearby mailroom.

Richards's October 1990 memo requested that the door be kept open during her work [**180] hours. It appears from that point forward, the door was kept open during the hours she was most likely to be at work and was otherwise closed. The issue was never raised again.

b. The Wheelchair Ramp

Beginning with her use of a wheelchair in April 1988, Richards had a problem traversing the wheelchair ramp leading to CH2M Hill's offices. Whenever it rained, the lawns were watered, or the water fountain at the top of the ramp overflowed, the ramp would become slippery, causing Richards's manual wheelchair to hydroplane. On such occasions, she needed to muscle her way up or

get a "running start."

In her October 1990 memo to Uhouse, Richards suggested that nonskid tape be applied to the ramp, which she estimated would have cost approximately $ 30. In the alternative, she suggested that drainage grooves be cut into the ramp. In October or November 1990, the building handyman applied a substance to the ramp in an effort to improve traction, but the repair was ineffectual. Richards [***14] continued to raise the issue with Uhouse, but the ramp was never modified to Richards's satisfaction. In January or February 1991, however, Richards began using a power wheelchair, which was unaffected by wet conditions on the ramp.

c. The Building Elevator

In her October 1990 memo to Uhouse, Richards complained that "the wheels of the wheelchair catch on the lip of the elevator floor[,] which slows [her] entrance into the elevator [such] that the doors close on [her] arms." Despite Richards's request that the elevator doors be fitted with an electronic eye, or that the time be lengthened for the doors to remain open, the problem was never fixed.

[*808] d. The Lunchroom

In her October 1990 memo, Richards complained that "the vending machines and southern counter area in the lunch room are not useable without my rearranging the tables and chairs each day."

In December 1991, another problem arose: The vending machines blocked Richards's access to the microwave, which had been moved to the back of the lunchroom and which she needed to warm up a special lunch prescribed by her physician.

In response to Richards's complaints, Uhouse moved one of the vending machines into [***15] a nearby hallway in order to give her access to the back of the room, including the microwave. However, the subsequent addition of recycling bins once again prevented her from accessing the microwave oven. Richards testified that her fellow employees would help her with the microwave.

e. Library Access

When Richards first started using a wheelchair in April 1988, she could access the entire Sacramento office library, except for two stacks that were too close together. In 1990, a microfiche machine was added, cutting off wheelchair access to all of the stacks. Richards mentioned the problem in her October 1990 memo. However, in mid-1992, the library was relocated, and access was no longer a problem for Richards.

f. Supply Room Access

Richards's October 1990 memo noted that it was difficult for her to access the supply room because of the placement of big paper cases in the aisles. The problem continued for several months, until the supply room was moved to a different location. However, the new location was effectively inaccessible because it required Richards to negotiate two 90-degree turns in her wheelchair. Sometime in 1991, Richards requested that the supply room be [***16] rearranged, giving her access to those supplies that she needed on a frequent basis. Her suggestion was never acted upon.

g. Hallway Access

Richards also complained in her October 1990 memo that boxes, furniture, and equipment in the hallways made wheelchair access difficult. In some areas, Richards would scrape her elbows against boxes piled up along the [*809] corridor, causing them to fall on [**181] her. In other areas, it was difficult, if not impossible, for Richards to turn her wheelchair around. Richards asked that the hallways have at least 36 inches of clearance space, and that corners have at least 45 inches of clearance. Access to an upstairs hallway, which was also impeded, was particularly important to Richards because she needed access to the word processing and drafting and computer services there "every day that [she] was at work." No changes were made until 1993.

G. Assignment to Strenuous Field Work

Some time in mid-1990, Norm Brazelton, a top CH2M Hill manager, asked Richards to take a field assignment that would have required her to do a great deal of walking along canal banks and climbing over barbed-wire fences. At the time Brazelton discussed the matter with [***17] Richards, she was in her wheelchair and it was obvious she would be unable to do the assignment. Concerned she was being set up to fail, Richards, through her supervisor, proposed alternative ways to participate in the project. Brazelton did not pursue the idea but refused to speak to her for several months.

H. Events of 1992

Richards thereafter missed work for a month following a

car accident in February 1992, and took two weeks off in June 1992 to get married. After Richards returned in July 1992, her symptoms worsened to the point where she was unable to walk, to move her fingers or hold a pencil, or even to raise her left arm off her lap.

Using her vacation time and sick leave, Richards took off from work between August 1 and November 18, 1992. When she returned, she worked a schedule varying from nine to 20 hours per week.

I. Events Within the Limitations Period

On or around January 27, 1993, Richards and the department manager, Bottorff, met for her annual evaluation. At the meeting, Richards submitted typewritten comments, which raised several items: Richards had been unable for the past three years to get a timely and correct W-2 form; her wheelchair [***18] access in the hallways was restricted due to the constant accumulation of furniture and boxes; the disabled access ramps were often blocked by delivery trucks; and CH2M Hill had not yet established an adequate fire escape plan for Richards. According to Richards, Bottorff told her that she was facing a brick wall and that nothing was going to change, as she had been told the previous year.

[*810] That same day, Bottorff gave Richards's typewritten comments to human resources administrator Kathy Metzger. Metzger began in earnest to attempt to address Richards's concerns. Between January 27 and February 8, 1993, Metzger reported to Richards almost daily on the progress made on her complaints. Metzger made sure the caterer and postal service were contacted and directed not to block the ramps. She formed a committee to develop a fire escape plan for Richards, and contacted the building owner to see if an additional wheelchair ramp could be built outside the exit near Richards's office. She had moved several of the items that were obstacles to Richards's access, including bookcases and furniture. Finally, Metzger began contacting various people in the corporate office and elsewhere in an effort [***19] to resolve the problems associated with Richards's W-2 form.

Not all of Richards's access problems were resolved, however. Metzger had moved the microwave to an accessible area, but "someone began piling ice chests in front of it" and she lost access again. Metzger's attempts to move certain bookcases that blocked hallway access foundered when Uhouse informed her she did not have the staff to accomplish the task.

When Richards returned to work on February 22, 1993, she submitted her resignation effective March 8, 1993. Richards testified that she resigned because she believed that all of the events over the previous four years had had a negative impact on her health: "the accumulation of just so many things, it was just -- it was unbearable for me. I could not work there any longer." Richards continued: "I knew my health was on the line. [**182] I was risking my health, permanent damage to my health."

J. The Institution of Richards's Claims

Richards filed her administrative complaint with the California Department of Fair Employment and Housing (the Department) on January 25, 1994. Richards elected to proceed with a civil action, and the Department issued Richards a right-to-sue [***20] letter.

Richards then filed this civil action against CH2M Hill. When trial began, Richards's claims were (1) disability harassment under the FEHA, (2) disability discrimination under the FEHA, (3) constructive discharge in violation of public policy, and (4) intentional and negligent infliction of emotional distress.

Before trial, CH2M Hill moved in limine to exclude evidence of unlawful conduct against Richards that occurred before the limitations period of January 25, 1993. The company also moved to preclude Richards from [*811] introducing evidence of purported past or future wage loss. The trial court denied the motions.

A six-week jury trial commenced on June 2, 1997. Late in the trial, Richards dismissed her constructive discharge in violation of public policy claim and her claims for intentional and negligent infliction of emotional distress. Based on the trial court's ruling that CH2M Hill's conduct constituted a continuing violation, Richards was permitted to introduce evidence of, and seek damages for, the entire five-year period (1988-1993) of alleged harassment and discrimination.

Finding CH2M Hill had discriminated against Richards, both in creating a hostile work environment [***21] and in failing to reasonably accommodate her disability, the jury awarded her $ 925,000 in emotional distress damages and $ 476,000 in economic damages.

CH2M Hill moved for judgment notwithstanding the verdict and for a new trial, based in part on the claim that much of the conduct for which it was found liable occurred outside the limitations period. The trial court denied the motion, finding that all the evidence of misconduct introduced at trial was part of "a course of conduct. I think you can't look at a hostile work

environment without looking at what the environment really was and how it existed. And this one happened to exist over a period of time and over a period of years involving the same problems." CH2M Hill timely appealed.

The Court of Appeal reversed. It held that the trial court had misapplied the continuing violation doctrine and had improperly allowed the jury to award damages to Richards for injuries occurring outside the limitations period. The court concluded that the statute of limitations is tolled only up to the point at which Richards knew or should have known that her rights were being violated, and under that test, all of the employer conduct occurring [***22] outside the limitations period was time-barred. It further concluded that some unlawful conduct had occurred during the limitations period and remanded the case to the trial court for a redetermination of damages limited to incidents occurring within this period.

II. DISCUSSION

A. Statute of Limitations and the Continuing Violation Doctrine

The statute of limitations for FEHA actions states, in pertinent part: "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except [*812] that this period may be extended as follows: (a) for not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence, or (b) for not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer." (§ 12960.)

The Court of Appeal correctly [***23] concluded that some of CH2M Hill's misconduct was within the relevant limitations period for FEHA actions -- e.g., the persistent blocking of hallway access and access to the supply [**183] room, the failure to prepare a fire escape plan, the failure to adjust the timing of the elevator door to provide access to the lunchroom. Other misconduct occurred outside the limitations period. Richards argues that these actions were nonetheless properly presented to the jury, both for evidentiary purposes and for purposes of proving damages, because they were brought in by the continuing violation doctrine. The Court of Appeal held, and CH2M Hill argues, that only those incidents of failure to reasonably accommodate that occurred within the limitations period were properly placed before the jury. To decide which party is correct, we must determine the proper scope of the continuing violation doctrine.

Essentially, the continuing violation doctrine comes into play when an employee raises a claim based on conduct that occurred in part outside the limitations period. In such cases, two questions are potentially raised. The first question is evidentiary: are the alleged acts outside the limitation period [***24] admissible as relevant background evidence? (See *United Airlines v. Evans* (1977) 431 U.S. 553, 558, 52 L. Ed. 2d 571, 97 S. Ct. 1885.) The second and more difficult question is remedial: is an employer liable for actions that take place outside the limitations period if these actions are sufficiently linked to unlawful conduct within the limitations period? It is this second question that is at issue in this case.

1. Review of Case Law

" 'Because the antidiscrimination objectives and relevant wording of title VII of the Civil Rights Act of 1964 (Title VII) [(42 U.S.C. § 2000e et seq.)] [and other federal antidiscrimination statutes] are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA.' " (*Reno v. Baird* (1998) 18 Cal. 4th 640, 647, 957 P.2d 1333.) A review of federal case law regarding the continuing violation doctrine reveals the [*813] doctrine to be, as one leading treatise has noted, "arguably the most muddled area in all of employment discrimination law." (Lindemann & Grossman, Employment Discrimination Law (3d ed. 1996) [***25] p. 1351.) This is so because the doctrine refers not to a single theory, but to a number of different approaches, in different contexts and using a variety of formulations, to extending the statute of limitations in employment discrimination cases. Our review of federal case law reveals essentially four approaches to the continuing violation doctrine.

In the first approach, a continuing violation is found when a corporate policy is initiated before the limitations period but continues in effect within that period to the detriment of the employee. As the Ninth Circuit Court of Appeals stated in *Williams v. Owens-Illinois, Inc.* (9th Cir. 1982) 665 F.2d 918, 924: "[A] systematic policy of discrimination is actionable even if

some or all of the events evidencing its inception occurred prior to the limitations period. [Citation.] The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period." For example, a discriminatory promotions policy implemented long before a lawsuit is brought is actionable if it continues into the limitations period [***26] to wrongfully deny an employee a promotion. (*Ibid.*; see also *E.E.O.C. v. Local 350, Plumbers and Pipefitters* (9th Cir. 1993) 982 F.2d 1305, 1308 [policy of discriminating against retirees in hiring hall]; *Bartmess v. Drewrys U.S.A., Inc.* (7th Cir. 1971) 444 F.2d 1186, 1188 [compulsory retirement policy discriminating against women]; *Abrams v. Baylor College of Medicine* (5th Cir. 1986) 805 F.2d 528, 533-534 [policy of discrimination against Jews in staffing Saudi Arabian hospital].) Two cases from our own Courts of Appeal also have concluded that a policy of systematic discrimination in the area of promotions constitutes a continuing violation. (*Valdez v. City of Los Angeles* (1991) 231 Cal. App. 3d 1043, 1052-1054, 282 Cal. Rptr. 726; *City and County of San Francisco v. Fair Employment & Housing Com.* (1987) 191 Cal. App. 3d 976, 983, 236 Cal. Rptr. 716.)

A second approach to the continuing violation doctrine is derived from the doctrine of equitable tolling. This approach has been cogently expressed by Judge Posner in *Moskowitz* [**184] *v. Trustees of Purdue University* (7th Cir. 1993) 5 F.3d 279: [***27] "Under the doctrine of equitable tolling, ... a person injured by an unlawful act need not sue until he knows, or through the exercise of reasonable diligence would have known, not only that he has been injured (for once he discovers that, his cause of action has accrued and the statute of limitations begins to run) but also that he has been injured by a possibly wrongful act of the [employer] .... If it is only with the benefit of hindsight, after a series of discriminatory acts, that the [employee] can [*814] realize that he is indeed a victim of unlawful discrimination, he can sue in regard to all of the acts provided he sues promptly after learning their character, even if the statute of limitations has run on all of them. If, however, he knows or with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed him, he may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one. So the fact that a series of discriminatory or otherwise unlawful acts is indeed a series, a continuum, rather than a concatenation of unrelated acts, will delay the deadline for suing [***28] with respect to the earliest acts in the series *only if* their character was not apparent when they were committed but became so when viewed in the light of the later acts." (*Id.* at pp. 281-282, italics added.) The *Moskowitz* court viewed equitable tolling as the sole basis of the continuing violation doctrine. (*Id.* at p. 282.) The Court of Appeal in the present case appears to have adopted a similar view.

A third approach is the multifactored test first articulated in *Berry v. Board of Sup's of L.S.U.* (5th Cir. 1983) 715 F.2d 971 (*Berry*). Under this approach, equitable tolling is one of a number of considerations for determining when a violation is deemed to be continuing. The court formulated the three nonexclusive factors of its test as follows: "The first is subject matter. Do the alleged acts involve the same type of discrimination, tending to connect them in a continuing violation? The second is frequency. Are the alleged acts recurring (e.g., a biweekly paycheck) or more in the nature of an isolated work assignment or employment decision? The third factor, perhaps of most importance, is degree of permanence. Does [***29] the act have the degree of permanence which should trigger an employee's awareness of and duty to assert his or her rights, or which should indicate to the employee that the continued existence of the adverse consequences of the act is to be expected without being dependent on a continuing intent to discriminate? ...." (*Id.* at p. 981.) This third factor is akin to equitable tolling, focusing on when the employee was put on notice that his or her rights had been violated.

The *Berry* test has been widely adopted by the federal courts. (See *Filipovic v. K&R Exp. System Inc.* (7th Cir. 1999) 176 F.3d 390, 396; *Sabree v. United Broth. of Carpenters & Joiners* (1st Cir. 1990) 921 F.2d 396, 402; *Hendrix v. City of Yazoo City, Miss.* (5th Cir. 1990) 911 F.2d 1102, 1104; *Bullington v. United Air Lines, Inc.* (10th Cir. 1999) 186 F.3d 1301, 1311; *Roberts v. Gadsden Memorial Hosp.* (11th Cir. 1988) 835 F.2d 793.) Although a number of courts using the *Berry* test have emphasized the paramount importance of the third factor, i.e., the permanence of the action (see, e.g., *Selan v. Kiley* (7th Cir. 1992) 969 F.2d 560, 565-566, [***30] and cases cited therein; *Bullington v. United Air Lines, Inc.*, *supra*, 186 F.3d at p. 1311), a review of [*815] the cases reveals that the weight and significance given to this factor is highly variable, often depending on the context in which the continuing violation doctrine is being applied.

For example, some courts employing the *Berry* test in the context of sexual or racial harassment have concluded that such harassment often lacks the

"permanence" to start the running of the statute of limitations. As one court stated: "Acts of harassment that create an offensive or hostile environment generally do not have the same degree of permanence as, for example, the loss of promotion. If the person harassing [an employee] leaves his job, the harassment ends; the harassment is dependent on a continuing intent to harass. In contrast, when a person who denies [an employee] a promotion leaves, the [employee] is still without a promotion even though there is no longer any intent to discriminate. In this latter example, there is [**185] an element of permanence to the discriminatory action, which should, in most cases, alert [an employee] that her rights have been violated. [***31] " (*Waltman v. International Paper Co.* (5th Cir. 1989) 875 F.2d 468, 476.)

Some courts applying the *Berry* test have found, moreover, a continuing violation based on a pattern of harassment even when the harassment is of such a serious nature as plainly to place the employee on notice that her rights were being violated. For example, in *Martin v. Nanny and the Newborns, Inc.* (10th Cir. 1993) 3 F.3d 1410, the court was confronted with a pattern of hostile environment sexual harassment that met the first two factors of the *Berry* test: the acts of harassment were sufficiently related and occurred with great frequency. But the facts relevant to the third factor were not in the employee's behalf -- she had been allegedly raped outside of the limitations period, an event that clearly would have put her on notice that her rights had been violated. Nonetheless, the court found the first two factors weighed sufficiently on her behalf to overcome this deficiency and avoid summary judgment on statute of limitations grounds. (*Martin*, *supra*, 3 F.3d at pp. 1415-1416; see *Bullington v. United Airlines, Inc.*, *supra*, 186 F.3d at p. 1311, fn. 4 [***32] [*Berry* test not a bright-line test and weight given to the factors varies according to the facts].)

Similarly, in the area of reasonable accommodation for disability, some courts applying the *Berry* test have found a continuing violation based primarily on the factors of similarity of subject matter and frequency of misconduct, deemphasizing the permanence factor. In *Lewis v. Board of Trustees of Alabama State University* (M.D.Ala. 1995) 874 F. Supp. 1299, 1304, an employee had made repeated requests, repeatedly refused, for a transfer to accommodate her disability. The question presented was whether the statute of limitations began to run from the first refusal, as the employer [*816] contended, or from the last. Using the *Berry* test adopted by the Eleventh Circuit in *Roberts v. Gadsen Memorial Hosp.*, *supra*, 835 F.2d 793, the court concluded that the complaint contained sufficient allegations of an ongoing practice of discrimination for failure to reasonably accommodate the employee's disability to survive the motion to dismiss. The court did not consider the permanence factor, but only that the various acts were nearly identical and were [***33] frequent enough to be properly viewed as a continuing violation. (*Ibid.*; see also *Bodiford v. State of Alabama* (M.D.Ala. 1994) 854 F. Supp. 886, 890-891 [repeated denials of request for a transfer on the basis of disability a continuing violation], disapproved on other grounds in *Holbrook v. City Alpharetta* (11th Cir. 1997) 112 F.3d 1522, 1530-1531.)

A fourth approach to the continuing violation doctrine has dispensed with the permanence factor altogether. This approach is exemplified by the Ninth Circuit, which has adopted what may be termed a "course of conduct" test rather than the *Berry* test, as was recognized in *Counts v. Reno* (D.Hawaii 1996) 949 F. Supp. 1478, 1484-1486. The test employed is essentially whether the separate acts of discrimination are " 'closely enough related' " to form a continuing violation. (*Id.* at p. 1485; see also *Fielder v. UAL Corp.* (9th Cir. 2000) 218 F.3d 973, 987-988 [rejecting *Berry* test with regard to hostile environment claims]; *Anderson v. Reno* (9th Cir. 1999) 190 F.3d 930, 936-937 [pattern of sexual harassment found to be sufficiently [***34] related]; *Draper v. Coeur Rochester, Inc.* (9th Cir. 1998) 147 F.3d 1104, 1108 [same]; *Sosa v. Hiraoka* (1990) 920 F.2d 1451, 1457 [various discriminatory actions against an instructor were "reasonably related" and therefore a continuing violation]; *Green v. Los Angeles Cty. Superintendent of Sch.* (9th Cir. 1989) 883 F.2d 1472, 1480-1481 [series of discriminatory acts may constitute continuing violation].) A continuing violation will not be found, on the other hand, when the alleged misconduct involves different types of unlawful discrimination. (See *Green*, *supra*, 883 F.2d at p. 1481 [no continuing violation where pre-limitations-period misconduct involved coworker harassment and post-limitations-period conduct involved employer's official discriminatory acts]; see also *Huckabay v. Moore* (5th Cir. 1998) 142 F.3d 233, 239-240 [continuing racial harassment was an ongoing violation but demotion and failure to promote were not].)

[**186] Our own Court of Appeal adopted a broad view of the continuing violation doctrine akin to that embraced by the Ninth Circuit in *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341. [***35] In that case a female police officer sued her employer under the FEHA, alleging that in her 11 years with the department she was subjected to various forms of sexual harassment,

including having untrue rumors spread about her abilities, being singled out for unfavorable work assignments, and being subjected to various sexist remarks and sexual advances. The only incidents that [*817] occurred during the limitations period were an allegedly mishandled workers' compensation and disability claim and a failure to reassign her to work details assigned to other partially disabled officers. Her employer argued that these alleged later forms of discrimination differed from the earlier forms of sexual harassment and that therefore the earlier forms were time-barred. The court rejected this contention, concluding that all the acts against Accardi should properly be viewed as part of "a decade-long campaign against her ....founded upon the department's unwritten policy that law enforcement has traditionally been 'a man's job' and, hence, 'no women need apply.' " (*Id.* at p. 350; see also *Watson v. Department of Rehabilitation* (1989) 212 Cal. App. 3d 1271, 1290-1291, 261 Cal. Rptr. 204 [***36] [series of acts of discrimination and retaliatory harassment for complaining about discrimination constitutes a continuing violation].)

Some courts have applied a similar course of conduct theory to cases in which an employer fails to reasonably accommodate a disability. In *Goodman v. Boeing Co.* (Wash.Ct.App. 1994) 75 Wn. App. 60, 877 P.2d 703 (affd. (1995) 127 Wn.2d 401, 899 P.2d 1265), an employee claimed not only that she was not reasonably accommodated for her repetitive motion injury, but that she was subjected to verbal harassment and more difficult work assignments as a result of it, all in violation of the state antidiscrimination statute. The jury found in her favor and awarded her $ 1.1 million in damages for pain and suffering, lost wages and future medical expenses. The court had instructed the jury that it could award damages for actions outside the limitations period if it found a continuing violation. Boeing contended that the term "continuing violation" should have been defined, and that in any event the evidence was insufficient to support the finding of such a violation. The court rejected those contentions, viewing Boeing's actions [***37] as "a systematic policy of discrimination" and hence a continuing violation. (877 P.2d at p. 713.) The "systematic policy" at issue in that case, however, was not an official policy, but an unofficial practice or course of conduct carried out against a particular employee. (See also *Martini v. Boeing Co.* (Wash.Ct.App. 1997) 88 Wn. App. 442, 945 P.2d 248, 254, affd. (1999) 137 Wn.2d 357, 971 P.2d 45 [employer's continuing failure to address employee's request for reasonable accommodation was a continuing violation].)

In short, courts applying the continuing violation doctrine have tended toward a broader view of that doctrine when the cause of action involves ongoing harassment or ongoing failure to accommodate disability. Even courts that have adopted the three-part *Berry* test have been inclined to find a continuing violation under these circumstances, either concluding the employer's actions had little "permanence" or else giving little weight to the permanence factor.

[*818] With this overview in mind, we turn to the applicability of the continuing violation doctrine to the FEHA when an employer fails to reasonably accommodate a disability or to [***38] prevent disability discrimination.

2. The Continuing Violation Doctrine and the FEHA

Richards urges us in essence to adopt the broader "course of conduct" continuing violation theory employed by the Ninth Circuit and other courts as discussed above. CH2M Hill contends that Richards's broad interpretation of the continuing violation doctrine is contrary to the language of section 12960, which, as stated, prohibits a complaint from being filed "after the expiration of one year from the date upon which the alleged unlawful practice occurred." Further, the statute makes only two exceptions: a maximum 90-day extension when the claimant first becomes [**187] aware of the facts of the alleged practice after the expiration of the limitations period, and a maximum one-year extension when the claimant misidentifies the employer. CH2M Hill argues that to extend the continuing violation doctrine beyond the well-established "equitable tolling" rule would be contrary to the plain language of the statute.

CH2M Hill's statutory argument begs the question whether an "unlawful practice" within the meaning of section 12960 includes a course of conduct, such as a continuing failure to reasonably accommodate [***39] a disabled employee. We considered the meaning of the term "unlawful practice" under the FEHA in *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245, 267-273, 284 Cal. Rptr. 718, 814 P.2d 704 (*Walnut Creek Manor*). There, we construed section 12987, which authorized a payment of punitive damages up to a statutory maximum of $ 1,000 (as adjusted for inflation) for every "unlawful practice" of housing discrimination under section 12955. The owner of an apartment building passed over a Black applicant for apartments in favor of non-Black applicants 35 times during the relevant period. The Fair Employment and

Housing Commission awarded the complainant $ 1,000 for each of the 35 instances of discrimination, but we held that only a single $ 1,000 award was warranted. The key to our inquiry was the meaning of the term "unlawful practice." As we stated, "the term ... is unambiguous. As both lay and legal dictionaries state, the term 'practice' means *a course of conduct*, i.e., 'to do or perform often, customarily, or habitually; to make a practice of' (Webster's New Internat. Dict. [(2d ed. 1958)] p. 1937, col. 3); 'repeated or customary action; [***40] habitual performance; a succession of acts of similar kind; custom; usage' (Black's Law Dict., [(6th ed. 1990)] p. 1172, col. 1). Given the plain meaning of the term, we conclude that in refusing to rent to [the complainant] on the basis of race, respondents committed a single [*819] 'unlawful practice' within the meaning of the statute." (*Walnut Creek Manor*, *supra*, 54 Cal. 3d at p. 269, italics added.)

We further clarified that "our conclusion that respondents are liable for only one punitive damages award does not mean that a single 'act' of discrimination is not a violation of the act or cannot support an accusation and finding of an 'unlawful practice.' The case law is to the contrary. [Citations.] In every case the issue simply is whether the act or acts complained of suffice to show a discriminatory practice in violation of the statute. [Citations.] We merely hold that, for the purposes of the authorized remedies, multiple acts of discrimination against the same complainant on the same unlawful basis establish only one unlawful practice." (*Walnut Creek Manor*, *supra*, 54 Cal. 3d at pp. 269-270.)

CH2M Hill correctly argues that *Walnut Creek Manor* decided the [***41] term "unlawful practice" in a different context. But it does not follow, as the company further argues, that the case is inapposite. Our holding in *Walnut Creek Manor* undercuts CH2M Hill's contention that Richards's more expansive interpretation of the continuing violation doctrine is inconsistent with the language of the FEHA. At the very least, the term "unlawful practice," in the context of the statute of limitations, is ambiguous. CH2M Hill stresses the discrete nature of each of its actions, e.g., the failure to fix the wheelchair ramp, the failure to adjust the elevator, the delay in transferring Richards to the Sacramento office, each with its own separate circumstances and different termination date. But Richards's characterization of CH2M Hill's failure to reasonably accommodate her disability over a five-year period as part of a single course of conduct -- informed by management's mistaken belief that her MS was a preexisting condition and that she was trying to "milk" the company -- is at least equally plausible and equally consistent with the meaning of the term "unlawful practice." Because the plain language of the statute by itself does not definitively determine [***42] the proper scope of the continuing violation doctrine, we turn to the overall purpose of the FEHA to determine which interpretation of that doctrine best serves its legislative objectives.

We begin with section 12993, subdivision (a), which states that the provisions of the FEHA "shall be construed liberally for [**188] the accomplishment of the purposes thereof." This liberal construction extends to interpretations of the FEHA's statute of limitations: "In order to carry out the purpose of the FEHA to safeguard the employee's right to hold employment without experiencing discrimination, the limitations period set out in the FEHA should be interpreted so as to promote the resolution of potentially meritorious claims on the merits." (*Romano v. Rockwell Internat. Inc.* (1996) 14 Cal. 4th 479, 493-494, 926 P.2d 1114 (*Romano*).)

[*820] *Romano* also concluded that it is contrary to the purposes of the FEHA to interpret its statute of limitations to encourage premature litigation at the expense of informal conciliation. We held that the statute of limitations on a FEHA claim for discriminatory termination does not begin to run at the point at which an employee is notified of [***43] the termination, but rather when the termination actually occurs. One of the reasons for our holding was that a contrary rule "would promote premature and potentially destructive claims, in that the employee would be required to institute a complaint with the Department while he or she still was employed, thus seeking a remedy for a harm that had not yet occurred. ... Such a rule would reduce sharply any chance of conciliation between employer and employee and draw the Department into investigations that might have been avoided through informal conciliation. [Citation.] Such a rule also would place upon the courts of this state the burden of prematurely adjudicating claims that a termination in violation of the FEHA has occurred." (*Romano*, *supra*, 14 Cal. 4th at pp. 494-495.) n4

n4 As *Romano* recognized, an employee bringing an FEHA action may not sue an employer directly but must first file a complaint with the Department. (§ 12960.) If the Department determines that it will not issue an "accusation" after the filing of the complaint, or when 150 days have elapsed after the filing of

the complaint, it "shall issue" a "right-to-sue" notice to the aggrieved employee. (§ 12965, subd. (b).) Additionally, "if the department determines after investigation that the complaint is valid, [it] shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation, and persuasion." (§ 12963.7, subd. (a).)

While CH2M Hill and the dissent argue that attempted conciliation is part of the FEHA process, and therefore informal conciliation prior to filing a complaint is of less importance, we affirmed in *Romano* that informal conciliation was to be encouraged before the institution of a complaint with the Department, the first formal step toward a lawsuit.

[***44]

Similarly, in *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal. 4th 731, 936 P.2d 1246 (*Mullins*), a non-FEHA breach of contract case, we held that the statute of limitations action for constructive discharge does not commence when the employee's working conditions become intolerable, but rather when the employee resigns. We stated: "As a practical matter, a rule requiring a lawsuit to be filed as soon as intolerable conditions begin would interfere with informal conciliation in the workplace. The filing of a lawsuit not only would stifle the parties' efforts to resolve differences informally; it would in most cases prompt the employee to resign at the earliest date to avoid the awkwardness of maintaining employment while pursuing litigation against his or her employer. The statute of limitations should not force the employee to institute premature legal proceedings, whether at the time the employer announces an intention to fire the employee, or at the time the employer begins to coerce a resignation by creating or knowingly permitting intolerable working conditions." (*Id.* at p. 741.)

As in *Romano* and *Mullins*, we do not believe the FEHA [***45] statute of limitations should be interpreted to give a disabled employee engaged in the [*821] process of seeking reasonable workplace accommodation or ending disability harassment two unappealing choices: on the one hand resigning and bringing legal action soon after the first signs that her rights have been violated, or on the other hand attempting to persist in the informal accommodation process and risk forfeiture of the right to bring such an action altogether. Nor, as we have recognized, is the third choice -- retaining employment while bringing formal legal action against the employer -- a viable option for many employees. [**189] (See *Mullins*, *supra*, 15 Cal. 4th at p. 741.) In light of the legislative directive that the FEHA be liberally construed "to safeguard the employee's right to hold employment without experiencing discrimination" (*Romano*, *supra*, 14 Cal. 4th at pp. 493-494), section 12960 should not be interpreted to impose serious practical difficulties on an employee's ability to vindicate this right through litigation if it can be reasonably interpreted otherwise.

Indeed, to hold that the statute of limitations begins to run at the first notice that an [***46] employee's rights have been violated would create the following incongruity: Under *Mullins*, an employee faced with discrimination or harassment that rises to the level of a constructive discharge would not have to take formal legal action until a year after resignation, giving him or her ample time for informal conciliation, but an employee confronted with lesser forms of harassment or discrimination would need to observe a strict one-year deadline from the time of the first unlawful employer activity. Of course, an employee confronted with such unlawful activity will generally not know whether it will eventually rise to the level of a constructive discharge. Therefore, the employee will be encouraged to take legal action before the informal conciliation process has run its course. Such a rule would effectively nullify our holding in *Mullins*.

There is particularly good reason to view the failure over time to reasonably accommodate a disabled employee as a single course of conduct. As the federal regulations implementing the duty of reasonable accommodation in the Americans with Disabilities Act (42 U.S.C. § 12111 et seq.) make clear, "to determine [***47] the appropriate reasonable accommodation it may be necessary for the [employer] to initiate an informal, interactive process" with the disabled employee. (29 C.F.R. § 1630.2(*o*)(3) (2000).) "The appropriate reasonable accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability." (29 C.F.R. Appen. to 1630, Interpretive Guidance on Title I of the Americans with Disabilities Act, foll. § 1630.9, Process of Determining the Appropriate Reasonable Accommodation (2000).) Thus, reasonable accommodation is often an ongoing process rather than a single action. As this case well illustrates, this process may have many facets and take a number of [*822] different forms. As with harassment, an instance of an employer's failure to accommodate that in isolation may seem trivial can assume greater significance and constitute a greater injury when viewed as one of a

series of such failures. Thus, as discussed, courts applying the *Berry* test to the area of reasonable accommodation, as well as courts applying a broader test, have found a continuing violation for the entire course of the employer's unlawful conduct. [***48] (*Lewis v. Board of Trustees of Alabama State University*, *supra*, 874 F. Supp. at p. 1304; *Bodiford v. State of Alabama*, *supra*, 854 F. Supp. at p. 891; *Goodman v. Boeing Co.*, *supra*, 877 P.2d 703; *Martini v. Boeing Co.*, *supra*, 945 P.2d at p. 254.) We believe that to interpret the FEHA statute of limitations in a way that does not short-circuit the reasonable accommodation process is consistent with both the letter and the spirit of the law.

CH2M Hill objects that allowing employees to delay filing a complaint as long as they are seeking accommodation allows employees to control the date the action accrues, to the severe disadvantage of the employer. Such concern is overstated. As we said in *Mullins* in the context of constructive discharge: "Rockwell objects that if the statute of limitations runs from the date of actual termination of employment pursuant to a constructive discharge, the employee will control the limitations period, because it is up to the employee to decide when to leave his or her employment .... If the employee controls the date on which the statute of limitations begins to run, [***49] Rockwell argues, employers will live in ignorance of an impending lawsuit until memories have faded and evidence is difficult to gather. ... [P] ... [P] Rockwell's concern to avoid vesting employees with sole control over the commencement of the statute of limitations period ... is misplaced .... The essence of constructive discharge is that it is a termination of employment [**190] secured *by the employer* through indirect means. The employer remains in control in that he or she coerces the employee's resignation. ... Further, the employer, who has created or permitted the persistence of known intolerable conditions, should not be able to complain of delay when the employee retains employment in the hope that conditions will improve or that informal conciliation may succeed." (*Mullins*, *supra*, 15 Cal. 4th at pp. 739-740, fn. omitted.) Similarly, the employer that creates or permits a persistent pattern of harassment or failure to reasonably accommodate that makes its working conditions unfavorable to the employee, even if such pattern or failure does not rise to the level of constructive discharge, cannot complain of delay when the employee retains employment in hopes [***50] that informal conciliation will succeed.

On the other hand, we find merit in CH2M Hill's argument that permitting an employee *indefinitely* to delay the filing of a lawsuit based on the employer's failure to reasonably accommodate disability or on disability [*823] harassment would be contrary to the FEHA's statute of limitations and potentially prejudicial to the employer. When "the hope that conditions will improve or that informal conciliation may succeed" (*Mullins*, *supra*, 15 Cal. 4th at p. 740) is unreasonable, as when an employer makes clear that it will not further accommodate an employee, justification for delay in taking formal legal action no longer exists. If the employer has made clear in word and deed that the employee's attempted further reasonable accommodation is futile, then the employee is on notice that litigation, not informal conciliation, is the only alternative for the vindication of his or her rights. Barring a constructive discharge, it is at that point the statute of limitations for the violation begins to run.

Accordingly, we adopt a modified version of the *Berry* test. As in *Berry*, we hold that an employer's persistent failure to reasonably accommodate [***51] a disability, or to eliminate a hostile work environment targeting a disabled employee, is a continuing violation if the employer's unlawful actions are (1) sufficiently similar in kind -- recognizing, as this case illustrates, that similar kinds of unlawful employer conduct, such as acts of harassment or failures to reasonably accommodate disability, may take a number of different forms (see *Fielder v. UAL Corp.*, *supra*, 218 F.3d at pp. 987-988.); (2) have occurred with reasonable frequency; (3) and have not acquired a degree of permanence. (*Berry*, *supra*, 715 F.2d at p. 981.) But consistent with our case law and with the statutory objectives of the FEHA, we further hold that "permanence" in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile.

Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation [***52] of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run not necessarily when the employee first believes that his or her rights may have been violated, but rather, *either* when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, *or* when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is

confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that [*824] it will not be granting any such requests, thereby commencing the running of the statute of limitations.

3. Application to the Present Case

In the present case, neither the trial court nor the Court of Appeal applied the proper standard for determining a continuing violation. The trial court appears to have implicitly [**191] found to be true the first two factors [***53] of the above stated test -- similarity in the types of unlawful conduct and reasonable frequency; it stated, in the context of denying CH2M Hill's motion for a new trial on statute of limitations grounds, that the company had engaged in "a continuing pattern of harassment, neglect and a violation of her rights in terms of accommodations, even reasonable accommodations," a pattern "that continued on up until the day she left, practically." From our review of the record, stated above, there is substantial evidence to support the trial court's conclusions. But the trial court did not consider the "permanence" of the employer's conduct. The Court of Appeal, while correctly concluding that Richards made certain claims that fell within the limitations period -- failure to reasonably accommodate in connection with the fire escape plan, hallway access, and access to the elevator and supply rooms -- incorrectly adopted the narrow view that the statute of limitations begins to run as soon as the disabled employee is on notice that his or her rights have been violated. It thus did not consider whether CH2M Hill and Richards continued to be engaged in an informal conciliation process to resolve [***54] the latter's grievances concerning the reasonable accommodation of her disability.

CH2M Hill argues that, at several critical junctures over the five-year period in question, it made clear to Richards that she was not going to be reasonably accommodated and that "nothing was going to change." Richards, on the other hand, claims that she received mixed signals on her accommodation requests throughout the period, including ambiguous statements from human resource manager Carol Uhouse that she would deal with Richards's requests "[her] way." Because the standard we announce is new, the proper course is to remand to the trial court for application of the continuing violation test formulated above to the facts of this case. (See *Berry*, *supra*, 715 F.2d at p. 982 [after formulating standard, the matter is remanded to the trial court for "fact-specific inquiry"].) n5

n5 Because we remand on an issue that may cause the redetermination of CH2M Hill's liability, we do not decide the issue pertaining to damages that the company raised in the answer to Richards's petition for review, i.e., whether an employee may obtain monetary damages for backpay when the employee resigns and the resignation does not rise to the level of a constructive discharge.

[***55]

[*825] III. DISPOSITION

The judgment of the Court of Appeal is reversed. The cause is remanded with directions to remand to the trial court for reconsideration of CH2M Hill's motion for a new trial on statute of limitations grounds in light of this opinion.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

CHIN, J.

DISSENTBY:
BROWN

DISSENT:

DISSENTING OPINION BY BROWN, J.

As with any statute of limitations, Government Code section 12960 n1 reflects a considered balancing of interests. Under the Fair Employment and Housing Act (FEHA; § 12900 et seq.), the employee has a right to employment free of invidious discrimination, and the employer has a right to fair notice of alleged discriminatory practices. (See generally, *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal. 4th 739, 756, 958 P.2d 1062.) Although the continuing violation doctrine assumes several forms, it has developed principally as an equitable exception to the limitations period for anti-discrimination laws. (See, e.g., *Huckabay v. Moore* (5th Cir. 1998) 142 F.3d 233,

238; *Moskowitz v. Trustees of Purdue University* (7th Cir. 1993) 5 F.3d 279, 281-282.) [***56] Flagrantly disregarding this rationale as well as the statutory language, the majority has adopted a broad, standardless variant that will effectively transform section 12960 into a statute of nonlimitation. As plaintiff's counsel succinctly defined the new rule: the statute of limitations "starts to run when the [employer's discriminatory] conduct stops." Since the employee need not place the employer on notice of alleged discriminatory acts, the complaint could encompass decades. Indeed, [**192] complainants may now assert FEHA causes of action in any circumstance involving two or more unlawful practices regardless of how much time separates them, with every incentive to delay claims and maximize recovery. As the Court of Appeal reasonably concluded: "the continuing violation doctrine [has never been] a doctrine of continued violations by which the most ancient claims can hijack more recent claims to ride through the courtroom door" contrary to express statutory language. Until now. Since this decision does violence to both the statute of limitations and to the entire statutory scheme, which is intended to protect not only the individual employee but co-workers and the public from the [***57] pernicious effects of employment discrimination, I dissent.

n1 All statutory references are to the Government Code.

Section 12960 states, "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice ... occurred." The statute sets forth only two circumstances in which "this period may be extended ...:(a) for not to exceed 90 days following the [*826] expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence, or (b) for not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer."

Both these exceptions are premised on equitable considerations. The first is a statutory analogue of the equitable tolling variant of the [***58] continuing violation doctrine articulated in *Moskowitz v. Trustees of Purdue University*, *supra*, 5 F.3d 279. The court in *Moskowitz* explained its rationale as follows: "If it is only with the benefit of hindsight, after a series of discriminatory acts, that the plaintiff can realize that he is indeed a victim of unlawful discrimination, he can sue in regard to all of the acts provided he sues promptly after learning their character, even if the statute of limitations has run on all of them. If, however, he knows or with the exercise of reasonable diligence would have known after each act that it was discriminatory and had harmed him, he may not sit back and accumulate all the discriminatory acts and sue on all within the statutory period applicable to the last one. So the fact that a series of discriminatory or otherwise unlawful acts is indeed a series, a continuum, rather than a concatenation of unrelated acts, will delay the deadline for suing with respect to the earliest acts in the series *only if their character was not apparent when they were committed but became so when viewed in the light of the later acts.*" (*Id.* at pp. 281-282, [***59] italics added; see also *Huckabay v. Moore*, *supra*, 142 F.3d at pp. 238-239.) Similarly, the first exception to section 12960 allows the complainant additional, albeit limited, time to recognize a discriminatory animus and seek redress.

The second exception was recently enacted (see Stats. 1999, ch. 797, § 2) in response to concern that "the employee is not always able to determine the precise name or the identity of his or her employer. The problem occurs, for example, where there are parent and subsidiary corporations with similar names, but the employee is unaware of any distinction between the two entities. Very often these distinct entities are housed in the same facility which further complicates identification of the proper party to be named. [P] If the employee inadvertently misidentifies the employer in the original [Department of Fair Employment and Housing (Department)] complaint, the real employer may later claim that the employee has failed to exhaust his or her administrative remedies prior to suit within the time prescribed by law and is barred from proceeding with litigation." (Sen. Rules Com., Off. of Sen. Floor Analyses, analysis of Sen. Bill [***60] No. 211 (1999-2000 Reg. Sess.) as amended Sept. 1, 1999, p. 4.) Accordingly, the Legislature provided for "a [*827] rebuttable presumption that 'employer,' as defined by [the FEHA,] includes any person or entity identified as the employer on the employee's Federal Form W-2 (Wage and Tax Statement)" (§ 12928; see Stats. 1999, ch. 797, § 1) and extended the one-year statute of limitations an additional year in the event that presumption is rebutted "to allow a person allegedly aggrieved by an unlawful practice to make a substitute [**193] identification of the actual employer." (§

12960.)

Plainly, the Legislature is capable of expanding the statutory period when it perceives the need. The majority offers no principled justification or rationale for displacing this critical component of the FEHA and undermining its goals. (Cf. *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 912-919, 941 P.2d 1157 (dis. opn. of Brown, J.) [allowing cause of action for wrongful termination in violation of public policy based on the FEHA inconsistent with legislative intent to provide administrative as well as judicial review to vindicate acts of employment discrimination].) Just as the Legislature [***61] must determine the appropriate limitations period, it is equally for the Legislature to create any exceptions. The courts may impose on that prerogative, if at all, only in a manner consistent with the purpose and intent of the underlying statutory scheme. This the majority fails to do. (See *post*, pp. 8-11.) A nonstatutory "course of conduct" exception does not comport in letter or spirit with the evident intent of limiting extensions to narrowly prescribed equitable circumstances. Moreover, nothing in *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal. 3d 245, 284 Cal. Rptr. 718, 814 P.2d 704 (*Walnut Creek Manor*); *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal. 4th 479, 926 P.2d 1114 (*Romano*); or *Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal. 4th 731, 936 P.2d 1246 (*Mullins*) supports adopting an unduly expansive variant of the continuing violation doctrine.

The majority cites *Walnut Creek Manor*, *supra*, 54 Cal. 3d at page 269, for the proposition that the term "unlawful practice" as used in the FEHA includes any series of discriminatory acts. (Maj. opn., *ante*, at p. 24.) That decision [***62] did not implicate the statute of limitations, and the majority's reliance is at best an inversion of its analysis. In *Walnut Creek Manor*, an apartment owner rented apartments to 35 non-Black applicants after refusing to rent to a Black man. Because the court found this was " 'a succession of acts of similar kind,' " i.e., a "practice" as defined by the dictionary, it constituted a single unlawful practice for purposes of imposing statutory punitive damages under the FEHA. (*Id.* at p. 269.) "Each discriminatory act in furtherance of the refusal to rent serves merely as proof of the alleged practice [rather than constituting an [*828] independent violation]. [Citation.]" (54 Cal. 3d at p. 270.) Without any particular regard for this reasoning, the majority seizes on one of several dictionary definitions of "practice" the court listed in its discussion (54 Cal. 3d at p. 269), one having no particular bearing on the ultimate holding. (See 54 Cal. 3d at pp. 268-273.) From this thread, it fashions a "course of conduct" rule allowing a FEHA complainant to transmute a series of discrete wrongful acts into a single unlawful practice as long as she alleges each act is motivated by the same discriminatory [***63] animus. And, regardless of how ancient in time the first act in the series, the statute of limitations is measured from the last. Thus, even though from January 1990 through January 1992 defendant repeatedly told plaintiff it did not intend to and would not make any further accommodations of her disability, the majority's holding excuses her delay in asserting a violation of the FEHA for a full year or more after the limitations period expired on those acts of discrimination. (See *Moskowitz v. Trustees of Purdue University*, *supra*, 5 F.3d at p. 282; *Huckabay v. Moore*, *supra*, 142 F.3d at p. 239.) This rule cannot be reconciled with the Legislature's implicit intent that the limitations period be strictly observed except in narrowly defined circumstances.

Equally without critical analysis, the majority invokes the admonition that provisions of the FEHA, including the statute of limitations, "shall be construed liberally for the accomplishment of [its] purposes ...." (§ 12993, subd. (a); see *Romano*, *supra*, 14 Cal. 4th at pp. 493-494.) Liberal construction is a mandate to fully effectuate not a license to abrogate. Moreover, the reasoning [***64] in *Romano* is entirely distinguishable; and the majority fails to explain why it is necessary to create a [**194] course of conduct exception to the limitations period, which effectively nullifies section 12960, in order to accomplish the purpose of the FEHA.

Although *Romano* raised a question of when the statute of limitations began to run, the continuing violation doctrine was not at issue. The facts did not involve, as here, a multiplicity of acts but a single allegation of wrongful termination in violation of the FEHA's proscription against age discrimination. The court concluded the statute began to run on the date of actual termination--rather than when the employee was informed of his impending discharge--because otherwise he "would be required to institute a complaint with the Department while he or she still was employed, *thus seeking a remedy for a harm that had not yet occurred.*" (*Romano*, *supra*, 14 Cal. 4th at p. 494, italics added.) This reasoning does not apply in the present context. Since plaintiff knew, or reasonably should have known, that discriminatory harm had occurred well prior to January 1993, she did not need to wait for some definitive unlawful practice [***65] to avoid instituting her complaint prematurely. Given that actionable harm, she would not "risk forfeiture of the right to bring such

an action altogether." (Maj. opn., *ante*, 2001 Cal. LEXIS 5481 at p. *45.)

[*829] The relevance of *Mullins* is questionable because that case did not include a FEHA action or require construction of section 12960. In any event, its reasoning is equally inapposite. As in *Romano*, the plaintiff asserted a single wrongful act of constructive discharge; and the court expressed concern that in that context "the statute of limitations should not force the employee *to institute premature legal proceedings*" (*Mullins*, *supra*, 15 Cal. 4th at p. 741, italics added), i.e., prior to actual termination. (See *id.* at p. 742.) While the plaintiffs in *Romano* and *Mullins* may have needed protection from the risk of forfeiting their claims due to the uncertainty of what conduct short of actual or constructive discharge was actionable, no such uncertainty arises when an employer commits specific and discrete acts of disability discrimination. (See *Mullins*, at p. 741; *Romano*, *supra*, 14 Cal. 4th at p. 494.)

Nor does the reasoning of *Accardi v. Superior Court* (1993) 17 Cal. App. 4th 341, [***66] 21 Cal. Rptr. 2d 292 assist the majority. Because the Court of Appeal reviewed the case on demurrer, it necessarily took an expansive view of the plaintiff's factual allegations that she had been subjected to sexual harassment as the result of a hostile work environment. Some of the alleged harassment occurred outside the limitations period, but the court allowed that it could be relevant to establish the discriminatory character of acts that were not time-barred. Although the later actions "if viewed as solitary events, could be nondiscriminatory, and therefore legitimate,... Accardi may be able to prove that [they] were a continuation of prior discriminatory practices and were used as a pretext to provide a deceptive cover of legitimacy." (*Id.* at p. 351; cf. *Walnut Creek Manor*, *supra*, 54 Cal. 3d at p. 270.) The present case comes to the court after trial. We therefore know what plaintiff knew and when she knew it. By her own admission, she understood each failure to accommodate as animus toward her disability. Rather than protecting the right to be free of invidious harassment, the majority's invocation of a course of conduct exception to section 12960 in these circumstances [***67] gives employees who experience discrimination every incentive to forbear seeking redress and to wait as long as they want to accumulate years of unlawful practices before filing a FEHA complaint, thus rendering the statute of limitations a nullity.

The majority also adverts to preserving the opportunity for "informal conciliation." (Maj. opn., *ante*, at p. 28.) This rationale falls short in several respects. First, an employee need not file a FEHA complaint immediately upon an act of discrimination or harassment but has a full year thereafter to do so, during which time informal conciliation efforts may proceed. Second, such efforts need not cease simply because the employee files a complaint [**195] to toll the statute. They may well continue while the Department investigates and initiates its own conciliation process or determines it should issue the [*830] complainant a right-to-sue letter, which may be a period of an additional 150 days or more. (See § 12965, subd. (b).) In the event the Department does not pursue its own investigation, the employee has a year from issuance of the right-to-sue letter within which to institute civil proceedings. (*Ibid.*) As a disincentive to the employer, [***68] any retaliation for filing a FEHA complaint will give rise to an additional unlawful practice charge. (§ 12940, subd. (h).)

Finally, and contrary to the majority's implication, the FEHA emphasizes *formal* conciliation, not only to benefit the individual employee but to effectuate the act's broader goals. Section 12930 expressly directs the Department to appoint conciliators and to investigate and conciliate complaints of alleged unlawful practices. (See also § 12963.7.) After receiving a complaint, the Department must serve a copy on the employer within 45 days, but has the discretion to keep the complainant's name confidential. (§ 12962.) Thus, the employer has adequate notice of the allegations but the employee can be shielded from retaliation. If the Department deems a claim valid, it seeks to resolve the matter--in confidence--by conference, conciliation, and persuasion. (§ 12963.7.) Only if the Department fails to act within 150 days after the filing of a complaint, or earlier determines not to take administrative action, must it issue a right-to-sue letter as a prerequisite to judicial action. (§ 12965, subd. (b); see *Rojo v. Kliger* (1990) 52 Cal. 3d 65, 83, 276 Cal. Rptr. 130, 801 P.2d 373.) [***69]

This compliance structure affords the Department and the Fair Employment and Housing Commission (the Commission) an initial opportunity to utilize their respective expertise both to eliminate "a particular unlawful employment practice *and* to prevent its recurrence." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal. 3d 1379, 1390, 241 Cal. Rptr. 67, 743 P.2d 1323, italics added; see *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal. 3d 422, 432, 217 Cal. Rptr. 16, 703 P.2d 354.) As to the individual complainant, the goal is to "make the aggrieved employee whole in the context of the employment." (*Dyna-Med, Inc.*, at p. 1387.) More

generally, "on finding harassment [or discrimination] the Commission will order such corrective measures as will benefit both the complainant *and others*, including that the employer cease and desist the practice, report the manner of compliance, and take other remedial action as appropriate. In addition, the Commission will thereafter conduct [or direct the Department to conduct] a compliance review to see that the employer is fully obeying the order. (§ 12973.) Hence, [***70] the administrative procedure serves the statutory purpose of providing effective remedies that will eliminate the discriminatory practice and prevent its recurrence, not just as to the immediate victim, but as to all employees, present and future. (§ 12920.)" (*Peralta Community College Dist. v. Fair Employment & Housing Com.* [*831] (1990) 52 Cal. 3d 40, 53, fns. omitted, 276 Cal. Rptr. 114, 801 P.2d 357; *State Personnel Bd.*, at pp. 429, 432; see *Rojo v. Kliger*, *supra*, 52 Cal. 3d at p. 83.) In *Jennings v. Marralle* (1994) 8 Cal. 4th 121, 876 P.2d 1074, the court recognized the significance of this remediation authority in effectuating the broader goals of the FEHA: The Legislature's "aim was not so much to redress each discrete instance of individual discrimination as to eliminate the egregious and continued discriminatory practices of economically powerful organizations." (*Id.* at p. 134.)

The Legislature has expressly declared, "It is the existing policy of the State of California ... that procedures be established by which allegations of prohibited harassment and discrimination may be filed, timely and [***71] efficiently investigated, and fairly adjudicated, and that agencies and employers be required to establish affirmative programs which include prompt and remedial internal procedures and monitoring so that worksites will be maintained free from prohibited harassment and discrimination .... To further this intent, the Legislature enacts [the FEHA]." [**196] (Stats. 1984, ch. 1754, § 1, pp. 6403-6404; see also Stats. 1992, ch. 911, § 1, subd. (a), p. 4230 ["primary public policy of the [FEHA] is the prevention and elimination of unlawful employment practices"].) Thus, not only the FEHA's remedies but its procedures as well vindicate the underlying public policy to eliminate discrimination.

Although as an alternative to the administrative process, a complainant may seek judicial relief upon the issuance of a right-to-sue letter, "current Department policy is to issue the letter only after the Department has invited the respondent to make settlement offers and settlement is not achieved." (*Rojo v. Kliger*, *supra*, 52 Cal. 3d at p. 84, fn. 11 [citing letter from the director of the Department to the Chief Justice of the Supreme Court dated June 9, 1989].) Such a position [***72] is consistent with "the compliance structure of FEHA[, which] encourages cooperation in the administrative process. ... That helps deter strategies of 'holding out' for court damages in inappropriate cases. Further, the possibility that an action might lead to punitive damages may enhance the willingness of persons charged with violations to offer fair settlements during the conciliation process." (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal. 3d 211, 218, 185 Cal. Rptr. 270, 649 P.2d 912, fn. omitted.) Administrative procedures also allow a compliant employer to rectify discriminatory practices without costly and protracted litigation, thus benefiting all employees.

As the rationale of *Jennings* makes clear, to fulfill the FEHA's public policy courts must consider "the legislative intent reflected in [its] various provisions ...." (*Jennings v. Marralle*, *supra*, 8 Cal. 4th at p. 124.) Read as [*832] a whole, these various provisions underscore the necessary balance of interests the Legislature strives to maintain in executing the collective public policy undergirding the FEHA: employees must be protected from discrimination and [***73] recompensed for violations of their rights; employers must rectify unlawful practices and maintain compliance without undue economic burden; the public must remain confident that antidiscrimination policies are enforced without resulting in a hostile business environment. With their broad remedial and oversight authority, the Commission and the Department can fully realize the "vital policy interests embodied in FEHA, i.e., the resolution of disputes and elimination of unlawful employment practices by conciliation. [Citations.]" (*Yurick v. Superior Court* (1989) 209 Cal. App. 3d 1116, 1123, 257 Cal. Rptr. 665.) In sum, it is the administrative process, not informal conciliation, that constitutes the defining structure of FEHA enforcement.

To suggest adherence to the statute of limitations may be sacrificed to informal conciliation also misperceives the wider purpose of the FEHA. While the stated policy of the act is "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of" enumerated characteristics (§ 12920), it does so because "the practice of denying employment [***74] opportunities and discriminating in the terms of employment for such reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advance, and substantially and adversely affects the interest of employees, employers, and the public in general." (*Ibid.*)

The majority has now placed vindication of this broad public policy in the hands of individuals whose only concern is their own narrow interests.

"Statutes of limitations are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system." (*Board of Regents v. Tomanio* (1980) 446 U.S. 478, 487, 64 L. Ed. 2d 440, 100 S. Ct. 1790.) " 'The period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones.' " (*Delaware State College v. Ricks* (1980) 449 U.S. 250, 259-260, 66 L. Ed. 2d 431, 101 S. Ct. 498, quoting *Johnson v. Railway Express Agency, Inc.* (1975) 421 U.S. 454, 463-464, 44 L. Ed. 2d 295, 95 S. Ct. 1716.) [***75] Statutes of repose are "designed to promote justice by preventing surprises [**197] through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the [*833] period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." (*Telegraphers v. Ry. Express Agency* (1944) 321 U.S. 342, 348-349, 88 L. Ed. 788, 64 S. Ct. 582; accord, *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, *supra*, 18 Cal. 4th at p. 756.)

These principles apply equally to the FEHA, particularly in light of the relatively short limitations period and the few statutory exceptions. Contrary to their counsel and without any regard for legislative intent and prerogative, the majority has crafted an exception to section 12960 that strikes at the heart of the FEHA's defining structure. No one condones discrimination on any invidious basis. The majority, however, submits no rationale for eliminating equitable considerations from the continuing [***76] violation doctrine and adopting a course of conduct exception that in practice will relegate the statute of limitations to oblivion and undermine rather than promote the FEHA's goal of eliminating discrimination for all, not just a few.

BROWN, J.

26 Cal. 4th 703, *; 28 P.3d 249, **;
2001 Cal. LEXIS 5258, ***; 110 Cal. Rptr. 2d 528

5 of 19 DOCUMENTS

CECELIO LUGTU et al., Plaintiffs and Appellants, v. CALIFORNIA HIGHWAY PATROL et al., Defendants and Respondents.

S088116

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 703; 28 P.3d 249; 2001 Cal. LEXIS 5258; 110 Cal. Rptr. 2d 528; 2001 Cal. Daily Op. Service 7124; 2001 Daily Journal DAR 8763

August 16, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:
Superior Court of California, San Diego County. Court of Appeal of California, Fourth Appellate District, Division One. D032518. Super. Ct. No. N76651. David B. Moon, Jr., Judge.

DISPOSITION:
The judgment of the Court of Appeal, reversing the trial court's grant of summary judgment in favor of defendants, is affirmed.

COUNSEL:
Attorneys for Appellant:

Law Office of Steven W. O'Reilly, Charles B. O'Reilly, Steven W. O'Reilly; Haight, Brown & Bonesteel and Rita Gunasekaran, for Plaintiffs and Appellants.

Attorneys for Respondent:

Bill Lockyer, Attorney General, Pamela Smith-Steward, Chief Assistant Attorney General, Margaret A. Rodda, Assistant Attorney General, Kristin G. Hogue and Karen M. Walter, Deputy Attorneys General, for Defendants and Respondents.

JUDGES:
GEORGE, C.J. WE CONCUR: KENNARD, J., WERDEGAR, J., CHIN, J., DISSENTING OPINION BY BROWN, J. I CONCUR: BAXTER, J.

OPINIONBY:
GEORGE

OPINION:

[*707] [**250] Plaintiffs, passengers in an automobile that had been pulled over by a California Highway Patrol officer into the center median strip of a highway for a traffic violation, were injured [***2] when a pickup truck ran into their automobile from behind, while the automobile was stopped in the median strip. Plaintiffs thereafter filed this personal injury action against (1) the driver of the pickup truck, (2) the driver of the automobile in which they were riding, and (3) the California Highway Patrol (CHP) and the CHP officer who had directed their vehicle to stop in the center median, alleging that each defendant had been negligent and bore some legal responsibility for plaintiffs' injuries.

Prior to trial, the CHP and the CHP officer -- the only defendants involved in the appeal now before us (hereafter generally referred to simply as defendants) -- filed a motion for summary judgment, contending that plaintiffs' action against them should be dismissed on the ground, among others, that the CHP officer owed no legal duty of care to plaintiffs. After the parties filed declarations and counter-declarations (including a copy of portions of the applicable CHP Officer Safety Manual), the trial court granted summary judgment in favor of defendants, based in part upon its determination that the CHP officer "had no duty to stop plaintiffs on the right shoulder as a matter of law [***3] and there is

no triable issue of fact as to whether [the officer] acted with due care or whether his conduct was a legal cause of plaintiffs' injuries."

On appeal, the Court of Appeal reversed, concluding that the CHP officer owed plaintiffs a legal duty of reasonable care when he directed the driver of the automobile in which they were riding to stop in a particular location, and that triable issues of material [**251] fact exist as to whether the officer acted with reasonable care and whether his alleged negligence was a legal cause of plaintiffs' injuries.

We granted review to consider the issues presented. As we shall explain, the governing precedents clearly establish that a law enforcement officer, in directing a traffic violator to stop in a particular location, has a legal duty to use reasonable care for the safety of the persons in the stopped vehicle and to exercise his or her authority in a manner that does not expose such persons to an unreasonable risk of harm; thus, the summary judgment in favor of defendants cannot be upheld on the theory that the CHP officer owed no duty of care to plaintiffs. Furthermore, although a jury properly could find from the evidence presented [***4] by defendants in support of the summary judgment motion that the CHP officer was not negligent in directing the automobile in which plaintiffs were riding to stop in the center [*708] median under the circumstances of this case, we agree with the Court of Appeal that, in view of the conflicting declarations and the provisions of the CHP Officer Safety Manual submitted by plaintiffs in opposition to the summary judgment motion, the issue whether the officer was or was not negligent cannot properly be resolved by a court as a matter of law and instead presents a triable issue of fact for the jury's determination. Accordingly, we conclude that the trial court erred in granting summary judgment in favor of defendants, and that the judgment of the Court of Appeal, reversing the trial court's ruling, should be affirmed.

I

On August 15, 1996, Richard Hedgecock, a CHP motorcycle patrol officer, was on duty in San Diego County on Highway 78, a limited access highway with three eastbound and three westbound lanes. The weather was dry, visibility was good, and traffic was moderate to fairly heavy. Shortly before 5:00 p.m., Hedgecock observed a Toyota Camry traveling westbound at an estimated [***5] speed of 85 miles per hour in the fast, or number one, lane. Hedgecock pulled his motorcycle along the right side of the Camry, sounded his siren to attract the attention of its driver, and motioned to the driver to stop in the center median area of the highway. As directed, the driver pulled the car over to the left and stopped the Camry in the center median of the highway. Hedgecock stopped 10 to 15 feet behind the Camry, close to a two-foot-high concrete barrier separating the westbound median area from traffic traveling in the eastbound direction, and turned off the motorcycle's lights.

Hedgecock walked to the driver's side of the Camry, which was about two feet from the concrete median barrier. Hedgecock noticed that the three young girls in the backseat of the Camry (Zean Lugtu, Zeachelle Lugtu, and Leah Cabildo) were not restrained by seat belts. The driver of the Camry, Michael Lugtu, identified himself as the uncle of the three girls, and identified the other passenger in front, Cecelio Lugtu, as the father of two of the girls. Hedgecock issued a speeding citation to Michael Lugtu and a seat belt citation to Cecelio Lugtu.

After writing the citations, Hedgecock noticed that [***6] the girl in the middle rear seat still did not have her seat belt on, and he stated he would issue another citation if she were not restrained by a seat belt. Michael Lugtu got out of the Camry, apparently to try to help retrieve the middle rear seat belt, as Hedgecock began walking back to his motorcycle. The other four occupants remained within the vehicle. At that point, the Camry had been stopped in the median area for about six to eight minutes. [*709]

As Hedgecock returned to his motorcycle, he observed a pickup truck, traveling westbound in the fast lane, begin drifting further and further into the center median toward Hedgecock and the Camry. As the truck approached, Hedgecock waved and jumped up and down, trying to attract the attention of the truck's driver, James Neeb, who appeared to Hedgecock to be looking down inside the truck. Just as the truck was about to hit him, Hedgecock dove over the concrete median barrier and heard a very loud crash.

The truck did not hit Hedgecock or Michael Lugtu, but it struck the rear of the [**252] Camry while Cecelio Lugtu and the three young girls were inside. All four of the car's occupants were seriously injured in the accident.

In August 1997, [***7] Cecelio Lugtu and the three young girls (plaintiffs) filed the present action against Hedgecock and the CHP (defendants), Neeb (the driver of the pickup truck), and Michael Lugtu (the driver of the Camry), alleging that each was negligent and that the negligence of each was a substantial cause

of plaintiffs' injuries. **n1**

n1 The California Department of Transportation also was named as a defendant in a cause of action alleging a dangerous condition of public property, but plaintiffs later voluntarily dismissed the department as a defendant.

In September 1998, after several depositions had been taken, defendants filed a motion for summary judgment, asserting that (1) Hedgecock did not owe a duty of reasonable care to plaintiffs, (2) as a matter of law, the accident was not foreseeable and Hedgecock's conduct was not a legal cause of plaintiffs' injuries, and (3) defendants were statutorily immune from liability. Defendants maintained that Hedgecock owed no duty of reasonable care to plaintiffs, because Hedgecock's [***8] alleged responsibility for plaintiffs' injuries arose merely from a failure to protect plaintiffs from injury (which defendants characterized as a negligent omission or nonfeasance), and because Hedgecock assertedly did not have the requisite special relationship with plaintiffs on which negligence liability for failure to provide such protection could be based. Defendants also contended that the undisputed facts established as a matter of law that Hedgecock was not negligent and that, in any event, his conduct was not a legal cause of plaintiffs' injuries. Finally, defendants argued that they were immune from liability under a number of statutory immunity provisions. (See Gov. Code, § § 820.2, 820.6, 845.)

In support of their summary judgment motion, defendants submitted declarations of Hedgecock and Arnold Sidney, another CHP officer. Hedgecock stated in his declaration that he decided to stop the Camry in the [*710] 10-foot-wide, asphalt-surfaced center median because the distance that the Camry had to travel to the center median was considerably less than the distance to the right shoulder, and because he believed that stopping the vehicle in the center median posed a lesser hazard to [***9] him and to the Camry's occupants than stopping the vehicle on the right shoulder, which at that location was only approximately eight feet wide. n2 Hedgecock indicated that at the time he directed the Camry's driver to pull into the center median, he was aware that there was traffic immediately behind him in the center lane and "quite a lot of traffic" in the right-hand lane. Hedgecock also declared that CHP procedures gave him discretion whether to stop a traffic violator in the median area or on the right shoulder (the declaration stated that "it is basically up to the officer to select a safe place to make a traffic stop"), and that he previously had stopped vehicles in that vicinity in both the center median and on the right shoulder. Finally, Hedgecock indicated that at the time he directed the Camry to pull into the center median, he had no knowledge of prior accidents having occurred within the center median in that vicinity.

n2 Hedgecock's declaration further disclosed that the right shoulder was asphalt surfaced and 7.8 feet wide and was adjacent to a concrete dike, which was next to a downhill slope.

[***10]

In his separate declaration, Sidney stated that he had been a CHP officer since 1969, had been trained in CHP motorcycle patrol procedures, and had been instructed that a motorcycle patrol officer has discretion to make a traffic enforcement stop in the median area, particularly if the violator's vehicle is traveling in the fast lane. Sidney further stated that he subsequently had received specialized training and had become a certified motorcycle training officer, and that in 1991 he had trained Hedgecock in CHP motorcycle patrol procedures and had instructed Hedgecock that a traffic stop in the median area is appropriate if the violator is in the fast lane and if the officer believes a stop in the median area is safer. Sidney's declaration also explains in some detail why, in his opinion, a stop in the median area may be particularly appropriate when the stop is made by a motorcycle officer rather [**253] than by an officer in a patrol car. n3 Finally, Sidney stated that based upon his review of Hedgecock's declaration, the accident report, photographs of the accident scene and involved vehicles, and the CHP Departmental Motorcycle Manual and CHP Officer Safety Manual, in his [*711] opinion Hedgecock [***11] had acted reasonably and with a proper exercise of discretion in directing Michael Lugtu to stop within the center median area of Highway 78.

n3 Sidney's declaration states in this regard: "Motor vehicle drivers may not key in to the presence of the patrol motorcycle as well as drivers do to the presence of a patrol car; the throttle controlling speed of a patrol motorcycle is on the right handlebar grip; if the officer takes his or her right hand off the throttle to signal traffic behind the motorcycle and violator that the enforcement stop will take place on the right shoulder, the motorcycle will slow down,

> exposing the violator and the motorcycle patrol officer to potential danger from traffic behind them; although the vehicle immediately behind the motorcycle may slow in response to the slowing of the motorcycle, traffic further back may not see the motorcycle slowing, causing an accordion effect."

In response to defendants' motion for summary judgment, plaintiffs filed a lengthy opposition. Plaintiffs initially [***12] maintained that defendants' claim that Hedgecock owed no legal duty of care to plaintiffs rested on a mischaracterization of the basis of Hedgecock's alleged liability, and asserted that the alleged negligent conduct of Hedgecock at issue in this case involved an affirmative act of misfeasance -- directing the driver of the vehicle in which they were passengers to stop the vehicle in an assertedly dangerous location -- rather than an act of omission or nonfeasance as argued by defendants. Second, plaintiffs insisted that the question whether Hedgecock had been negligent or instead had exercised due care in directing the driver of the Camry to stop in the center median could not be decided as a matter of law, but instead clearly presented a triable question of fact for the jury's determination. In this regard, plaintiffs vigorously disputed the assertion in Hedgecock's and Sidney's declarations that the applicable CHP procedures gave CHP officers discretion to stop a vehicle either in the center median or on the right shoulder, maintaining that the applicable CHP Officer Safety Manual flatly contradicted that assertion by explicitly providing that "after determining that a driver is [***13] to be stopped, effective techniques should be used to ensure stopping on the right shoulder rather than in the median or in a traffic lane." Plaintiffs additionally asserted that the question whether Hedgecock's negligence was a legal cause of plaintiff's injuries presented a triable issue of fact for the jury and could not be determined as a matter of law. Finally, plaintiffs maintained that the governing precedents interpreting the statutory immunity provisions relied upon by defendants established that the immunity afforded by each of those statutes did not apply to the conduct of defendants at issue in this case.

In support of their opposition to the summary judgment motion, plaintiffs submitted a declaration of Joseph Thompson (a former CHP officer and CHP accident investigation supervisor), a copy of chapter 10 of the CHP Officer Safety Manual, a copy of the accident report, and brief excerpts from the depositions of Hedgecock and Sidney.

Thompson stated in his declaration that he had been employed by the CHP from 1959 through 1982 both as a motorcycle and patrol car officer and as an accident investigator and supervisor, and in the latter capacity had been responsible for [***14] conducting more than 2,000 accident investigations. Thompson stated he was "extremely familiar" with the CHP Officer Safety Manual in effect at the time of the accident, and that the manual, and all CHP [*712] motorcycle and patrol car training, "mandates that routine traffic enforcement stops on California freeways shall be made by directing all violators over to the right shoulder for purposes of violator and officer protection." Thompson further stated that "stopping a violator in the center median lane of a California freeway is not permitted by the [CHP] Officer Safety Manual as this creates a substantial risk of harm to the violator as well as the patrol officer due to the increased speed of vehicles in the inside/fast or number one lane of travel." Thompson's declaration further explained in this regard that "the center median lane is for emergency vehicles only and users of the [**254] freeway do not expect to see a routine traffic stop being enforced in the center median lane. The sight of a traffic enforcement stop being conducted in the center median startles users of the freeway in the number one or fast lane of traffic causing them to lose control of their vehicles."

Moreover, in [***15] contrast to the views expressed by Sidney in his declaration, Thompson's declaration stated that the CHP manuals and training make "no distinction between motorcycle and patrol car officers in how to make a routine traffic stop from all lanes of the freeway" (original underlining), and that nothing in the applicable motorcycle manual allows for officer discretion in this regard. Finally, Thompson stated in his declaration that based upon his review of the depositions of Hedgecock and Sidney, the accident report, the CHP Departmental Motorcycle Manual, and the CHP Officer Safety Manual (in particular, chapter 10, pertaining to patrol and enforcement on the freeway), in Thompson's opinion "Officer Hedgecock was negligent by violating the California Highway Patrol enforcement techniques in directing Michael Lugtu to the center median lane instead of over to the right shoulder," and that in doing so Hedgecock "substantially increased the risk of harm to the occupants in the Lugtu vehicle and to the officer."

In addition to Thompson's declaration, plaintiffs submitted a copy of chapter 10 of the CHP Officer Safety Manual, entitled Patrol and Enforcement on the Freeway, which states [***16] in relevant part:

"3. ENFORCEMENT TECHNIQUES.

"a. Stopping the Violator.

"(1) After determining that a driver is to be stopped, *effective techniques should be used to ensure stopping on the right shoulder rather than in the median or in the traffic lane.* Because of the hazards of high speed and traffic volume on modern freeways, the officer must be aware of his/her primary responsibility to control traffic approaching from the rear when attempting to stop a violator. Under these conditions, one error by a single driver can [*713] cause multiple traffic collisions. Special and unique methods have been developed which materially reduce the hazards involved in directing the violator from a high-speed traffic lane to a position of safety. The following procedures should be used whenever possible. [P] ... [P]

"(b) The patrol vehicle should normally be offset slightly to the right and to the rear of the violator's vehicle to permit evasive action if it become necessary and *also to provide a protected lane for the violator's safe movement to the right.* The rear amber warning light should be used at this time to warn following traffic of the impending stop.

"(2) When difficulties [***17] arise in gaining the violator's attention, it may be necessary to pull abreast, preferably on the right side, in order to attract the driver's attention. ...

"(a) The moment the violator looks and identifies the patrol unit, the officer should apply the brakes slightly. No matter how the fast the violator's reflexes are, the officer then has control of the situation and can slow down as necessary.

"(b) *The driver should be directed by the use of the hand gesture to the right lane.* During a violator's transition to the right, traffic should be held back in adjacent lanes by the use of the rear amber light, turn signals and hand gestures. ..."

"(c) If the driver's attention is not gained in time to stop at a desired stopping location, he/she should be permitted to proceed, if practicable, to the next safe stopping location. ... [P] ... [P]

"(3) *If possible, ensure a violator does not stop in the roadway or park in the median divider.* All stops on freeways should be made completely off the roadway and as inconspicuously as possible to minimize the possibility of a traffic slowdown. ...

"(4) *When a violator stops in the center divider, the officer must make* [***18] *a decision whether to handle the transaction there or request a move to a safer location.* Factors to be considered are divider width, traffic speed, traffic density, and other surrounding circumstances. The ultimate question is 'Are the hazards of conducting the stop in the center divider more or less than moving the violator across multiple freeway lanes?'

[**255] "(5) Avoid stopping motorists where restricted shoulders of heavy congestion exists. The stop should be delayed until a safe location is [*714] reached. ..." (Cal. Highway Patrol, Officer Safety Manual (July 1991 re v.) pp. 10-3 to 10-6, italics added.) n4

n4 As noted above, in addition to the declaration of Thompson and the passage from the CHP Officer Safety Manual, plaintiffs submitted a copy of the accident report and very brief excerpts of the depositions of Hedgecock and Sidney. In the excerpt from the Hedgecock deposition, Hedgecock acknowledged that after the incident there were discussions in his CHP office "concerning whether it was prudent to pull traffic over to the right versus left" and that someone in the discussion had indicated "something to the effect, 'Oh man, you always have to go to the right, never to the left.' " In the excerpt from the Sidney deposition, Sidney agreed that the traffic enforcement technique provisions of chapter 10 of the CHP Officer Safety Manual are applicable both to patrol cars and motorcycles.

[***19]

Defendants thereafter filed a reply to the opposition, attaching additional portions of the CHP Officer Safety Manual that defendants maintained (1) demonstrated that the manual should not be interpreted, as Thompson had suggested, as *mandating* that all traffic stops on a highway be made on the right shoulder rather than the center median, but rather should be interpreted to grant a CHP officer discretion in this matter, and (2) further supported their contention that Hedgecock's conduct was reasonable and not negligent. n5 Defendants also submitted additional excerpts from Sidney's deposition, it which Sidney stated that when the CHP Officer Safety Manual uses the word "should" rather than "shall," the manual "is leaving the officer with an option and his best judgment to do what the situation may call [for]."

n5 The additional excerpts of the CHP Officer Safety Manual submitted with defendants' reply included the following passage: "FOREWORD "This manual was developed in the interest of officer safety to assist members in performing their duties in a safe and professional manner. [P] The policies and procedures set forth have been established for the purpose of promoting the safety of the enforcement officer through the proper use of safety equipment and enforcement procedures. [P] The officer's safety is of the utmost concern and proper use of the techniques depicted in this manual should prove a valuable aid in minimizing injuries. [P] ... [P] "APPREHENSION OF THE MISDEMEANOR VIOLATOR "1. MAKING THE STOP. "a. Quick Apprehension. Upon observing a violation, the officer should stop the violator's vehicle as soon as possible. Many problems may be generated when the officer waits too long before stopping the violator. "(1) The farther the violator is pursued, the longer the officer is exposed to the hazard of high speed and his/her safety is greatly affected. [P] ... [P] "(4) In the case of speed violations, among others, the defense can raise the point that if the speed was so dangerous, why did the officer permit the violator to continue for some distance rather than stop him/her promptly. "(b) Choosing a Safe Location. ... "(1) The officer should pre-select a safe location to stop the violator, keeping in mind his/her own safety as well as that of the violator and the general public. [P] ... [P] "4. SUMMARY. Each traffic stop presents a slightly different set of circumstances to the officer. For overall officer safety, it is best to remember the basic concepts presented above rather than memorizing one method and performing each stop exactly alike. The officer who has a plan and is flexible to meet each situation is the officer who survives." (Original underlining.)

[***20] [*715]

After considering defendants' motion, plaintiffs' opposition, defendants' reply, and the supporting declarations and other submitted material, the trial court granted summary judgment in favor of defendants, concluding that "Hedgecock had no duty to stop plaintiffs on the right shoulder as a matter of law and there is no triable issue of fact as to whether Hedgecock acted with due care or whether his conduct was a legal cause of plaintiffs' injuries. In addition, even assuming a duty, lack of due care, and causation, defendants are immune from liability."

On appeal, the Court of Appeal reversed, concluding that Hedgecock owed plaintiffs a legal duty of reasonable care when he directed the driver of the Camry to stop the vehicle in a particular location, and that, in view of the provisions of the CHP Officer Safety Manual and the conflicting declarations that were before the trial court, there was a triable issue of fact whether Hedgecock was negligent and, if so, whether that negligence was a legal cause of plaintiffs' injuries. Finally, the Court of Appeal concluded that [**256] defendants' claims of statutory immunity lacked merit.

Defendants sought review in this court, limiting their [***21] challenge to the negligence issue, with particular attention to the Court of Appeal's conclusion on the question of duty. n6 We granted review to address these points.

n6 Defendants' petition for review did not challenge the Court of Appeal's determination that the statutory immunity provisions relied upon by defendants in their summary judgment motion do not apply to the conduct of Hedgecock at issue in this case, and we thus do not address the issue of immunity.

II

We begin with the issue of duty. (See generally *Davidson v. City of Westminster* (1982) 32 Cal. 3d 197, 202-203, 185 Cal. Rptr. 252, 649 P.2d 894.)

Under the provisions of the California Tort Claims Act, "*a public employee* is liable for injury caused by his act or omission *to the same extent as a private person*," except as otherwise specifically provided by statute. (Gov. Code, § 820, subd. (a), italics added.) In addition, the Tort Claims Act further provides that "[*a*] *public entity* is liable for injury [***22] proximately caused by an act or omission of an employee of the public entity within the scope of his employment *if the act or omission would ... have given rise to a cause of action against that employee,*" unless "the employee is immune from liability." (Gov. Code, § 815.2, subds. (a), (b), italics added.) Because it is undisputed that Hedgecock was acting within the scope of his employment when he engaged in the conduct at issue in this case, the [*716] initial question of duty, and defendants' potential liability for Hedgecock's conduct, turns on ordinary and

general principles of tort law.

Under general negligence principles, of course, a person ordinarily is obligated to exercise due care in his or her own actions so as to not to create an unreasonable risk of injury to others, and this legal duty generally is owed to the class of persons who it is reasonably foreseeable may be injured as the result of the actor's conduct. (Civ. Code, § 1714; see generally Rest.2d Torts, § 281; Prosser and Keeton on Torts (5th ed. 1984) § 31, p. 169; 3 Harper et al., The Law of Torts (2d ed. 1986) § 18.2, pp. 654-655.) It is well established, moreover, that one's general duty to exercise [***23] due care includes the duty not to place another person in a situation in which the other person is exposed to an unreasonable risk of harm through the reasonably foreseeable conduct (including the reasonably foreseeable negligent conduct) of a third person. (See, e.g., *Schwartz v. Helms Bakery Limited* (1967) 67 Cal. 2d 232, 240-244, 60 Cal. Rptr. 510, 430 P.2d 68; *Richardson v. Ham* (1955) 44 Cal. 2d 772, 777, 285 P.2d 269; see generally Rest.2d Torts, § § 302, 302A. **n7**) It is this duty that plaintiffs alleged was breached by Hedgecock.

n7 Section 302 of the Restatement Second of Torts provides: "A negligent act or omission may be one which involves an unreasonable risk of harm to another through either (a) the continuous operation of a force started or continued by the act or omission, or (b) the foreseeable action of the other, a third person, an animal, or a force of nature." Section 302A provides: "An act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the negligent or reckless conduct of the other or a third person."

[***24]

In their summary judgment motion, however, defendants asserted that Hedgecock owed no duty of care to plaintiffs because "the alleged failure of defendant Hedgecock to protect plaintiffs from injury by defendant Neeb is, at most, a negligent omission, or nonfeasance," and because there assertedly was no "special relationship" between Hedgecock and plaintiffs that would support the imposition of liability on the basis of such an omission. We agree with plaintiffs that this argument rests upon a fundamental mischaracterization of the basis of Hedgecock's alleged responsibility for plaintiffs' injuries.

It is true that the duty plaintiffs rely upon is said to be restricted to instances of misfeasance, not nonfeasance. As this court explained in *Weirum v. RKO General, Inc.* (1975) 15 Cal. 3d 40, 49, 123 Cal. Rptr. 468, 539 P.2d 36, however, "misfeasance exists when the defendant is responsible for making the [**257] plaintiff's position worse, i.e., defendant has created a risk. Conversely, nonfeasance is found when the defendant has failed to aid plaintiff through beneficial intervention." In this case, unlike the cases relied upon by defendants, plaintiffs' cause of action does [***25] not rest [*717] upon an assertion that defendants should be held liable for failing to come to plaintiffs' aid, but rather is based upon the claim that Hedgecock's affirmative conduct itself, in directing Michael Lugtu to stop the Camry in the center median of the freeway, placed plaintiffs in a dangerous position and created a serious risk of harm to which they otherwise would not have been exposed. Thus, plaintiffs' action against Hedgecock is based upon a claim of misfeasance, not nonfeasance.

Consistent with the basic tort principle recognizing that the general duty of due care includes a duty not to expose others to an unreasonable risk of injury at the hands of third parties, past California cases uniformly hold that a police officer who exercises his or her authority to direct another person to proceed to -- or to stop at -- a particular location, owes such a person a duty to use reasonable care in giving that direction, so as not to place the person in danger or to expose the person to an unreasonable risk of harm. Thus, for example, in *Williams v. State of California* (1983) 34 Cal. 3d 18, 192 Cal. Rptr. 233, 664 P.2d 137, this court recognized that although law enforcement [***26] officers, like other members of the public, generally do not have a legal duty to come to the aid of a person, in carrying out routine traffic enforcement duties or investigations, a duty of care does arise when an officer engages in "*an affirmative act which places the person in peril or increases the risk of harm* as in *McCorkle v. Los Angeles* (1969) 70 Cal. 2d 252, 74 Cal. Rptr. 389, 449 P.2d 453, where an officer investigating an accident directed the plaintiff to follow him into the middle of the intersection where the plaintiff was hit by another car." (34 Cal. 3d at p. 24, italics added.)

The Court of Appeal recognized this same principle in *Whitton v. State of California* (1979) 98 Cal. App. 3d 235, 159 Cal. Rptr. 405. In that case, CHP officers had made a traffic stop of the plaintiff's automobile on the right shoulder of a highway, parking their patrol car 10

to 15 feet behind the plaintiff's vehicle, and a drunk driver subsequently struck the patrol car, propelling it into the plaintiff while she was standing between the patrol car and her own vehicle. Although the Court of Appeal in *Whitton* found that sufficient evidence [***27] supported the jury's determination that, under the circumstances of the case, the officers had acted with reasonable care and thus should not be held liable, that court explicitly recognized that the CHP officers, in making the traffic stop, had a duty "to perform their official duties in a reasonable manner." (*Id.* at p. 241; see also *Reed v. City of San Diego* (1947) 77 Cal. App. 2d 860, 866-867, 177 P.2d 21 [upholding jury verdict imposing liability upon police department where officers' negligence in positioning their patrol car during a traffic stop resulted in an injury to the stopped motorist when a third car collided with the police vehicle].) Other [*718] states also have recognized that law enforcement officers, in making a traffic stop, have a legal duty to exercise due care for the safety of those whom they stop and may incur liability when their failure to exercise such care exposes a person to injury at the hands of another motorist. (See, e.g., *Kaisner v. Kolb* (Fla. 1989) 543 So. 2d 732, 734-736; *Kinsey v. Town of Kenly* (N.C. 1965) 263 N.C. 376, 139 S.E.2d 686, 688-690.)

Accordingly, we conclude that, under [***28] California law, a law enforcement officer has a duty to exercise reasonable care for the safety of those persons whom the officer stops, and that this duty includes the obligation not to expose such persons to an unreasonable risk of injury by third parties. The summary judgment in favor of defendants cannot be sustained on the ground that Hedgecock owed no legal duty of care to plaintiffs.

III

Although defendants argued in their summary judgment motion that a law enforcement officer in making a traffic stop on a highway owes no duty of care to the persons he or she stops, in their briefs before this [**258] court defendants have modified their position and now ask this court to adopt a rule that "the duty of a law enforcement officer who has made a traffic enforcement stop entirely off of the travel lanes of a freeway [does] not extend to liability for a traffic collision in which a third party's vehicle subsequently strikes the car stopped by the officer."

As this court explained in *Ramirez v. Plough, Inc.* (1993) 6 Cal. 4th 539, 546, 863 P.2d 167, it is more accurate to view defendants' present argument not as relating to the threshold question of the existence [***29] of a duty itself -- defendants no longer claim that an officer owes *no* duty of care to passengers in a vehicle stopped by the officer -- but rather as relating to the appropriate "standard of care." **n8** Defendants argue in essence that we should declare, as part of the governing standard of care, that a law enforcement officer, in making a traffic stop on a highway, *always* satisfies the duty of reasonable care so long as the officer stops a vehicle at any location off of the travel lanes of a highway -- without regard to whether the stop is made in the center median of a freeway or on the right shoulder, and apparently also without regard to the width of the median or shoulder on which the stop is made, how far off the roadway the stopped car is located, the visibility of the stopped vehicle to oncoming [*719] traffic at the location of the stop, or any other potentially relevant circumstance.

n8 As the court in *Ramirez* explained: "Issues such as this, which concern the scope of an established duty, are resolved by reference to the governing standard of care: 'Once the existence of a legal duty is found, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform.' (Rest.2d Torts, § 328B, com. f., p. 153." (*Ramirez v. Plough, Inc., supra,* 6 Cal. 4th at p. 546.)

[***30]

From a commonsense perspective, defendants' proposal has little to recommend it. It is counterintuitive to suggest that an officer's conduct should be considered prudent whenever the officer stops a vehicle in the center median of a highway so long as the vehicle that the officer has stopped is not actually in the travel lane of the highway, no matter how narrow the center median strip and how little room there is between the stopped vehicle and the approaching traffic. Indeed, under the defendants' formulation, a law enforcement officer's conduct would be deemed to satisfy the duty of reasonable care even if the center median of a highway is very narrow and the right shoulder generously wide, and even if there is no barrier to traffic traveling in the other direction, and the officer chooses the sole location that is not readily visible to oncoming traffic. Defendants fail to cite any decision in California or in any other jurisdiction -- and our research has disclosed none -- that defines in such a manner the standard of care applicable to a traffic stop on a highway.

Moreover, defendants are unable to point to any legislative or administrative pronouncement accepting their claim [***31] that considerations of "public policy" support the rule they propose. Defendants' reliance upon this court's decision in *Ramirez v. Plough, Inc., supra*, 6 Cal. 4th 539 is misplaced. In that case, we relied upon "the dense layer of state and federal statutes and regulations that control virtually all aspects of the marketing of [the defendant drug manufacturer's] products" (*id.* at p. 548), as well as our assessment that "defining the circumstances under which warnings or other information should be provided in a language other than English is a task for which legislative and administrative bodies are particularly well-suited" (*id.* at p. 550), in concluding that a drug manufacturer satisfies its duty to warn of adverse side effects by providing such warnings in English, as required by the applicable federal and state regulations. In the present case, by contrast, no legislative, administrative, or other official pronouncement indicates that an officer fully satisfies his or her duty of due care in making a traffic stop so long as the officer stops the vehicle off the travel lane of a freeway, regardless of the configuration [***32] of the area in which the stop is made or the ready availability of alternative, safer sites in which the [**259] stop could have been made. n9

n9 Indeed, as the court explained in *Ramirez v. Plough, Inc., supra*, 6 Cal. 4th 539, 547-548, even when a defendant has complied with an applicable statute or regulation, "courts have generally not looked with favor upon the use of statutory compliance as a defense to tort liability. The Restatement Second of Torts summarizes the prevailing view in these terms: 'Where a statute, ordinance or regulation is found to define a standard of conduct for purposes of negligence actions, ... the standard defined is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation. This legislative or administrative minimum does not prevent a finding that a reasonable [person] would have taken additional precautions where the situation is such as to call for them.' [Citations.]" (See also 6 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 756, p. 96, and cases cited.)

[***33]

Indeed, not only is there no statute or regulation that supports defendants' contention, but the provisions of the CHP Officer Safety Manual submitted [*720] by plaintiffs appear fundamentally inconsistent with defendants' position. As indicated by the lengthy quotation set forth above, the CHP Officer Safety Manual clearly establishes at the very least a general preference for directing a cited vehicle to the right shoulder of a highway, rather than to the center median. All of the manual's references to stops in the median appear to refer only to instances in which a motorist stops in the center median *on his or her own volition, presumably without the officer's direction to do so*. And even in such instances, the officer is advised to consider directing the driver to move to a safer location. No provision in the manual establishes that the officer acts properly or with due care so long as he or she stops a vehicle entirely within a center median strip.

In considering the effect that the provisions of the CHP Officer Safety Manual should have in the present case, it is important to keep in mind the appropriate role that the provisions of such a safety manual may play in a negligence [***34] action under California law. Under Evidence Code section 669.1, n10 the provisions of the CHP Officer Safety Manual may not properly be viewed as *establishing* the applicable standard of care, but they may be *considered* by the trier of fact in determining whether or not an officer was negligent in a particular case. The manual cannot be read to *establish* the standard of care, because there is no indication that the manual was adopted pursuant to the state (or federal) Administrative Procedure Act. Absent such adoption, Evidence Code section 669.1 forbids the use of the manual to establish the presumption of negligence that otherwise would arise under Evidence Code section 669. At the same time, Evidence Code section 669.1 specifies that this statute is not intended to affect the admissibility of such a manual into evidence, and thus it is clear that the manual may be considered [*721] as evidence on the question of negligence. (See, e.g., *Bullis v. Security Pac. Nat. Bank* (1978) 21 Cal. 3d 801, 809, 148 Cal. Rptr. 22, 582 P.2d 109.) n11

n10 Evidence Code section 669.1 provides in full: "A rule, policy, manual, or guideline of state or local government setting forth standards of conduct or guidelines for its employees in the conduct of their public employment shall not be considered a statute, ordinance, or regulation of that public entity within the meaning of Section 669, unless the rule, manual, policy, or guideline has been formally adopted as a statute, as an

ordinance of a local governmental entity in this state empowered to adopt ordinances, or as a regulation by an agency of the state pursuant to the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code), or by an agency of the United States government pursuant to the federal Administrative Procedure Act (Chapter 5 (commencing with Section 5001) of Title 5 of the United States Code). This section affects only the presumption set forth in Section 669, and is not otherwise intended to affect the admissibility or inadmissibility of the rule, policy, manual, or guideline under other provisions of law." [***35]

n11 The legislative history of Evidence Code section 669.1 confirms that the Legislature contemplated that the statute would permit a jury or other trier of fact to take the provisions of such a safety manual into account in determining in a particular case whether a public employee was negligent or not. (See Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1598 (1985-1986 Reg. Sess.) as amended Aug. 20, 1987, p. 4 ["Under the bill, a violation of a rule or manual regarding a public employee's conduct would remain admissible as evidence of the employee's negligence. However, it would no longer give rise to a presumption of negligence."]; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1598 (1985-1986 Reg. Sess.) as amended Aug. 20, 1987, p. 3 ["Under this bill a violation of any state or local rule, policy, manual, or guideline not 'formally adopted' may continue to be admissible as evidence of an employee's negligence. However, the violation will not give rise to a presumption of negligence."].)

[**260] Because the relevant provisions of the CHP Officer Safety Manual [***36] submitted by plaintiffs indicate, at the least, a strong preference for stopping a vehicle on the right shoulder rather than in the center median, and advise officers to consider carefully whether to require a motorist to move the vehicle from the center median even when the driver stops on the center median on his or her own volition, we cannot accept defendants' assertion that considerations of public policy support the adoption of a standard of care under which a CHP officer *never* could be found to have violated the duty of care so long as he or she stops a vehicle off the travel lanes of a freeway, without regard to any other relevant factor that may affect the reasonableness of the officer's action. Instead, as in negligence cases generally, we believe that the applicable standard of care by which the officer's conduct must be measured in this context is simply that "of a reasonably prudent person under like circumstances." (*Ramirez v. Plough, Inc., supra*, 6 Cal. 4th 539, 546-547, and cases cited.)

In arguing that considerations of public policy justify the adoption of the narrow standard of care that they propose, defendants apparently fear that the [***37] application of ordinary negligence principles in the present context will impair the ability of CHP officers to carry out their responsibilities and will result in an inordinate financial liability to the state, because juries will be too ready to second-guess police officers in the exercise of their discretion in making traffic stops. To the extent that past cases provide any guidance, this limited precedent does not support defendants' prediction. As noted above, in *Whitton v. State of California*, *supra*, 98 Cal. App. 3d 235 -- probably the closest California case on point -- the jury returned a verdict against a plaintiff who had been injured by a drunk driver as she was stopped for a traffic violation. The jury found that the CHP officers who had stopped the plaintiff's car (on the right shoulder of the highway) and, after detecting [*722] alcohol on the plaintiff's breath, conducted a sobriety test on the plaintiff as she stood between her vehicle and the patrol car, were not negligent. As *Whitton* demonstrates, the various considerations that an officer is required to take into account in deciding when and where to make a traffic stop, and how to conduct an investigation [***38] after the stop, are not beyond the understanding or experience of most jurors, and there is little reason to suspect that juries in general will not grant an officer engaged in law enforcement duties appropriate leeway in assessing the reasonableness of the officer's conduct.

In sum, we find no justification for the limitation on the ordinary standard of care that defendants propose. Of course, if the Legislature determines that the application of general common law negligence principles in this setting is undesirable or detrimental, it remains free to fashion an appropriate response, either through the creation of a statutory immunity or the promulgation of a legislatively prescribed standard of care. In the absence of such legislative action, we conclude that the ordinary negligence standard of care should apply in this context.

IV

Defendants further contend that even if, as we have concluded above, Hedgecock's conduct must be evaluated under the ordinary standard of reasonable care, the summary judgment in their favor should be upheld on the theory that the trial court correctly found that the undisputed facts establish, as a matter of law, that Hedgecock was not negligent [***39] under that standard. As this court recently explained in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal. 4th 826, 850, "the party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. ... There is a triable issue of material fact if ... the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the [**261] motion in accordance with the applicable standard of proof."

In support of their claim that no triable issue of fact existed on the question whether Hedgecock was negligent, defendants stress that it is undisputed that (1) the center median was wider than the right shoulder at the location where the stop in this case was made, (2) the Camry was traveling in the fast lane and thus a stop in the center median did not require the Camry to cross other lanes of traffic, whereas a stop on the right shoulder would have required the Camry to cross two lanes of traffic, and (3) the weather and visibility were good, reducing the risk that oncoming traffic might not see a stopped vehicle in the median strip. [*723]

All of the [***40] circumstances upon which defendants rely clearly are relevant to the determination whether defendants were negligent and properly could persuade a jury that Hedgecock was not negligent in stopping the Camry as he did. Nonetheless, the declarations and other evidence presented by plaintiffs in opposition to the summary judgment motion constitute evidence from which a jury could come to a contrary conclusion, thus raising a triable issue of fact on the question of negligence.

First, the provisions of the CHP Officer Safety Manual constituted evidence from which a jury could find that stops in the center median, as a general matter, create a greater risk of injury than stops on the right shoulder, and that, absent unusual circumstances, an officer in the exercise of reasonable care ordinarily should stop a vehicle on the right shoulder. As discussed above, although under Evidence Code section 669.1 a jury determination that Hedgecock had violated the provisions of the CHP Officer Safety Manual would not raise a presumption of negligence, that statute does not preclude a jury from taking into account the provisions of the manual in determining whether Hedgecock [***41] was or was not negligent under the circumstances of this case.

Second, the declaration of Thompson, a former CHP officer and former accident investigator and investigation supervisor, also constitutes evidence that would support a jury finding that Hedgecock was negligent. As noted above, Thompson stated in his declaration that stops in the center median of a highway pose a greater danger than stops on the right shoulder, because oncoming vehicles are less likely to expect to see cars or motorcycles stopped in the center median and thus are more likely to be distracted by such an event. He further stated that because vehicles traveling in the left lane of a freeway generally are traveling faster than those in the right lane, a driver in the left lane is more likely to lose control of his or her vehicle (and less likely to be able to avoid a collision) in the event the distraction leads the driver to swerve away from the stopped vehicle.

Third, a jury might find that although the existence of circumstances such as bad weather or an emergency could have made it reasonable for Hedgecock to direct the Camry to the center median, there was insufficient justification under the present [***42] circumstances for Hedgecock to subject plaintiffs to the risks inherent in such a stop -- especially in view of the good weather and clear visibility prevailing at the time and location of the stop. Finally, particularly in light of the provisions of the CHP manual indicating that if a location is too dangerous the officer should delay the stop and wait for a safer location, a jury might conclude that if the width of the right [*724] shoulder at the particular area of the highway was not sufficient to permit the stop to be made safely on the right shoulder, the officer, in the exercise of reasonable care, should have permitted the Camry to proceed further and have stopped the vehicle at a location where the right shoulder was wider. **n12**

n12 In response to the latter argument, defendants could counter that Hedgecock's actions were reasonable in light of the CHP Officer Safety Manual's direction, in a separate provision, that "upon observing a violation, the officer should stop the violator's vehicle as soon as possible." (See, *ante*, 2001 Cal. LEXIS 5258 pp. *19, fn. 5.)

[***43]

In sum, in light of the conflicting evidence relating

to the requirements of CHP procedure in the situation presented, and the circumstance that the evidence disclosed by the declarations and counterdeclarations could [**262] support a jury's finding either that Hedgecock was not negligent or that he was negligent, the evidence before the trial court on the summary judgment motion clearly raised a triable issue for the jury's determination on the question of negligence. Indeed, as we have seen, the declarations of CHP Officer Sydney and former CHP Officer Thompson -- both of whom had many years of experience in traffic enforcement -- were in direct conflict on the ultimate question of whether Hedgecock was or was not negligent under the circumstances of this case. On this record, we conclude that the trial court erred in finding that the undisputed evidence established, as a matter of law, that Hedgecock was not negligent. n13

n13 The dissenting opinion misapplies the standard of care concept in maintaining that a court, in determining the applicable standard of care, properly looks to such case-specific facts as whether "the weather was dry and visibility was good," whether the traffic was light or heavy in the various lanes of the highway at the time of the incident, or whether the particular officer had or had not made similar traffic stops in the past. (See, *post*, dis. opn. at pp. 7-8.) That approach to the standard of care issue effectively would eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court under the standard of care rubric. The dissent's conclusion is more accurately characterized as a determination that the present record establishes, as a matter of law, that Officer Hedgecock was not negligent. As explained above, however, we believe that in light of the conflicting evidence and declarations, the record before the trial court on the summary judgment motion clearly raised a triable issue for the jury's determination on the question of whether Officer Hedgecock was or was not negligent under the circumstances of this case.

The dissent also criticizes the opinion's treatment of the CHP Officer Safety Manual. (See, *post*, dis. opn. at pp. 9-11.) As explained above, however, the proper role that such a safety manual plays in a negligence case is governed by the provisions of Evidence Code section 669.1, and our consideration of the appropriate use of the manual follows the language and legislative history of that statute. (See, *ante*, 2001 Cal. LEXIS 5258 pp. *34-35 & fns. 10, 11.) The dissent's position is inconsistent with the use that the Legislature contemplated for such a manual.

[***44] [*725]

V

Finally, defendants argue that even if a triable issue of fact exists as to whether or not Hedgecock was negligent, the grant of summary judgment in their favor was nonetheless proper because even if the jury were to find that Hedgecock was negligent, the undisputed evidence established, as a matter of law, that Hedgecock's negligence was not a legal cause of plaintiffs' injuries. Defendants maintain in this regard that even if the jury were to find that Hedgecock breached his duty of due care and carelessly exposed plaintiffs to an unreasonable risk of harm, the conduct of the driver of the pickup truck -- in diverting his eyes from the highway, drifting into the center median of the freeway, and ultimately colliding with the Camry -- constitutes, as a matter of law, a superseding cause that relieves Hedgecock of responsibility for plaintiffs' injuries.

Defendants' contention lacks merit. It is well established that when a defendant's negligence is based upon his or her having exposed the plaintiff to an unreasonable risk of harm from the actions of others, the occurrence of the type of conduct against which the defendant had a duty to protect the plaintiff cannot properly [***45] constitute a superseding cause that completely relieves the defendant of any responsibility for the plaintiff's injuries. As the commentary to the Restatement Second of Torts explains: "The problem which is involved in determining whether a particular intervening force is or is not a superseding cause of the harm is in reality a problem of determining whether the intervention of the force was within the scope of the reasons imposing the duty upon the actor to refrain from negligent conduct. If the duty is designed, in part at least, to protect the other from the hazard of being harmed by the intervening force, or by the effect of the intervening force operating on the condition created by the negligent conduct, then that hazard is within the duty, and the intervening force is not a superseding cause." (Rest.2d Torts, § 281, com. h, p. 8; see, e.g.,

Haft v. Lone Palm Hotel (1970) 3 Cal. 3d 756, 769-770, 91 Cal. Rptr. 745, 478 P.2d 465; *McEvoy v. American Pool Corp.* (1948) 32 Cal. 2d 295, 298-299, 195 P.2d 783.) [**263] As further explained in *Soule v. General Motors* (1994) 8 Cal. 4th 548, 882 P.2d 298, for an intervening act properly to be considered [***46] a superseding cause, the act must have produced "harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible." (*Soule*, 8 Cal. 4th at p. 573, fn. 9, 34 Cal. Rptr. 2d 607, 882 P.2d 298.)

Under these principles, it is clear that the trial court could not properly find, as a matter of law, that the conduct of the driver of the pickup truck constituted a superseding cause that relieves Hedgecock of any legal responsibility for plaintiffs' injuries. The risk of harm posed by the negligence of [*726] an oncoming driver is one of the foremost risks against which Hedgecock's duty of care was intended to protect. Accordingly, even if a jury were to determine that the driver of the pickup truck was negligent and that his negligence was a substantial and even predominant cause of plaintiffs' injuries, such a finding would not render the pickup driver's conduct a superseding cause that totally eliminates Hedgecock's responsibility for plaintiffs' injuries -- although such a finding certainly would provide ample justification for the jury, in applying comparative fault principles, to apportion the bulk of responsibility for the accident [***47] to the pickup driver, rather than to the CHP officer. Indeed, the latter consideration provides a further reason to discount defendants' claim that a decision in plaintiffs' favor is likely to subject the state to substantial liability, because in most cases of this nature the great majority of fault is likely to be attributed to the third party, and not to the officer. (See Civ. Code, § 1431.2, subd. (a) ["In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault ...."].)

Thus, for the reasons discussed above, we cannot sustain the summary judgment that was rendered in favor of defendants on the theory that Hedgcock's conduct, as a matter of law, was not the legal cause of plaintiffs' injuries.

VI

The judgment of the Court of Appeal, reversing the trial court's grant of summary judgment in favor of defendants, is affirmed.

GEORGE, C.J. [***48] WE CONCUR:

KENNARD, J.

WERDEGAR, J.

CHIN, J.

DISSENTING OPINION BY BROWN, J.

DISSENTBY:
BROWN

DISSENT:

DISSENTING OPINION BY BROWN, J.

I respectfully dissent.

Like the majority, I agree that a police officer owes a general duty of care to the passengers in a vehicle stopped by that officer. I, however, believe the majority errs in formulating the appropriate standard of care. Under the undisputed facts, Officer Hedgecock's legal duty to plaintiffs did not include a duty to stop plaintiffs somewhere other than the center median of the freeway. Thus, Officer Hedgecock did not breach his legal duty to plaintiffs as a matter of law. Accordingly, I would reverse the judgment of the Court of Appeal and affirm the trial court's grant of summary judgment for defendants. [*727]

Like the existence of a legal duty, the *scope* of that duty is a question of law for the court. (*Merrill v. Navegar, Inc.* (Aug. 6, 2001, S083466) 2001 Cal. LEXIS 4945, Cal. 4th , [p. 11] (*Merrill*) .) In discussing the scope of Officer Hedgecock's duty, the majority characterizes the issue as whether an officer "*always* satisfies" the duty of care by stopping a traffic violator "at any location off [***49] of the travel lanes of a highway." (Maj. opn., *ante*, 2001 Cal. LEXIS 5258 at p. *29.) Relying exclusively on *Ramirez v. Plough, Inc.* (1993) 6 Cal. 4th 539, 863 P.2d 167 (*Ramirez*),the majority answers "no" because no legislative or administrative pronouncements support such a rule (maj. opn., *ante*, at pp. 18-21), and because the California Highway Patrol Officer Safety Manual (Safety Manual) indicates "a strong preference for stopping a vehicle on the right shoulder rather than in the center median" [**264] (maj. opn., *ante*, 2001 Cal. LEXIS 5258 at p. *35).]The majority, however,

engages in faulty analysis, and, in doing so, misstates the issue before the court. The issue is not whether an officer satisfies his duty of care *in every case* by stopping a traffic violator off the lanes of a highway. Rather, the issue is whether an officer satisfies his duty of care to the passengers of a car under the uncontested circumstances of this case when he stops their car in the median area. The answer should be "yes."

As an initial matter, the majority mistakenly assumes that the scope of a defendant's duty cannot depend on the particular facts of a case. "In most cases, courts have fixed no standard of care [***50] for tort liability more precise than that of a reasonably prudent person under like circumstances." (*Ramirez*, *supra*, 6 Cal. 4th at p. 546.) "However ... in particular situations a more specific standard may be established by judicial decision, statute or ordinance." (*Kentucky Fried Chicken of Cal., Inc. v. Superior Court* (1997) 14 Cal. 4th 814, 824, 927 P.2d 1260.) Thus, " 'each case must be considered *on its own facts* to determine' " the scope of the legal duty owed by a defendant to a class of plaintiffs " 'to refrain from subjecting them to' " a given risk. (*Dillon v. Legg* (1968) 68 Cal. 2d 728, 742, 69 Cal. Rptr. 72, 441 P.2d 912 (*Dillon*),italics added, quoting *Hergenrether v. East* (1964) 61 Cal. 2d 440, 445, 39 Cal. Rptr. 4, 393 P.2d 164.) Indeed, where the facts are undisputed, we have regularly affirmed summary judgment for a defendant even though the defendant owed a general duty of care to the plaintiff, because that general duty did not require the defendant to act any differently under the facts of the case. (See, e.g., *Sharon P. v. Arman, Ltd.* (1999) 21 Cal. 4th 1181, 1189-1199, 989 P.2d 121 [***51] (*Sharon P.*); *Parsons v. Crown Disposal Co.* (1997) 15 Cal. 4th 456, 477-483, 936 P.2d 70 (*Parsons*); *Thompson v. County of Alameda* (1980) 27 Cal. 3d 741, 753-758, 167 Cal. Rptr. 70, 614 P.2d 728 (*Thompson*);cf. *Artiglio v. Corning Inc.* (1998) 18 Cal. 4th 604, 616, 957 P.2d 1313 [affirming summary judgment because there was "no triable issue of [*728] fact concerning the scope of" defendant's duty under Restatement Second of Torts section 324A].)

The majority's second mistake lies in its exclusive focus on legislative or administrative pronouncements in formulating the standard of care. When determining the scope of a defendant's legal duty under the particular facts of a case, courts do not always rely on legislative or administrative pronouncements, but weigh *all* relevant public policy considerations. (See *Merrill*, *supra*, Cal. 4th at pp. - [pp. 11-12].) As part of the weighing process,

" 'foreseeability of risk [is] of ... *primary* importance. ...' " (*Dillon*, *supra*, 68 Cal. 2d at p. 739, italics added, quoting *Grafton v. Mollica* (1965) 231 Cal. App. 2d 860, 865, 42 Cal. Rptr. 306.) [***52] Foreseeability for purposes of the duty analysis, however, is different from foreseeability "in the fact-specific sense in which we allow juries to consider [the] question." (*Parsons*, *supra*, 15 Cal. 4th at p. 476, 63 Cal. Rptr. 2d 291, 936 P.2d 70.) "[A] court's task--in determining 'duty'--is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed." (*Ballard v. Uribe* (1986) 41 Cal. 3d 564, 573, fn. 6, 224 Cal. Rptr. 664, 715 P.2d 624.)

After determining the foreseeability of harm, courts typically balance foreseeability against other relevant policy considerations to determine the scope of a defendant's duty "within the factual context of a specific case." (*Lopez v. McDonald's Corp.* (1987) 193 Cal. App. 3d 495, 506, 238 Cal. Rptr. 436 (*Lopez*);see also *Parsons*, *supra*, 15 Cal. 4th at p. 476.) Relevant policy considerations include "the degree of certainty that the plaintiff suffered injury, [***53] the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant [**265] and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Rowland v. Christian* (1968) 69 Cal. 2d 108, 113, 70 Cal. Rptr. 97, 443 P.2d 561.) "When public agencies are involved," courts may also consider " 'the extent of [the agency's] powers, the role imposed upon it by law and the limitations imposed upon it by budget.' " (*Thompson*, *supra*, 27 Cal. 3d at p. 750, quoting *Raymond v. Paradise Unified School Dist.* (1963) 218 Cal. App. 2d 1, 8, 31 Cal. Rptr. 847.) This lengthy list of policy considerations, however, is neither exhaustive (*Lopez*, at p. 506), nor mandatory (see, e.g., *Sharon P.*, *supra*, 21 Cal. 4th at pp. 1191-1199 [analyzing legal duty without considering all the *Rowland* factors]; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal. 4th 666, 678-680, 863 P.2d 207 [***54] (*Ann M.*) [same]). [*729]

Thus, where the relevant facts are undisputed, a court may define a more specific standard of care than the reasonably prudent person standard *if the public policy considerations warrant it*. In such cases, the court

may be able to decide the case on summary judgment because the definition of a more specific standard of care often resolves an interrelated issue: whether a defendant breached his legal duty of care. " 'The question whether an act or omission will be considered a breach of duty ... necessarily depends upon the scope of the duty imposed. ...' " (*Federico v. Superior Court* (1997) 59 Cal. App. 4th 1207, 1211, quoting *Wattenbarger v. Cincinnati Reds, Inc.* (1994) 28 Cal. App. 4th 746, 751.) If a defendant's conduct satisfies the standard of care defined by the court as a matter of law under the undisputed facts of the case, then the defendant, by definition, has not breached any legal duty. Indeed, some of our early decisions rely on foreseeability of harm and other policy considerations to find no breach of a legal duty as a matter of law. (See, e.g., *La Manna v. Stewart* (1975) 13 Cal. 3d 413, 428-429, 118 Cal. Rptr. 761, 530 P.2d 1073 [***55] [a pedestrian had no duty to continuously look "in the direction of potential oncoming traffic" under the facts and could not breach her legal duty because the imposition of such a duty would have placed her in even greater danger]; *Schmitt v. Henderson* (1969) 1 Cal. 3d 460, 465-466, 82 Cal. Rptr. 502, 462 P.2d 30 [a pedestrian had no duty "to be alert to danger approaching him from behind" under the facts and could not breach his legal duty because there was no foreseeability of harm]; see also *Putensen v. Clay Adams, Inc.* (1970) 12 Cal. App. 3d 1062, 1077-1078, 91 Cal. Rptr. 319 [balancing "the likelihood of harm, and the gravity of the harm if it happens ... against the burden of precaution which would be effective to avoid the harm" under the facts of the case may lead to a finding that the defendant did not breach his duty of care as a matter of law (italics omitted)].)

A survey of our more recent negligence cases further illustrates these principles at work. In *Thompson*, the County of Alameda released a juvenile offender into a neighborhood without warning police, other parents in the neighborhood or the juvenile's mother. The released [***56] offender later murdered the plaintiffs' son. (*Thompson*, *supra*, 27 Cal. 3d at p. 746.) Although we recognized that the county had a duty "to exercise reasonable care to protect *all* of its citizens" (27 Cal. 3d at p. 753), we concluded that this duty did not include a duty to warn under the *particular* facts of the case (27 Cal. 3d at pp. 756-758). We reached this conclusion "based in part on policy considerations and in part upon an analysis of 'foreseeability' *within the context of this case*." (27 Cal. 3d at p. 753, italics added.) We further acknowledged that the county may have had a duty to warn under different facts, i.e., if there had been "a prior threat to a specific identifiable victim." (27 Cal. 3d at p. 758.) Because the county lacked [*730] such a duty under the facts of this case and therefore could not, as a matter of law, breach its general duty of care, we dismissed the plaintiffs' negligence claim. (See *ibid.*)

[**266] More recently, we affirmed summary judgment for a defendant after defining a more specific standard of care under the particular facts of that case based on public policy considerations. In *Parsons*, the plaintiff claimed that the defendant's negligent [***57] operation of a garbage truck caused her to fall off her horse. (*Parsons*, *supra*, 15 Cal. 4th at p. 463.) Although we held that the defendant owed certain common law duties to the plaintiff, we concluded that these duties did not include a duty to guard against frightening horses under the circumstances presented. (*Id.* at p. 477.) Thus, the defendant, as a matter of law, did not breach its duty of care to the plaintiff. (*Id.* at p. 485.) We reached this conclusion by balancing the foreseeability of harm against relevant public policy considerations, including "the social utility of the defendant's conduct, and the consequences to the community of imposing a duty to guard against frightening [horses]." (*Id.* at p. 476.) We, however, acknowledged that the defendant could have been negligent for failing to guard against frightening horses under different factual circumstances. (See *id.* at pp. 477-478.)

We have also applied these same principles in affirming summary judgment for defendants in the premises liability context. In *Sharon P.*, an assailant attacked the plaintiff in an underground parking [***58] garage. The plaintiff sued the owner of the premises and the operator of the parking garage, alleging, among other things, that the defendants negligently failed to provide adequate security. (*Sharon P.*, *supra*, 21 Cal. 4th at p. 1185, 91 Cal. Rptr. 2d 35, 989 P.2d 121.) Although we acknowledged that the defendants had a duty to protect the plaintiff " 'against *foreseeable* criminal acts of third parties' " (21 Cal. 4th at p. 1189, 91 Cal. Rptr. 2d 35, 898 P.2d 121, quoting *Ann. M.*, *supra*, 6 Cal. 4th at p. 674, 25 Cal. Rptr. 2d 137, 863 P.2d 207), we affirmed summary judgment for the defendants (*Sharon P.*, at p. 1199). To reach this result, we balanced the foreseeability of the attack against the efficacy of additional security measures and the resulting burden on the defendants. (See 21 Cal. 4th at pp. 1189-1199.) Based on this balancing, we concluded that the defendants had no duty to provide additional security measures under the undisputed facts. (*Ibid.*) Thus, the defendants, as a matter of law, did not breach their general duty of care to the plaintiff. (See 21 Cal. 4th at p. 1199.) We, however, implicitly recognized that a legal duty to provide additional security measures

might exist under different facts, i.e., if there had been "prior similar incidents or other indications [***59] of a reasonably foreseeable risk of violent criminal assaults in that location." (*Ibid.*; see also *Ann M., supra*, 6 Cal. 4th at pp. 679-680 [the defendant had no duty to provide security guards absent notice of prior similar incidents].) [*731]

Thus, our case law establishes that public policy considerations may justify the definition of a more specific standard of care than the reasonably prudent person standard in certain cases where the relevant facts are undisputed. In such cases, a court may properly grant summary judgment for a defendant if the more specific standard establishes that the defendant could not have breached his legal duty as a matter of law. This is such a case.

I begin by considering the foreseeability of harm in the context of this case. Foreseeability must be analyzed "in terms of the totality of the circumstances facing the police officer at the scene." (*Dutton v. City of Pacifica* (1995) 35 Cal. App. 4th 1171, 1175.) In the traffic enforcement context, any assessment of foreseeability must account for the inherent risk created by a routine stop because "neither police nor their employer [may] incur any liability by virtue of " the "original [***60] police decision to stop ... a suspected wrongdoer." (*Sparks v. City of Compton* (1976) 64 Cal. App. 3d 592, 596, 134 Cal. Rptr. 684 (*Sparks*).) Any traffic enforcement stop "carries a risk of harm that a" negligent third party driver "will crash into the stopped vehicles." (*Whitton v. State of California* (1979) 98 Cal. App. 3d 235, 242, 159 Cal. Rptr. 405.) Thus, the foreseeability of harm created by an officer's execution of a [**267] stop must be measured in relation to the foreseeability of harm inherent in a routine stop. Otherwise, officers may be held liable for their *decision* to stop a suspected traffic violator and become insurers of the motorists they stop. (*Ibid.* [holding officers liable for the risks inherent in any traffic enforcement stop would result in "a liability-extending doctrine of 'risk in the air' "].)

These principles establish that the foreseeability of harm created by Officer Hedgecock's decision to stop plaintiffs in the median area was minimal to nonexistent. The relevant facts are undisputed. The weather was dry and visibility was good. The car occupied by plaintiffs was parked well within the median area. The median [***61] area was wider than the right shoulder, and the right shoulder was adjacent to a downward slope. Contrary to the general pronouncements of plaintiffs' expert, no admissible evidence in the record even suggests that a car parked in this particular median area was in fact less visible than a car parked on the right shoulder or that the driver of the truck that hit plaintiffs was in fact distracted by the presence of a vehicle in the median area. Although plaintiffs' expert observed that traffic in the lane closest to the median generally travels faster than traffic in the lane closest to the right shoulder, the record establishes that traffic in the number one lane was travelling only minimally faster than traffic in the other two lanes. Moreover, traffic in all lanes was moderately heavy. Finally, Officer Hedgecock had stopped traffic violators in the median area on numerous occasions without incident, and there was no evidence that accidents were [*732] more likely in the median area than on the right shoulder. Under these facts, the risk of harm to plaintiffs was no different than the risk of harm inherent in any traffic stop. Indeed, stopping plaintiffs on the right shoulder as suggested [***62] by the Safety Manual arguably would have *increased* the likelihood of harm to plaintiffs because they would have had to cross two busy lanes of traffic to reach the right shoulder. Holding that Officer Hedgecock might have breached his legal duty to plaintiffs under these circumstances creates the type of " 'Monday-morning quarterbacking' " that negligence law should avoid. (See *Dutton, supra*, 35 Cal. App. 4th at p. 1175, quoting *Williams v. State of California* (1983) 34 Cal. 3d 18, 30, 192 Cal. Rptr. 233, 664 P.2d 137 (conc. and dis. opn. of Mosk, J.).)

The countervailing policy considerations also strongly support such a conclusion. By enacting numerous statutes relating to traffic safety (see, e.g., Veh. Code, § § 21000- 23336), and by making police officers statutorily immune for their decision to stop a suspected traffic violator (Gov. Code, § 820.2; *Sparks, supra*, 64 Cal. App. 3d at p. 596), the Legislature has established a strong public policy in favor of enforcing the rules of the road. Indeed, rigorous enforcement of our traffic laws serves a vital public [***63] function by making "automobile driving less dangerous." (*Breithaupt v. Abram* (1957) 352 U.S. 432, 439, 1 L. Ed. 2d 448, 77 S. Ct. 408.) Where, as here, the location of the stop was *no more dangerous* than any other available location, holding that an officer *could* breach his legal duty by stopping a traffic violator in one of those locations would create a "Catch 22" situation. No matter where the officer stopped the violator, he would arguably create a risk of harm and open himself and his employer to liability. Indeed, the majority carefully avoids any suggestion that Officer Hedgecock could have escaped liability by stopping plaintiffs on the right shoulder and offers no alternative location for the stop.

If officers may incur liability no matter where they stop a traffic violator, they have less incentive to make stops, resulting in the reduced enforcement of our traffic laws. Rather than impede such police work, I would conclude that Officer Hedgecock, as a matter of law, satisfied his duty of care to plaintiffs under the circumstances presented here. (See *Parsons, supra*, 15 Cal. 4th at p. 476 [holding that the social utility of defendant's [***64] conduct overrode the foreseeability of harm].)

The Safety Manual does not dictate a contrary conclusion. Although the manual states a preference for stopping traffic violators on the right shoulder, it allows for officer discretion. For example, the manual's consistent use of the word "should"--rather than "shall"--implies that officers have discretion [**268] when deciding where to conduct a traffic enforcement stop. The manual also states that an officer, "*if possible*," should "ensure a violator does not ... park in the median divider." Finally, the manual specifically [*733] addresses the situation where "a violator stops in the center divider" and states that the officer must decide whether the hazards of conducting the stop in the center median are greater than the hazards of moving the violator across multiple freeway lanes. Although this provision ostensibly covers situations where the violator stops in the median on his own volition, it implies that officers must do the same calculation when deciding where to stop a violator travelling in the lane farthest from the right shoulder. Because the manual does not conflict with my conclusions above, the admissibility of the manual as evidence [***65] of the standard of care (see *Grudt v. City of Los Angeles* (1970) 2 Cal. 3d 575, 588, 86 Cal. Rptr. 465, 468 P.2d 825), does not preclude us from affirming summary judgment in defendants' favor on the uncontroverted facts.

Indeed, the majority's contrary conclusion will likely cause more problems than it will solve. By holding that discretionary provisions in a manual preclude summary judgment under the facts of this case, the majority creates a huge incentive for government agencies to discard or sanitize their manuals in an effort to minimize the possibility of open-ended tort liability. Such a result will likely have deleterious effects by depriving government employees of useful guides for doing their jobs.

The majority's reliance on the cited provisions of the Safety Manual may also have the perverse effect of increasing the number of accidents. (See *Adams v. City of Fremont* (1998) 68 Cal. App. 4th 243, 273 [declining to impose a duty that would "likely result in more deaths or injuries"].) By ignoring the undisputed facts and reversing summary judgment solely based on the manual's suggestion to stop traffic violators on the right shoulder, the [***66] majority, in effect, creates a legal presumption for traffic stops on the right shoulder. As a result, officers will likely conduct *all* traffic stops on the right shoulder even though they are more familiar with the roads they patrol than this court. Where, as here, the right shoulder arguably creates a greater risk of accident than the median area, this judicially imposed limitation on officer discretion will likely increase the risk of harm. Consequently, the majority will likely cause more accidents than it prevents because its failure to provide officers with any meaningful guidance does nothing to reduce the possibility of such accidents.

The facts in this case are tragic, and I, like my colleagues, have great sympathy for plaintiffs, who suffered severe injuries through no apparent fault of their own. Nonetheless, I do not believe that Officer Hedgecock or the State of California should be held responsible for these injuries. Holding that a jury could find that Officer Hedgecock breached his legal duty under the facts of this case will not reduce the likelihood of such accidents in the [*734] future. Instead, such a holding will likely hinder enforcement of our traffic laws and [***67] may even increase the number of accidents. While I might conclude differently under another set of facts, I believe that Officer Hedgecock had no duty to stop plaintiffs in a different location under the undisputed facts presented here. Accordingly, he did not, as a matter of law, breach his legal duty to plaintiffs.

BROWN, J.

I CONCUR:

BAXTER, J.

6 of 19 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. SERGIO OCHOA, Defendant and Appellant.

S030416

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 398; 28 P.3d 78; 2001 Cal. LEXIS 4944; 110 Cal. Rptr. 2d 324; 2001 Cal. Daily Op. Service 6719; 2001 Daily Journal DAR 8191

August 6, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

SUBSEQUENT HISTORY:
Rehearing Denied September 19, 2001, Reported at: 2001 Cal. LEXIS 6367.

PRIOR HISTORY:
Superior Court of Los Angeles County. Super. Ct. No. BA020873. Sandy R. Kriegler, Judge.

DISPOSITION:
The judgment is affirmed.

COUNSEL:
Attorneys for Appellant:

Conrad Peterman, under appointment by the Supreme Court, for Defendant and Appellant.

Attorneys for Respondent:

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Carol Wendelin Pollack, Assistant Attorney General, John R. Gorey, Robert S. Henry and Brad D. Levenson, Deputy Attorney General, for Plaintiff and Respondent.

JUDGES:
BROWN, J. WE CONCUR: GEORGE, C.J., BAXTER, J., WERDEGAR, J., CHIN, J. CONCURRING OPINION BY KENNARD, J.

OPINIONBY:
BROWN

OPINION:

[**84]

[*415] A jury convicted defendant Sergio Ochoa of two counts of first degree murder (Pen. Code, § 187; all further statutory references are to [*416] this code unless otherwise indicated) and one count of attempted second degree robbery (§ § 664, 211). The jury also found true the allegations that a principal was armed with respect to all three offenses (§ 12022, subd. (a)(1)) and that defendant personally used a firearm [***2] with respect to one of the murders and the attempted robbery (§ 12022.5). Having found true the special circumstance allegations that defendant committed multiple murders (§ 190.2, subd. (a)(3)), and that a murder was committed while defendant was engaged in robbery (§ 190.2, subd. (a)(17)(A)), the jury set the penalty at death. The trial court denied defendant's motion to modify the sentence (§ 190.4, subd. (e)). This appeal is automatic. (Cal. Const., art. VI, § 11; Pen. Code, § 1239).

For the reasons stated below, we conclude the judgment should be affirmed in its entirety.

I. FACTS

A. Guilt Phase

1. The People's Case a) The gang rivalry

In late 1989 and early 1990, defendant's 18th Street Gang was in a "war" with a rival gang, Crazy Riders. On December 15, 1989, defendant was walking with "Pollo" near Pico Boulevard and Fourth Avenue in Los Angeles n1 when a white Toyota with license plate number "2MTV878" pulled up beside them. A Crazy Riders member named "Pompis" exited the car and shot three times at defendant and Pollo. Defendant and Pollo ran to Fifth Avenue, where they were shot at twice more.

n1 All of the events described occurred in the City of Los Angeles .

[***3]

The next day, the Crazy Riders Gang shot Luis Magallenes, an 18th Street Gang member nicknamed "Bandit." Later that same day, an 18th Street Gang member nicknamed, "Flacko," fatally shot Crazy Rider Nelson Mauricio Donis to retaliate for the shooting of Magallenes.

On January 3, 1990, at approximately 5:00 p.m., 18th Street Gang members Jacinto Alonzo, and Walter Aguilar and his brother, Oscar Quijada, were driving near 12th Avenue and Venice Boulevard. The white Toyota pulled up and Pompis shot Quijada in the forehead. He was taken to the hospital and survived.

[*417] b) The Navarette murder

At approximately 8:00 p.m. on January 3, 1990, Aguilar and Alonzo were [*418] assembled at Pico Boulevard and Wilton Avenue with fellow gang members Juan Velasquez and Mauricio Soriano. Defendant, driving a red truck, arrived and stated he had just seen the Crazy Riders' white Toyota on Pico Boulevard. Aguilar, Alonzo, Velasquez and Soriano entered defendant's truck. Aguilar brought a double-barreled shotgun with him, and the 18th Street Gang members set off to find the Crazy Riders.

Defendant drove eastward on Pico Boulevard. Defendant stated, "There they are." [**85] Defendant accelerated and changed lanes [***4] so his truck was adjacent to the Toyota, on its left. Two shots were fired from the shotgun. After the shooting, defendant turned the truck and drove northbound on Kingsley Drive.

The white car in question was not the Toyota belonging to the Crazy Riders, but a Datsun driven by decedent Pedro Navarette, whose passenger at the time was his brother, Rudolfo Rivera. Navarette was not a rival gang member. The beginning of Navarette's license plate number read "2MTY." Navarette fell on the steering wheel after the second shot was fired; the car drove onto the sidewalk and crashed into a wall. Rivera heard the truck passengers' voices after the second shot, but he could not understand what they were saying. The cause of death was a shotgun wound to the head.

Defendant was first questioned on January 22, 1990. He stated he had heard nothing about a shooting at Pico Boulevard and Kingsley Drive of a car with a license plate beginning with "2MTY." On February 13, 1990, defendant signed a statement in which he admitted he drove the truck during the shooting. Defendant stated Velasquez requested a ride to Normandie Avenue, and defendant obliged; Soriano, Alonzo and Aguilar also traveled as [***5] passengers. A car resembling the one that belonged to the Crazy Riders was also driving eastbound on Pico Boulevard. Defendant suddenly heard a loud bang, and the car window cracked. Defendant stated he looked in his mirror and saw Velasquez holding a shotgun. Defendant had not formerly known that Velasquez was armed.

Detective Michael Bercham described defendant as a "hard-core" gang member. Defendant had 18th Street Gang tattoos all over his body. After his arrest on January 21, and interview on January 22, 1990, he added a tattoo over his eye that depicted the number "187," the California Penal Code section proscribing murder.

c) The Castro attempted robbery and murder

On the evening of January 20, 1990, defendant, Soriano, Velasquez, and fellow 18th Street Gang members Oscar Montes and David Lozano were assembled at Pico Boulevard and Wilton Avenue. Defendant said, "Let's go do a jack." When Lozano stated he did not want to go, defendant told Lozano to "do something for the neighborhood," meaning the 18th Street Gang. Lozano agreed to participate.

Lozano drove the other 18th Street Gang members in his car past a white Trans Am that was parked on St. Andrews Place between [***6] Fifth and Sixth Streets. Soriano commented it was a nice car. Defendant agreed it "was a nice car to get." Lozano parked the car. His four passengers exited the car and approached the Trans Am.

Jose Castro was sitting in his Trans Am. Defendant and Soriano went to the left side of the car; Montes and Velasquez went to the right side of the car. Defendant, the only assailant with a gun, placed it in Castro's face

and ordered him to leave the car. Montes and Velasquez, anticipating Castro's flight, entered the car. Castro refused to exit. Defendant stated, "I'm gonna' shoot him." Castro held on to the wheel.

David Mandich was driving on St. Andrews Place from Sixth Street toward Fifth Street. He saw four males, in their mid-teens to early 20's, standing around a white Trans Am. Two of the four were on the left and two were on the right. The tallest of the four talked to a person in the driver's seat. The tall one then pulled a gun from his jacket and shot the driver. All four males began running toward Fifth Street.

Lozano was surprised to see the four return, as he expected them to drive away in the Trans Am. Defendant stated he had shot the man in the leg. Defendant further stated [***7] the man had cried, "Oh, shit, oh shit." Defendant wore a silver Raiders jacket with black lettering.

Mandich described the incident to a police officer that evening. He described the shooter as a Black or dark-complected Hispanic male between five feet ten inches and six feet tall, wearing a dark athletic jacket with white letters in a semicircle on the back. Detective Paul Coulter testified that the shiny "satiny" jacket could have appeared [**86] darker than its actual color due to the lighting conditions in the area.

Mandich was unable to select anyone from a photographic lineup. On September 4, 1990, he selected defendant from a live lineup that included six males. Mandich had no doubt that he was correct, unless defendant "had a twin brother." At trial, Mandich again identified defendant as the perpetrator.

Defendant was taken into custody for an unrelated matter on January 21, 1991. He was wearing a silver Raiders jacket, which had letters in a [*419] semicircle on the back. Defendant stands six feet tall; the other individuals involved in the Castro robbery were five feet six inches tall or shorter.

Ruben Sanchez, an expert on latent fingerprints, took fingerprints from the Trans Am. [***8] Gilbert Aguilar, a Los Angeles Police Department fingerprint expert, testified these prints matched the samples of Soriano and Velasquez.

Dr. Irwin Golden, a deputy medical examiner coroner, performed the autopsy of Jose Castro, who died from a gunshot to the chest. The bullet entered through the victim's left shoulder, passed through his chest and lung, and exited on the right side of his chest. The wound was consistent with the scene described by Mandich: the shot was fired by an assailant standing outside the driver's side door.

2. The Defense Case

Los Angeles Police Officer Jason Loya interviewed David Mandich on the night of the shooting. Mandich indicated four males, three Black and one Hispanic, all ranging in age from 17 to 22, had surrounded a Trans Am on St. Andrews Place. The shooter was a Black male, approximately five feet ten inches to six feet tall. He wore a dark blue or black jacket with letters on the back.

Los Angeles Police Officer Frank Bolan helped prepare a photographic display in March 1990, from which Mandich was unable to identify defendant. Officer Bolan also participated in the staging of an in-person lineup on

September 4, 1990. Jose Castro's [***9] sister, his widow, the widow's sister and her son were present, seated in the back row. Officer Bolan warned them not to have any contact with anyone else. After making his selection, Mandich asked if he had selected the right person. Officer Bolan stated he could not answer that question. Mandich told the officer he was positive of his selection. Mandich again sought confirmation, and Officer Bolan again refused.

B. Penalty Phase

1. The People's Case

On August 11, 1986, 14-year-old Lionel Fricks was walking on Exposition Boulevard, carrying a "semi-big" radio. Defendant and another male punched Fricks several times. Once Fricks had fallen to the ground, one of the two males took Fricks's radio. Defendant pleaded guilty to second degree robbery.

[*420] On July 10, 1989, defendant pleaded guilty to driving or taking a vehicle without the owner's consent in violation of Vehicle Code section 10851.

On January 20, 1990, at approximately 11:30 p.m., Freddie Garcia was at a gas station on La Brea Avenue. Defendant and three other males approached him. The males kicked Garcia to the ground; when he rose, defendant punched him. Defendant warned Garcia, "Give up [***10] the car, otherwise I'm going to shoot you." Another male put a gun to Garcia's stomach, although defendant did the talking. Defendant entered

the car, and drove the other three males away. Defendant pleaded guilty to robbery with the allegation that a principal was armed with a firearm.

On the evening of April 5, 1992, defendant participated in a fight between Black and Hispanic inmates of the North County Correctional Facility. Even after officers had separated the combatants, defendant tried to provoke the Black inmates into further conflict.

On July 22, 1992, defendant was transported from court to the North County Correctional Facility. Deputy Sheriff David Mertens searched defendant and found a makeshift handcuff key in a small incision inside his wristband. Deputy Mertens tested [**87] the key and found it easily opened a pair of Smith and Wesson handcuffs, the kind most commonly used to control inmates being transported back from court. Another deputy later searched defendant's property bag and found a shank.

Rudolfo Rivera, Navarette's brother and his passenger on the night of the murder, testified he and Navarette were living in their family home when Navarette was murdered. Navarette [***11] worked six days a week, not returning home until 11:00 p.m., to help support the family. Navarette's death was especially difficult for his mother, who was still taking pills for her high blood pressure in September 1992, nearly three years after the shooting.

Maria Mastrocinque, Jose Castro's older sister, testified he was loving, peaceful and sensitive. After finishing high school, Castro volunteered for the Marines, in which he served for two and a half years. The family used to get together every week. Now, Castro's mother is "a walking wound that will never heal."

Gladys Castro, the youngest sister, testified Castro always helped and was there for her and that her mother is "lost" and "not all there." Gladys further stated that she is afraid to sleep at night.

Martha and Jose Castro were high school sweethearts who married in 1979. Castro was a very giving and loving man, who had a close relationship [*421] with their 15-year-old son, Joey. Joey keeps his feelings to himself and has been attending counseling. After Castro's death, Joey began misbehaving in school. He has since improved his behavior, but does not want to talk about the murder. He wants to be like his dad. He often [***12] asks his mother "what would Daddy do" in certain situations.

2. The Defense's Case

Leland Bradford was with defendant when Lionel Fricks was robbed. The robbery was the idea of Juan Lombrero, who first hit Fricks and grabbed his radio. Bradford admitted that before he was arrested, defendant had the radio and gave it to Lombrero because the police were looking for it.

Besides participating in the fight and possessing the handcuff key and shank, on one occasion defendant possessed food and United States currency in excess of permitted limits and "roamed" (entered a jail tier other than his own) on another. These incidents were the extent of defendant's documented infractions while in custody.

Deputy Sheriff Dennis Parker and Deputy Sheriff Robert Thomasser observed the April 5, 1992, jail fight. The two inmates who resumed fighting after officers had separated the two groups were inmates Rene Munoz and Christopher Wood. Rosendo Florentin, a registered nurse, treated defendant after the fight. Defendant suffered a one-inch laceration on his eyebrow. Nurse Florentin treated three other inmates that night; defendant was the only inmate sent to an outside hospital for his injuries. [***13]

Rosalba Gallegos, defendant's older sister, and Eduardo Ochoa, defendant's father, described defendant's childhood. Defendant was the fourth of five children born to a shoemaker and a homemaker. The family lived in Tijuana when defendant was born, and moved to San Diego three years later. A few months later, the family moved to Figueroa Street in Los Angeles . It took defendant's father six months to find work as a shoemaker; defendant's mother worked as a housecleaner. Neither was home during the day.

Some of the neighborhood children mistreated the Ochoa children, pouring water on their backs while calling them "wetbacks," cutting up their clothes and throwing away their food. When defendant's parents spoke to the other children's parents, they responded by threatening to report the Ochoa family to immigration authorities. When defendant was in kindergarten the family moved to Welcome Avenue, where defendant had no problems in school. About seven years later, the family moved to a Black neighborhood near Arlington Avenue. Some neighborhood kids threw rocks [*422] and bottles every night at the Ochoa door. Gallegos called the police but they never came. The home was also burglarized. When [***14] defendant was approximately 16 years old, his sister was severely beaten.

Defendant had done well in elementary school, but he began missing school and [**88] dressing differently once he was in high school. Dr. Michael Maloney, a clinical psychologist and professor at University of Southern California School of Medicine, evaluated defendant and reviewed his school records. In fourth grade, defendant was described as "capable," maybe even "bright." In sixth grade, defendant was "working hard," and performing "adequately." His grades plummeted after sixth grade, when he became involved with gang activity, and he received D's and F's in junior high school. In the eighth grade, defendant scored in the 26th percentile in reading and in the 27th percentile in mathematics. By the time Dr. Maloney evaluated defendant, he registered an IQ of 74. This placed him in the fifth percentile of society, although that ranking was "probably a low estimate of his ability." Defendant read at an eighth grade level, and his arithmetic skills equaled those of a fifth grade student.

Lisa Martinez was defendant's girlfriend from 1984 until 1987, and she is the mother of defendant's daughter, Claudia. Defendant [***15] loved and played with Claudia. Defendant had studied with Lisa to become a dental technician. He earned his diploma but was unable to find work in the field.

Defendant has maintained close ties with his sister's children. They visit him in prison and get excited when he telephones.

Defendant's performance on the Minnesota Multiphasic Personality Inventory did not indicate he was schizophrenic or psychotic. "There is some suggestion he has always been somewhat insecure, but not grossly disturbed." The doctor concluded that defendant "knows right from wrong."

James Park, a correctional consultant and former corrections officer, testified that prisoners serving life without possibility of parole terms are automatically sent to maximum security "level-four" facilities, from which there has never been an escape.

II. DISCUSSION

A. Guilt Phase

1. Joinder of the Navarette and Castro Charges

Defendant moved to sever counts 1 and 2 (the Castro homicide and attempted robbery) from count 3 (the Navarette homicide). The trial court [*423] denied the motion. Defendant now contends the denial was erroneous and deprived him of a fair trial and due process of law.

The law prefers consolidation [***16] of charges. (*People v. Ochoa* (1998) 19 Cal. 4th 353, 409, 966 P.2d 442.) Where, as here, the offenses charged are of the same class, joinder is proper under section 954. (*People v. Kraft* (2000) 23 Cal. 4th 978, 1030 (*Kraft*); *People v. Bradford* (1997) 15 Cal. 4th 1229, 1315, 939 P.2d 259 (*Bradford*) .) Defendant can predicate error in the denial of the motion only on a clear showing of potential prejudice. (*Kraft*, at p. 1030; *Bradford*, at p. 1315.) We review the denial of defendant's motion for an abuse of discretion, that is, whether the denial fell

" 'outside the bounds of reason.' " (*Ochoa*, at p. 408, quoting *People* v. *DeSantis* (1992) 2 Cal. 4th 1198, 1226, 831 P.2d 1210.) We find the trial court properly exercised its discretion in denying the severance motion.

We have developed criteria to guide evaluations of trial court decisions on severance motions. "Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; [***17] (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." (*Kraft*, *supra*, 23 Cal. 4th at p. 1030.)

Cross-admissibility of evidence is sufficient but not necessary to deny severance. (*Bradford*, *supra*, 15 Cal. 4th at p. [**89] 1316.) As the four-part test is stated in the conjunctive, joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. (*People v. Musselwhite* (1998) 17 Cal. 4th 1216, 1244-1246, 954 P.2d 475 (*Musselwhite*) .) Even where the People present capital charges, joinder is proper so long as evidence of each charge is so strong that consolidation is unlikely to affect the verdict. (*People v. Arias* (1996) 13 Cal. 4th 92, 130, fn. 11, 51 Cal. Rptr. 2d 770, 913 P.2d 980 (*Arias*); *People v. Lucky* (1988) 45 Cal. 3d 259, 277-278, 247 Cal. Rptr. 1, 753 P.2d 1052 (*Lucky*) .) As in those cases, [***18] the strength of the [*424] People's evidence warrants our conclusion that the trial court properly joined the charges. n2

n2 Because we do not find that either charge was unusually likely to inflame the jury or that

> the evidence of either or both of the charges was "weak," we need not determine whether and to what extent the evidence of the two homicides would have been cross-admissible.

Defendant contends the evidence of the Navarette homicide tended to inflame the jury to defendant's detriment concerning the Castro charges. Defendant argues a jury trying the Castro charges separately would not have learned about defendant's heavy gang involvement. Without expressing our agreement or disagreement with this assertion, we note it is doubtful that the evidence on the Navarette charge was so much more inflammatory than that supporting the Castro charge. The evidence supporting the former charge indicated defendant assisted Aguilar in shooting the individual who, in their minds, had shot Aguilar's brother three hours earlier, [***19] and had shot at defendant on several occasions a few weeks before. By contrast, the evidence supporting the latter charge showed defendant was the instigator and perpetrator of a killing for which the only motive was punishing Jose Castro for refusing to abandon his car on defendant's demand. We find defendant has failed to meet his burden of showing the evidence supporting either charge was so inflammatory as to create prejudice regarding the other.

We also find the People's case on both charges was sufficiently strong to render joinder proper. (*Lucky*, *supra*, 45 Cal. 3d at p. 278.) Defendant contends the People's case on the Castro charges was weak, emphasizing the favorable dispositions granted to the witnesses and the alleged unreliability of Mandich's identification. Contrary to defendant's argument, we find the evidence of the Castro homicide to be comparable to, if not stronger than, the evidence of the Navarette homicide.

Defendant contends "Castro evidence" was tainted by the favorable dispositions received by the witnesses. None of the evidence inculpating defendant on the Castro charges could have been the dubious product of favorable prosecutorial treatment. David [***20] Lozano was allowed to plead guilty to voluntary manslaughter and received a maximum sentence of 11 years, but his testimony echoed his June 4, 1990, pretrial statement, which he offered prior to his arrest and disposition in this case. Oscar Montes pleaded guilty to voluntary manslaughter pursuant to an agreement that he would receive no more than four years imprisonment. But Montes's trial testimony was of minimal value to the People; his value as a witness derived from his tape-recorded interview of June 1, 1990, which preceded his plea. Moreover, due to the disposition accepted by two of the witnesses on the Navarette count, Walter Aguilar and Mauricio Soriano, we cannot find the dispositions [*425] to be a meaningful basis for distinguishing the strength of the evidence on the two charges.

The People actually presented more evidence corroborating the gang members' testimony with respect to the Castro charges. The People tied both Velasquez and Soriano to the shooting through their fingerprints; no such physical corroboration supported the Navarette charge. Furthermore, David Mandich, a disinterested witness, identified defendant as the shooter, both in court and at a lineup. Although [***21] defendant naturally challenges these identifications, observing Mandich failed to identify defendant from photographs, initially identified the perpetrator as a Black male, and described the shooter's jacket as being black, Mandich's description was consistent with the statements of [**90] Montes and Lozano. Mandich correctly described the number and positioning of Castro's assailants (two, including the shooter, at the left front of the car and two at the right front), he described the location where the car was parked, he described how the shooter was talking to the driver, and then, after the shooting, how all four assailants began running. He further identified defendant's jacket, although, according to Montes, it was silver with black lettering; someone else in the party wore the black Raiders jacket. Mandich correctly described defendant's height in both absolute and relative terms. Considering the evidence as a whole, we find the evidence supporting the Castro charges was sufficiently strong to support the denial of the motion. n3

> n3 The evidence supporting the Navarette charge was also convincing. Both defendant's statement and those of his passengers showed he drove the truck. The testimony of disinterested witnesses Rudolfo Rivera and Carlos Montes further confirmed the driver accelerated and maneuvered the truck in a way that facilitated the shooting and escape.

[***22]

Defendant cannot show that the evidence supporting either charge was unusually likely to inflame the jury or impermissibly weak. (*Musselwhite*, *supra*, 17 Cal. 4th at pp. 1244-1247.) We find the trial court properly exercised its discretion in joining the charges,

and defendant received his due process right to a fair trial.

2. Transfer to the Northwest Judicial District

Defendant challenges the trial court's transfer of the case from the Central Judicial District of the Los Angeles Superior Court to the Northwest Judicial District. He contends the transfer denied him his rights both to vicinage and a jury chosen from a fair cross-section of the community. We reject both claims.

On April 16, 1992, Judge Stephen Czuleger announced he would transfer the case from the Central Judicial District to the Northwest Judicial District [*426] on April 21. Defendant moved to impanel prospective jurors from the Central Judicial District to provide him with a jury drawn from a representative cross-section of the community. Defendant further moved to quash the Northwest Judicial District jury panel, alleging a systematic exclusion of minority jurors.

Defendant based the motion to quash [***23] on demographic evidence, including the testimony of Juanita Blankenship, the administrator of litigation support services for Los Angeles County Superior Court, and social demographer Dennis Willigan. The trial court rejected the motion. The court found transfer was authorized by *Hernandez v. Municipal Court* (1989) 49 Cal. 3d 713, 263 Cal. Rptr. 513, 781 P.2d 547 (*Hernandez*) . The trial court rejected defendant's allegation of systematic exclusion, basing its analysis on *Duren v. Missouri* (1979) 439 U.S. 357, 58 L. Ed. 2d 579, 99 S. Ct. 664 (*Duren*) . The trial court properly denied the motion.

As the trial court correctly observed, *Hernandez* authorizes intracounty transfer of cases. In *Hernandez*, we held the boundaries of vicinage are coterminous with the boundaries of the county. (*Hernandez*, *supra*, 49 Cal. 3d at p. 729.) Accordingly, *Hernandez* decided "there is no violation of the vicinage requirement when a criminal defendant is tried in Los Angeles County by a jury drawn from Los Angeles County " (*id.* at p. 722, 263 Cal. Rptr. 513, 781 P.2d 547), and we decline defendant's request to reconsider that conclusion. Furthermore, as we recently held in [***24] *Price v. Superior Court* (2001) 25 Cal. 4th 1046, 1065, the Sixth Amendment right to vicinage was not incorporated by the Fourteenth Amendment against the states, and thus the transfer implicates no federal constitutional right.

The trial court also properly concluded defendant failed to establish a prima facie violation of his right to a jury drawn from a fair cross-section of the community. " 'In order to establish a prima facie violation of the fair cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation [**91] to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.' " (*People v. Howard* (1992) 1 Cal. 4th 1132, 1159, 824 P.2d 1315, quoting *Duren*, *supra*, 439 U.S. at p. 364.) The trial court determined defendant satisfied only the first prong of this test.

We have recognized that Hispanics are a cognizable group. (*People v. Ramos* (1997) 15 Cal. 4th 1133, 1154, 938 P.2d 950 [***25] [*427] (*Ramos*); *People v. Sanders* (1990) 51 Cal. 3d 471, 491, 273 Cal. Rptr. 537, 797 P.2d 561 (*Sanders*) .)

Whether defendant satisfies the second prong is less certain. The evidence presented revealed that although 13 percent of the jury-eligible population of the Northwest Judicial District was Hispanic, only 7.7 percent of the district's jury pool in May and June 1992 was Hispanic. This resulted in an "absolute disparity" of 5.3 percent, and a "comparative disparity" of approximately 40.8 percent. n4 Neither we nor the United States Supreme Court has decided which test better measures alleged violations of the cross-section right or what degree of disparity is impermissible. (*Ramos*, *supra*, 15 Cal. 4th at p. 1155.) We need not decide either question here, because defendant clearly failed to satisfy *Duren's* third prong.

n4 Courts calculate the "absolute disparity" by subtracting the proportion of the underrepresented group in the pool (figure B) from the underrepresented group's proportion of the population (figure A). (*People v. Breaux* (1991) 1 Cal. 4th 281, 297, fn. 3, 821 P.2d 585.) In this case, subtracting 7.7 percent from 13 percent yields 5.3 percent. Courts calculate the comparative disparity by dividing the absolute disparity by figure A and multiplying the result by 100. (*Ibid.*) In this case, dividing 5.3 percent by 13 percent yields .4077, which produces a comparative disparity of 40.77 percent.

[***26]

The third prong requires defendant to show the state selected the jury pool in a constitutionally impermissible manner that was the probable cause of the disparity. (*People v. Bell* (1989) 49 Cal. 3d 502, 524, 262 Cal. Rptr. 1, 778 P.2d 129 (*Bell*) .) The evidence presented below showed Los Angeles County had formerly relied on voter registration lists to compile its jury pools, and added Department of Motor Vehicles (DMV) records in the early 1980's to provide a more representational list. We have observed that Code of Civil Procedure section 197 prescribes that a list derived from voter and driver records " 'shall be considered inclusive of a representative cross-section of the population' " where it is properly nonduplicative. (*Sanders*, *supra*, 51 Cal. 3d at p. 496, fn. 9, 273 Cal. Rptr. 537, 797 P.2d 561.)

Defendant now contends the county's failure to supplement these two lists with other "readily available lists" demonstrates the systematic exclusion required by *Duren*. This claim fails because the United States Constitution "forbids the *exclusion* of members of a cognizable class of jurors, but it does not require that venires created by a neutral selection [***27] procedure be supplemented to achieve the goal of selection from a representative cross-section of the population." (*Bell*, *supra*, 49 Cal. 3d at p. 530.) As the United States Fourth Circuit Court of Appeals has explained, the failure of a particular group to register to vote in proportion to its share of the population cannot constitute improper exclusion attributable to the state. (*United States v. Cecil* (4th Cir. 1988) 836 F.2d 1431, 1448-1449.) So long as the state uses criteria [*428] that are neutral with respect to the underrepresented group, a defendant cannot satisfy *Duren*'s third prong by showing the state could have adopted other measures to improve further the group's representation. (*People v. Currie* (2001) 87 Cal. App. 4th 225, 235-237.) The challenged state action must be the probable *cause* of the disparity (*Bell*, at p. 524); defendant has pointed only to the state's inability to provide a *remedy*. Without more, defendant's claim challenging the Los Angeles County Northwest Judicial District jury pool must fail.

3. Voir Dire Questions and Challenges for Cause

Defendant contends the prosecutor offered [***28] misleading descriptions of the case on voir dire, which led to the erroneous exclusion of [**92] jurors for cause. He contends these jurors offered responses that appeared to call into question their ability to keep an open mind as to penalty only because the prosecutor characterized the facts of the case as being relatively benign for a capital case. The result of this allegedly improper characterization, defendant argues, was a jury predisposed to impose death under the particular circumstances of this case. We conclude both the questioning and the excusals were proper.

a) Prospective Jurors Gertrude W., Patrice V. and Alicia B.

After the court asked the panel some questions, the defense commenced its voir dire by noting some people believe only individuals like Adolf Hitler or Jeffrey Dahmer deserve death. The trial court sustained the prosecutor's objection to defense counsel's asking a prospective juror whether she could vote to execute Hitler or Dahmer. The prosecutor used her voir dire to explain, without objection, the concepts of accomplice liability and the felony-murder doctrine. When asked, Prospective Juror Gertrude W. confirmed she would not impose the death penalty in [***29] a case, like the instant one, where the defendant did not personally commit one of the murders, and did not plan or premeditate the other. She told the court, "I don't think I would consider voting for death." The court excused Prospective Juror Gertrude W. for cause.

At the conclusion of the first panel's voir dire, the trial court remarked the first questioning went very smoothly. Neither party disagreed with this characterization. With respect to future panels, the court warned the defense not to ask whether jurors would favor the death penalty for individuals such as Jeffrey Dahmer or Charles Manson, but instead to limit its inquiry to the facts of the instant case. The court likewise cautioned the prosecutor not to ask prospective jurors if they could impose the death penalty for an unintentional felony murder, since there was a second, intentional murder charged.

[*429] Thereafter, the court questioned Prospective Juror Patrice V., who noted on her questionnaire her belief that "the death penalty was state sanctioned murder." She stated that "it would be very difficult" for her to sentence someone to death. She thought she could set aside her personal feelings if she received "very [***30] clear instructions about what my obligation was." Prospective Juror Alicia B. stated she did not "fully agree with the death penalty." The prosecutor described the general principles of accomplice liability and felony murder. She asked prospective jurors whether they could return a death verdict if, in one of the charged murders, defendant did not personally shoot the victim, and, in the other, defendant neither planned nor premeditated the murder.

Upon inquiry, Prospective Juror Patrice V. confirmed she considered the death penalty "state sanctioned murder." Patrice V. agreed she "would not consider the death penalty in this type of case." Prospective Juror Alicia B. confirmed she did not really agree with the death penalty. She did not feel she would consider death as a possible penalty, as this was not "the right kind of case" for capital punishment. The court later followed up the prosecutor's questions by asking whether Alicia B. would consider voting for death if she heard about defendant's prior violent misconduct during the penalty phase. Prospective Juror B. answered, "This is my position. That this case is not the case for [the] death penalty," no matter what evidence [***31] the People presented during the penalty phase. The trial court excused both Prospective Jurors Alicia B. and Patrice V. for cause.

After a brief recess, the defense expressed its concern that the court precluded defense questions about capital punishment in the Dahmer or Manson cases, yet allowed the prosecutor to use a "misleading nonegregious hypothetical when questioning those same jurors." The court reiterated its ban on the defense's Hitler/Dahmer/Manson inquiries, and noted the prosecutor had offered her hypotheticals without timely objection. The court found it "fair for the prosecutor to point out [that a felony] murder may be accidental, nonintentional or it may be intentional as well." For future questioning, the court granted the defense some "rebuttal" voir dire after the prosecutor had finished. [**93] The defense announced its intention to ensure the hypotheticals accurately described the evidence in the case.

Because there had been no objection, the court refused to revisit any of the excusals the court had already allowed. The court stated its belief, however, that "almost all of [the jurors excluded on the People's motion] were what we would call *Witherspoon* [***32] [*v. Illinois* (1968) 391 U.S. 510, 20 L. Ed. 2d 776, 88 S. Ct. 1770] excludables. Most, if not all, were those that were adamantly opposed and would not impose [the death penalty under] any circumstances."

[*430] b) Prospective Jurors Linda H., Martha C., Arthur R. and Lynn J.

During the trial court's inquiry, Prospective Juror Linda H. announced, "I'm against the death penalty." She agreed, however, she could set aside her personal opinion in serving as a juror. After describing the aiding and abetting and felony-murder doctrines, the prosecutor asked about Linda H.'s questionnaire comment that "when a jury sentences someone to death, it's murder." Ms. H. confirmed her opposition, stating, "I'm against the death penalty always." She stated she could not vote for death "in any case." The court excused her for cause.

During the trial court's inquiry of a later panel, the court asked Prospective Juror Martha C. about her questionnaire comment that, given the choice, she would always vote for life imprisonment without possibility of parole. She answered she did not think she could envision any set of circumstances that would prompt her to vote for death. Ms. C. also confirmed [***33] her questionnaire remark that if she sentenced someone to death, she would feel guilty for the rest of her life. She later told the prosecutor she did not think she could impose a sentence of death "regardless of the evidence in this case."

After hearing the prosecutor's description of aiding and abetting liability, Prospective Juror Arthur R. volunteered he would have a difficult time finding an aider and abettor guilty of first degree murder, and he could do so only where it was "pretty clear that the person was really connected." Mr. R. admitted he was not sure whether he could vote for death, "regardless of the evidence in this case." He stated, "I rather feel that I would be inclined to not [impose a death sentence]." When asked further whether he could vote for death "if you felt it was appropriate," he thought he would "not [be] able to follow through."

Prospective Juror Lynn J. volunteered he thought it might be best to limit capital punishment to premeditated and deliberate murders. When later questioned, Mr. J. confirmed his questionnaire statement that the death penalty should be limited to cases of mass murder, unusual cruelty, torture or murder while in prison. When [***34] asked if he could nevertheless vote for death in the instant case, which did not involve such factors, he answered affirmatively. When the prosecutor asked whether he could consider death as a penalty considering "what you know about this case," the trial court sustained defendant's objection. Mr. J. averred he could vote for death "if it involves torture or some activity that's at the highest level of crime." Upon further inquiry, Mr. J. agreed that neither murder in the commission of an attempted robbery nor murder by aiding and abetting met his standards for [*431] imposing death. Accordingly, he did not believe he could consider voting for death in this case. The trial court excused Prospective Jurors Martha C., Arthur R. and Lynn J. for cause.

c) Analysis

Trial courts excuse for cause a juror whose views on

capital punishment would " ' "prevent or substantially impair" ' " the performance of the juror's duties. (*Morgan v. Illinois* (1992) 504 U.S. 719, 728, 119 L. Ed. 2d 492, 112 S. Ct. 2222; *Wainwright v. Witt* (1985) 469 U.S. 412, 424, 83 L. Ed. 2d 841, 105 S. Ct. 844 (*Wainwright*);*Bradford, supra*, 15 Cal. 4th at p. 1318.) The real question [***35] is " ' "whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death *in the case before the juror.*" ' " (*Bradford*, at pp. 1318-1319, quoting *People v. Hill* (1992) 3 Cal. 4th 959, 1003, 839 P.2d 984.) A juror is subject to exclusion for cause if [**94] she "would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances ...." (*People v. Kirkpatrick* (1994) 7 Cal. 4th 988, 1005, 874 P.2d 248 (*Kirkpatrick*) .)

To facilitate the intelligent exercise of both peremptory challenges and those for cause, parties may inform prospective jurors of the general facts of the case. (*People v. Ervin* (2000) 22 Cal. 4th 48, 70, 990 P.2d 506 (*Ervin*);*Kirkpatrick, supra*, 7 Cal. 4th at pp. 1004-1005.) A prosecutor may therefore inquire whether a juror will be able to impose the death penalty on a defendant who commits felony murder (*People v. Pinholster* (1992) 1 Cal. 4th 865, 916-918, 824 P.2d 571), or on a defendant [***36] who did not personally kill the victim. (*Ervin*, at pp. 70-71.) The trial court properly exercised its broad discretion in allowing the prosecutor's voir dire. (*Pinholster*, at p. 918.) To the extent a more accurate characterization of the case was possible, defendant had the opportunity to provide it. The trial court correctly found defendant had waived any challenge to the prosecutor's questioning by failing to offer a timely objection. (*People v. Medina* (1995) 11 Cal. 4th 694, 740, 906 P.2d 2 (*Medina*) .) Even after receiving the court's advice about the need for timely objection, defendant failed to object to ensure that the prosecutor offered a more accurate description of the case. Where defendant offered a proper objection, the trial court sustained it. Furthermore, the trial court expressly indicated it would not dismiss for cause a prospective juror who [*432] based her stated inability to impose the death penalty on a description of the case that the court deemed misleading. n5

> n5 The prosecutor asked Prospective Juror Doris K., "Knowing what you know now about this case ... it doesn't necessarily involve premeditation and deliberation, especially with respect to the robbery murder. [P] ... Would it be fair to say that as you sit here today you don't see yourself actually imposing a sentence of death." Defendant objected. The court reminded the prosecutor the People alleged the Navarette murder was premeditated. The court further found the prosecutor had omitted any reference to any aggravating evidence. Although the court declined to restrict the prosecutor's voir dire, the court thrice stated it would not dismiss Prospective Juror Doris K. for cause on this record.

[***37]

We uphold both the questioning and the excusals. If a juror's responses are equivocal or conflicting, the trial court's determination of the juror's fitness to serve is binding. (*People v. Cooper* (1991) 53 Cal. 3d 771, 809, 281 Cal. Rptr. 90, 809 P.2d 865.) If there is no inconsistency, we uphold the determination below if it is supported by substantial evidence. (*Ibid.*) In other words, only if the record discloses no evidence from which a rational trier of fact could find a juror was qualified to serve will we find error. Prospective Juror Linda H.'s comments revealed her unambiguous opposition to the death penalty, and the trial court properly excused her. Substantial evidence likewise supports the exclusion of the other jurors. To the extent their responses could support multiple inferences, we defer to the trial court's determination of their unfitness to serve. (*Ibid.*)

4. Peremptory Challenges Against Death Penalty Skeptics

Defendant contends the prosecutor committed reversible error in exercising peremptory challenges against four prospective jurors who expressed skepticism about capital punishment, even though they were qualified to serve in accordance [***38] with *Witherspoon v. Illinois, supra*, 391 U.S. 510 and *Wainwright, supra*, 469 U.S. 412. Defendant did not object to these challenges, and thus failed to preserve the issue for appeal. (*People v. Champion* (1995) 9 Cal. 4th 879, 907, 39 Cal. Rptr. 2d 547, 891 P.2d 93 (*Champion*) .)

Furthermore, these challenges were proper. We have distinguished between the impermissible practice of excluding jurors based on their membership in a racial or ethnic group and the permissible practice of excluding jurors based on their attitudes or [**95] viewpoints. (*People v. Turner* (1984) 37 Cal. 3d 302,

313-315, 208 Cal. Rptr. 196, 690 P.2d 669, overruled on another ground in *People v. Anderson* (1987) 43 Cal. 3d 1104, 1115, 240 Cal. Rptr. 585, 742 P.2d 1306.) Because both parties may exercise peremptory challenges to remove jurors with unfavorable attitudes, the practice does not produce a jury biased toward death. (*Turner*, at p. 315.) We therefore [*433] permit prosecutors to exercise peremptory challenges against prospective jurors who express skepticism about capital punishment. (*People v. Bolin* (1998) 18 Cal. 4th 297, 317, 956 P.2d 374 [***39] (*Bolin*);*Champion*, *supra*, 9 Cal. 4th at p. 907.)

5. Defendant's Absence from Sidebar Conferences

The trial court inquired of 12 prospective jurors who had marked on their juror questionnaires "confidential" regarding specific questions. Two of these jurors, Raymond F. and Cecil H., eventually served on the jury. The prosecutor and both counsel were present at these sidebar conversations. Defendant neither asked to participate nor objected to his absence. He now contends his absence deprived him of his right to be present at trial, which is protected by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, article I, section 15 of the California Constitution, Penal Code sections 977 and 1043, and common law.

a) Constitutional law

A criminal defendant's federal constitutional right to be present at trial, largely rooted in the confrontation clause of the Sixth Amendment, also enjoys protection through the due process clause of the Fifth and Fourteenth Amendments (*United States v. Gagnon* (1985) 470 U.S. 522, 526, 84 L. Ed. 2d 486, 105 S. Ct. 1482 (*Gagnon*)) " 'whenever [***40] his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge,' " but not " 'when presence would be useless, or the benefit but a shadow.' " (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745, 96 L. Ed. 2d 631, 107 S. Ct. 2658, quoting *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-107, 78 L. Ed. 674, 54 S. Ct. 330.) Article I, section 15 of the California Constitution applies the same standard. (*People v. Waidla* (2000) 22 Cal. 4th 690, 742, 996 P.2d 46 (*Waidla*) .)

Defendant has not indicated any way in which his presence at the sidebar conferences bore a reasonably substantial relation to his opportunity to defend himself. He admits the impossibility of knowing what sudden impressions and unaccountable prejudices he might have formed. Because there must be a "reasonably substantial relation" to defendant's ability to defend himself, and not a mere "shadow" benefit, we must reject such claims based on undue speculation. (*Waidla*, *supra*, 22 Cal. 4th at p. 742; *People v. Johnson* (1993) 6 Cal. 4th 1, 19, 859 P.2d 673 (*Johnson*) .)

In *Johnson*, the trial [***41] court held a sidebar conference during trial to determine whether a juror should have been dismissed. Evidence showed the [*434] juror had (1) nodded and " 'consistently smiled' at defendant, 'to the extent that [his] teeth [were] showing' "; (2) frequently greeted defendant before lunch breaks; (3) concealed a prior arrest for narcotics possession; and (4) apparently failed to pay attention or slept during proceedings. (*Johnson*, *supra*, 6 Cal. 4th at pp. 16-17.) After the in camera hearing, which neither the prosecutor nor defense counsel attended, the court excused the juror for the latter two reasons. In *Johnson*, unlike the instant case, some of the questions raised at the conversation from which the defendant was absent concerned activity in which he was personally involved and would have personal, possibly exclusive knowledge. n6 We rejected Johnson's allegation [**96] that he was improperly excluded (even though Johnson both objected to the hearing on the juror's fitness and requested to be present) because we deemed his claim that he "might have helped his counsel" too speculative to show his presence bore a reasonably substantial relation to his ability to defend against the [***42] charges. (*Johnson*, at pp. 18-19.) A fortiori, we must reject defendant's instant contention.

n6 The confidential sidebar conferences here concerned past criminal behavior on the part of the prospective jurors, their friends or relatives, the criminal victimization of a relative, the possible professional hardship imposed by jury service, participation in Overeaters Anonymous, psychological issues regarding whether a prospective juror was a leader or follower, the Rodney King case, religious questions concerning capital punishment, and concern about the confidentiality of identities of jurors and their posttrial security. The one prospective juror who commented on defendant personally, indicating his failure to look at jurors suggested his guilt, was excused for cause by the court on its own motion, which was at the defendant's "request."

b) Statutory law

Defendant further contends his absence deprived him of his statutory and common law rights. We have observed that both the United States Constitution [***43] and the California Penal Code do not follow the common law on this subject. (*People v. Grant* (1988) 45 Cal. 3d 829, 845, 248 Cal. Rptr. 444, 755 P.2d 894.) Insofar as the statutory right is concerned, we have recognized its relation to the constitutional right. In *Ervin*, *supra*, 22 Cal. 4th at page 74, we stated that where the proceeding bears no reasonable relation to defendant's ability to defend against the charges, sections 977 and 1043 do not *require* defendant's presence. In *Waidla*, *supra*, 22 Cal. 4th at page 742, we stated those sections do not *entitle* a defendant to be present where the [**97] constitutional standard has not been met. Although we find the constitutional standard has not been met here, we analyze the issue to place our prior statements in their proper context.

We have long recognized a hierarchy of proceedings concerning the need for the defendant's presence. In *People v. Jackson* (1980) 28 Cal. 3d 264, 168 [*435] Cal. Rptr. 603, 618 P.2d 149, we cited section 977's provisions that a defendant could not waive presence for certain fundamental proceedings (arraignment, plea, preliminary hearing, the [***44] taking of evidence by the trier of fact, and sentencing), but could waive presence for " 'all other proceedings.' " (*Jackson*, at p. 309.) We further observed a third category; unlike the first two categories, the fundamental and " 'all other' " proceedings, for which a defendant was entitled to be present, we noted "the accused is not entitled to be personally present either in chambers or at bench discussions which occur outside of the jury's presence on questions of law or other matters in which defendant's presence does not bear a ' "reasonably substantial relation to the fullness of his opportunity to defend against the charge." ' " (*Ibid.*)

We reiterated these categories in *People v. Holt* (1997) 15 Cal. 4th 619, 706, 937 P.2d 213 (*Holt*) . We recalled that section 977 requires a defendant to be present at the five fundamental proceedings and entitles him to be present at all others. We added, however, "that neither [section 977] nor the constitutional right to be present at trial extends to chambers or bench discussions outside the presence of the jury when those matters do not bear a reasonably substantial relation to the opportunity to defend." [***45] (*Holt*, at p. 706.) We evaluated the sidebar and in-chambers discussions at issue in *Holt*, and concluded, "Since his presence at [those] proceedings was not necessary to protect his interests, assure him a fair and impartial trial, or assist counsel in defending the case, there was no error" in excluding Holt from the proceedings. (15 Cal. 4th at pp. 706-707.)

Holt and *Jackson* illuminate our statements in *Ervin* and *Waidla*. In proceedings that are not in chambers or at sidebar, a defendant is entitled (but not required) to be present (*Ervin*, *supra*, 22 Cal. 4th at p. 74.) n7 On the other hand, for those proceedings that are beyond the scope of section 977, defendants do not have a right to be present unless the constitutional standard has been met. (*Waidla*, *supra*, 22 Cal. 4th at p. 742.)

> n7 Of course, if the defendant's presence does not bear a reasonable relationship to his ability to defend, an erroneous exclusion may well be harmless. (*People v. Medina* (1990) 51 Cal. 3d 870, 902-903, 274 Cal. Rptr. 849, 799 P.2d 1282.)

[***46]

There are sound public policy reasons why a defendant has a lesser interest in personal presence when the jury is also not present. (Cf. *People v. Hovey* (1988) 44 Cal. 3d 543, 573, 244 Cal. Rptr. 121, 749 P.2d 776.) When a prospective juror seeks a confidential exchange with the court, allowing the defendant to be present "could well undermine the confidence and cooperation" necessary. (*Ibid.*) In light of one juror's concern about posttrial safety, allowing defendant to be present would have been "counterproductive" (*Gagnon*, *supra*, 470 U.S. at p. 527, 105 S. Xt. at p. 1485); the juror [*436] may have declined to share his concerns, remained on the jury, and allowed his concerns to incline him toward finding defendant guilty. Instead, the juror candidly acknowledged that his security concerns made him "partial towards the prosecution," and was dismissed from jury service. We therefore follow *Holt* and decline to extend the statutory right to personal presence to such confidential proceedings.

6. The Motion to Suppress

Detective Coulter interviewed defendant on the morning of January 22, 1990, after Detective Bercham had advised defendant of his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602.) [***47] Detective Coulter considered defendant to be a possible witness but not a suspect in either the Navarette or Castro murders. Later that

evening, Detective Coulter asked defendant to show him the residence of a suspect in a different case. The detective did not remind defendant of his *Miranda* rights. The detective taped their evening conversation, which disclosed evidence of the gang warfare between the 18th Street Gang and the Crazy Riders, but did not establish anything regarding the Navarette or Castro murders. When asked if the shooting of the white car with license plate number "2MTY" (Navarette) was in retaliation for a Crazy Riders shooting, defendant answered, "I know that they could have probably confused them, but I have heard nothing about it."

Defendant moved to suppress the evening statement as the unlawful product of a custodial interrogation that was not preceded by *Miranda* advisement. Defendant contended the detective was already aware of the gang rivalry between the 18th Street Gang and the Crazy Riders and of defendant's involvement with the 18th Street Gang. The trial court denied the motion to suppress. It held that Detective Coulter considered defendant [***48] to be only a possible witness on the Navarette and Castro murders, and the interview was not a custodial interrogation for *Miranda* purposes. The court further found the morning advisement adequately informed defendant of his constitutional rights, and no readvisement was necessary.

We accord deference to the trial court's factual findings, upholding all that are supported by substantial evidence. We independently determine from the facts whether the challenged statement was unlawfully obtained. (*Johnson*, *supra*, 6 Cal. 4th at p. 25.) Substantial evidence supports the conclusion that the evening interview was not an interrogation for *Miranda* purposes. Other than the question cited above, the interview did not concern the Castro or Navarette murders. Detective Coulter questioned defendant about other suspects, asking defendant, "Who *else* besides you has [*437] the license number of this white Toyota that [Crazy Riders] had been driving ...." We find the evening interview was not reasonably likely to elicit an incriminating response. (*People v. Wader* (1993) 5 Cal. 4th 610, 637, 854 P.2d 80.) n8

n8 Because we find defendant's conversation was not an interrogation, and thus no advisement was necessary, we need not evaluate the trial court's determination that the morning advisement sufficed.

[***49]

Furthermore, any error was harmless beyond a reasonable doubt. (*People v. Cahill* (1993) 5 Cal. 4th 478, 510, 853 P.2d 1037.) The statement had minimal value to the People's case on the Navarette count and no value on the Castro counts, whereas the People offered compelling cases for conviction with their other [**98] evidence. In short, we find beyond a reasonable doubt that the exclusion of the challenged statement would not have affected the outcome at trial.

7. Defendant's 187 Tattoo

Detective Bercham testified about defendant's tattoos. He explained the extent of defendant's 18th Street Gang tattoos signified his "hard-core" member status. The detective further testified defendant had on his forehead a tattoo of the number "187," the California Penal Code section proscribing murder, which had been added after the charged homicides occurred. After an Evidence Code section 402 hearing, the trial court overruled defendant's objections that evidence of the tattoo was unduly prejudicial within the meaning of Evidence Code section 352 and that Detective Bercham was not qualified to offer an expert opinion about the tattoo's [***50] significance. The trial court found the "187" tattoo highly probative, as it could be viewed as an admission of defendant's guilt. The court found it highly unlikely that an innocent person would obtain such a tattoo, and ruled the jury could conclude defendant displayed the tattoo as a badge of honor. Defendant reiterates his objection on appeal. n9

n9 Defendant now raises numerous state and federal constitutional grounds for error. The Attorney General contends these grounds were not preserved for appeal. As our analysis of alleged evidentiary error generally does not depend on whether the defense attaches the violation to the federal Constitution (see *People v. Cudjo* (1993) 6 Cal. 4th 585, 611-612, 863 P.2d 635), we need not determine whether defendant preserved these grounds.

Trial courts exercise discretion in determining both the admissibility of evidence under Evidence Code section 352 (*People v. Kipp* (1998) 18 Cal. 4th 349, 371, 956 P.2d 1169) and [***51] a witness's expert status (*Bolin*, *supra*, 18 Cal. 4th at pp. 321-322). The exercise of discretion is not grounds for reversal unless " 'the court exercised its discretion in an arbitrary,

capricious or patently absurd manner that resulted in a [*438] manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1124-1125, 885 P.2d 1 (*Rodrigues*),quoting *People v. Jordan* (1986) 42 Cal. 3d 308, 316, 228 Cal. Rptr. 197, 721 P.2d 79.) We find the trial court properly exercised its discretion both in admitting the tattoo into evidence and in permitting Detective Bercham to provide expert testimony describing the tattoo's significance.

The trial court properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt. The court reasonably considered the tattoo highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder. Defendant contends the admission was ambiguous, as he could have been highlighting his connection to the 18th Street Gang's Seventh Street subgroup. Such argument concerns only the weight of this evidence, not its [***52] admissibility, which does not require complete unambiguity. In *Kraft*, *supra*, 23 Cal. 4th at pages 1032-1036, we approved the admission of a coded list that arguably referred to a series of homicides committed by the defendant. We rejected the defense claim that the evidence was unduly speculative in that it "required interpretation to be understood by a reader." (*Id.* at p. 1035.) We further found any error in admitting the list harmless, as the jury would not accord weight to the list unless it found it was an admission of guilt as argued by the People. (*Ibid.*) Our analysis in *Kraft* leads us to reject defendant's Evidence Code section 352 objection to the admission of his "187" tattoo.

We likewise find the trial court properly exercised its discretion in permitting Detective Bercham to testify as an expert concerning defendant's gang-related tattoos, including the "187" mark. The Evidence Code authorizes a witness to testify as an expert "if he has special knowledge, skill, experience, training, or education sufficient" to qualify as an expert, "related to a subject that is sufficiently beyond common experience that [***53] the [expert] opinion ... would assist the trier of fact." (Evid. Code, § § 720, 801.) The detective testified he received training on gangs when he attended the police academy, and has since attended gang [**99] awareness school. He further testified that for most of the past 11 years and all of the past seven he has investigated street gangs and the crimes they commit.

The detective noted "187" was the California Penal Code section that proscribed murder. We have observed the culture and habits of criminal street gangs are not matters within common knowledge for Evidence Code section 801 purposes (*People v. Gardeley* (1996) 14 Cal. 4th 605, 617, 927 P.2d 713), and have therefore approved expert testimony to describe the significance of gang graffiti and hand signs. (*Champion*, *supra*, 9 Cal. 4th at pp. 919-924.) Just as the expert witness in *Champion* could testify as to the significance of specific symbols of graffiti [*439] without ascertaining the subjective intent of the graffiti's author, Detective Bercham could testify as to the significance of the "187" tattoo without obtaining defendant's statement [***54] on the subject. Furthermore, considering the tattoo itself was admissible, and the strength of the People's overall case, we conclude any error in admitting the detective's expert opinion was surely harmless.

8. Defendant's Prior Bad Acts

Defendant contends the trial court committed reversible error (1) by informing the jury, and permitting the People to inform the jury, of defendant's prior bad acts; and (2) by allowing Detective Bercham to imply defendant had served time in prison. Defendant contends these errors deprived him of a myriad of constitutional rights, including the right to a fundamentally fair trial. The record belies these claims.

The trial court and the People examined several prospective jurors on voir dire to determine whether they could impose a death sentence. The court sought to ascertain whether the prospective jurors' minds would remain open until the penalty phase, when both the People and the defense could introduce evidence about defendant's background. Accordingly, the court asked prospective jurors whether they would consider such information. Defendant cites, for instance, the following examination: "Would you take into account the background [***55] information in determining whether or not the punishment was appropriate[?] [P] The background information may be, on the one hand, bad things about the defendant. Say a prior conviction or prior act of violence, something like that. [P] On the other hand, it might be something favorable. Good deeds he's done, people he's helped, things he can do within the prison system that might be beneficial to others. [P] Would you be willing to consider that and give it whatever weight you thought was appropriate?" The court later inquired: "So if you heard evidence of two murders - I'm not saying any of this is going to happen, but if there was evidence of two murders and the prosecutor had all kinds of bad evidence about the defendant, and you conclude this guy is a rotten apple and we are better off without him, you couldn't vote for death under any circumstances?" When the juror

responded, "No," the court reiterated the hypothetical nature of the inquiry: "I don't want the jurors to get the wrong idea. I have no idea what evidence would be presented in the penalty phase. I'm just throwing these things out for purposes of the question."

The court carefully explained the inquiry was [***56] hypothetical, and the court had no knowledge of any specific misconduct on defendant's part. We therefore reject defendant's contention that this and similar inquiries prejudicially informed the jury that defendant had committed prior bad acts.

[*440] Defendant's assignment of reversible error to Detective Bercham's testimony is likewise meritless. When the prosecutor asked the detective to describe a particular tattoo of defendant's, Detective Bercham noted it was very common, and people often obtained it while in prison. After the defense objected, the court ruled, "Why don't we just clarify that. [P] You don't have any reason to believe that was done in prison?" Detective Bercham agreed, "No, I don't know where this was done." The trial court properly restricted the detective from implying defendant had served time in state prison. No error occurred.

[**100] 9. The Continuance

In July 1992, the prosecutor requested not to have any court proceedings during the week of August 17-21, 1992, apparently because she had a planned vacation. Although the prosecutor preferred to delay the start of trial until August 24, the trial court ruled that a delay would impede the court's retention of [***57] jurors. The court instead preferred to begin on August 10, allowing the jury a break in the middle of an expected three-week trial. The defense did not object to this schedule.

Defendant now contends this break of five court days, and nine total days, n10 violated numerous constitutional provisions. n11 In *People v. Johnson* (1993) 19 Cal. App. 4th 778, another capital case, n12 the parties agreed to give the jury a recess, for nine court days and 17 calendar days, for the December holiday season. (*Id.* at p. 792.) The Court of Appeal, following *People v. Harris* (1977) 73 Cal. App. 3d 76, 83, 140 Cal. Rptr. 697, held the defense's failure to object waived the issue on appeal. (*Johnson*, at p. 794.) Defendant's failure to object likewise waives the instant claim.

n10 The court adjourned on Friday, August 14, to give the defense additional preparation time.

n11 Specifically, defendant alleges violations of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and violations of article I, sections 1, 7, 15, 16, and 17 of the California Constitution. With the exception of *Hicks v. Oklahoma* (1980) 447 U.S. 343, 65 L. Ed. 2d 175, 100 S. Ct. 2227, which he cites in support of "an additional due process violation," defendant's argument relies entirely on California cases. [***58]

n12 The jury convicted defendant and returned a death sentence, but the trial court modified the punishment to life imprisonment without possibility of parole. (*People v. Johnson*, *supra*, 19 Cal. App. 4th at p. 780.)

Defendant cites *People v. Santamaria* (1991) 229 Cal. App. 3d 269, 280 Cal. Rptr. 43 (*Santamaria*),which includes a footnote indicating "the court's abuse of discretion was of such magnitude that whether or not appellant objected is irrelevant." (*Id.* at p. 279, fn. 7.) The *Santamaria* opinion, however, did not purport to abrogate the duty to object generally. On its [*441] facts, it found the court's abuse was so great as to warrant appellate relief notwithstanding the absence of objection. The facts of *Santamaria* differ markedly from those here, and it therefore does not govern our analysis.

The *Santamaria* trial court adjourned the trial during jury deliberations for 10 calendar days, six of which would have otherwise been court days. (*Santamaria*, *supra*, 229 Cal. App. 3d at p. 275.) The court planned to be away that [***59] week, and refused the People's request to transfer the matter to another judge, who could have presided over the deliberations, as provided by section 1053. (*Santamaria*, at p. 278.) The Court of Appeal, in finding the trial court abused its discretion, emphasized the timing of the delay. "It cannot be overemphasized that this prolonged and unwarranted interruption came at the most critical period in the trial. ... [P] Had the adjournment occurred in midtrial, [counsel's] recapitulation of the evidence during argument might have nullified or minimized the effect of the delay on the jurors' recall." (229 Cal. App. 3d at pp. 281-282.) The timing of the delay, and the disregard for the requested alternative of a substitute judge, distinguish *Santamaria* from the instant case.

Defendant also relies on *People v. Engleman* (1981)

116 Cal. App. 3d Supp. 14, 20, 172 Cal. Rptr. 474. Although the opinion does not fully record the procedural facts, it indicates the court shut down for three weeks, rather than one. The *Engelman* trial court also ignored section 1053. Accordingly, *Engelman* is likewise inapposite. We therefore conclude the defense's acquiescence [***60] in the continuance has waived this issue on appeal. (*People v. Johnson*, *supra*, 19 Cal. App. 4th at pp. 792-794.)

10. The Prosecutor's Closing Argument

Defendant alleges three instances of prosecutorial misconduct during closing argument, which he contends violated his rights under the Fifth, Sixth, Eighth and Fourteenth [**101] Amendments to the federal Constitution. We reject all three allegations.

a) The jacket

Defendant first objects to the following statement: "We know that the defendant was wearing a Raider's jacket on January 22. [P] Whether Mr. Montes believed it was a white jacket or silver jacket, it really doesn't matter. [P] We also know that according to David Mandich, that the defendant or the shooter was wearing some kind of team jacket. Whether it was a silver jacket, a dark blue jacket or black jacket, I don't think really matters, because we don't know beyond any doubt really what color this jacket [*442] contained in People's 16 looked like to David Mandich the night the murder happened. [P] And we don't know whether the defendant was really wearing the jacket in People's 16 the night of the murder. [P] We just know that two nights [***61] later he was wearing ...." The trial court overruled defendant's objection, and the prosecutor moved to a different subject.

Defendant contends the prosecutor knowingly falsified facts to protect what defendant deems the Achilles' heel of the case--David Mandich's identification of defendant. Oscar Montes testified that defendant wore a white or silver Raiders jacket both on the night of the Castro murder and the day he was arrested. Mandich initially told Detective Coulter the shooter wore a dark athletic jacket with lettering on the back. According to defendant, Mandich's incorrect description of the color of the jacket threatened to undermine the People's case. The prosecutor, defendant argues, therefore mischaracterized the time when defendant was arrested, stating it was two nights after the shooting, on January 22, rather than the afternoon of January 21. This mischaracterization, defendant asserts, weakened the inference that Mandich had misidentified the shooter.

This allegation fails for several reasons. First, the obvious import of the prosecutor's statement was that Mandich's correct observation that the shooter wore a team jacket with lettering was more significant [***62] than his error regarding its color, especially considering Detective Coulter's testimony that the satin-like jacket could have looked darker on the night of the shooting. Second, whether the prosecutor characterized the date of defendant's arrest as January 21 or 22 had little bearing on the accuracy of Mandich's identification. If defendant had access to only one Raiders jacket, Mandich's description was no more accurate if the date of the arrest were January 22 instead of January 21. If defendant had a second Raiders jacket, he could have just as easily worn it on January 21 as he could have worn it on January 22. Furthermore, there is no reasonable probability that defendant would have received a more favorable result absent this isolated comment. (*People v. Stansbury* (1993) 4 Cal. 4th 1017, 1057, 846 P.2d 756 (*Stansbury*) .)

b) Defendant's placement of the gun

Defendant also challenges the prosecutor's remark, "There was no reason for that gun to come back out and go to the head of Mr. Castro and for that gun to be fired, other than the fact that the defendant is a cold-blooded killer who didn't get what he wanted, when he wanted it, when he put a gun [***63] to the head of a man seated in a car that he wanted to take." Defendant failed to object and preserve this claim for appeal. (*People v. Hart* (1999) 20 Cal. 4th 546, 619, [*443] 85 Cal. Rptr. 2d 132, 976 P.2d 683 (*Hart*) .) Defendant's claim also founders on its merits. The record supports the argument that (1) defendant placed a gun to Castro's head, and (2) he fired the gun. The prosecutor carefully argued nothing more than those facts. Finally, any possible misconduct was harmless. (*Stansbury*, *supra*, 4 Cal. 4th at p. 1057.)

c) Mandich's credibility

Defendant's third allegation of misconduct concerns the prosecutor's characterization of David Mandich. Defense counsel had argued Mandich displayed "extreme bias" and that his "credibility on that identification issue was ridiculous." The prosecutor answered by arguing, "[Mandich] was about 90 percent certain [of his lineup identification] because he wanted to leave room for the possibility that the defendant had a twin [**102]

brother standing in this lineup. So that's how careful he was. [P] There is an honest man. This is one of the best witnesses you can ever have in a murder case. And the defense has to stoop to the level of [***64] calling this man, not only a liar, but a criminal himself is one of the most outrageous things I've ever heard in my career. And I don't think you should pay any attention to that." "And, Ladies and Gentlemen, that is the testimony of an honest witness, of a good witness, the kind of witness that I wish I had more of in these kinds of cases." Defendant now objects to this argument but failed to do so at trial, and therefore has waived this claim on appeal. (*Hart*, *supra*, 20 Cal. 4th at p. 619.) Furthermore, there is no merit to the allegation. The prosecutor exhorted the jury to credit Mandich's account based on matters within the record, not matters within her personal knowledge. (*Stansbury*, *supra*, 4 Cal. 4th at p. 1059, distinguishing *People v. Gates* (1987) 43 Cal. 3d 1168, 1187, 240 Cal. Rptr. 666, 743 P.2d 301.) Finally, any possible misconduct was harmless. (*Stansbury*, at p. 1057.)

11. Jury Instructions

The trial court refused to instruct the jury with many of defendant's proposed special instructions.

a) Instruction No. 11

Defendant asked the court to instruct the jury that "if you have any reasonable doubt as to the credibility [***65] or truthfulness of any statement made by any witness against the defendant, you must resolve that doubt in favor of the defendant and find such statement to be untrue." The trial court deemed the instruction duplicative of other instructions concerning false statements of witnesses, willfully false witnesses, and the presumption of [*444] innocence. Defendant now contends that whereas CALJIC No. 2.90 instructed the jury on reasonable doubt generally, it did not inform them of the need to find each witness's testimony true by that standard. To the extent defendant's proposed instruction went beyond CALJIC No. 2.90, it was incorrect and properly denied.

Contrary to defendant's requested instruction, the existence of reasonable doubt concerning some aspect of a witness's statement does not require its negation. We have observed "a trier of fact is permitted to credit some portions of a witness's testimony, and not credit others." (*People v. Williams* (1992) 4 Cal. 4th 354, 364, 841 P.2d 961.) In the instant case, for instance, the possibility that a witness falsely minimized his own involvement does not preclude the possibility that the rest of his description of an event was [***66] true. Furthermore, " 'It is ... established that each fact in a chain of circumstances need not be proved beyond a reasonable doubt.' " (*People v. Van Winkle* (1999) 75 Cal. App. 4th 133, 147, quoting *People v. Naughton* (1969) 270 Cal. App. 2d 1, 8, 75 Cal. Rptr. 451.)

Defendant's authority, *People v. Hidalgo* (1947) 78 Cal. App. 2d 926, 936, 179 P.2d 102, does not hold otherwise. The trial court there read the instruction defendant here requested, and rejected a defense request to read a similar instruction. (*Ibid.*) The Court of Appeal found the trial court's rejection of the other instruction was not error as it duplicated the instruction actually read. (*Ibid.*) The Court of Appeal nowhere stated the instruction was a correct statement of law, let alone one defendant was entitled to have read. n13

n13 It would be correct to instruct that the People must prove every element of the offense beyond a reasonable doubt, but a defendant is not entitled to that instruction. (*People v. Reed* (1952) 38 Cal. 2d 423, 430, 240 P.2d 590; *People v. Orchard* (1971) 17 Cal. App. 3d 568, 577, 95 Cal. Rptr. 66.)

[***67]

The trial court properly refused to read defense instruction No. 11.

b) Instruction Nos. 13 and 15

Defendant requested instruction No. 13: "Proof which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence. It merely raises a possibility and [**103] is not sufficient for an inference of fact." Defendant also requested instruction No. 15: "You have no right to convict the defendant of a crime upon mere suspicion however strong nor simply because there may be a preponderance of all of the evidence in the case against him nor merely because there is or may be strong reason to suspect that he is guilty. [P] Before you can lawfully [*445] convict, you must be convinced of the defendant's guilt beyond a reasonable doubt." The trial court found both instructions repeated the substance of CALJIC No. 2.90, and refused defendant's request. This was proper. Assuming, arguendo, that the proposed instructions correctly described the law, a defendant has no right to restatement of the reasonable doubt standard

expressed in CALJIC No. 2.90. (§ 1096a; *People v. Wright* (1988) 45 Cal. 3d 1126, 1134, 248 Cal. Rptr. 600, 755 P.2d 1049.) [***68]

c) Instruction No. 18

Defendant requested instruction No. 18: "You should view with extreme caution any purported out-of-court statement made by a witness that has been admitted as substantive evidence because they are not made under oath, and, if false, are not subject to prosecution [for] perjury. [P] Furthermore, in determining whether or not an out-of-court statement is true, you should consider the circumstances under which it was made including the fact that you did not have a chance to see the witness'[s] demeanor at the time the out-of-court statement was made, and that the statement was not subject to cross-examination at the time it was made." Defendant based the request on *People v. Lopez* (1975) 47 Cal. App. 3d 8, 13, 120 Cal. Rptr. 562. *Lopez* concerned a defendant's admission, but defendant argued *Lopez*'s rationale extends to other witnesses' extrajudicial statements also. In denying this request, the trial court correctly recognized the distinction between the extrajudicial statements of a party and those of a nonparty witness.

A party's extrajudicial statement may be offered against a party under Evidence Code section 1220 [***69] due to the declarant's identity. By contrast, the extrajudicial statements of a nonparty witness are not admissible unless they bear some indicia of trustworthiness. In this case, the People offered extrajudicial statements that were admissible under Evidence Code section 1235, which renders admissible the prior inconsistent statements of a witness. As the Law Revision Commission comments note, such prior inconsistent statements are trustworthy. "The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given [***70] in court." (Cal. Law Revision Com. com., Deering's Ann. Evid. Code (1986 ed.) foll. § 1235, pp. [*446] 389-390.) Accordingly, trial courts provide cautionary instructions only for extrajudicial statements made by a party. (*People v. Sims* (1976) 64 Cal. App. 3d 544, 556, 134 Cal. Rptr. 566.)

The trial court properly refused to read defense instruction No. 18.

d) Instruction No. 21

Defendant requested instruction No. 21: "The corroboration of the testimony of an accomplice required by law is not sufficient if it merely shows the commission of the offense or some or all of the circumstances thereof, or if it does no more than raise a suspicion of guilt of the defendant." The trial court refused to read the instruction, finding the standard CALJIC instructions adequately conveyed its substance. The trial court instructed the jurors with CALJIC Nos. 3.11 (Testimony of Accomplice Must be Corroborated) and 3.12 (Sufficiency of Evidence to Corroborate an Accomplice), and adequately advised them on how to evaluate accomplice testimony for purposes of [**104] corroboration. The trial court properly refused to read defendant's duplicative instruction. (*People v. Berryman* (1993) 6 Cal. 4th 1048, 1079-1080, 864 P.2d 40 [***71] (*Berryman*) .)

e) Instruction No. 23

The trial court agreed to read a modified version of defendant's instruction No. 23. The court agreed to instruct the jury: "The requirement of corroboration of the testimony of an accomplice is based on the notion that the testimony of an accomplice should be viewed with suspicion because it may have been given in the hope or expectation of leniency or immunity." It appears, however, the trial court inadvertently failed to read this instruction to the jury. The People now contend defendant's failure to object waived the issue. Without deciding whether defendant adequately preserved the issue for appeal, we find no error in its omission. The trial court properly instructed the jury on CALJIC Nos. 2.20 (Believability of Witnesses) and 3.18 (Testimony of Accomplice to be Viewed with Distrust). These instructions properly informed the jury how to consider accomplice testimony. (*People v. Pitts* (1990) 223 Cal. App. 3d 606, 881, 273 Cal. Rptr. 757; *People v. Castro* (1979) 99 Cal. App. 3d 191, 197, 160 Cal. Rptr. 156.) Even where an omitted instruction concerns an "essential element," its absence may be cured [***72] by other instructions. (*Musselwhite*, *supra*, 17 Cal. 4th at p. 1248.) No error appears.

f) The omitted written instructions

The trial court read CALJIC Nos. 2.02 and 2.03 orally, but inadvertently omitted these instructions from the written set with which the jury was [*447] provided. Defendant assigns error to this failure. The Attorney General contends defendant has waived this issue by failing to object at trial. Without deciding whether defendant preserved the issue, we find it fails on the merits. Although providing written instructions is "generally beneficial and to be encouraged," defendant has no federal or state constitutional right to instructions in writing (*People v. Samayoa* (1997) 15 Cal. 4th 795, 845, 938 P.2d 2 (*Samayoa*)), and the statutory right depends on an express request. (§ 1093, subd. (f).) Furthermore, defendant has not shown it is reasonably probable that the jury would have reached a result more favorable to defendant had it received a written copy of CALJIC Nos. 2.02 and 2.03. (*People v. Cooley* (1993) 14 Cal. App. 4th 1394, 1399; *People v. Blakley* (1992) 6 Cal. App. 4th 1019, 1023.)

12. Cumulative [***73] Error

Defendant contends the cumulative error that occurred during the guilt phase compels reversal. Consistent with our review of defendant's individual claims, we find no cumulative error occurred. (*Bradford*, *supra*, 15 Cal. 4th at p. 1344.)

B. Penalty Phase

1. Admission of Defendant's Possession of a Handcuff Key

Deputy Sheriff David Mertens searched defendant one evening and found a piece of metal concealed in defendant's wristband. The instrument, which the deputy considered a makeshift handcuff key, easily opened the handcuffs just like the ones restraining defendant when he traveled to court. Deputy Sheriff Hall searched defendant's property and discovered a shank. Defendant now contends the trial court erroneously admitted this evidence.

Section 190.3, factor (b) permits the trier of fact to consider the defendant's criminal activity that "involved the use or attempted use of force or violence or the express or implied threat to use force or violence." In *People v. Mason* (1991) 52 Cal. 3d 909, 277 Cal. Rptr. 166, 802 P.2d 950 and *People v. Gallego* (1990) 52 Cal. 3d 115, 276 Cal. Rptr. 679, 802 P.2d 169, we upheld the admission [***74] under section 190.3, factor (b) of evidence showing the defendant possessed weapons in jail and attempted to escape. (*Mason*, at pp. 954-957; *Gallego*, at pp. 155, 196.) In *People v. Howard* (1988) 44 Cal. 3d 375, 428, 243 Cal. Rptr. 842, 749 [**105] P.2d 279, we found that even possession of a handcuff key by itself could evince an express or implied threat to use force or violence. We did not conclusively decide the question [*448] in *Howard*, however, because we found the abundant additional evidence presented of violent activity rendered any error in admitting the handcuff key evidence harmless. (*Ibid.*) The People in the instant case also presented abundant additional evidence of violent activity. We find *Mason*, *Gallego* and *Howard* persuasive, and find the trial court did not commit prejudicial error in admitting the evidence in question.

Defendant cites *People v. Boyd* (1985) 38 Cal. 3d 762, 776, 215 Cal. Rptr. 1, 700 P.2d 782, where we found the defendant's removing a metal grating from an air vent was not admissible under section 190.3. In that case, "the Attorney General argued that the presumably violent removal of the grate [was] [***75] sufficient to justify admission of the evidence." (*Boyd*, at p. 776.) We rejected the contention that the violent injury *to the property* satisfied section 190.3. We had no occasion to consider the proposition, described in *Howard*, that "the possession of the handcuff key and its implied intended use to permit defendant to free himself from handcuffs, normally worn during defendant's transportation in the custody and presence of law enforcement personnel, constituted criminal activity which posed an 'implied threat' to use force or violence." (*People v. Howard*, *supra*, 44 Cal. 3d at p. 428.) The *Boyd* decision therefore does not lead us to find the trial court prejudicially erred in admitting the key evidence.

Defendant also asserts the admission of the key violated the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 15, 16 and 17 of the California Constitution. He acknowledges, however, that the same analysis governs both the constitutional claim and the allegation of error under Penal Code section 190.3, factor (b), because the statutory claims underlying defendant's [***76] motion "to exclude evidence about the purported handcuff key are the same arguments that support the constitutional issues. The trial court's resolution of one effectively resolved the other." In light of our finding that there was no error under Penal Code section 190.3, we find no constitutional violation.

2. Prosecutorial Argument

Defendant alleges violation of these same federal and state constitutional provisions by four instances of prosecutorial misconduct during closing argument. We reject all four allegations.

a) Remorse

The prosecutor argued defendant expressed no remorse for his behavior, and was proud of the killings. "The interesting thing about this [*449] defendant's behavior that night [of the Castro murder] is that he felt absolutely no remorse for what he had done. He ran back to the car. He told his friends 'Hey, I just shot the guy.' [P] There is some evidence according to the statement of Oscar [Montes] he was bragging about the fact that after he shot the guy, or as he was shooting the man, Joe Castro, that Joe Castro said, Quote 'Oh, shit.' This was something the defendant was bragging about to his friends. [P] He [***77] was bragging to his friends about the fact that he shot the guy. That he shot Joe Castro. [P] It shows the type of person that the defendant is and shows the type of murder that this was, and that's why under factor (a) these are things that you should, and I ask you to consider now, in determining the defendant's moral responsibility and the punishment that he deserves."

This argument was proper. Section 190.3, factor (a), to which the prosecutor expressly referred, authorizes the jury to consider the circumstances of the crime. The jury may consider the defendant's refusal to show any remorse in the context of the murder as an aggravating factor. (*Ramos*, *supra*, 15 Cal. 4th at p. 1164; *People v. Sully* (1991) 53 Cal. 3d 1195, 1249, 283 Cal. Rptr. 144, 812 P.2d 163.)

The prosecutor further emphasized defendant's failure to show remorse in the two years following the murders. "[Section 190.3], factor (k) evidence would have permitted that evidence [of remorse] to be presented to you if it existed. If the defendant [**106] wrote a letter to his mother saying 'I'm sorry, so sorry for the pain I've caused you and the pain I've caused the victims' families.' If he [***78] called his sister and said that, you would have heard that. [P] I think we have more than enough evidence that not only is the defendant a cold-blooded murderer, but he is really proud, proud of what he has done."

This argument was also proper. Although defendant characterizes this argument as an invitation to the jury to consider this fact aggravating, the prosecutor expressly referred to section 190.3, factor (k), which is available only to mitigate the murders. (*People v. Frye* (1998) 18 Cal. 4th 894, 1021, 959 P.2d 183 (*Frye*) .) The prosecutor properly argued defendant's lack of remorse showed the potential mitigating factor was inapplicable. (*People v. Pensinger* (1991) 52 Cal. 3d 1210, 1270-1271, 278 Cal. Rptr. 640, 805 P.2d 899.)

b) The placement of the gun

The prosecutor argued, "It was the defendant himself who walked up to the driver's side of that car, pointed the gun at the head of Mr. Castro and demanded he relinquish his car. ... I remember arguing at the guilt phase [*450] with regard to David Mandich's testimony that when the defendant was standing at the car, according to the accomplices, we had the defendant pointing the gun [***79] at the head of Joe Castro and threatening to kill him if he didn't get out of the car." As with her guilt phase argument, the prosecutor's argument correctly followed the record.

c) Inadequacy of imprisonment

The prosecutor argued prison was insufficient punishment for defendant. "The defendant, by [your] sending him to prison, isn't going to sit in prison for the rest of [his] life and think about how bad he feels and how sorry he is for what he's done. It will just be life for him, life as usual. ... [P] ... For this defendant, I don't think that prison is such a terrible thing. [P] The reason I say that is that prison is really an intolerable place for people that abide by the law. But for people that don't, for people that live by no laws at all, prison can be a very tolerable place." Defendant contends the evidence did not support this argument. We have approved similar comments that life imprisonment is an insufficient penalty given an individualized assessment of the defendant. (*People v. Smithey* (1999) 20 Cal. 4th 936, 997-999, 978 P.2d 1171; *People v. Lucas* (1995) 12 Cal. 4th 415, 496, 907 P.2d 373 [defendant's "brutality [***80] was such that he 'would not even see the bars' "].) This argument was proper.

d) Comparison to other special circumstance cases

Defendant argued his crimes were not the "worst of the worst." During argument, defense counsel asked "what kinds of heinous crimes are we talking about that justify the death penalty?" He then described in vivid detail the murders committed by infamous serial murderers, including Richard Ramirez, "the Night Stalker"; Lawrence Bittaker, who tortured, raped and murdered

five teenage girls, and recorded their death screams; David Carpenter, "the Trailside Strangler," who raped and killed "eight or ten" women; and William Bonin, "the Freeway Killer," who murdered 14 teenagers. Although the defense counsel conceded, "You don't have to be a mass murderer to get the death penalty," he argued, "I am trying to show you also that it takes more. [P] It takes the worst of the worst or it should for a death penalty. ... [Defendant] is not the worst of the worst. He is not in the category of people that should get the death penalty."

The prosecutor attempted to answer the question defense counsel posed. "What kind of cases do we have a death penalty for [***81] .... [P] The death penalty isn't sought in every case where special circumstances are alleged." The defense objected, citing *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383 [*451] (*Brooks*) . The court overruled the objection, finding the People's argument responded fairly to the defense argument. "I would never allow the prosecutor to stand up in the opening argument and give a laundry list of people in the State of California who committed one felony murder and were given the death penalty. I would never allow that. [P] [**107] But when you make the argument only the worst of the worst get the death penalty, and you give a laundry list of all the cases, giving the jury the impression that only those people are appropriate for death, it's proper for the prosecutor to point out there are cases involving special circumstances that are not appropriate for death."

The trial court properly overruled the objection. The prosecutor continued, explaining the numerous special circumstances that could support a death sentence. "Not all of those cases, not in every case where there is an allegation of special circumstances ... do we even seek the death penalty. ... [P] [Defense [***82] counsel] said you will see the death penalty ... in only the worst of the worst. I submit to you that's not correct. [P] I'm not going to give you names or specifics of cases, but there are cases where the death penalty is imposed ... where there is one count of murder committed. ... And these people do receive the death penalty." Finally, the prosecutor directed the jury's attention to defendant's individual circumstances. "It's not an appropriate function to speculate as to what other cases involve in terms of the evidence and the factors .... Your sole function in this case [is] to determine what those circumstances or factors are, the good and the bad, and weigh and balance them."

The Eleventh Circuit Court of Appeals found nonprejudicial error in the prosecutor's argument that the prosecution sought death in very few cases, which could " 'lead the jury to believe that the whole governmental establishment had already determined the appellant to be guilty ....' " (*Brooks*, *supra*, 762 F.2d at p. 1410, quoting *Hall v. United States* (5th Cir. 1969) 419 F.2d 582, 587.) The Eleventh Circuit expressed concern that "the argument improperly suggested [***83] that the prosecutor had canvassed all murder cases and selected this one as particularly deserving of the death penalty, thus infringing upon the jury's decisionmaking discretion and improperly invoking the prosecutorial mantle of authority." (*Brooks*, at p. 1413, fn. omitted.)

The prosecutor's argument neither implied any "governmental establishment" had determined the propriety of a death sentence in this case nor infringed upon the jury's discretion. Furthermore, the prosecution offered a fair response to the defense argument that capital punishment was properly limited to serial killers. If the defense argued that only the "worst of the worst" received a death sentence, the prosecutor was entitled to argue [*452] defendant was not among the "best of the worst," and a death sentence was therefore appropriate. This argument was proper.

3. Jury Instructions

Defendant contends the trial court improperly instructed the jury and improperly denied defendant's proposed instructions. We reject each allegation of instructional error.

a) CALJIC No. 8.88

The trial court instructed the jury with CALJIC No. 8.88, both orally and with a written copy. n14 Defendant now alleges [***84] the [**108] instruction is defective in that (1) it failed to guide the jury's sentencing discretion; (2) the "so substantial" standard created a presumption for death; and (3) it failed to define "aggravating" and "mitigating" for the jury. We have repeatedly rejected the instant challenges to CALJIC No. 8.88, and do so again. (*Arias*, *supra*, 13 Cal. 4th at pp. 170-171; *Rodrigues*, *supra*, 8 Cal. 4th at pp. 1191-1192; *Johnson*, *supra*, 6 Cal. 4th at p. 52.)

n14 "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. [P] After having heard all the evidence and having heard

and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. [P] An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. [P] The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole. [P] You shall now retire and select one of your number to act as foreperson, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree. [P] Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom."

[***85]

b) Defense special instruction No. 3

Defendant asked the court to read special instruction No. 3: "You may not consider as aggravation any evidence of unadjudicated acts allegedly committed by the Defendant unless you first determine beyond a [*453] reasonable doubt that (1) the Defendant committed the acts; [and] (2) the acts involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence." The trial court refused to read the instruction, finding it was duplicative of CALJIC No. 8.87, which informed the jury it could not consider the acts unless the jury found beyond a reasonable doubt that the acts occurred, but which did not invite the jury to determine for itself whether the acts involved the use, attempted use, or threat, of force or violence.

As the People note, we have upheld CALJIC No. 8.87 in the past. (*People v. Millwee* (1998) 18 Cal. 4th 96, 162, fn. 33, 954 P.2d 990.) Defendant asserts, however, that *Apprendi v. New Jersey* (2000) 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (*Apprendi*) requires the jury to find beyond a reasonable doubt that the evidence established the attempted, [***86] threatened, or actual use of force or violence. We reject this contention, and conclude *Apprendi* does not extend to require a jury to find beyond a reasonable doubt the applicability of a specific section 190.3 sentencing factor.

In *Apprendi,* the United States Supreme Court decided which sentencing bases must be determined (1) beyond a reasonable doubt (2) by a jury. *Apprendi* itself excluded from its scope "state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death." (*Apprendi*, *supra*, 530 U.S. at p. 496.) The *Apprendi* court cited as an example the sentencing scheme described in *Walton v. Arizona* (1990) 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047, whose holding compels rejection of defendant's instant claim. Arizona law provided that convicted first degree murderers were subject to a hearing in which the trial court decided whether to sentence the defendant to death or life imprisonment. A finding of first degree murder in Arizona was thus the functional equivalent of a finding of first degree murder with [***87] a section 190.2 special circumstance in California; both events narrowed the possible range of sentences to death or life imprisonment. n15

n15 An Arizona defendant sentenced to life imprisonment for first degree murder would be eligible for parole after 25 years of imprisonment. (*Poland v. Arizona* (1986) 476 U.S. 147, 153, fn. 4, 90 L. Ed. 2d 123, 106 S. Ct. 1749.)

Walton held there was no constitutional right to a jury determination that death was the appropriate penalty. (

Walton v. Arizona, *supra*, 497 U.S. at pp. 647-649.) As the *Apprendi* court explained, a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the [*454] requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence. [***88] " 'Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a [**109] crime a capital offense. What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed

....' " (*Apprendi*, *supra*, 530 U.S. at p. 497, quoting *Almendarez-Torres v. U. S.* (1998) 523 U.S. 224, 257, fn. 2, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (dis. opn. of Scalia, J.).)

As we observed in *People v. Anderson* (2001) 25 Cal. 4th 543, once a jury has determined the existence of a special circumstance, defendant stands convicted of an offense whose maximum penalty is death. (*Id.* at p. 589, fn. 14.) Therefore, a penalty determination of death does not result in a sentence that exceeds the statutory maximum prescribed for the offense of first degree murder with a special circumstance. The Eighth Circuit Court of Appeals has upheld the Federal Death Penalty Act's sentencing provisions through this [***89] reasoning: "The statutes at issue expressly authorize a maximum penalty of death and the sentencing factors of mental culpability and aggravating circumstances do not increase the sentencing range but rather provide the particularized standards for choosing which of the available sentences should be imposed." (*United States v. Allen* (8th Cir. 2001) 247 F.3d 741, 763.) Accordingly, *Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder.

c) Defense special instruction No. 4

Defendant asked the court to read special instruction No. 4: "The determination of punishment turns on the personal moral culpability of the Defendant. [P] Such culpability is assessed in accordance with the specified factors of aggravation and mitigation upon which you also have received instruction. [P] The circumstances of the crimes can be either aggravating or mitigating. Their character depends on the greater or lesser blameworthiness they reveal, ranging, for example, from the most intentional of willful, deliberate, and premeditated murder to the most accidental of felony murders." The trial court [***90] properly refused to read this instruction because it was duplicative of other instructions, it was an inaccurate statement of law, and did not apply to the case.

The trial court properly refused defendant's request. CALJIC Nos. 8.85 and 8.88 adequately informed the jury about what to consider in determining [*455] the penalty. The requested instruction was therefore duplicative. (*Berryman*, *supra*, 6 Cal. 4th at pp. 1103-1104.) Furthermore, as the court observed, there was no evidence that the Castro murder was "accidental." Finally, insofar as the proposed instruction told the jury that premeditated murders supported a death sentence more than felony murders, it did not correctly describe California law. Both kinds of murder qualify as murder in the first degree. (§ 189.) Like other jurisdictions, California deems both to be among the most serious kinds of murder. (See *Schad v. Arizona* (1991) 501 U.S. 624, 640-641, 115 L. Ed. 2d 555, 111 S. Ct. 2491.) California has further categorized murder in the commission of an enumerated felony as a special circumstance, which supports a sentence of death or life imprisonment without possibility of parole. (§ 190.2, subd. [***91] (a)(17).) The proposed instruction would have incorrectly informed jurors that felony murders are less serious for the purpose of punishment than premeditated and deliberate murders. The trial court properly refused to read special instruction No. 4.

d) Defense special instruction No. 5

Defendant asked the court to read special instruction No. 5: "Evidence has been introduced for the purpose of showing the specific harm caused by the Defendant's crimes. Such evidence was not received and may not be considered by you to divert your attention from your proper role of deciding whether the Defendant should live or die. You must face this obligation soberly and rationally, and you may not impose the ultimate sanction as a result of an irrational, subjective response to emotional evidence and argument. On the other hand, evidence [**110] and argument on emotional though relevant subjects may provide legitimate reasons for the Jury to show mercy to the Defendant." The trial court refused to read the proposed instruction, finding it was duplicative of CALJIC No. 8.84.1. The proposed instruction would not have provided the jury with any

information it had not otherwise learned from CALJIC [***92] No. 8.84.1, and the trial court properly refused to read special instruction No. 5. (*Berryman, supra*, 6 Cal. 4th at pp. 1103-1104.)

e) Defense special instruction No. 6

The trial court granted defendant's request to read the following instruction: "In deciding whether death or life in prison without the possibility of parole is the appropriate sentence, you may not [*456] consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty or the monetary cost to the State of execution or maintaining a prisoner for life without the possibility of parole." When the court read the instruction, it read the following version, "In deciding whether life in prison without the possibility of parole or death is the appropriate sentence, you may not consider for any reason whatsoever whether or not there is a deterrent effect to the death penalty. [P] Likewise, you may not consider for any reason whatsoever how much it may cost to keep the defendant in prison for life without the possibility of parole." The most important difference between the instruction prepared and the instruction read was the latter did not warn the jurors not to consider the cost of [***93] execution.

The Attorney General asserts defendant has waived any challenge to the instruction by failing to object below. He further contends the error was beneficial to defendant, because the jury was permitted to consider cost as a reason to vote against, but not for, death. He argues defendant cannot complain the instruction implicitly told the jury do otherwise (consider the cost of life imprisonment), because defendant must have believed in the efficacy of the instruction, or else he would never have requested it.

We have held a trial court may refuse to read this instruction where neither deterrence nor cost is raised by the parties. (*People v. Benson* (1990) 52 Cal. 3d 754, 806-807, 276 Cal. Rptr. 827, 802 P.2d 330.) Moreover, so long as these issues are not raised, there can be no prejudice from the instruction's omission. (*People v. Bacigalupo* (1991) 1 Cal. 4th 103, 146, 820 P.2d 559; *People v. Thompson* (1988) 45 Cal. 3d 86, 132, 246 Cal. Rptr. 245, 753 P.2d 37.) The absence of evidence regarding these issues during the penalty phase precludes our finding prejudicial error.

f) Defense special instruction No. 7

Defendant [***94] asked the trial court to read special instruction No. 7: "You may consider the fact that the Defendant's accomplices received more lenient sentences as a mitigating factor." The trial court ruled the instruction was contrary to California law as expressed in *People v. Beardslee* (1991) 53 Cal. 3d 68, 111-112, 279 Cal. Rptr. 276, 806 P.2d 1311. Since *Beardslee*, we have adhered to our position that the jury need not be instructed to consider the sentences received by codefendants. n16 (*Rodrigues, supra*, 8 Cal. 4th at pp. 1188-1189; *People v. Mincey* (1992) 2 Cal. 4th 408, 479-480, 827 P.2d 388.) We maintain that position here.

> n16 Of course, there were no codefendants in the instant trial. With the exception of Juan Velasquez, who fled the country, defendant's cohorts all pleaded guilty prior to defendant's trial.

g) Defense special instruction No. 15

Defendant asked the trial court to read special instruction No. 15: "After weighing all the aggravating and mitigating [***95] factors, it is up to you individually to decide which of the punishments, life imprisonment without parole or [*457] death, should be imposed in this case. [P] You must always keep in mind that each of you bears the ultimate moral responsibility to determine the appropriate penalty under all the circumstances of this case." The trial court refused to read the instruction, ruling it was covered by CALJIC No. 8.88. The trial court properly refused the proposed instruction, which was duplicative [**111] of CALJIC No. 8.88. (*Berryman, supra*, 6 Cal. 4th at pp. 1103-1104.)

h) Defense special instruction No. 24

Defendant asked the trial court to read special instruction No. 24: "You must not consider as an aggravating factor the existence of any special circumstance if you have already considered the facts of the special circumstance as a circumstance of the crime for which the defendant has been convicted. [P] In other words, do not consider the same facts more than once in determining the presence of aggravating factors." The trial court refused to read the instruction in light of the standard instruction on aggravating factors.

The instruction is of uncertain validity. We have [***96] observed a prior felony conviction for a violent

crime could fulfill both section 190.3 factors (b) (violent criminal activity) and (c) (prior felony conviction). (*People v. Melton* (1988) 44 Cal. 3d 713, 764-765, 244 Cal. Rptr. 867, 750 P.2d 741.) The jury may consider a prior conviction for a violent felony under both factors. (*Ibid.*; see also *People v. Price* (1991) 1 Cal. 4th 324, 472, 821 P.2d 610.) In any event, the prosecutor did not urge the jury to "double count" and the possibility of prejudice is therefore " 'remote.' " (*Medina*, *supra*, 11 Cal. 4th at p. 779.) We find no error.

i) Defense special instruction No. 28

Defendant asked the trial court to read special instruction No. 28: "Evidence has been presented of defendant's lifestyle or background. You cannot consider this evidence as an aggravating factor, but may consider it only as a mitigating factor." The trial court refused to read the instruction because it was confusing and a misstatement of law.

The Attorney General points out that insofar as defendant's lifestyle included gang-related criminal activity, it could be a proper factor in aggravation. Defendant's argument [***97] appears to use the term "background" in the context of his ethnic background, which is not a legitimate factor in aggravation or mitigation. In any event, there was no error, as the trial court properly instructed the jury on aggravating and mitigating factors.

The trial court properly instructed the jury during the penalty phase.
[*458]

4. Intercase Proportionality Review

Defendant contends California unconstitutionally imposes the death penalty without intercase proportionality review. There is no constitutional requirement of intercase proportionality review. (*Pulley v. Harris* (1984) 465 U.S. 37, 50-51, 79 L. Ed. 2d 29, 104 S. Ct. 871; *People v. Marshall* (1996) 13 Cal. 4th 799, 865-866, 919 P.2d 1280.)

5. Intracase Proportionality Review

Defendant also contends his death sentence was arbitrary and disproportionate to the penalties imposed on his codefendants. This claim likewise fails. For one thing, there were no codefendants. We need not compare a death sentence with the plea bargain terms received by defendant's companions. "The exercise of prosecutorial discretion in obtaining evidence and making charging decisions is not pertinent [***98] to a review of a capital sentence." (*People v. Morris* (1991) 53 Cal. 3d 152, 235, fn. 25, 279 Cal. Rptr. 720, 807 P.2d 949.) Furthermore, defendant's sentence was not disproportionate to those received by his accomplices. With respect to the Castro murder, defendant was the actual killer, as well as the instigator of the carjacking. No one else sought to use lethal force to take the Trans Am. With respect to the Navarette murder, defendant was also primarily responsible for the offense. The gang did not set out to avenge past shootings of 18th Street Gang members until defendant arrived with his truck and facilitated the murder. As one witness explained, the shooting would not have occurred without defendant because he was the one whose vehicle enabled the gang to commit the murder. His greater involvement justifies his more severe sentence. (*People v. Douglas* (1990) 50 Cal. 3d 468, 540, 268 Cal. Rptr. 126, 788 P.2d 640.) Even if the involvement of any of defendant's cohorts equaled that of defendant, his death sentence [**112] is not constitutionally suspect. (*Sanders*, *supra*, 51 Cal. 3d at p. 530.)

6. Cumulative Error

Defendant contends the [***99] cumulative error that occurred during the penalty phase compels reversal. Consistent with our review of defendant's individual claims, we find no cumulative error occurred. (*Bradford*, *supra*, 15 Cal. 4th at p. 1344.)

7. The Constitutionality of the Special Circumstances

Defendant contends neither special circumstance found below, the commission of multiple murders (§ 190.2, subd. (a)(3)) or the commission of [*459] murder in the commission of an attempted robbery (§ 190.2, subd. (a)(17)(A)), adequately narrows the class of first degree murders, and his death sentence is therefore unconstitutional. We reject this claim and continue to hold that section 190.2 and its enumerated special circumstances adequately perform the narrowing function compelled by the Eighth Amendment. (*Kraft*, *supra*, 23 Cal. 4th at p. 1078.)

8. The Section 190.4, Subdivision (e) Motion

Defendant contends the trial court erred in denying the section 190.4 subdivision (e) motion to modify the verdict. Defendant contends (1) the court failed to reweigh independently the penalty phase evidence; (2) insufficient evidence supports the denial of the motion;

and (3) the trial court erroneously [***100] considered impermissible factors in denying the motion to modify the verdict. These claims fail.

a) The trial court's reweighing the evidence

Defendant moved to modify the verdict in accordance with section 190.4, subdivision (e). After hearing argument, the trial court addressed the merits of the motion in great detail.

The court began by noting its statutory obligation "to review the entire record and determine whether the jury's judgment of death is consistent with both the facts and the law." After reviewing the evidence and the section 190.3 factors, the court observed, "My duty then is to apply the same rules that the jury applied in determining whether the judgments of death were appropriate. [P] In this case I believe that the circumstances in aggravation are so strong, so overwhelming in contrast with the really minimal evidence of mitigation that the jury verdict was appropriate. [P] It was consistent with the facts. It was consistent with the law. [P] And I do specifically find that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that as to counts 1 and 3 the jury verdict was appropriate, and this court respectfully [***101] declines the opportunity to modify the jury's verdicts."

In reviewing defendant's automatic section 190.4, subdivision (e) motion, "the trial judge's function is not to make an independent and de novo penalty determination, but rather to independently reweigh the evidence of aggravating and mitigating circumstances and then to determine whether, in the judge's independent judgment, *the weight of the evidence supports the jury verdict.*" (*People v. Lang* (1989) 49 Cal. 3d 991, 1045, 264 Cal. Rptr. 386, 782 P.2d 627.) The above statements prove the trial court fulfilled its duty.
[*460]

b) Evidence supporting the death verdict

In reviewing the trial court's decision, we simply review the trial court's determination after independently considering the record; we do not make a de novo determination of penalty. (*People v. Mickey* (1991) 54 Cal. 3d 612, 704, 286 Cal. Rptr. 801, 818 P.2d 84.) We find the trial court properly denied the motion to modify the death verdict.

The trial court found the circumstances of both murders were aggravated. The court characterized the Castro murder as "cold-blooded," "absolutely [without] justification," and the result [***102] of a "planned affair." The [**113] court deemed defendant the "moving force" behind the Navarette murder, "the one who caused this entire incident to take place." The court also noted Navarette was an innocent person, not a gang member or anyone who had invited any form of retaliation. The court also found Navarette's brother, Rudolfo Rivera, was endangered by the attack, and had to watch the murder of his brother.

The court also discussed the other evidence presented by the People during the penalty phase. The court found "particularly horrendous" the robbery of Freddie Garcia. Only several hours after murdering Castro, defendant led an attack on Garcia, in which defendant punched, kicked and threatened to shoot his victim. The court further recalled the robbery of Lionel Fricks, defendant's possession of a shank and a makeshift handcuff key, and defendant's involvement in racial violence while incarcerated, although the court found little significance in that latter fact.

The court then reviewed the evidence offered in mitigation. The court recalled defendant had been mistreated by children in his neighborhood, and that his sister had been assaulted and hospitalized. The court noted defendant [***103] communicated with his sister's children and his own daughter. The court recalled the testimony of Dr. Maloney, who testified defendant had a "low-end IQ," but was neither retarded nor psychotic. The court described the testimony of defendant's father, Eduardo Ochoa. The court further noted defendant had only five incident reports while in jail, and two of those were trivial in nature. The court observed defendant did not personally kill Navarette, and it cited the defense's position that defendant did not intend Castro's death. The court concluded its analysis by mentioning each of the statutory mitigating factors listed in section 190.3. The court stated defendant was relatively young (§ 190.3, factor (i)), and was an accomplice (§ 190.3, factor (j)), but that section 190.3, factors (d) through (h) did not apply to mitigate his crimes.

The court comprehensively recalled the evidence, and the evidence well supported the decision to deny the motion. (*Hart, supra*, 20 Cal. 4th at p. 657.)
[*461]

c) Reliance on improper evidence

Defendant contends the trial court based its decision on

matters not supported by the record. He assigns error to the court's finding that defendant [***104] was the leader of the attack on Freddie Garcia. The record reflects that of the four males who approached Garcia, defendant did all the talking and threatened to kill Garcia if he did not give up his car. When Garcia was able to stand up after being kicked repeatedly, defendant punched him again. Although Garcia saw another individual holding a gun, it was defendant who stated, "Give up your car, otherwise I'm going to shoot you." Defendant entered the car and drove it away, with the other males as passengers. The evidence supports the trial court's finding.

Defendant also objects to the trial court's characterization of defendant as the "moving force" behind the Navarette murder. The record shows the other 18th Street Gang members were simply loitering on the street until defendant arrived with his truck and told the others that he had just seen Crazy Riders driving eastbound on Pico Boulevard. At that point, Aguilar grabbed a weapon. While driving, defendant accelerated, changed lanes and maneuvered the truck to render possible Navarette's shooting. As David Alonzo testified, the shooting would not have occurred but for defendant's involvement. The evidence supports the trial court's [***105] finding.

Finally, defendant objects to the court's noting he also shot in the vicinity of Navarette's brother and passenger, Rudolfo Rivera, as there was no evidence showing defendant saw Rivera. The trial court properly considered this evidence, as "we have recognized that the number of victims exposed to the use of a firearm is relevant to the defendant's culpability." (*In re Tameka C.* (2000) 22 Cal. 4th 190, 199-200, 990 P.2d 603.)

Furthermore, Rivera's presence rendered the shooting more culpable even if defendant did not see Rivera. In *People v. Hansen* (1994) 9 Cal. 4th 300, 309-310, [**114] 885 P.2d 1022, we held that shooting at an inhabited dwelling is an inherently dangerous felony. We found "there always will exist a significant likelihood that an occupant may be present." (*Id.* at p. 310.) Following *Hansen*, the Court of Appeal held that shooting into an occupied vehicle is also an inherently dangerous felony. (*People v. Tabios* (1998) 67 Cal. App. 4th 1, 9-11.) Just as there is always a significant likelihood there will be someone present inside an inhabited dwelling, there is always the likelihood there will be [***106] a second person present in an occupied vehicle. (By definition, there will always be one person.) There was no evidence that defendant, who drove on the left side of Navarette's car, was in a position to dispel that possibility, or tried to [*462] do so. Furthermore, shooting into an occupied vehicle creates an even greater social danger than shooting at an inhabited dwelling. A driver who is shot may lose control of his vehicle, endangering many other drivers and pedestrians nearby. n17 Accordingly, the trial court properly considered this evidence.

n17 In the instant case, Navarette lost control of his car, which proceeded onto the sidewalk before crashing into a wall.

9. Section 190.3, Factor (a)

Defendant contends factor (a) of section 190.3, which allows the jury to weigh "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1," is unconstitutionally vague. The United States Supreme [***107] Court has joined us in rejecting this claim. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975-977, 129 L. Ed. 2d 750, 114 S. Ct. 2630; *People v. Ray* (1996) 13 Cal. 4th 313, 358-359, 914 P.2d 846; *Arias*, *supra*, 13 Cal. 4th at p. 187.)

10. Miscellaneous Challenges to the Death Penalty

Defendant raises numerous challenges to the death penalty, all of which we have already rejected. We have upheld the death penalty law against the challenge that it (1) fails to narrow the class of death-eligible offenders (*Frye*, *supra*, 18 Cal. 4th at p. 1029); (2) fails to require written findings of aggravating factors (*ibid.*); (3) fails to impose a reasonable doubt standard on the penalty determination (*ibid.*); (4) fails to require juror unanimity (*People v. Fairbank* (1997) 16 Cal. 4th 1223, 1255-1256, 947 P.2d 1321); (5) requires mental or emotional disturbance to be "extreme" to qualify under section 190.3, factor (d) (see *People v. Davenport* (1995) 11 Cal. 4th 1171, 1230, 906 P.2d 1068); (6) invests the prosecution with unbounded discretion (*Kraft*, *supra*, 23 Cal. 4th at p. 1078); (7) violates international [***108] norms (*People v. Ghent* (1987) 43 Cal. 3d 739, 778-779, 239 Cal. Rptr. 82, 739 P.2d 1250); (8) provides insufficient opportunity for postconviction relief (*Fairbank*, at p. 1255); and (9) applies in an unconstitutionally arbitrary manner (*People v. Crittenden* (1994) 9 Cal. 4th 83, 156-158, 885 P.2d

887). These miscellaneous claims all fail.

11. Delayed Execution

Defendant contends there has been an unconstitutional delay since his trial and sentencing. We have already rejected the contention that the [*463] delay between sentencing and execution violates the Eighth Amendment's proscription of cruel and unusual punishment. (*Frye*, *supra*, 18 Cal. 4th at pp. 1030-1031.) Nevertheless, defendant recharacterizes this claim to assert execution after such delay is unconstitutional because it cannot serve any legitimate penological ends, citing Justice Stevens's dissent to the denial of certiorari in *Lackey v. Texas* (1995) 514 U.S. 1045, 131 L. Ed. 2d 304, 115 S. Ct. 1421. Defendant further observes Justice Breyer seemingly has endorsed this view in his dissent to the denial of certiorari in *Elledge v. Florida* (1998) 525 U.S. 944, 142 L. Ed. 2d 303, 119 S. Ct. 366. [***109] We therefore evaluate this newly presented [**115] claim, and conclude the delay does not eliminate the legitimate penological purposes supporting the execution.

Both deterrence and retribution are legitimate purposes of punishment. (*Gregg v. Georgia* (1976) 428 U.S. 153, 183, 49 L. Ed. 2d 859, 96 S. Ct. 2909; *People v. Roberts* (1992) 2 Cal. 4th 271, 316, 826 P.2d 274.) The delay of which defendant now complains does not prevent the fulfillment of either goal. Insofar as defendant complains of the extreme discomfort he suffers as a result of his uncertainty regarding execution, that discomfort would *enhance* the deterrent effect of the death penalty by increasing the penalty imposed for the commission of capital crimes. By contrast, an announcement by this court that any defendant whose automatic appeal has been pending for many years is exempt from subsequent execution would eviscerate any possible deterrent effect of a death sentence, for it would probably never be imposed. n18

n18 As Justice Clarence Thomas has observed, the only conduct such a holding would deter is prompt filing by petitioners and careful consideration by courts. (See *Knight v. Florida* (1999) 528 U.S. 990, 992, 145 L. Ed. 2d 370, 120 S. Ct. 459 (conc. mem. opn. of Thomas, J., from denial of petn. for writ of cert.).)

[***110]

Similarly, executing defendant, notwithstanding the period that has elapsed since his conviction and sentencing, would further the retributive purpose of capital punishment. Insofar as the "just deserts" theory holds certain murderers do not deserve a fate better than that inflicted on their victims, the passage of time and alteration of circumstances have no bearing on this retributive imperative. (Cotton, *Back With a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment* (2000) 37 Am. Crim. L.Rev. 1313, 1316, citing Kant, Political Writings, The Metaphysics of Morals (Hans Reiss ed. 1991) pp. 131, 156.) For these reasons, Nazi war criminals and church bombers motivated by racial hatred have been prosecuted for murders committed decades earlier. Furthermore, defendant, by delaying his execution for these past nine years, has already reduced the full retributive function of execution, and indefinitely rendered his status more like that of a life prisoner, his objective at trial. To [*464] bar his execution would further frustrate the retributive function of capital punishment.

Although we are cognizant of the significant stress faced by prisoners [***111] on death row, we cannot conclude their fate is worse than death, which we have long recognized as a constitutional punishment. As the Fifth Circuit of the United States Court of Appeals observed, "[defendant] made no effort to inform the Texas courts that their delay was detrimental to him or to ask for expedited review of his petition and we cannot fault them for assuming that [defendant] would be grateful for or, at least, indifferent to the delay." (*White v. Johnson* (5th Cir. 1996) 79 F.3d 432, 439.) We therefore conclude that execution notwithstanding the delay associated with defendant's appeals furthers both the deterrent and retributive functions; shielding defendant from execution solely on this basis would frustrate these two penological purposes.

12. Lethal Injection

Defendant contends lethal injection is an unconstitutional means of execution. We have rejected this claim before and do so again. (*Samayoa*, *supra*, 15 Cal. 4th at p. 864; *Holt*, *supra*, 15 Cal. 4th at p. 702.)

CONCLUSION

For the reasons stated herein, we conclude the judgment is affirmed.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

WERDEGAR, J.

CHIN, J. [***112]

CONCURRING OPINION BY KENNARD, J.

CONCURBY:
KENNARD

CONCUR:

CONCURRING OPINION BY KENNARD, J.

I concur in the majority opinion except for its treatment of defendant's contention that the delay between sentencing and execution violates the Eighth Amendment's prohibition against cruel and unusual punishment. This court has in the past rejected such a claim, holding that "as long as it is reasonable, the time required for our statutorily mandated [**116] review is not a violation of a criminal defendant's constitutional rights; it is essential to ensuring that those rights are and have been respected." (*People v. Ochoa* (1998) 19 Cal. 4th 353, 477, 966 P.2d 442.) Because the delay here is reasonable, this court's holding in *Ochoa* is dispositive here. I would go no further.

KENNARD, J.

26 Cal. 4th 316, *; 27 P.3d 739, **;
2001 Cal. LEXIS 4941, ***; 109 Cal. Rptr. 2d 851

7 of 19 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. SAY SENGPADYCHITH, Defendant and Appellant. In re SAY SENGPADYCHITH on Habeas Corpus.

S090076

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 316; 27 P.3d 739; 2001 Cal. LEXIS 4941; 109 Cal. Rptr. 2d 851; 2001 Cal. Daily Op. Service 6594; 2001 Daily Journal DAR 8037

August 2, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION. NOT CITABLE - SUPERSEDED BY GRANT OF REHEARING

SUBSEQUENT HISTORY:
As Modified October 17, 2001. This Modification does not affect a change in the judgment.

Rehearing Denied October 17, 2001, Reported at: 2001 Cal. LEXIS 7043.

PRIOR HISTORY:
Superior Court of Santa Clara County. Super. Ct. No. 190917. Marilyn Pestarino Zecher, * Judge. Court of Appeal of California, Sixth Appellate District, Sixth Appellate District. Nos. H016871, No. H020131.

* Retired judge of the Santa Clara Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISPOSITION:
Reversed the judgment of the Court of Appeal and remand the matter to that court for proceedings not inconsistent with this opinion. It is so ordered.

COUNSEL:
Attorneys for Appellant:

David McNeil Morse, under appointment by the Supreme Court, for Defendant and Appellant.

Attorneys for Respondent:

Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson and David P. Druliner, Chief Assistant Attorneys General, Ronald E. Niver, Ronald A. Bass, Assistant Attorney General, Catherine A. Rivlin, Mark S. Howell and Michael D. O'Reilley, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES:
KENNARD, J. WE CONCUR: [***2] GEORGE, C.J., BAXTER, J., WERDEGAR, J., CHIN, J., CONCURRING OPINION BY BROWN, J.

OPINIONBY:
KENNARD

OPINION:

[**741] [*319]

Step by step, this court continues its struggle through the thicket of statutory construction issues presented by the California Street Terrorism Enforcement and Prevention Act of 1988, also known as the STEP Act. (Stats. 1988, ch. 1242, § 1, pp. 4127-4129; see *People v. Robles* (2000) 23 Cal. 4th 1106; *People v. Castenada* (2000) 23 Cal. 4th 743; *People v. Zermeno* (1999) 21 Cal. 4th 927, 986 P.2d 196; *People v. Loeun* (1997) 17 Cal. 4th 1, 947 P.2d 1313; *People v. Gardeley* (1996) 14 Cal. 4th 605, 927 P.2d 713.) Like *Gardeley*, this case involves Penal Code section 186.22,

subdivision (b), a sentence enhancement provision for felonies committed "for the benefit of, at the direction of, or in association with any *criminal street gang*." **n1** (Italics added.) The STEP Act defines a criminal street gang as [**742] "any ongoing organization, association, or group of three or more persons, whether formal or informal" that has as one of its "primary activities" the commission of one or more [***3] [*320] statutorily enumerated criminal offenses and through its members engages in a "pattern of criminal gang activity." (§ 186.22, subd. (f).) In *Gardeley*, we construed the phrase "pattern of criminal gang activity," but we also touched on the gang statute's "primary activities" requirement, an issue in this case.

n1 Further undesignated statutory references are to the Penal Code.

The questions we decide here are these:

1. May the jury consider the circumstances of the charged crimes on the issue of the group's primary activities? We hold that it can.

2. What standard of harmless error governs a trial court's failure to instruct the jury on the requisite primary activities of the group? To answer this question, we look to the United States Supreme Court's recent decision in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (*Apprendi*). That case holds as a matter of federal constitutional law: "Other than the fact of a prior conviction, *any fact that increases* [***4] *the penalty* for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Id.* at p. 490, italics added.) Applying *Apprendi* here, we conclude that, for felonies *not* punishable by an indeterminate term of imprisonment for life, the gang statute's requirement of a finding by the trier of fact on the group's primary activities is a "fact that increases the penalty" for the charged crime. Because such a finding is necessary to prove the criminal street gang enhancement, it is an element of the enhancement. Therefore, a trial court's failure to instruct the jury on the necessity of such a finding is federal constitutional error. Such error must be evaluated under the high court's test in *Chapman v. California* (1967) 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (*Chapman*), which asks whether the prosecution has "proved beyond a reasonable doubt that the error ... did not contribute to" the jury's verdict. (*Id.* at p. 24, 87 S. Ct. 824.)

The gang enhancement provision does not, however, increase the maximum term of imprisonment for felonies punishable by life imprisonment: A defendant [***5] sentenced to life imprisonment for a gang-related crime is statutorily required to serve at least 15 years of that sentence before becoming eligible for parole. Because for this category of offenses the gang statute does not increase the maximum penalty for the crime, the failure to instruct on the primary activities requirement does not violate the federal Constitution. In that situation, therefore, *Apprendi* does not apply. Instead, it is a matter of state law error, subject to the test this court articulated in *People v. Watson* (1956) 46 Cal. 2d 818, 836, 299 P.2d 243 (*Watson*), which asks [*321] whether without the error it is "reasonably probable" the trier of fact would have reached a result more favorable to the defendant. n2

n2 For this one category of offenses, subdivision (b) of section 186.22 does not increase or enhance the prescribed punishment for the underlying crime. Nevertheless, because the provision does enhance punishment for most gang-related crimes, we will, consistent with common usage, call it an "enhancement."

[***6]

I

The prosecution charged defendant with five counts of attempted willful, deliberate, and premeditated murder (§ § 187, subd. (a), 189, 664, subd. (a)), shooting at an inhabited dwelling house (§ 246), and shooting at an unoccupied motor vehicle (§ 247, subd. (b)). Each offense carried allegations of various sentence enhancements, including one for committing the offense to benefit a criminal street gang. (§ 186.22, subd. (b).)

At trial, the prosecution presented this evidence:

At 5:00 p.m. on May 9, 1996, Soeury "Eve" Pen was in the front yard of her home in San Jose with her friends Joel Dacanay, Pao Av, and Sal Vong, when defendant, who was her former boyfriend and a member of the Triple S gang, telephoned. Eve refused to talk to him. Dacanay, a member of Real Pinoy Brothers (RPB), Triple S's main rival, returned [**743] the call and issued a gang challenge, in which Av and Vong joined.

Around 6:45 p.m., defendant and some companions drove to Eve's house in a car and a truck. Standing

outside were Av, Vong, and Dacanay. Also with them were Graylone Brown and Travis Cruz. Someone in the car yelled "Who's RPB?" Dacanay answered *he* was. Defendant then got out [***7] of the truck with a handgun and started firing, hitting Cruz in the chest. Defendant also shot through a window and a wall of a nearby house, and he and a companion both shot through the rear window of a van parked on the street.

Detective Marty Hogan of the San Jose Police Department's Violent Crime Unit, which investigates gang crimes, testified to a September 3, 1993, shooting committed by Triple S member Darius Augustin. That crime, like the shootings in this case, was in Detective Hogan's opinion committed to benefit the Triple S gang.

The trial court instructed the jury on the criminal street gang sentence enhancement but failed to explain that, to trigger that provision, the jury had to find that one of Triple S's primary activities was the commission of one or more statutorily enumerated felonies. (See § 186.22, subds. (e) & (f).) [*322]

The jury convicted defendant of four counts of attempted murder and of shooting at an unoccupied motor vehicle. But it acquitted him of shooting at an inhabited dwelling house, finding him guilty of the lesser included offense of grossly negligent discharge of a firearm (§ 246.3). The jury also found true each of the criminal street gang and [***8] other sentence-enhancement allegations.

On one of the counts of attempted murder, the trial court sentenced defendant to an indeterminate term of imprisonment for life, consecutive to a determinate term of imprisonment. The court imposed concurrent sentences for defendant's other offenses.

On defendant's appeal, the Court of Appeal reversed and remanded for correction of certain sentencing errors. It also faulted the trial court for not instructing the jury on the gang enhancement's primary activities requirement, but it found the error harmless under *Watson*, *supra*, 46 Cal. 2d 818, 836. In support, the Court of Appeal cited this court's decision in *People v. Wims* (1995) 10 Cal. 4th 293, 895 P.2d 77 (*Wims*).

After the Court of Appeal issued its decision, the United States Supreme Court decided *Apprendi*, *supra*, 530 U.S. 466. Defendant notified the Court of Appeal, asking it to grant rehearing on its own motion to reconsider the instructional issue, but the court lost jurisdiction without acting on that request.

We granted defendant's petition for review.

II

To trigger the gang statute's sentence enhancement provision (§ 186.22, [***9] subd. (b)), the trier of fact must find that one of the alleged criminal street gang's primary activities is the commission of one or more of certain crimes listed in the gang statute. In *People v. Gardeley*, *supra*, 14 Cal. 4th 605 (*Gardeley*), that requirement was satisfied by the testimony of a police gang expert who expressed his opinion that the primary activities of the group in question were drug dealing and witness intimidation, both statutorily listed crimes. (See *Gardeley*, *supra*, 14 Cal. 4th at pp. 611, 620.) Neither of these crimes was charged in *Gardeley*; they reflected past criminal conduct by members of the gang.

A year later, the Court of Appeal in *In re Elodio O.* (1997) 56 Cal. App. 4th 1175, 1181, read *Gardeley* as allowing only "past activity, not current offenses" as evidence of an alleged gang's primary [*323] activities. The next year, the Court of Appeal in *People v. Galvan* (1998) 68 Cal. App. 4th 1135, 1140, disagreed, holding that "either prior conduct or acts committed at the time of the charged offenses can be used to establish the 'primary activities' element of the gang enhancement. [***10] " As we explain, we agree with *Galvan*.

[**744] **A**

The STEP Act defines a criminal street gang as "any ongoing organization, association, or group of three or more persons, whether formal or informal, *having as one of its primary activities the commission of one or more of [certain enumerated] criminal acts* ..., having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity." (§ 186.22, subd. (f), italics added.) Nothing in this statutory language prohibits the trier of fact from considering the circumstances of the *present* or charged offense in deciding whether the group has as one of its primary activities the commission of one or more of the statutorily listed crimes.

Evidence of past or present conduct by gang members involving the commission of one or more of the statutorily enumerated crimes is relevant in determining the group's primary activities. Both past and present offenses have some tendency in reason to show the group's primary activity (see Evid. Code, § 210) and therefore fall within the general rule of admissibility [***11] (*id.* at § 351).

Insofar as the Court of Appeal's decision in *In re Elodio O.*, *supra*, 56 Cal. App. 4th 1175, allowed evidence only of *past* offenses, we disapprove it.

B

As we just discussed, evidence of either past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the alleged criminal street gang. Would such evidence alone be sufficient to prove the group's primary activities? Not necessarily. The phrase "primary activities," as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes be one of the group's "chief" or "principal" occupations. (See Webster's Internat. Dict. (2d ed. 1942) p. 1963 [defining "primary"].) That definition would necessarily exclude the occasional commission of those crimes by the group's members. As the Court of Appeal cautioned in *People v. Gamez* (1991) 235 Cal. App. 3d 957, 970-971, 286 Cal. Rptr. 894 (disapproved on another point in *Gardeley*, *supra*, 14 Cal. 4th 605, 624, fn. 10): "Though members of the Los Angeles Police Department may commit an [*324] enumerated offense [***12] while on duty, the commission of crime is not a *primary activity* of the department. Section 186.22 ... requires that one of the primary activities of the group or association itself be the commission of [specified] crimes. ... Similarly, environmental activists or any other group engaged in civil disobedience could not be considered a criminal street gang under the statutory definition unless one of the primary activities of the group was the commission of one of the [25] enumerated crimes found within the statute."

Sufficient proof of the gang's primary activities might consist of evidence that the group's members *consistently and repeatedly* have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in *Gardeley*, *supra*, 14 Cal. 4th 605. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on "his personal [***13] investigations of hundreds of crimes committed by gang members," together with information from colleagues in his own police department and other law enforcement agencies. (*Gardeley*, *supra*, at p. 620.)

III

What harmless error standard governs a trial court's failure to instruct the jury on the primary activities element of the criminal street gang enhancement provision? Under the high court's recent decision in *Apprendi*, *supra*, 530 U.S. 466, the answer depends on whether the enhancement provision increases the maximum possible penalty for the underlying crime.

[**745] **A**

The federal Constitution's Fifth Amendment right to due process and Sixth Amendment right to jury trial, made applicable to the states through the Fourteenth Amendment, require the prosecution to prove to a jury beyond a reasonable doubt every element of a *crime*. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 277-278, 124 L. Ed. 2d 182, 113 S. Ct. 2078.) Thus, a trial court's failure to instruct on an element of a *crime* is federal constitutional error (see *United States v. Gaudin* (1995) 515 U.S. 506, 509-511, 522-523, 132 L. Ed. 2d 444, 115 S. Ct. 2310) [***14] that requires reversal of the conviction unless it can be shown "beyond a reasonable doubt" that the error did not contribute to the jury's verdict (*Chapman*, *supra*, 386 U.S. at p. 24; *People v.* [*325] *Flood* (1998) 18 Cal. 4th 470, 492-504, 957 P.2d 869; see *Neder v. United States* (1999) 527 U.S. 1, 8-15, 144 L. Ed. 2d 35, 119 S. Ct. 1827). Does the *Chapman* test also apply to the failure to instruct on a sentence enhancement? We explore this issue below.

This court held in *Wims* that under California statutory law the prosecution must prove beyond a reasonable doubt every element of a sentence enhancement, but that the federal Constitution does not impose such a requirement. (*Wims*, *supra*, 10 Cal. 4th at pp. 298, 302-309, 314; but see 10 Cal. 4th at pp. 316-317 (conc. & dis. opn. of Mosk, J.); and 10 Cal. 4th at pp. 317-329 (conc. & dis. opn. of Kennard, J.).) *Wims* relied primarily on *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (*McMillan*), in which the high court considered a mandatory minimum sentencing law that required trial courts to impose a five-year minimum prison term on defendants [***15] who possessed a firearm in the commission of certain felonies; this five-year term did not, however, exceed the statutory maximum for any of the covered crimes. (*Id.* at pp. 81-82.) Noting that the Pennsylvania Legislature expressly intended firearm possession to be a "sentencing factor that comes into

play only after the defendant has been found guilty of one of [the enumerated] crimes," *McMillan* held that such sentencing factors need not be proved to a jury beyond a reasonable doubt. (*Id.* at pp. 80, 85-91.)

Because this court in *Wims* concluded that the California Legislature intended *all* statutory enhancements to be sentencing factors, it held that the failure to instruct the jury on an element of a sentence enhancement violated state law but not the federal Constitution. (*Wims*, *supra*, 10 Cal. 4th at pp. 301, 306-307, 314.) Thus, *Wims* said, such error must be evaluated under this court's test in *Watson*, *supra*, 46 Cal. 2d at page 836, which asks whether without the error it is "reasonably probable" that a result more favorable to the defendant would have been obtained. (*Wims*, *supra*, at p. 315.)

Five years [***16] after this court's 1995 decision in *Wims*, the United States Supreme Court held in *Apprendi*: "Other than the fact of a prior conviction, *any fact that increases the penalty* for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi*, *supra*, 530 U.S. at p. 490, italics added.) The high court's reasoning was this: The federal Constitution requires the elements of a crime to be proved beyond a reasonable doubt *because they expose the defendant to punishment*; likewise, the elements of a sentence enhancement must be proved beyond a reasonable doubt if there is exposure to *increased* punishment. (*Apprendi*, *supra*, 530 U.S. at pp. 474-476, 482-484, 120 S. Ct. 2348; see 530 U.S. at pp. [*326] 494-495, 120 S. Ct. 2348.) The court treated a sentence enhancement as the functional equivalent of a crime. (530 U.S. at pp. 476-477, 483, fn. 10, 120 S. Ct. 2348.) To put it more accurately, *Apprendi* treated the crime together with its sentence enhancement as the "functional equivalent" of a single "greater" crime. (530 U.S. at pp. 490-495 & fn. 19, 120 S. Ct. 2348.)

This is what *Apprendi* teaches us: Except for sentence enhancement provisions that are based on a defendant's [***17] prior conviction, the federal Constitution requires a jury to find, beyond a reasonable doubt, the existence [**746] of every element of a sentence enhancement that increases the penalty for a crime beyond the "prescribed statutory maximum" punishment for that crime. (*Apprendi*, *supra*, 530 U.S. at p. 490.) Therefore, a trial court's failure to instruct the jury on an element of a sentence enhancement provision (other than one based on a prior conviction), is federal constitutional error if the provision "increases the penalty for [the underlying] crime beyond the prescribed statutory maximum." (*Ibid.*) Such error is reversible under *Chapman*, *supra*, 386 U.S. at page 24, unless it can be shown "beyond a reasonable doubt" that the error did not contribute to the jury's verdict.

With regard to its earlier decision in *McMillan*, *supra*, 477 U.S. 79, which held there is no federal constitutional right to a jury determination of a "sentencing factor," the high court stressed in *Apprendi*: "We do not overrule *McMillan* [but instead] ... limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense [***18] established by the jury's verdict - a limitation identified in the *McMillan* opinion itself." (*Apprendi*, *supra*, 530 U.S. at p. 487, fn. 13.) The court added that it was "reserving for another day" whether considerations of stare decisis precluded its reconsideration of *McMillan*. (*Ibid.*)

In *Wims*, *supra*, 10 Cal. 4th 293, this court expressly relied on *McMillan*, *supra*, 477 U.S. 79. Because *McMillan* has not been overruled, *Wims* survives as to sentence enhancement provisions that do not increase the statutorily prescribed maximum penalty for the underlying crime. Thus, a trial court's failure to instruct on an element of such provisions must on appeal be evaluated under *Watson*, *supra*, 46 Cal. 2d at page 836, whose harmless error test we discussed on page 3, *ante*. **n3**

n3 Justice Brown's concurring opinion asserts that the high court's rationale in *Apprendi*, *supra*, 530 U.S. 466, "effectively eviscerates" its earlier decision in *McMillan*, *supra*, 477 U.S. 79. (Conc. opn. of Brown, J., *post*, at p. 5.) But as we discussed on page 10, *ante*, the high court expressly reserved for another day any reconsideration of *McMillan*. That is a matter within the province of the high court, not ours.

[***19] [*327] **B**

Does the criminal street gang sentence enhancement increase the penalties for the underlying crimes? Yes, for two categories of felony offenses listed in the enhancement provision.

For certain specified felonies punishable by a determinate term of imprisonment, the criminal street gang enhancement *increases* the punishment for the offense to an indeterminate term of imprisonment *for life*. (§ 186.22, subd. (b)(4).) For all other felonies

punishable by a determinate term of imprisonment, the enhancement adds a separate term of imprisonment "*in addition and consecutive to*" the punishment otherwise prescribed for the felony. (§ 186.22, subd. (b)(1), italics added.) Thus, in these two categories, the gang enhancement *increases* the sentence for the underlying crime beyond its statutory maximum. In these instances, therefore, a trial court's failure to instruct on an element of the gang enhancement is federal constitutional error (*Apprendi*, *supra*, 530 U.S. at p. 490), reviewable under the harmless error standard of *Chapman*, *supra*, 386 U.S. at page 24, a test we discussed on page 2, *ante*.

The gang statute has a third category of felony [***20] offenses -- those that are punishable by an indeterminate term of imprisonment *for life*. For these felonies, the gang enhancement provision does not alter the indeterminate term of life imprisonment; it merely prescribes the minimum period the defendant must serve before becoming eligible for parole. (§ 186.22, subd. (b)(5) [providing for this category of felonies committed to benefit a street gang, the defendant "shall not be paroled until a minimum of 15 calendar years have been served."].) Thus, for these felonies, the gang enhancement provision [**747] does *not* increase the life term for the underlying offense. Consequently, in this category of cases instructional error on an element of the gang enhancement provision does not violate the federal Constitution (see *Apprendi*, *supra*, 530 U.S. at p. 490), but only California law, making the error reviewable under the standard we articulated in *Watson*, *supra*, 46 Cal. 2d 818, 836, a test we discussed on page 3, *ante*.

C

Here, the jury convicted defendant of four counts of attempted willful, deliberate, and premeditated murder, as well as one count of grossly negligent discharge of a firearm. With [***21] respect to all five offenses, the jury found they were committed to benefit a criminal street gang. [*328]

The crime of attempted willful, deliberate, and premeditated murder falls within the gang statute's category of offenses punishable by an indeterminate term of imprisonment for life. As we explained in the preceding part, for these offenses the gang enhancement prescribes only the minimum term before parole eligibility. Before becoming eligible for parole, a defendant who has committed such an offense with a gang enhancement must serve *a minimum term of 15 years* (§ 186.22, subd. (b)(4)), rather than the minimum term of seven years (§ 3046) required of those convicted of the same offense without the criminal street gang sentence enhancement. There is no increase in the maximum statutory penalty for the crime of attempted murder, which remains "imprisonment in the state prison for life with the possibility of parole." (§ 664, subd. (a).) Therefore, for this category of offenses instructional error of the type at issue in this case is, for reasons discussed in the preceding section, subject to this court's harmless error test in *Watson*, *supra*, 46 Cal. 2d 818, 836. [***22]

The crime of gross negligence in discharging a firearm is among the felonies for which the gang enhancement provision sets forth a separate term of imprisonment "in addition and consecutive to" the punishment otherwise prescribed for the offense (§ 186.22, subd. (b)(1)), thus *increasing* the crime's statutorily set maximum sentence. **n4 Therefore, for this offense the trial court's instructional error here is, for reasons discussed in the preceding section, federal constitutional error and subject to the high court's harmless error test in *Chapman*, *supra*, 386 U.S. at page 24. Accordingly, the Court of Appeal here erred in applying the test of *Watson*, *supra*, 46 Cal. 2d at page 836, which pertains to state law error.**

> **n4 For grossly negligent discharge of a firearm, as for most crimes in this category, subdivision (b)(1) of section 186.22 increases the term of imprisonment by "two, three, or four years at the court's discretion." At the time defendant committed his offenses, subdivision (b)(1) of section 186.22 increased the term of imprisonment by "one, two or three years at the court's discretion." (Former § 186.22, subd. (b)(1), Stats. 1995, ch. 377, § 2.) For "serious" felonies as set forth in subdivision (c) of section 1192.7, the added penalty is five years. For "violent" felonies as defined in subdivision (c) of section 667.5, the added term is ten years. (§ 186.22, subd. (b)(1).)**

[***23] **IV**

On remand, the Court of Appeal is to determine with respect to the offense of gross negligence in discharging a firearm whether the trial court's instructional error was harmless under *Chapman* (see *People v. Breverman* (1998) 19 Cal. 4th 142, 178-179,

77 Cal. Rptr. 2d 870, 960 P.2d 1094.) **n5 and, with respect to the offense of attempted murder, whether the same error was harmless under *Watson, supra,* 46 Cal. 2d at page 826. And the court should also reconsider defendant's claim that the prosecution's evidence was insufficient to support a jury finding that defendant's gang, Triple** [*329] **S, was primarily engaged in the commission of one or more offenses specified in the gang statute. In finding the evidence sufficient, the Court of Appeal concluded the prosecution had established that a primary activity of Triple S was committing "gang crimes," but it failed to identify the felonies comprising the gang's primary activities. (See § 186.22, subdivision** [**748] **(e) [listing the specific felonies that can satisfy the gang statute's "primary activities" requirement].)**

n5 The Attorney General concedes that the harmless error test in *Chapman, supra,* 386 U.S. 18, 24, also applies to the trial court's instructional error with respect to section 12021.5, an enhancement for carrying a firearm when committing a gang-related crime. The enhancement under that provision contributed two years to the determinate term defendant must serve before beginning his life sentence.

[***24]

DISPOSITION

For the reasons stated above, we reverse the judgment of the Court of Appeal and remand the matter to that court for proceedings not inconsistent with this opinion.

It is so ordered.

KENNARD, J.

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

CONCURRING OPINION BY BROWN, J.

CONCURBY:
BROWN

CONCUR:

CONCURRING OPINION BY BROWN, J.

Because it apparently follows from a literal reading of certain language in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (*Apprendi*), I concur in the result as to the standard of review of the trial court's instructional error.

I write separately, however, to question the anomaly created in applying that literal reading to a sentencing enhancement such as Penal Code section 186.22 that contains a series of escalating additional penalties. Defendant's several crimes were subject to enhanced punishment upon the jury's finding that he committed them "for the benefit of, at the direction of, or in association with any criminal street gang" with the requisite specific intent. (Pen. Code, § 186.22, [***25] subd. (b)(1).) As the majority correctly concludes in light of *Apprendi*, instructional error as to that finding is reviewed under the *Chapman* harmless beyond a reasonable doubt standard (*Chapman v. California* (1967) 386 U.S. 18, 24, 17 L. Ed. 2d 705, 87 S. Ct. 824) with respect to those offenses coming within section 186.22, subdivision (b)(1) and (4) because that subdivision "increases the penalty for a crime beyond the prescribed statutory maximum ...." (*Apprendi, supra,* 530 U.S. at p. 490.) With respect to offenses coming within Penal Code section 186.22, subdivision (b)(5), however, *the very same error on the very same facts* does not invoke *Apprendi* and therefore is assessed according to the *Watson* miscarriage of justice standard (*People v. Watson* (1956) 46 Cal. 2d 818, 836, 299 P.2d 243) because only the mandatory minimum punishment is increased, not the statutory maximum of life in prison. (See *Apprendi, supra,* 530 U.S. at pp. [*330] 482-483, 487, fn. 13; *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 87-88, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (*McMillan*).) [***26]

The language of *Apprendi* may not be quite so categorical as the majority implies. Quoting Justice Scalia's dissent in *Almendarez-Torres v. U.S.* (1998) 523 U.S. 224, 251, 140 L. Ed. 2d 350, 118 S. Ct. 1219, the high court majority expressly noted, "Since *Winship*, we have made clear beyond peradventure that *Winship*'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's

guilt or innocence, *but simply to the length of his sentence*.' [Citation.]" (*Apprendi*, *supra*, 530 U.S. at p. 484, italics added.) The court also emphasized that "the relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (530 U.S. at p. 494, fn. omitted.) These passages suggest an enhancement that increases the defendant's actual punishment must surmount constitutional hurdles, even if the potential maximum remains the same.

The majority relies substantially on the fact the *Apprendi* court did not overrule *McMillan*, *supra*, 477 U.S. 79. Granted, *McMillan* has ostensibly survived, [***27] but only barely and only for the moment--as the New Jersey Supreme Court persuasively concluded in *State v. Johnson* (2001) 166 N.J. 523 [766 A.2d 1126] (*Johnson*), which also involved an enhancement increasing the defendant's mandatory minimum sentence. (But see, e.g., *United States v. Aguayo-Delgado* (8th Cir. 2000) 220 F.3d 926, 933 [finding the rule of *Apprendi* does not apply to a factual determination that "only narrows the sentencing judge's discretion" within a previously authorized range].) Drawing on the views of a collective majority of the United States Supreme Court justices expressed in separate opinions, the court inferred "that the continuing vitality of *McMillan* itself may be [**749] in question. ... Both the principal concurrence and dissent in *Apprendi* ... construed the majority opinion as mandating reversal of *McMillan* and invalidation of the mandatory minimum statutes in the mold of the Pennsylvania law. [Citations.]" (*Johnson*, *supra*, 766 A.2d at pp. 1136-1137.)

"The [*Apprendi*] majority noted specifically that its reasoning did not necessarily conflict with the narrow holding[] of *McMillan* [***28] ..., because the statute in *McMillan* did not increase the overall maximum prison term, [citation] .... However, an undeniable tension, explicitly recognized in Justice O'Connor's dissent, [citation] exists between the formal distinctions drawn between the cases and the language of the *Apprendi* majority indicating that 'the relevant inquiry is not one of form, but of effect--does the [*331] required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?' [Citation.] [P] Recognizing that tension, the majority made explicit its reservations about the future application of *McMillan*, although it specifically avoided reconsideration of *McMillan*'s holding ...." (*Johnson*, *supra*, 766 A.2d at p. 1134; see *Apprendi*, *supra*, 530 U.S. at p. 487, fn. 13.)

As the *Johnson* court noted, Justice Thomas's concurrence evinced no such reserve. "Considering *McMillan* in light of those common-law roots [informing the majority's rationale], the concurrence found it 'clear that the common-law rule would cover the *McMillan* situation of a mandatory-minimum sentence': [P] No doubt a defendant could, under such [***29] a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. ... (Of course, a similar scenario is possible with an increased maximum.) But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum entitles the government to more than it would otherwise be entitled .... Thus, the fact triggering the mandatory minimum is part of the punishment sought to be inflicted: it undoubtedly enters into the punishment so as to aggravate it, and it is an act to which the law affixes punishment.' [Citation.]" (*Johnson*, *supra*, 766 A.2d at p. 1135, quoting *Apprendi*, *supra*, 530 U.S. 466, 521 (conc. opn. of Thomas, J.); see also *Apprendi*, *supra*, 530 U.S. 466, 532 (dis. opn. of O'Connor, J.) ["The essential holding of *McMillan* conflicts with at least two of the several formulations the Court gives to the rule it announces today"].)

In concluding that the rule of *Apprendi* applies to a mandatory minimum [***30] increase, the New Jersey Supreme Court also found support in its own jurisprudence, which " 'always recognized that *real time* is the realistic and practical measure of the punishment imposed.' [Citations.]" (*Johnson*, *supra*, 766 A.2d at p. 1137, italics added; cf. *Weaver v. Graham* (1981) 450 U.S. 24, 31, 67 L. Ed. 2d 17, 101 S. Ct. 960 [finding reduced accumulation of monthly gain-time credits constituted punishment for ex post facto analysis: "it is the effect, not the form, of the law that determines"].) California statutory and decisional law accords with this recognition: For example, the three strikes law is intended "to ensure longer prison sentences and greater punishment" for certain recidivists. (Pen. Code, § 667, subd. (b).) To that end, the statutory scheme allows fewer conduct credits to be awarded against a mandatory indeterminate term (*id.*, § 667, subd. (c)(5); see *In re Cervera* (2001) 24 Cal. 4th 1073, 1076) and [*332] provides that the minimum term for an indeterminate sentence is doubled (Pen. Code, § 667, subd. (e)(1); see *People v. Jefferson* (1999) 21 Cal. 4th 86, 96, 980 P.2d 441). [***31] As this court explained in *Jefferson*, "under present law the prison 'term' is the actual time

served in prison before release on parole ...." (*Jefferson*, 21 Cal. 4th at p. 95, italics omitted.)

Penal Code section 2900.5 credits "all days of custody of the defendant, including days served as a condition of probation ...,upon his or her term of imprisonment ...." This provision in part "eliminates the unequal treatment suffered by indigent defendants [**750] who, because of their inability to post bail, serve[] a longer overall confinement than their wealthier counterparts. [Citations.]" (*In re Rojas* (1979) 23 Cal. 3d 152, 156, 151 Cal. Rptr. 649, 588 P.2d 789.) In *People v. Olivas* (1976) 17 Cal. 3d 236, 243, 131 Cal. Rptr. 55, 551 P.2d 375, this court concluded Penal Code section 1731.5 violated equal protection because it authorized certain juvenile offenders committed to the Youth Authority to "be subjected to significantly greater terms of incarceration" "despite the fact that they are treated in the same manner as any competent adult during the process which results in their convictions [***32] ...." This court has also found ineffective assistance of counsel where the attorney's advice to reject a plea bargain failed to include the mandatory minimum sentence the defendant would receive if convicted at trial. (*In re Alvernaz* (1992) 2 Cal. 4th 924, 937, 830 P.2d 747.) Moreover, "In all guilty plea and submission cases the defendant shall be advised of the direct consequences of conviction such as the permissible range of punishment provided by statute ...." (*Bunnell v. Superior Court* (1975) 13 Cal. 3d 592, 605, 119 Cal. Rptr. 302, 531 P.2d 1086.)

Since *Apprendi* did not involve an enhancement increasing the defendant's mandatory minimum sentence, the United States Supreme Court could justifiably avoid for the present determining the application of its rationale in that circumstance. (See *Apprendi*, *supra*, 530 U.S. at p. 487, fn. 13.) This court cannot. The rationale of *Apprendi*--as well as the express views of a majority of the justices--effectively eviscerates the holding in *McMillan*; yet the majority demurs to filling the resulting interstices, a reluctance uncharacteristic of the court. (See, e.g., *People v. Monge* (1997) 16 Cal. 4th 826, 834-843, 941 P.2d 1121.) [***33]

This case illustrates why *McMillan* ultimately must fall. It makes no constitutional sense to apply the federal standard to an enhancement when it adds two, three, or four years to defendant's total sentence for gross negligence in discharging a firearm but not when it "merely" ensures he will remain in prison eight additional years before becoming eligible for conditional release. (See maj. opn., *ante*, at pp. 11-12.) In *Apprendi*, the majority [*333] rejected the state's reliance on *McMillan* based simply on the *possibility* of a comparable increase in punishment: "It can hardly be said that the potential doubling of one's sentence--from 10 years to 20--has no more than a nominal effect. Both in terms of absolute years behind bars, and because of the more severe stigma attached, the differential here is unquestionably of constitutional significance." (*Apprendi*, *supra*, 530 U.S. at p. 495.) Regardless of any other consideration, an increased penalty of eight years imprisonment counsels closer analysis, not rote invocation of dictum.

We have once already misjudged the implications of *McMillan* in *People v. Wims* (1995) 10 Cal. 4th 293, 305-308, 895 P.2d 77. [***34] The anomaly created by the majority's interpretation of *Apprendi* suggests we have done so again.

BROWN, J.

26 Cal. 4th 297, *; 27 P.3d 726, **;
2001 Cal. LEXIS 4943, ***; 109 Cal. Rptr. 2d 836

8 of 19 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. DAMANI COLLINS, Defendant and Appellant.

S075232

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 297; 27 P.3d 726; 2001 Cal. LEXIS 4943; 109 Cal. Rptr. 2d 836; 2001 Cal. Daily Op. Service 6574; 2001 Daily Journal DAR 8031

August 2, 2001, Filed

NOTICE:
[***1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

PRIOR HISTORY:
Court of Appeals A079808. San Mateo County Super. Ct. No. SC-39994. Craig L. Parsons.

DISPOSITION:
Decision of the Court of Appeal reversed.

COUNSEL:
For Appellant: Randy Baker, under appointment by the Supreme Court, for Defendant and Appellant.

For Respondent: Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Laurence K. Sullivan and Gregory A. Ott, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES:
GEORGE, C.J. WE CONCUR: KENNARD, J., BAXTER, J., WERDEGAR, J., CHIN, J., CONCURRING OPINION BY BROWN, J.

OPINIONBY:
GEORGE

OPINION:

[**728] [*300]

In this case we must determine the validity of a criminal defendant's waiver of a jury trial, when the trial court, in advising the defendant before accepting the waiver, informed him that he would receive "some benefit" if he waived his right to a jury trial, although the court could not specify what the benefit would be. The Court of Appeal, in a divided decision, determined that the jury waiver obtained under these circumstances was valid. We conclude that the waiver of a [**729] jury [***2] trial obtained by a trial court's assurance of an unspecified benefit is not a valid waiver, and that this error compels reversal of defendant's conviction. Accordingly, the judgment of the Court of Appeal is reversed.

I

On January 29, 1997, an information was filed against defendant Damani Collins, alleging that he had committed five forcible acts of lewd or lascivious conduct on a child under the age of 14 years (Pen. Code, § 288, subd. (b)), [*301] or five acts of lewd or lascivious conduct on a child under that age without the use of force (Pen. Code, § 288, subd. (a)), based upon the same five acts. The information alleged that four of the acts in violation of Penal Code section 288, subdivision (b), were committed by defendant's use of force or fear of immediate and unlawful bodily injury, and that three of the acts in violation of Penal Code section 288, subdivisions (a) and (b), involved substantial sexual conduct (Pen. Code, § 1203.066, subd. (a)(1), (8)), precluding any grant of probation, suspension of the sentence, or striking of those findings. On April 10, 1997, the [***3] information was amended to allege additionally that defendant had

suffered prior convictions (Pen. Code, § 4532, subd. (b); Health & Saf. Code, § 11351.5) and previously had served a prison term (Pen. Code, § 667.5, subd. (b)). n1

n1 All further statutory references are to the Penal Code.

On June 10, 1997, the matter was called for trial, and jury selection was scheduled to commence. Prior to the entrance of the first group of prospective jurors, defense counsel informed the trial court that counsel had discussed with defendant the possibility of his waiving a jury trial.

We set forth in some detail the trial court's communication with defendant on the subject of his waiver of a jury trial, in order to provide an adequate factual context in which to understand the determinations made by the trial court and, subsequently, by the Court of Appeal.

The trial court inquired of defendant whether he wished to "waive jury" or not, and [***4] defendant responded "waive." The trial court again asked whether defendant wished to proceed with having jurors brought into court or instead have a trial without a jury, and defendant responded, "without a jury." The trial court stated that defendant was entitled to have his case tried before a jury, observing that defense counsel had spoken with defendant about giving up his right to a jury trial and having the trial take place solely before a judge. The trial court inquired of defendant whether that was what he wished to do. Defendant responded that he would follow defense counsel's recommendation and waive jury trial.

The trial court then asked whether defendant understood that he was entitled to have a trial by jury; that if he had a trial by jury, a jury of 12 individuals would be selected to decide his case; that in order to return a verdict of guilty, all 12 jurors would have to agree to the verdict; that if he did not have a jury trial, the court would hear the evidence in the case; that the trial judge in effect would be the jury in the case and would make the determination of guilty or not guilty; that the prosecution's burden to prove guilt beyond a reasonable doubt would [***5] be the same whether the trial was by [*302] a jury or by the court; that defendant would retain his rights to confront and cross-examine witnesses, to compel the attendance of witnesses on his own behalf, to present evidence on his own behalf, and to remain silent or choose to testify; that defendant would relinquish solely his right to trial by jury and would retain all his other rights; and that his maximum potential punishment was the same whether his trial was before a jury or before the court. Defendant responded in the affirmative to these questions.

The trial court then inquired whether defendant understood that by waiving a trial by jury, he was not "gaining any promises of leniency or anything else relative to the waiver." At this point, defendant responded in the negative. The trial court asked whether defendant understood that the trial court would hear the evidence and make decisions based upon the evidence presented and consistent with the law. Defendant responded in the affirmative.

The following exchange then occurred:

[**730] "THE COURT: *Okay. And do you understand that I'm not promising you anything just to get you to waive jury? ... Do you understand that?*

"DEFENDANT: [***6] *I was told that it would -- that it was some reassurance or some type of benefit.*

"THE COURT: Okay. I think that -- I think what [defense counsel] may have been referring to is that *I indicated to counsel when somebody mentioned that this issue is going to be discussed with you that there might well be a benefit in it. Just by having waived jury, that has some effect on the court. Do you understand that? By not taking up two weeks' time to try the case, but rather giving -- just having it in front of a judge alone. ... Do you understand that?*

"DEFENDANT: *Yes.*

"THE COURT: *Is that your understanding as well? Let me ask you that.*

"DEFENDANT: *Yes.*

"THE COURT: *I didn't specify and I'm not specifying that there's any particular benefit, but that by waiving jury, you are getting some benefit, but I can't tell you what that is because I don't know yet. Understood?*

"DEFENDANT: *Yes.* [*303]

"THE COURT: *Okay. Is that agreeable to you?*

"DEFENDANT: *Yes.*

"THE COURT: Do you have any questions about waiving jury?

"DEFENDANT: No.

"THE COURT: Okay. Has anybody made any

threats or promises to you to get you to waive jury?

"DEFENDANT: No.

"THE COURT: Okay, [***7] I'll find that Mr. Collins has made a free, knowing and intelligent waiver of the right to a jury trial."

In response to the prosecutor's inquiry, defendant acknowledged he understood that the prosecutor's earlier offer concerning a negotiated plea no longer was available and that defendant faced a maximum potential sentence of 41 years in prison. The trial court again asked defendant whether anyone had made a representation or promise in order to induce him to waive trial by jury, and defendant responded in the negative. The trial court determined that defendant had made a voluntary, knowing, and intelligent waiver of the right to jury trial. The trial court then obtained the prosecutor's and defense counsel's agreement to waive trial by jury. (See Cal.Const., art. I, § 16.)

The case proceeded to trial before the court. The trial court found defendant guilty of three counts of forcible and five counts of nonforcible lewd or lascivious acts upon a child under the age of 14 years. (§ 288, subds. (a) and (b)(1).) The trial court found true the allegations that defendant committed three of the acts by force or fear and that two of the acts involved substantial sexual conduct (§ [***8] 1203.066, subd. (a)(1), (8)), and that defendant had served a prior prison term (§ 667.5, subd. (b)). The trial court sentenced defendant to a total term of 24 years in prison, consisting of the upper term of eight years, and two consecutive terms of six years each, for the three violations of section 288, subdivision (b), and two consecutive terms of two years each for the two violations of section 288, subdivision (a). The trial court stayed the sentences on the three remaining violations of section 288, subdivision (a), as well as the enhancement for the service of a prior prison term.

Defendant appealed on the sole ground that his waiver of the right to trial by jury was induced by the trial court's offer of a benefit, and therefore under the federal and state Constitutions was not made voluntarily. The [*304] Court of Appeal, determining that this issue was analogous to the question of the "sufficiency" of a defendant's waiver of the right to trial considered in *People v. Howard* (1992) 1 Cal. 4th 1132, 1175-1178, 824 P.2d 1315 (*Howard*), and employing the standard of review enunciated in that decision, decided in a split decision that under the totality of the circumstances, [***9] defendant's waiver of his right to trial by jury was knowing, intelligent, and voluntary and therefore valid. The dissenting justice, employing the same standard of review, concluded that defendant's waiver of his right to [**731] jury trial was not knowing, intelligent, and voluntary.

We granted defendant's petition for review.

II

A

Defendant contends the trial court's statement that defendant would receive "some benefit" -- of a nature that would be determined at a later date if defendant waived his right to a trial by jury -- amounted to an improper inducement to waive that right, and that defendant's waiver of a jury trial in response to that inducement may not be deemed knowing, intelligent, and voluntary. Defendant urges that consequently his right to due process of law under both the federal and state Constitutions was violated. As explained, we conclude that defendant's contention has merit.

Our consideration of the issue requires a brief review of the nature of the constitutional right at stake and the procedural protections that must accompany its waiver. The Sixth Amendment, made applicable to the states in this context by the Fourteenth Amendment of the federal Constitution, [***10] confers upon a defendant in a criminal prosecution the right to a trial by jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 148-150, 155-156, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (*Duncan*); see *Argersinger v. Hamlin* (1972) 407 U.S. 25, 27, 29, 32 L. Ed. 2d 530, 92 S. Ct. 2006.) The right to a trial by jury is recognized to be a "fundamental constitutional right." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282, 124 L. Ed. 2d 182, 113 S. Ct. 2078 (*Sullivan*); *Duncan*, *supra*, 391 U.S. 145, 156-158.) Similarly, article I, section 16, of the California Constitution confers upon a defendant in a criminal prosecution the right to a trial by jury. (*People v. Ernst* (1994) 8 Cal. 4th 441, 444-445, 881 P.2d 298 (*Ernst*); *In re Lewallen* (1979) 23 Cal. 3d 274, 278, 152 Cal. Rptr. 528, 590 P.2d 383 (*Lewallen*); see also § § 689, 1042.) We have recognized that this state constitutional right is fundamental. (*Ernst*, *supra*, 8 Cal. 4th 441, 448-449.) [*305]

Nonetheless, the practice of accepting a defendant's waiver of the right to jury trial, common in both federal and state courts, clearly [***11] is constitutional. (*Duncan*, *supra*, 391 U.S. 145, 157-158; *Patton v. United States* (1930) 281 U.S. 276, 298, 308-312, 74 L. Ed. 854, 50 S. Ct. 253 (*Patton*), disapproved on other grounds in *Williams v. Florida* (1970) 399 U.S. 78, 86-88, 26 L. Ed. 2d 446, 90 S. Ct. 1893.) As with the

waiver required of several other constitutional rights that long have been recognized as fundamental, a defendant's waiver of the right to jury trial may not be accepted by the court unless it is knowing and intelligent, that is, " ' "made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it," ' " as well as voluntary " ' "in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." ' " (*Colorado v. Spring* (1987) 479 U.S. 564, 573, 93 L. Ed. 2d 954, 107 S. Ct. 851 [a knowing, intelligent, and voluntary waiver of the Fifth Amendment privilege against self-incrimination must precede a confession that is the product of police interrogation]; *McCarthy v. United States* (1969) 394 U.S. 459, 465-466, 22 L. Ed. 2d 418, 89 S. Ct. 1166 [***12] [an intentional revocation of a known right or privilege must accompany a guilty plea, which in effect is a waiver of the right to trial by jury, the right to confront opposing witnesses, and the privilege against self-incrimination]; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464, 468, 82 L. Ed. 1461, 58 S. Ct. 1019 [a knowing and intentional waiver of the Sixth Amendment right to assistance of counsel is required before a defendant may proceed without counsel]; *Patton, supra*, 281 U.S. at pp. 308-312 [an intelligent waiver of right to trial by jury is required].) n2

n2 Of course, it is well established that many rights, whether emanating from constitutional or other sources, "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." (*United States v. Olano* (1993) 507 U.S. 725, 731, 123 L. Ed. 2d 508, 113 S. Ct. 1770; see *People v. Simon* (2001) 25 Cal. 4th 1082, 1097; *People v. Saunders* (1993) 5 Cal. 4th 580, 590, 853 P.2d 1093.) In discussing a federal statutory rule permitting discretionary reversal of a judgment upon timely motion, the high court in *United States v. Olano* explained: "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.' *Johnson v. Zerbst* [, *supra*,] 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019. ... Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. [Citations.]" (*United States v. Olano*, *supra*, 507 U.S. 725, 733.) In the present case, we are dealing with a fundamental constitutional right that, although clearly waivable, may be waived only if there is evidence in the record that the decision to do so was knowing, intelligent, and voluntary.

[***13]

[**732] In formulating the constitutional procedural doctrines that permit waiver, and in many instances forfeiture, of constitutional rights, the high [*306] court long has recognized that the state may not punish a defendant for the exercise of a constitutional right, or promise leniency to a defendant for refraining from the exercise of that right. (*United States v. Jackson* (1968) 390 U.S. 570, 580-582, 20 L. Ed. 2d 138, 88 S. Ct. 1209; *Waley v. Johnston* (1942) 316 U.S. 101, 104, 86 L. Ed. 1302, 62 S. Ct. 964.) Coercion in either form has been rejected, whether its source is executive, legislative, or judicial in nature. (See, e.g., *Blackledge v. Perry* (1974) 417 U.S. 21, 27-31, 40 L. Ed. 2d 628, 94 S. Ct. 2098 [prosecutor prohibited by Fourteenth Amendment due process clause from reindicting a convicted misdemeanant on a felony charge following misdemeanant's successful invocation of appellate remedy, because of the "realistic likelihood of 'vindictiveness' "]; *North Carolina v. Pearce* (1969) 395 U.S. 711, 725, 23 L. Ed. 2d 656, 89 S. Ct. 2072 [trial court prohibited by Fourteenth Amendment due process clause from sentencing [***14] a defendant more harshly as retaliation for filing an appeal, because "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial"]; *United States v. Jackson*, *supra*, 390 U.S. at pp. 580-583 [Federal Kidnapping Act prescribing life imprisonment upon a plea of guilty but permitting jury to impose death sentence upon the defendant's election of a trial, discouraged exercise of right to plead not guilty and have a jury trial, and was unconstitutional].)

The line of decisions prohibiting such coercion condemns "the State's *unilateral* imposition of a penalty upon a defendant who had chosen to exercise a legal right ...." (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 362, 54 L. Ed. 2d 604, 98 S. Ct. 663 (*Bordenkircher*), italics added.) The denial of due process of law frequently recognized in that line of decisions is attributable to the danger that the state might act in retaliation against the defendant for lawfully challenging his or her conviction. (*Id.* at p. 363.) "To

punish a person *because* he has done what the law plainly [***15] allows him to do is a due process violation of the most basic sort [citation], and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is 'patently unconstitutional.' [Citations.]" (*Ibid.*; see *Wasman v. United States* (1984) 468 U.S. 559, 567-568, 82 L. Ed. 2d 424, 104 S. Ct. 3217 (plur. opn. of Burger, C.J.); *United States v. Goodwin* (1982) 457 U.S. 368, 372, 73 L. Ed. 2d 74, 102 S. Ct. 2485.)

In *Lewallen*, *supra*, 23 Cal. 3d 274, 278-281, this court recognized and applied the principle, enunciated in the federal high court decisions, that the state is prohibited by the federal Constitution from punishing a defendant for the exercise of a constitutional right, or rewarding a defendant for forbearing [*307] from the exercise of such a right. In *Lewallen*, the defendant declined to accept the prosecutor's offer of a reduced prison sentence on one count in exchange for a plea of guilty on that count. Following the defendant's trial, in which he was found not guilty on that count but guilty on other counts, the trial court in sentencing the defendant expressly [***16] determined that he should receive a sentence greater than he would have received under the terms of the rejected offer premised upon a plea of guilty, merely because of his [**733] election of a jury trial. The trial court in *Lewallen* stated in this regard: "As far as I'm concerned, if a defendant wants a jury trial he's not going to be penalized with that, but on the other hand he's not going to have the consideration he would have had if there was a plea." (*Id.* at p. 277.) We concluded that the trial court essentially had punished the defendant for the exercise of his right to trial and held that his sentence must be vacated. (*Id.* at pp. 279-281; *People v. Colds* (1981) 125 Cal. App. 3d 860, 863-864, 178 Cal. Rptr. 430 [trial court's imposition of mitigated sentence, based solely upon circumstance that the defendant had waived his right to jury trial, was unauthorized and illegal]; accord, *People v. Cahill* (1993) 5 Cal. 4th 478, 482, fn. 1, 853 P.2d 1037 (*Cahill*) [confession obtained through threat of greater punishment or promise of more lenient sentence deemed involuntary].)

We stated in *Lewallen*: "Appellate [***17] courts in California and in other jurisdictions have vacated sentences when the trial court has apparently used its sentencing power, either more severely or more leniently than the norm, in order to expedite the resolution of criminal matters. [Citations.]" (*Lewallen, supra*, 23 Cal. 3d 274, 279.) The impropriety of a trial court's explicit promise of more lenient treatment in sentencing if the defendant waives trial by jury is comparable to the impropriety of harsher treatment imposed because of the defendant's having invoked his or her right to trial by jury.

In the present case, of course, the trial court's remarks were made not at the sentencing stage, but shortly before the commencement of the trial in the course of obtaining defendant's waiver of his right to jury trial. Moreover, the trial court's remarks did not include the promise of specific relief, such as a reduction in sentence, but rather the statement that the trial court would confer an unspecified benefit in the event defendant waived jury trial, thereby "not taking up two weeks' time to try the case." Thus, we need also examine decisions that discuss the various procedural safeguards attending the [***18] waiver of a fundamental constitutional right, such as the right to trial by jury.

To protect against inappropriate incursions on a defendant's exercise or waiver of a fundamental constitutional right, such as that to jury trial, the [*308] federal Constitution long has been construed as requiring procedural safeguards, such as the requirement that a waiver of the right in question be made by the defendant personally and expressly. (See, e.g., *Brookhart v. Janis* (1966) 384 U.S. 1, 7-8, 16 L. Ed. 2d 314, 86 S. Ct. 1245 [a defendant personally must waive the right to plead not guilty, because that right encompasses the right to jury trial, the right to confront opposing witnesses, and the privilege against self-incrimination]; *Johnson v. Zerbst*, *supra*, 304 U.S. 458, 464-465 [a defendant expressly must waive Sixth Amendment right to assistance of counsel]; *Aetna Ins. v. Kennedy* (1937) 301 U.S. 389, 393-394, 81 L. Ed. 1177, 57 S. Ct. 809 [a defendant expressly must waive right to trial by jury in a civil case]; *Patton*, *supra*, 281 U.S. 276, 308-312 [a defendant expressly must waive right to trial by jury].) With [***19] respect to the particular fundamental constitutional right to a jury trial, moreover, our state Constitution explicitly requires the defendant's personal and express waiver in open court. (Cal. Const., art. I, § 16; *Ernst*, *supra*, 8 Cal. 4th 441, 445; *In re Tahl* (1969) 1 Cal. 3d 122, 131, 81 Cal. Rptr. 577, 460 P.2d 449 (*Tahl*); *People v. Holmes* (1960) 54 Cal. 2d 442, 443-444, 5 Cal. Rptr. 871, 353 P.2d 583 (*Holmes*).)

In addition, in the wake of the numerous decisions concluding that a waiver of the fundamental constitutional rights that accompany a trial must be knowing, intelligent, and voluntary, the doctrine developed that when a defendant elects not to exercise such rights by pleading guilty and thus forgoing his or her right to a trial, the record must reflect that the

defendant did so knowingly and voluntarily -- that is, he or she was advised of and elected to refrain from exercising the fundamental rights in question. The most prominent decision articulating that rule is *Boykin v. Alabama* (1969) 395 U.S. 238, 242, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (*Boykin*). [**734] (See *Tahl, supra*, 1 Cal. 3d 122, 131-134; [***20] see also *Holmes, supra*, 54 Cal. 2d 442, 443-444.) n3

n3 In *Boykin*, consistently with its earlier recognition that a defendant's entry of a plea of guilty in effect waives three constitutional rights, and that consequently before entering such a plea a defendant personally must waive the right to a trial after being informed of the charges (*McCarthy v. United States*, *supra*, 394 U.S. 459, 465-466; *Brookhart v. Janis*, *supra*, 384 U.S. 1, 7-8), the high court held that the record affirmatively must disclose the defendant's knowing and voluntary waiver of those rights prior to the trial court's acceptance of the guilty plea. (*Boykin*, *supra*, 395 U.S. at p. 242.) This court, following the federal constitutional standard, concluded that in order to ensure compliance with *Boykin*'s procedural requirement, the trial court must obtain the defendant's express waiver of those rights on the record prior to accepting the guilty plea. (*Tahl*, *supra*, 1 Cal. 3d 122, 132, fn. 5, 133.) This requirement subsequently was codified. (See § 1192.5 [the court "shall cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made ...."].)

[***21]

In the present case, the trial court set out to discharge its constitutional procedural duty to advise defendant of his right to jury trial, and to [*309] determine impartially whether defendant's waiver of jury trial was knowing, intelligent, and voluntary. The trial court's formal adherence to these procedural requirements, however, does not ensure either that the substance of its comments satisfied that obligation or that defendant's ensuing waiver was knowing, intelligent, and voluntary. The trial court, by following that procedure while announcing its intention to bestow some form of benefit in exchange for defendant's waiver of that fundamental constitutional right, acted in a manner that was at odds with its judicial obligation to remain neutral and detached in evaluating the voluntariness of the waiver.

At the outset the trial court indicated that previously, upon learning that defendant might waive jury trial, the court had informed defense counsel that "there might well be a benefit in it," because "just by having waived jury" and thus not taking two weeks' time to try the case, "that has some effect on the court." Subsequently the trial court, upon informing defendant that he [***22] would receive a benefit of an unspecified nature in the event he waived his right to trial by jury, secured defendant's response that he understood. The court made these representations and offers to defendant prior to determining that his waiver of the right to jury trial was knowing, intelligent, and voluntary. The form of the trial court's negotiation with defendant presented a "substantial danger of unintentional coercion." (*People v. Orin* (1975) 13 Cal. 3d 937, 943, 120 Cal. Rptr. 65, 533 P.2d 193.)

In addition, the objective of the trial court's comments was to obtain defendant's waiver of a fundamental constitutional right that, by itself (when defendant elects to go to trial), is not subject to negotiation by the court. In effect, the trial court offered to reward defendant for refraining from the exercise of a constitutional right. (See *Lewallen*, *supra*, 23 Cal. 3d 274, 278-281; *People v. Colds*, *supra*, 125 Cal. App. 3d 860, 863-864; accord, *People v. Alexander* (1992) 8 Cal. App. 4th 602, 605.) The circumstance that the trial court did not specify the nature of the benefit by making a promise of a particular [***23] mitigation in sentence, or other reward, does not negate the coercive effect of the court's assurances. The inducement offered by the trial court to defendant, to persuade him to waive his fundamental right to a jury trial, violated defendant's right to due process of law. n4

n4 We do not intend by our holding today to call into question the well-established practice in which the *prosecutor* and the defendant negotiate a plea of guilty or nolo contendere (see *People v. West* (1970) 3 Cal. 3d 595, 606-609, 91 Cal. Rptr. 385, 477 P.2d 409), a practice that obviously involves a relinquishment of the constitutional rights attending a trial, including the right to trial by jury. As the high court has explained in examining the prerogative of the state, through the prosecutor, to offer such a plea: "Not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right is invalid. Specifically, there is no *per se* rule against encouraging guilty pleas. We have squarely held

> that a State may encourage a guilty plea by offering substantial benefits in return for the plea," which may obtain for the defendant " 'the possibility or certainty ... [not only of] a lesser penalty than the sentence that *could* be imposed after a trial and a verdict of guilty ...' [citation], but also of a lesser penalty than that *required* to be imposed after a guilty verdict by a jury." (*Corbitt v. New Jersey* (1978) 439 U.S. 212, 218-220, fns. omitted, 58 L. Ed. 2d 466, 99 S. Ct. 492, italics added; see *Bordenkircher, supra*, 434 U.S. at pp. 362-364.)

[***24] [*310]

[**735] B

We next consider the effect of the trial court's error upon the judgment of conviction. As described above, the Court of Appeal determined that the issue was analogous to the question of the "sufficiency" of a defendant's waiver of the right to trial considered in *Howard, supra*, 1 Cal. 4th 1132, 1175, 1178. Reviewing the trial court's error "in the totality of the circumstances," the majority of the Court of Appeal determined that defendant's waiver of his right to trial by jury was knowing, intelligent, and voluntary, and the dissent, employing the same standard, concluded to the contrary.

In *Howard, supra*, 1 Cal. 4th at pp. 1174-1175, the trial court erred in failing to advise the defendant of his constitutional privilege against self-incrimination and obtain his waiver of that privilege (as required by *Boykin, supra*, 395 U.S. 238, 243-244, and *Tahl, supra*, 1 Cal. 3d 122, 132-133, in the context of a defendant's plea of guilty), prior to accepting the defendant's admission that he had served a prior term of imprisonment. (See *In re Yurko* (1974) 10 Cal. 3d 857, 861-863, 112 Cal. Rptr. 513, 519 P.2d 561 [***25] [applying *Boykin/Tahl* requirements when a defendant admits the truth of a prior conviction].) We determined that the trial court's error was reviewable under the federal constitutional standard that upholds the validity of a defendant's guilty plea "if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances." (*Howard, supra*, 1 Cal. 4th at p. 1175, citing *North Carolina v. Alford* (1970) 400 U.S. 25, 31, 27 L. Ed. 2d 162, 91 S. Ct. 160; *Brady v. United States* (1970) 397 U.S. 742, 747-748, 25 L. Ed. 2d 747, 90 S. Ct. 1463.) We concluded that reversal was not required, because the record revealed that the defendant knew he had the right not to admit the prior prison term allegation and thus knowingly waived his privilege against self-incrimination. (*Howard, supra*, 1 Cal. 4th at pp. 1179-1180.) Subsequently, in *People v. Allen* (1999) 21 Cal. 4th 424, 439, 981 P.2d 525, footnote 4, we observed that "although we have not directly held the *Howard* totality-of-the-circumstances test would apply on direct appeal from a guilty plea to a substantive [***26] offense, our subsequent cases seem [*311] to have assumed it. (See ... *Ernst*[, *supra*,] 8 Cal. 4th 441, 446, 881 P.2d 298; *People v. Adams* (1993) 6 Cal. 4th 570, 576, fn. 5, 862 P.2d 831; *People v. Wash* (1993) 6 Cal. 4th 215, 268-269, 861 P.2d 1107.)"

The Attorney General argues that *Howard* compels a harmless error analysis. As we shall explain, however, a harmless error standard does not, and cannot, apply in the present case. Under the federal Constitution, the right to trial by jury is recognized as fundamental, and its denial is "structural error," compelling reversal of a judgment of conviction without the necessity of a determination of prejudice. (*Sullivan, supra*, 508 U.S. 275, 281-282; *Duncan, supra*, 391 U.S. 145, 156-158.) Similarly, under the California Constitution, the right to jury trial is fundamental, and its denial is considered a "structural defect in the proceedings," resulting in a "miscarriage of justice" within the meaning of California Constitution, article VI, section 13, and requiring that the judgment of conviction be set aside. (*Ernst, supra*, 8 Cal. 4th 441, 448-449.)

In *Ernst, supra*, 8 Cal. 4th 441, [***27] we discussed the difference between the effect of a trial court's error in failing to obtain a defendant's express waiver of the fundamental constitutional right to trial by jury, as distinguished from the right to a trial. We concluded that the [**736] court's failure to obtain a waiver of the right to trial by jury is reversible per se. (*Id.* at pp. 448-449; *Holmes, supra*, 54 Cal. 2d 442, 443-444.)

In the present case, the trial court explained the nature of the right to trial by jury in order to determine whether defendant's decision to waive that right was knowing and intelligent. The trial court questioned defendant to determine whether defendant had sufficient knowledge of the right being waived and obtained defendant's repeated affirmations that he understood the difference between trying his case to a jury and trying it to the court. But once defendant conveyed his understanding that he would receive some benefit in the event he waived jury trial, after having been advised by the trial court that he *would* receive some benefit of an undetermined nature to be determined by the court at a later time, the defendant no longer could be said to have voluntarily [***28] relinquished his right to jury trial.

The error caused by the trial court's assurances of a benefit was not corrected by the circumstance that these assurances were provided in the course of the court's otherwise appropriate explanations and advisements concerning the right to jury trial. Nor was the error remedied by the trial court's subsequent inquiry whether defendant had received any threats or [*312] promises of a benefit in order to persuade him to waive his right to jury trial, followed by defendant's express representation that he had not received such inducements.

In *People v. West*, *supra*, 3 Cal. 3d 595, we recalled that, during the period prior to *Brady v. United States*, *supra*, 397 U.S. 742, when plea negotiation between prosecutors and defendants was in widespread use but of uncertain constitutionality, a negotiated plea was regarded as suspect because of judicial decisions concluding that a guilty plea, if induced by promises or threats, was involuntary and thus invalid. "Consequently judges commonly inquired of defendants whether any promises had been made to induce them to plead guilty, and defendants, fearing that the court would [***29] invalidate the bargain, commonly responded in the negative." (3 Cal. 3d at p. 606.) " 'A defendant who is expected to lie when the judge asks if a guilty plea is the result of a promise of leniency is in no position to engage in a forthright exchange with the same judge at the same time when the question is the defendant's understanding and relinquishment of his constitutional rights.' [Citation.]" (*Id.* at p. 609, 91 Cal. Rptr. 385, 477 P.2d 409.)

In the present case, the trial court's improper assurances of a benefit obtainable by waiver of jury trial had a similar effect. The trial court, after providing those assurances, questioned defendant as to whether he had received any promises to induce him to waive his right to trial by jury. Defendant -- having been assured by the trial court that he would receive some benefit if he waived that right, and presumably being loath to jeopardize that understanding -- answered on the record in a manner intended to uphold his agreement with the trial court rather than to convey his actual state of mind. Defendant's volition having been compromised, there can be no application of harmless error analysis premised upon the remainder of the representations [***30] made by defendant in his colloquy with the court.

The manner in which the trial court induced defendant to waive his right to jury trial rendered that waiver involuntary. (See *Cahill*, *supra*, 5 Cal. 4th at p. 482, fn. 1; *Lewallen*, *supra*, 23 Cal. 3d at pp. 278-279.) Like a trial court's denial of the right to jury trial by an outright refusal to provide such a trial, its present error in improperly inducing a waiver of that right amounts to a "structural defect in the proceedings" requiring that the judgment of conviction be set aside without the necessity of a determination of prejudice. (*Sullivan*, *supra*, 508 U.S. at pp. 281-282; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310, 113 L. Ed. 2d 302, 111 S. Ct. 1246; *Duncan*, *supra*, 391 U.S. at pp. 155-156; *Ernst*, *supra*, 8 Cal. 4th at pp. [**737] 448-449; *Cahill*, *supra*, 5 Cal. 4th at pp. 501-502; see also *United States v. Olano*, *supra*, 507 U.S. 725, 736-737 [*313] ["plain error" may " 'seriously affect the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence" [***31] and require reversal].) Additionally, where a case improperly is tried to the court rather than to a jury, there is no opportunity meaningfully to assess the outcome that would have ensued in the absence of the error. (See *Sullivan*, *supra*, 508 U.S. 275, 278-282.) n5 The trial court's error thus compels reversal of the judgment.

n5 Our conclusion regarding the applicable standard of review is not inconsistent with the conclusion in *People v. Epps* (2001) 25 Cal. 4th 19, 29-30. In that case, the trial court denied the defendant his *statutory* right to a jury trial on the prior-conviction allegations. This court observed that because the state need not provide a jury trial on prior-conviction allegations (*Apprendi v. New Jersey* (2001) 530 U.S. 466, 486-490, 496-497, 147 L. Ed. 2d 435, 120 S. Ct. 2348; *People v. Wiley* (1995) 9 Cal. 4th 580, 585, 889 P.2d 541), the denial of the statutory right did not implicate the federal Constitution. (*People v. Epps, supra*, 25 Cal. 4th at p. 29.) Because the error was purely one of state law, it was subject to the state test of harmless error (*People v. Watson* (1956) 46 Cal. 2d 818, 836, 299 P.2d 243), requiring reversal only upon a finding of a reasonable probability of a result more favorable to the defendant in the absence of the error. (*People v. Epps, supra*, 25 Cal. 4th at p. 29.) The present case, in contrast, involves defendant's right to jury trial on the issue of guilt or innocence, a right recognized as fundamental under both the federal and state Constitutions. (U.S. Const., Sixth Amend.; Cal. Const., art. I, § 16.)

[***32]

The decision of the Court of Appeal is reversed.

GEORGE, C.J.

WE CONCUR:

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

CONCURBY:
BROWN

CONCUR:

CONCURRING OPINION BY BROWN, J.

I agree with the majority that defendant's waiver of his right to a jury trial cannot be deemed knowing and intelligent in light of the trial court's offer of some unspecified benefit in exchange for that waiver. I would, however, expressly evaluate the validity of that waiver under the well-established totality of the circumstances test.

Here, unlike the situation in *People v. Ernst* (1994) 8 Cal. 4th 441, 443, 881 P.2d 298, in which there was no express jury trial waiver, we have an express waiver, and the only question is its validity. The offer of an undefined benefit was an error in the admonitions preceding the jury trial waiver that was not cured by other statements during the proceeding (an examination of the totality of the circumstances). It is difficult to imagine how else we would determine the waiver's validity other than by examining the circumstances under which it was made. Indeed, the majority alludes to such an approach in [***33] parts of its analysis. (See, e.g., maj. opn., *ante*, 2001 Cal. LEXIS 4943 at p. *3 ["we set forth in some detail the trial court's communication with defendant on the subject of his waiver of a jury trial, in order to provide an adequate factual context"]; 2001 Cal. LEXIS 4943 at p. *12, fn. 2 [jury trial right "may be waived only if there is evidence in the record that the decision to do so was [*314] knowing, intelligent, and voluntary"].) Moreover, this is the standard the parties and both the majority and the dissent in the Court of Appeal agree should apply in the context of jury trial waivers, and it is the standard for the waiver of numerous, if not all, constitutional rights. (*People v. Castaneda* (1975) 52 Cal. App. 3d 334, 343-345, 125 Cal. Rptr. 9 [evaluating circumstances of jury trial waiver to determine its validity]; see, e.g., *Edwards v. Arizona* (1981) 451 U.S. 477, 482, 68 L. Ed. 2d 378, 101 S. Ct. 1880 [validity of waiver of right to counsel depends in each case on the particular facts and circumstances surrounding that case]; *Fare v. Michael C.* (1979) 442 U.S. 707, 724-725, 61 L. Ed. 2d 197, 99 S. Ct. 2560 [self-incrimination and counsel waiver [***34] by minor examined under the totality of the circumstances]; *People v. Panizzon* (1996) 13 Cal. 4th 68, 84, 913 P.2d 1061 [examining surrounding circumstances to determine whether defendant's waiver of the right to appeal a bargained sentence was knowing, intelligent, [**738] and voluntary]; *People v. Howard* (1992) 1 Cal. 4th 1132, 1175, 824 P.2d 1315 [guilty plea valid if record affirmatively shows it is voluntary and intelligent under the totality of the circumstances].)

Suppose, for example, the court below had offered defendant the unspecified benefit in this case, but then following a sidebar with counsel, had apologized, retracted the promise of any benefit, and extensively voir dired the defendant to ensure he was under no illusion that any benefit would be gained by waiving a jury. While the court initially erred, under the totality of the circumstances we would not conclude the subsequent jury trial waiver was invalid because the defendant clearly understood no benefit was being offered in exchange for his waiver. This result has much to commend it.

Of course, once we determine the jury trial waiver was not valid under the totality of circumstances, [***35] then the question becomes the effect of the absence of a valid waiver. I agree the trial court was not authorized to proceed in the absence of a valid waiver, and hence we must reverse.

Furthermore, instead of simply noting that the undefined benefit here could not possibly result in a knowing or intelligent waiver, the majority broadly endorses the principle that no leniency may ever be accorded a defendant because of a jury trial waiver. (Maj. opn., *ante*, 2001 Cal. LEXIS 4943 at p. *15 ["state is prohibited by the federal Constitution from ... rewarding a defendant for forbearing from the exercise of" a constitutional right]; 2001 Cal. LEXIS 4943 at pp. *15 [citing *People v. Colds* (1981) 125 Cal. App. 3d 860, 178 Cal. Rptr. 430, with approval for the proposition that "trial court's imposition of mitigated sentence, based solely upon circumstance that the defendant had waived his right to jury trial, was unauthorized and illegal"]; 2001 Cal. LEXIS 4943 at p.

*17 [*315] ["The impropriety of a trial court's explicit promise of more lenient treatment in sentencing if the defendant waives trial by jury is comparable to the impropriety of harsher treatment imposed because of the defendant's having invoked his or [***36] her right to trial by jury"].) While the majority relies on *United States v. Jackson* (1968) 390 U.S. 570, 20 L. Ed. 2d 138, 88 S. Ct. 1209, the high court has more recently stated, "The cases in this Court since *Jackson* have clearly established that not every burden on the exercise of a constitutional right, and not every pressure or encouragement to waive such a right, is invalid." (*Corbitt v. New Jersey* (1978) 439 U.S. 212, 218, 58 L. Ed. 2d 466, 99 S. Ct. 492, fn. omitted; maj. opn., *ante*, 2001 Cal. LEXIS 4943 at p. *23.)

Rather, it seems sufficient to conclude here that the trial court's offer of some unspecified benefit would necessarily render the waiver not knowing or intelligent. This court's statements in *In re Lewallen* (1979) 23 Cal. 3d 274, 278-279, 152 Cal. Rptr. 528, 590 P.2d 383, recounted by the majority regarding rewarding a defendant for forbearing from the exercise of a constitutional right, are dicta. (Maj. opn., *ante*, at pp. 9-10.) That is because in *Lewallen*, we concluded the trial court *punished* the defendant for exercising his right to trial and his refusal to accept a plea negotiation. (*Lewallen*, at pp. 276-277, 280.) [***37]

Conceivably, there may be situations in which we would not find that the benefit noted rendered the waiver invalid. For example, if a defendant asked the court what benefit there would be in a court trial over a jury trial, and the court stated, "Well, court trials tend to proceed more quickly than jury trials," it is unlikely we would conclude the trial court's statement rendered the subsequent jury trial waiver not knowing, intelligent, or voluntary, particularly if the defendant rejoined that he in fact wanted the trial over as quickly as possible. In addition, here defense counsel suggested at sentencing that defendant's waiver had benefited the minor victim by reducing her "exposure to presentation of traumatic events." It would seem the trial court could properly consider such a circumstance in reducing defendant's sentence. However, had defendant mentioned this to the court as a reason for his jury trial waiver prior to entering that waiver, and the trial court noted it would consider such a gesture at any sentencing hearing, would [**739] that render the waiver invalid? Not knowing the answer to these questions, it seems best to avoid foreclosing our options in future cases.

BROWN, [***38] J.