26 Cal. 4th 249, *; 27 P.3d 289, **;
2001 Cal. LEXIS 4939, ***; 109 Cal. Rptr. 2d 575

9 of 19 DOCUMENTS

ALEX MONTENEGRO, Plaintiff and Respondent, v. DEBORAH DIAZ, Defendant and Appellant.

S090699

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 249; 27 P.3d 289; 2001 Cal. LEXIS 4939; 109 Cal. Rptr. 2d 575; 2001 Cal. Daily Op. Service 6407; 2001 Daily Journal DAR 7833

July 30, 2001, Filed

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

PRIOR HISTORY:
Appeal from the Fourth Appellate District. Division Two. E025810. San Bernardino County Super. Ct. No. RFL-12037. Frederick A. Mandabach.

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

COUNSEL:
For Appellant: Covington & Crowe, Katrina West and Donald C. Haslam for Defendant and Appellant.

For Respondent: Tuckerman & Thompson and Byron C. Thompson for Plaintiff and Respondent.

Starre & Cohn, Shelley L. Albaum and Harold J. Cohn as Amici Curiae on behalf of Plaintiff and Respondent.

Sissie L. Barker and P. Timothy Pittullo for Minor.

Leslie Ellen Shear for Levitt and Quinn Family Law Center, Inc., Association of Certified Family Law Specialists, Inc., Harold J. Cohn, Douglas Darnell, Robin Drapkin, Lyn Greenberg, Lee Lawless, Hugh McIsaac, Nancy Oleson, Philip M. Stahl, Peter Walzer, Richard Warshak, Leonard Weiler and Linda Wisotsky as Amici Curiae on behalf of Minor.

Sandra E. Purnell for Mary A. Duryea as Amicus Curiae.

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

OPINIONBY:
BROWN

OPINION:

[**290] [*251]

In a story that has become all too familiar, Deborah Diaz and Alex Montenegro could not agree on custody and visitation over their son, Gregory. During the child custody proceedings, Diaz and Montenegro entered into various stipulations, confirmed by the trial court, "resolving" their disputes over Gregory. In the last such stipulation, Diaz and Montenegro agreed to joint legal custody of Gregory, with Diaz having primary physical custody. When Gregory was to start kindergarten, [**291] however, they were [*252] unable to resolve their differences and asked the trial court to modify its last stipulated custody order. After an adversarial hearing, the trial court awarded primary physical custody to Montenegro based on the "best interests" of the child. The Court of Appeal reversed, concluding that the trial court applied the wrong standard. Finding that two of the stipulated orders were final judicial custody determinations, the Court of Appeal held that the custody arrangement was subject to modification only if

Montenegro established a significant change in circumstances. We now reverse and hold that the trial court properly applied the best interest standard, [***3] rather than the changed circumstance rule.

FACTS

Montenegro and Diaz were unmarried when their son Gregory was born in November 1994. For the first 18 months after the birth, Montenegro had short visits with Gregory, usually in the home Diaz shared with her mother.

In March 1996, Montenegro visited Gregory while Diaz was at work and Gregory was in the care of his grandmother. Although Montenegro had made no previous arrangements with Diaz, he took Gregory for an overnight visit. After that incident, Diaz refused to allow visitation without a court order. Montenegro then filed a complaint and order to show cause to establish paternity and requested joint legal and physical custody. Diaz conceded paternity but sought sole physical custody of Gregory. She also sought child support and a restraining order preventing Montenegro from harassing her at home or work. The trial court referred them to family court services, including mediation counseling.

Montenegro and Diaz were both represented by counsel and initially stipulated to a temporary custody order after mediation. Under the order, Diaz retained physical custody and Montenegro had visitation rights that would increase by [***4] stages to one weekday a week and alternate weekends.

On September 30, 1996, the superior court entered another order, signed by the parents and their attorneys, captioned "Stipulation and Order to Show Cause for Judgment." The order stated that Montenegro was Gregory's biological father and that Diaz had "primary responsibility for the care, custody and control of the minor." The order included a detailed visitation schedule for Montenegro, specifying weekend and midweek visits, holiday visits on alternate years, and visits on alternate weeks in the summer "when [the] child reaches 5 1/2 years old." The order further provided that "this stipulation covers all matters in dispute in this Order to Show Cause. This Order when signed is the formal Order. No further documents are necessary." The minute order, however, was virtually identical in form to the [*253] previous temporary minute orders, and the end of the order contained a "Notice to Parties Without Attorneys" stating that "this order, although temporary, shall remain in effect until further order of court."

Despite the September 30, 1996 order, several disputes concerning custody and visitation arose, which resulted in additional [***5] mediation and in orders that were, on their face, temporary. One of these temporary orders referred Montenegro and Diaz "to Dr. Bradbury for [a] co-parenting class."

On June 24, 1997, the trial court entered another stipulated order signed by the parents and their attorneys after both parents filed orders to show cause seeking to modify the custody arrangement. Prior to this stipulation, neither Montenegro nor Diaz claimed that the September 30, 1996 order was a final judgment as to custody. In the new stipulation, the parents agreed to joint legal custody. Diaz had "primary physical custody," and Montenegro had "secondary physical custody." The order also included the following detailed visitation schedule: Montenegro had physical custody of Gregory on the first weekend of each month and twice weekly, on holidays in alternating years, and for week-long vacations in the summer and winter. His physical custody of Gregory amounted to approximately 12 out of every 28 days, and a nearly equal division of time during holidays. Although the June 24, 1997 order did not provide for further review, it [**292] never stated that it was a permanent custody order.

Not surprisingly, this order did [***6] not end the feuding as Montenegro and Diaz had a disagreement over Gregory's future school. As a result, Montenegro filed an order to show cause requesting that the June 24, 1997 order be modified to provide for joint physical custody, with Gregory living with each parent on alternating weeks. Diaz filed a responsive declaration indicating that a joint custody arrangement would not be feasible once Gregory began to attend regular school, and that it would be in his best interest to be with her. Although she argued that Montenegro had not made "the requisite showing of a 'change in circumstances' or that a change in custody would be 'in the best interests' of " their child, she did not contend that the June 24, 1997 order was a final judicial custody determination.

Trial commenced on August 4, 1999. At the outset, both parents agreed that the triggering event for the hearing was Gregory's impending enrollment in kindergarten and the need to choose his school. They also agreed that the current custody arrangement would no longer be appropriate once Gregory began kindergarten, because his new daily schedule would necessitate that he spend the majority of his time with one parent. [***7]

At trial, Montenegro argued that he should have sole physical custody of Gregory. Although he admitted that the situation had improved somewhat [*254] since

the June 24, 1997 order, he claimed that Diaz was still unwilling to share Gregory with him. She was also hostile to Laura, his new wife and the mother of his second child, and had referred to Laura, in Gregory's presence, in very derogatory terms. Diaz argued that she should have sole physical custody of Gregory. She denied that she was unwilling to share Gregory with Montenegro, but conceded that she had not given Montenegro medical information about Gregory, even though Gregory was frequently ill. She also admitted that she had not attended all court-ordered sessions with Dr. Bradbury, and that she had not attended previously arranged meetings concerning a childcare provider used by Montenegro. Dr. Bradbury testified that Diaz was "consistently quite hostile toward Mr. Montenegro and ... appeared ... to be unwilling to try to establish an amicable relationship." In contrast, Montenegro "was quite willing to extend himself and go to almost any length in order to maintain contact with his son and to make the relationship between [***8] himself and the mother an amicable one."

On September 10, 1999, the trial court issued a statement of intended decision. In the decision, the court acknowledged that the parents had previously entered into stipulated orders concerning custody. It, however, concluded that "this is an initial trial on custody" and held that a showing of changed circumstances was not required for a change in custody. Because Montenegro was more willing to share Gregory, the court ruled that it was in "the best interests of Gregory ... that he be in the primary physical custody of the father ...." Consistent with these rulings, the trial court entered an order awarding physical custody to Montenegro and visitation to Diaz on alternate weekends, alternate holidays, and, during the summer, alternate weeks.

The Court of Appeal reversed. Concluding that the September 30, 1996 and June 24, 1997 orders were final judgments as to custody, the court held that the trial court should have applied the changed circumstance rule described in *Burchard v. Garay* (1986) 42 Cal. 3d 531, 534, 538, 229 Cal. Rptr. 800, 724 P.2d 486, footnote 4 (*Burchard*) and *In re Marriage of Biallas* (1998) 65 Cal. App. 4th 755, 761 [***9] (*Biallas*), rather than the best interest standard. n1 After reviewing the evidence presented at trial, the Court of Appeal determined that there was no evidence of a significant change of circumstances. Consequently, the court [*255] found that [**293] application of the changed circumstance rule likely would have yielded a different result.

n1 The Court of Appeal also declined to apply footnote 12 of *In re Marriage of Burgess* (1996) 13 Cal. 4th 25, 40, 913 P.2d 473 (*Burgess*), which suggested that the changed circumstance rule does not apply when the parents have joint custody, because: (1) the instant case did not involve a move-away; and (2) Montenegro and Diaz did not have joint custody. Because we resolve this case on other grounds, we express no opinion as to these aspects of the Court of Appeal's rulings.

We granted review.

DISCUSSION

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*Burgess*, *supra*, 13 Cal. 4th at p. [***10] 32.) Under this test, we must uphold the trial court "ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (*Ibid.*) In this case, the Court of Appeal held that the trial court abused its discretion by applying the best interest standard instead of the changed circumstance rule. We now reverse the Court of Appeal on the ground that the trial court properly applied the best interest standard. Because the trial court did not abuse its discretion by refusing to apply the changed circumstance rule, we do not consider whether the Court of Appeal erred in its application of this rule to the facts of this case.

Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child. The court and the family have "the widest discretion to choose a parenting plan that is in the best interest of the child." (Fam. Code, § 3040, subd. (b).) n2 When determining the best interest of the child, relevant factors include the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and [***11] amount of contact with the parents. (§ 3011.)

n2 All further undesignated statutory references are to the Family Code.

Although the statutory scheme provides for court determinations of custody and visitation, private resolutions are preferred. Thus, section 3170 requires mediation "if it appears on the face of a petition, application, or other pleading to obtain or modify a

temporary or permanent custody or visitation order that custody, visitation, or both are contested ...." The "purposes of [the] mediation proceeding" are: (1) "to reduce acrimony" between the parties; (2) "to develop an agreement assuring the child close and continuing contact with both parents that is in the best interest of the child"; and (3) "to effect a settlement of the issue of visitation rights of all parties that is in the best interest of the child." (§ 3161.)

As part of this emphasis on nonadversarial resolutions of custody and visitation disputes, the Legislature has developed "standards of practice" for these mediations. [***12] (§ 3162.) These standards include "provision for the best [*256] interest of the child and the safeguarding of the rights of the child to frequent and continuing contact with both parents." (*Id.*, subd. (b)(1).) The mediator "shall use his or her best efforts to effect a settlement of the custody or visitation dispute that is in the best interest of the child ...." (§ 3180.) Private counsel appointed to represent the child in the custody or visitation proceeding are "charged with the representation of the child's best interests." (§ 3151, subd. (a).)

If the mediation is successful and the parties reach an agreement, then the agreement must be submitted to the court for confirmation and incorporation into a court order. (§ 3186.) If, however, the mediation fails, then "the court shall set the matter for hearing on the unresolved issues." (§ 3185, subd. (a).) At the adversarial hearing, the court has " 'the widest discretion to choose a parenting plan that is in the best interest of the child' " (*Burgess*, *supra*, 13 Cal. 4th at p. 31, quoting § 3040, subd. (b)), but "must look to *all the circumstances* bearing on the best interest of the minor child." (*Burgess*, [***13] at p. 31.)

Although the statutory scheme only requires courts to ascertain the "best interest of the child" (e.g., § § 3011, 3020, 3040, 3087), this court has articulated a variation on the best interest standard once a final judicial custody determination is in place. Under the so-called changed circumstance rule, a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification. (*Burgess, supra*, [**294] 13 Cal. 4th at p. 37.) According to our earlier decisions, "the changed-circumstance rule is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements." (*Burchard*, *supra*, [***14] 42 Cal. 3d at p. 535.)

In *Burchard*, we held that the changed circumstance rule applies "whenever [final] custody has been established by judicial decree." (*Burchard*, *supra*, 42 Cal. 3d at p. 535, fn. omitted.) Our holding followed the majority of jurisdictions (*ibid.*), which applied the changed circumstance rule "regardless of whether the initial determination of custody resulted from the parents' agreement, from a default judgment, or from litigation." (Sharp, *Modification of Agreement-Based Custody Decrees: Unitary or Dual Standard?* [*257] (1982) 68 Va. L.Rev. 1263, 1265, fn. omitted (Sharp).) We also expressly disagreed with the minority of jurisdictions that applied the rule only when custody was determined by the court through an adversarial factfinding process. (See *Burchard*, at p. 535.) In doing so, we affirmed our earlier rejection of the minority standard in *In re Marriage of Carney* (1979) 24 Cal. 3d 725, 731, 157 Cal. Rptr. 383, 598 P.2d 36, footnote 4. (*Burchard,* at p. 535, fn. 2.) n3 Our subsequent decision in *Burgess* further confirmed that the changed circumstance rule applied after any final "judicial [***15] custody determination." (*Burgess*, *supra*, 13 Cal. 4th at p. 37.)

> n3 *Burchard*, however, rejected the argument that the changed circumstance rule applies in the case of an informal or de facto arrangement for custody, i.e., without a judicial order. "It is unworkable because ... absent such a prior determination the courts have no established basis on which they can assess the significance of any change. And it is potentially harmful because it could compel the court to make an award inconsistent with the child's best interest." (*Burchard*, *supra*, 42 Cal. 3d at p. 538, fn. omitted.)

Following this line of reasoning in *Burchard* and *Burgess*, the Court of Appeal in *Biallas*, *supra*, 65 Cal. App. 4th 755, rejected the father's argument that the changed circumstance rule did not apply because the trial court entered the permanent custody order pursuant to a stipulation between the parties. (*Id.* at pp. 760-761;

see also *In re Marriage of Edlund & Hales* (1998) 66 Cal. App. 4th 1454, 1466-1470 [***16] [applying the changed circumstance rule to a request for modification of a stipulated permanent custody order].) Because *Burchard* and *Burgess* "did not question the legitimacy of judicial orders entered pursuant to parental agreement" (*Biallas*, at p. 761), the court concluded that the trial court was not "empowered to make a de novo determination" of the best interest of the child. (65 Cal. App. 4th at p. 762.)

Despite these precedents, Montenegro now contends that stipulated custody orders cannot be final judicial custody determinations for purposes of the changed circumstance rule absent a "judicial inquiry as to whether the agreement results in an actual custody arrangement that fosters the child's best interest." We disagree. Nothing in our statutes or case law supports this contention, and we see no basis for treating a permanent custody order obtained via stipulation any differently than a permanent custody order obtained via litigation. Indeed, Montenegro's proposed requirement contravenes the stated intent behind our custody statutes. The Legislature has adopted a comprehensive statutory scheme designed to promote the mediation of all custody disputes. In doing so, the [***17] Legislature has indicated a strong preference for resolving custody disputes *outside the courtroom* through parental stipulations, on the apparent belief that cooperation is more likely to produce a sound resolution than litigation. Making stipulated [*258] permanent custody orders less binding than litigated permanent custody orders absent a [**295] judicial inquiry runs counter to this preference and would likely lead to instability in custody arrangements. (See § § 3160-3164.)

Moreover, Montenegro's contention ignores the reality that most parents resolve their custody disputes by agreement rather than litigation. These parents presumably do so because they believe these stipulated arrangements are in the child's best interest. Indeed, most courts and commentators agree that parents can adequately determine and protect their children's best interests. (See Sharp, *supra,* 68 Va. L.Rev. at p. 1263; Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce* (1979) 88 Yale L.J. 950, 957-958 (Mnookin).) Requiring a judicial inquiry similar to the inquiry courts make when a defendant pleads guilty in order to attain finality would burden courts [***18] and parties with unnecessary expense and delay. (See Sharp, at p. 1286.)

Although we conclude that stipulated custody orders *may* be final judicial custody determinations for purposes of the changed circumstance rule, we also recognize that many stipulated custody orders are not intended to be final judgments. Child custody proceedings usually involve fluid factual circumstances, which often result in disputes that must be resolved before any final resolution can be reached. Although the parties typically resolve these disputes through stipulations confirmed by court order, they often do not intend for these stipulations to be permanent custody orders. Indeed, these temporary custody orders serve an important role in child custody proceedings, and our statutory scheme expressly provides for them. (See, e.g., § 3061.) Because many parties would not enter into a stipulated custody order if a court might later treat that order as a final judicial custody determination, we must be careful in construing such orders. Otherwise, we may discourage these parties from entering into such stipulations.

With this in mind, we hold that a stipulated custody order is a final judicial custody [***19] determination for purposes of the changed circumstance rule only if there is a clear, affirmative indication the parties intended such a result. In adopting this holding, we recognize the reality that many family court litigants do not have attorneys and may not be fully aware of the legal ramifications of their stipulations. Because most trial courts " ' "rubber stamp" ' " stipulations in custody proceedings (*Burchard*, *supra*, 42 Cal. 3d 531, 548 (conc. opn. of Mosk, J.)), our holding insures that courts effectuate the *actual* intent of the parties when they entered into the stipulation without precluding them from making enforceable promises (Mnookin, *supra*, 88 Yale L.J. at p. 984 [observing that "the inability to make an enforceable promise may inhibit dispute settlement"]). [*259]

Applying this holding to the facts presented here, we conclude that neither the June 24, 1997 order nor the September 30, 1996 order constitutes a final judicial custody determination. Although these orders included detailed visitation schedules and did not provide for further hearings, they did not clearly state that they were final judgments as to custody. For example, the September 30, 1996 order, [***20] which did contain the words "for judgment" written by hand, also contained a notice stating that "this order, *although temporary*, shall remain in effect until further order of Court." Although the notice ostensibly applied to parties without attorneys, its inexplicable inclusion casts the finality of the judgment into doubt. Meanwhile, the June 24, 1997 order never mentioned the words "final," "permanent" or "judgment." Finally, the minute orders confirming these stipulations resembled the minute

orders confirming the parties' temporary stipulations. Thus, neither order contained a clear, affirmative indication that the parties intended it to be a final judicial custody determination.

In addition to the ambiguities in the orders themselves, the parties' conduct following the entry of these orders strongly suggest that they did not intend for these orders to be final judgments as to custody. Both Montenegro and Diaz regularly sought to modify these orders. During these modification proceedings, Montenegro never claimed that the stipulated orders were final judicial custody determinations and never argued that the changed circumstance rule applied. Although Diaz eventually argued [***21] that the [**296] changed circumstance rule applied, she did so on the basis that Gregory had lived with her since birth--and not because she had stipulated to a final judgment. In fact, at the hearing, Diaz's counsel argued that the stipulated orders had no "significance at all," and Diaz conceded that a new custody arrangement was necessary because Gregory was to start kindergarten. Under these circumstances, we will not second-guess the trial court's interpretation of its own orders and conclude that the court correctly applied the best interest standard. Because the record amply supports the trial court's determination that Montenegro should have custody of Gregory, we affirm it under the deferential abuse of discretion standard.

In reaching this conclusion, we do not dismiss the arguments of various amici curiae who contend this court should reevaluate the changed circumstance rule in light of new developments in social science and child psychology and development. Although we agree that the changed circumstance rule should be flexible and should reflect the changing needs of children as they grow up, we need not reach this issue today because we conclude that the changed circumstance [***22] rule does not apply. Accordingly, we leave any review of the changed circumstance rule for another day. [*260]

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.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

26 Cal. 4th 200, *; 26 P.3d 1061, **;
2001 Cal. LEXIS 4811, ***; 109 Cal. Rptr. 2d 327

10 of 19 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. JIMMIE DALE OTTO, Defendant and Appellant.

S088807

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 200; 26 P.3d 1061; 2001 Cal. LEXIS 4811; 109 Cal. Rptr. 2d 327; 2001 Cal. Daily Op. Service 6167; 2001 Daily Journal DAR 7533

July 23, 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 12, 2001, Reported at: 2001 Cal. LEXIS 6152.

PRIOR HISTORY:
Superior Court of California, Solano County. Super.Ct. No. C30931. Peter B. Foor, Judge. Court of Appeal of California, First Appellate District, Division Five. A086761.

DISPOSITION:
The judgment of the Court of Appeal is affirmed.

COUNSEL:
Ozro William Childs, under appointment by the Supreme Court, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Ronald S. Matthias and Linda M. Murphy, Deputy Attorneys General, for Plaintiff and Respondent.

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

OPINIONBY:
BROWN

OPINION:

[*203] [**1062]

In this case we decide whether Welfare and Institutions Code **n1** section 6600, subdivision (a)(3) (section 6600(a)(3)), which permits the details of predicate offenses to be proven by documentary evidence in a sexually violent predator (SVP) commitment proceeding, [**1063] allows the admission of multiple hearsay that does not fall within any exception to the hearsay rule, [***2] and if so, whether reliance on this evidence violates a defendant's right to due process. The Court of Appeal concluded such hearsay was admissible and reliance on the evidence did not contravene defendant's due process rights. We affirm.

n1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 9, 1991, Jimmie Dale Otto pled no contest to four felony counts of lewd and lascivious conduct on a child less than 14 years of age (Pen. Code, § 288, subd. (a)). The factual basis for the plea was "contained [*204] in the police report." The four counts involved four different victims--K.W., M.S., A.S., and D.S. Dr. Charlene Steen, appointed to examine Otto, stated in her report, which was attached

to the presentence report, that Otto admitted he touched K.W. under her pants on one occasion, tickling her buttocks and "private areas" without any sexual intent. Otto also told the probation officer he tickled K.W. on her bottom under [***3] her panties. He denied having molested any of the S children, and stated he had pled no contest because his attorney told him this was the best possible deal. On December 13, 1991, Otto was sentenced to 12 years in state prison.

On February 27, 1998, the People filed a petition seeking Otto's commitment as an SVP. Otto moved in limine to exclude "police or other hearsay reports" and prevent psychological evaluators from relying on them. The trial court denied the motion. Otto waived his right to a jury trial. Both the People and Otto presented experts who reviewed and relied on the presentence report and other documents. As relevant here, the People's three experts n2 concluded two of Otto's prior offenses involved substantial sexual conduct. n3 Indeed, although one defense expert, who did not testify, opined in his written report Otto was not likely to engage in sexually violent criminal behavior as a result of his diagnosed mental disorder, he also concluded Otto had been convicted of sexually violent predatory offenses against two or more victims. The other defense expert declined to offer an opinion regarding this latter issue, although he noted in his written report "the descriptions [***4] of the crimes strongly suggest that they included 'sexual violence.' " n4 The trial court found beyond a reasonable doubt that Otto was an SVP within the meaning of section 6600, and ordered him committed to Atascadero State Hospital or other secure facility for two years.

n2 At the People's request, the trial court admitted the abstract of judgment and presentence report from Otto's felony convictions for molesting K.W., M.S., A.S., and D.S., a 1991 evaluation by Dr. Steen that accompanied the presentence report, the written psychological evaluations of Dr. Zinik, Dr. Jackson, and Dr. Sreenivasan, and the notification of evaluation as an SVP.

n3 In addition to this conclusion which is at issue here, the People's experts relied on additional factors, such as Otto's admission he had molested his minor stepchildren (not the same victims as those in the predicate offenses) and his substance abuse problem, in opining Otto satisfied the criteria for the Sexually Violent Predators Act (SVPA), section 6600 et seq.

n4 At Otto's request, the trial court admitted the written psychological evaluations of Dr. Halon and Dr. Owen.

[***5]

The Court of Appeal affirmed, and denied Otto's subsequent petition for rehearing. We granted Otto's petition for review, and limited the issues to whether section 6600(a)(3) allows the admission of multiple hearsay that does not fall within any exception to the hearsay rule, and if so, whether reliance on this evidence violates a defendant's right to due process.

[*205] II. DISCUSSION

A. Overview of the SVPA

In enacting the SVPA, "the Legislature expressed concern over a select group of criminal offenders who are extremely dangerous as the result of mental impairment, and who are likely to continue committing acts of sexual violence even after they have been punished for such crimes. The Legislature indicated that to the extent such persons are currently incarcerated and readily identifiable, commitment under the SVPA is warranted immediately upon their release from prison. The act provides treatment for mental disorders from which they currently suffer [**1064] and reduces the threat of harm otherwise posed to the public. No punitive purpose was intended." (*Hubbart v. Superior Court* (1999) 19 Cal. 4th 1138, 1143-1144, 969 P.2d 584 (*Hubbart*).)

The requirements for classification [***6] as an SVP are set forth in section 6600, subdivision (a) and related provisions. (*Hubbart*, *supra*, 19 Cal. 4th at p. 1144.) As relevant to the issues presented here, first an SVP must suffer from "a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1); *Hubbart*, *supra*, 19 Cal. 4th at p. 1144.) Second, an SVP must have been "convicted of a sexually violent offense against two or more victims." (§ 6600, subd. (a)(1); *Hubbart*, *supra*, 19 Cal. 4th at p. 1145.) A

" 'sexually violent offense' " refers to certain enumerated sex crimes, including violation of Penal Code section 288, subdivision (a), "committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (Welf. & Inst. Code, § 6600, subd. (b); *Hubbart*, *supra*, 19 Cal. 4th at p. 1145.) In the alternative, and relevant

here, "If the victim of an underlying offense that is specified in subdivision (b) of Section 6600 is a child under the age of 14 [***7] and the offending act or acts involved substantial sexual conduct, the offense shall constitute a 'sexually violent offense' for purposes of Section 6600." (§ 6600.1, subd. (a); *People v. Superior Court (Johannes)* (1999) 70 Cal. App. 4th 558, 562 [section 6600.1 modifies section 6600, subdivision (b), such that someone who commits two or more specified sex crimes involving substantial sexual conduct against children under 14 is subject to the SVPA even if his crimes were not committed with force, violence, menace, or fear].) " 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 6600.1, subd. (b).)

"Prior crimes play a limited role in the SVP determination." (*Hubbart*, *supra*, 19 Cal. 4th at p. 1145.) The conviction "constitutes evidence that [*206] may support a court or jury determination that a person is a sexually violent predator, but shall not be the sole basis for the determination." (§ 6600(a)(3).) Rather, the trier of fact "may not find a person a sexually violent predator [***8] based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others ...." (*Ibid.*)

"At trial, the alleged predator is entitled to 'the assistance of counsel, the right to retain experts or professional persons to perform an examination on his or her behalf, and have access to all relevant medical and psychological records and reports.' " (*Hubbart*, *supra*, 19 Cal. 4th at p. 1147, quoting § 6603, subd. (a).) "Either party may demand and receive trial by jury." (*Hubbart*, at p. 1147, citing § 6603, subds. (a), (b); see § 6603, subd. (d).)

"The trier of fact is charged with determining whether the requirements for classification as an SVP have been established 'beyond a reasonable doubt.' " (*Hubbart*, *supra*, 19 Cal. 4th at p. 1147, quoting § 6604.) Any jury verdict must be unanimous. (§ 6603, subd. (e).) "If the state fails to carry this burden, the person is released from prison when his term expires." (*Hubbart*, *supra*, 19 Cal. 4th at p. 1147, citing § 6604.) "However, where the requisite SVP findings are made, 'the person shall be committed for two years to the [***9] custody of the State Department of Mental Health for appropriate treatment and confinement in a secure facility designated by the Director of Mental Health ....' " (*Ibid.*) "Confinement generally cannot exceed two years unless a new petition is filed and an extended commitment is obtained from the court." (*Ibid.*)

B. Analysis

1. Admission of multiple hearsay

We first consider whether section 6600(a)(3), which permits the details of predicate [**1065] offenses to be proven by documentary evidence in an SVP commitment proceeding, allows the admission of multiple hearsay that does not fall within any exception to the hearsay rule. Section 6600(a)(3) provides in relevant part: "The existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, *may be shown by documentary evidence, including, but not limited to,* preliminary hearing transcripts, trial transcripts, *probation and sentencing reports*, and evaluations by the State Department of Mental Health." (Italics added.)

By its terms section 6600(a)(3) authorizes the use [***10] of hearsay in presentence reports to show the details underlying the commission of a predicate [*207] offense. It is difficult to interpret the language "may be shown by documentary evidence, including ... probation and sentencing reports," in any other manner. (*Ibid.*) Indeed, the "details underlying the commission of " (*ibid.*) the crime could only be shown by hearsay since presumably the court officer who prepared the report was not a percipient witness to the crime.

Otto contends, however, that while "the Legislature intended to create an exception to the hearsay rule to allow the described documents to be admitted in evidence," it did not intend to repeal Evidence Code section 1201 and "admit without restriction hearsay found in such documents." Thus, according to Otto, the presentence report was admissible, but the victim statements contained in the report were not admissible unless they fell within an exception to the hearsay rule, such as a declaration against interest or a spontaneous declaration.

Evidence Code section 1200, subdivision (b) provides, "Except as provided by law, hearsay evidence is inadmissible." "Exceptions [***11] to the hearsay rule are not limited to those enumerated in the Evidence Code; they may also be found in other codes and decisional law." (*In re Malinda S.* (1990) 51 Cal. 3d

368, 376, 272 Cal. Rptr. 787, 795 P.2d 1244 (*Malinda S.*), now superseded by statute.) Evidence Code section 1201 provides, "A statement within the scope of an exception to the hearsay rule is not inadmissible on the ground that the evidence of such statement is hearsay evidence if such hearsay evidence consists of one or more statements each of which meets the requirements of an exception to the hearsay rule."

As noted, section 6600(a)(3) expressly permits the use of probation and sentencing reports to show "the details underlying the commission of an offense." This provision implicitly authorizes the admission of hearsay statements in those reports. The Legislature is undoubtedly familiar with the typical contents of such reports, which include "the facts and circumstances of the crime" and "the victim's statement or a summary thereof, if available." (Cal. Rules of Court, rule 4.411.5(a)(2), (5)(i); hereafter all references to rules are to the California Rules of Court.) [***12] The source of the details of the prior offense is not the author of the report, but the victims. Rule 4.411.5 contemplates that police reports will be used as a source of information for summarizing the crime in the presentence report. (See rule 4.411.5(a)(7)(i); *People v. Superior Court (Howard)* (1999) 70 Cal. App. 4th 136, 154 ["Probation reports in felony cases necessarily include victim hearsay statements, pursuant to the requirements for probation reports set forth in" rule 4.411.5(a)(5)]; *People v. Valdivia* (1960) 182 Cal. App. 2d 145, 148, 5 Cal. Rptr. 832 ["A probation officer could not make an investigation and report of the nature required by Penal Code, [*208] section 1203, if restricted to the rules of evidence. Much of the prior record and history of a defendant, as well as the circumstances surrounding the crime, are hearsay and can be investigated and reported upon only by the use of hearsay information"].) By permitting the use of presentence reports at the SVP proceeding to show the details of the crime, the Legislature necessarily endorsed the use of multiple-level-hearsay statements that do not otherwise fall [***13] within a hearsay exception.

This interpretation is also supported by the legislative history. As originally enacted, the SVPA did not permit the use of documentary evidence. (See Stats. 1995, ch. 763, § 3.) The Legislature modified the act after [**1066] prosecutors complained that "they must bring victims back to court to re-litigate proof of prior convictions." (Sen. Com. on Crim. Proc., analysis of Assem. Bill No. 3130 (1995-1996 Reg. Sess.) as amended May 24, 1996, p. 7.) The bill amending the statute allowed "the existence of any prior convictions to be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, could be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, probation and sentencing reports, and evaluations by [the Department of Mental Health." (*Ibid.*)

Thus, the Legislature apparently intended to relieve victims of the burden and trauma of testifying about the details of the crimes underlying the prior convictions. Moreover, since the SVP proceeding may occur years after the predicate offense or offenses, the Legislature [***14] may have also been responding to a concern that victims and other percipient witnesses would no longer be available. Given these purposes, the only reasonable construction of section 6600(a)(3) is that it allows the use of multiple-level hearsay to prove the details of the sex offenses for which the defendant was convicted. If the amendment to section 6600, subdivision (a) is construed as excluding multiple hearsay, i.e., victim statements, contained in probation and sentencing reports, then victims would be required to testify--an interpretation that would defeat the apparent purposes of the amendment.

Indeed, under Otto's construction, the amendment to Welfare and Institutions Code section 6600, subdivision (a) would have no practical effect. At the time of the amendment, Evidence Code section 1201 already provided for admission of hearsay falling within an established exception. Thus, amending Welfare and Institutions Code section 6600, subdivision (a) to provide for the admission of hearsay that was already admissible would have been meaningless.

Otto asserts that the legislative history also indicates [***15] that the bill's author, Assemblywoman Paula Boland, Chair of the Assembly Committee on Public [*209] Safety, thought the amendment was consistent with existing law. In an undated Committee Statement, Assemblywoman Boland describes the proposed amendment as providing for "proof of prior convictions by consistent evidence and documentary proof consistent with mentally disordered offender procedures." (Assemblywoman Boland, Assem. Com. on Public Safety, Statement re Assem. Bill No. 3130 (1995-1996 Reg. Sess.) p. 2.) Otto states, "We do not pretend to know what 'consistent evidence' means, other than to observe that the admission into evidence of hearsay statements to the police is not, ordinarily, consistent with the rules of evidence" and that in a mentally disordered offender case, the prisoner retains the "right to require the prosecutor to prove the details of such

underlying crimes by admissible evidence." Even if correct, the victim hearsay evidence in this case was made admissible by the language of section 6600(a)(3). We are loath to ignore the express terms of the statute because of an obscure remark made by one legislative member.

Otto contends admission of the victims' hearsay statements [***16] is also precluded by *People v. Reed* (1996) 13 Cal. 4th 217, 914 P.2d 184. In *Reed*, we held that statements from a preliminary hearing transcript that fell within a hearsay exception could be used to prove the defendant's prior assault conviction involved the personal use of a dangerous or deadly weapon. (*Reed*, at p. 220.) In so doing, we distinguished cases involving the use of prison records hearsay (presumably not falling within an exception), which was "specifically authorized" by statute. (*Id.* at p. 230.) Similar multiple hearsay statements contained in a probation officer's report that did not identify the declarant or fall within any hearsay exception were held inadmissible. (*Id.* at pp. 220, 230.) Here, unlike *Reed*, the hearsay statements at issue fall within an express statutory exception similar to the prison records discussed in *Reed*, and the declarants are clearly identified.

[**1067] 2. Alleged Violation of Due Process

Otto further contends that even if the Legislature intended to authorize the admission of multiple hearsay that does not fall within any previously established hearsay exception, reliance on [***17] such evidence violates his due process right to confrontation and "concomitant right to be convicted only if the prosecution proves its case by reliable evidence."

Because civil commitment involves a significant deprivation of liberty, a defendant in an SVP proceeding is entitled to due process protections. (*Foucha v. Louisiana* (1992) 504 U.S. 71, 80, 118 L. Ed. 2d 437, 112 S. Ct. 1780.) A defendant challenging the statute on due process grounds carries a heavy burden. Courts have a " 'duty to uphold a [*210] statute unless its unconstitutionality clearly, positively, and unmistakably appears; all presumptions and intendments favor its validity.' " (*People v. Hansel* (1992) 1 Cal. 4th 1211, 1219, 824 P.2d 694.)

"Once it is determined that due process applies, the question remains what process is due." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593.) We have identified four relevant factors: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute [***18] procedural safeguards; (3) the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail; and (4) the dignitary interest in informing individuals of the nature, grounds, and consequences of the action and in enabling them to present their side of the story before a responsible government official. (*Malinda S.*, *supra*, 51 Cal. 3d at p. 383.)

Applying these factors to reliance on the victims' hearsay statements in this case, we consider first that the private interests that will be affected by the official action are the significant limitations on Otto's liberty, the stigma of being classified as a sexually violent predator, and subjection to unwanted treatment. (See *Vitek v. Jones* (1980) 445 U.S. 480, 495, 63 L. Ed. 2d 552, 100 S. Ct. 1254.)

Second, we consider the risk of an erroneous deprivation of such interests through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. Here, the parties agree the victim hearsay statements must contain special indicia of reliability to satisfy due process. (See [***19] *In re Lucero L.* (2000) 22 Cal. 4th 1227, 1247-1248, 998 P.2d 1019 (*Lucero L.*); *id.* at pp. 1250-1251 (conc. opn. of Kennard, J.) [out-of-court statements of a child who is subject to a jurisdictional hearing and disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not form the sole basis for a jurisdictional finding unless they show special indicia of reliability].) We agree. As Otto notes, the hearsay at issue in this case permeates not only the substantial sexual conduct component of the prior crime determination, but also the psychological experts' "conclusion that [Otto] was and remained a pedophile ... likely to reoffend." (See *Addington v. Texas* (1979) 441 U.S. 418, 429, 60 L. Ed. 2d 323, 99 S. Ct. 1804 [factual issues resolved in commitment proceeding "represent only the beginning of the inquiry. Whether the individual is mentally ill and dangerous to either himself or others and is in need of confined therapy turns on the *meaning* of the facts which must be interpreted by expert psychiatrists and psychologists"].) Thus, if these facts [***20] are unreliable, a significant portion of the [*211] foundation of the resulting SVP finding is suspect. Moreover, while the current SVP commitment is for only two years, Otto raises an arguable concern he will be estopped by the finding below from relitigating the issue of whether the prior crimes involved substantial

sexual conduct at any future SVP proceedings.

In evaluating the reliability of hearsay statements in a presentence report, a court may consider numerous factors, including the context in which the statements appear. The presentence report is written by a [**1068] court officer regarding a crime to which the defendant either pled or was found guilty. Transcripts from any preliminary hearing or trial held regarding the predicate conviction are also pertinent, as well as any indicia the defendant challenged the accuracy of the hearsay statements at the underlying criminal proceeding. Relevant factors further include the circumstances surrounding the making of the statement, if known, such as spontaneity and consistent repetition, the mental state of the declarant, use of terminology unexpected of a child of a similar age, lack of motive to fabricate, and whether the hearsay statement [***21] was corroborated. (Cf. *Lucero L.*, *supra*, 22 Cal. 4th at p. 1239.)

Not surprisingly, the parties disagree as to whether the victims' hearsay statements here were reliable. We conclude the victims' hearsay statements possess sufficient indicia of reliability to satisfy due process.

The most critical factor demonstrating the reliability of the victim hearsay statements is that Otto was convicted of the crimes to which the statements relate. This factor will nearly always be present in an SVP proceeding because the SVPA requires conviction "of a sexually violent offense against two or more victims." (§ 6600, subd. (a)(1).) Thus, a prerequisite to considering the presentence report is a conviction for the crime to which the hearsay statements relate. As a result of such a conviction, some portion, if not all, of the alleged conduct will have been already either admitted in a plea or found true by a trier of fact after trial.

Here, Otto pled no contest to the prior crimes. In so doing, he stated the factual basis for his plea was contained in the police reports. Thus, unlike the typical scenario in a dependency proceeding in which a parent disputes the factual [***22] allegations, such as in *Lucero L.*, Otto's plea admitted the truth of the victims' statements.

Otto asserts that one can violate Penal Code section 288, subdivision (a) by any touching committed with lewd intent. (*People v. Martinez* (1995) 11 Cal. 4th 434, 451-452, 903 P.2d 1037.) Thus, he [*212] contends, his no contest plea admits only this conduct, not the substantial sexual conduct described in the presentence report. (*People v. Watts* (1977) 67 Cal. App. 3d 173, 178, 136 Cal. Rptr. 496 ["Inquiry into the factual basis for the plea ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead"].) Our review of the presentence report indicates little, if any, innocent touching made culpable solely by lewd intent. Nor does Otto contend the presentence report omitted acts by Otto against the victims, as described in the underlying police report, that would constitute lewd behavior based solely on his wrongful intent. Moreover, taking Otto's argument to its logical conclusion, while Penal Code section 288, subdivision (a) is listed as a predicate offense [***23] in the SVPA, it would never so qualify when the defendant pled guilty or no contest prior to the preliminary hearing because the offense may be committed by an otherwise innocuous touching coupled with lewd intent.

In addition, consideration of hearsay statements contained in presentence reports is not unique to the SVPA. A probation report is required following every felony conviction in this state. (Pen. Code, § 1203c.) Rule 4.411.5 details the contents of presentence reports, and contemplates that police reports will be used to prepare crime summaries contained therein. (Rule 4.411.5(a)(7)(i).) Defendants are required by statute to have an opportunity to review and challenge inaccuracies in the presentence report. (Pen. Code, § § 1170, subd. (b), 1203, subd. (b)(2)(D), 1203d; Cal. Rules of Court, rule 4.437(e); see *People v. Scott* (1994) 9 Cal. 4th 331, 350-351, 885 P.2d 1040.) Otto does not contend he failed to receive such an opportunity in the underlying criminal prosecution.

Superior courts consider and rely upon hearsay statements contained in a presentence report to determine whether to place a defendant on [***24] probation, and to evaluate his level of culpability when selecting an appropriate sentence. (Pen. Code, § 1203, subd. (b)(3); Cal. Rules of Court, rule 4.411(d).) This includes the court's assessment of aggravating and mitigating factors, such as [**1069] whether the crime involved great bodily harm or other act disclosing a high degree of viciousness, cruelty, or callousness, whether the victim was particularly vulnerable, whether the crime was carried out with sophistication, whether the defendant took advantage of a position of trust or confidence, whether the defendant played a minor role in the crime, whether the victim participated in the incident and, if so, under what circumstances, and whether the defendant exercised caution to avoid harm or damage. (Rules 4.420(b), 4.421(a)(1), (3), (8), (11), 4.423(a)(1), (2), (6).)

Thus, courts routinely rely upon hearsay statements contained in probation reports to make factual findings concerning the details of the crime. These [*213] findings, in turn, guide the court's sentencing decision--a decision which has a great impact on the defendant's liberty interest. Indeed, the range of sentences available in a case involving one [***25] of the sex offenses enumerated in section 6600, subdivision (b) commonly exceeds the two-year liberty interest at issue here. As one Court of Appeal has stated, "In every felony proceeding in the State of California, a probation report is required and must be read and considered by the sentencing judge. [Citation.] The Legislature does not require trial court judges to read and consider 'unreliable' documents as a prerequisite to the imposition of sentence." (*People v. Miller* (1994) 25 Cal. App. 4th 913, 918, 31 Cal. Rptr. 2d 423.)

Moreover, other than Otto's broad denials that no molestation occurred, which were inconsistent with his no contest plea, he never specifically challenged the accuracy of the victims' statements in the underlying criminal proceeding. Indeed, Otto admitted to Dr. Steen he touched K.W. under her pants, tickling her buttocks and "private areas," and told the probation officer he tickled K.W. on her bottom under her panties.

Otto asserts that because he pled no contest in 1991, he had little motivation to challenge the accuracy of the victims' statements at the time of sentencing for the underlying crimes. Of course, since the 1996 amendment to section 6600, [***26] subdivision (a), defendants have been on notice that "the details underlying the commission of an offense that led to a prior conviction ... may be shown by documentary evidence, including ... probation and sentencing reports." n5 Even here, at the time of sentencing, Otto was presumably aware that should he reoffend, a trial court would consider the details of his earlier crimes in sentencing him for any future offenses. (See Rule 4.411.5(a)(3) [presentence report includes a "summary of the defendant's record of prior criminal conduct"]; rule 4.414(b)(1) [criteria affecting the decision to grant or deny probation include defendant's prior record of criminal conduct, and whether the record "indicates a pattern of regular or increasingly serious criminal conduct"]; rule 4.421(b)(2) [circumstances in aggravation for purposes of sentencing include whether defendant's prior convictions are "numerous or of increasing seriousness"].)

n5 Thus, to the extent defendants are "discouraged ... from entering into plea agreements and encouraged ... instead to cross-examine individuals who made the statements appearing in the reports" (conc. opn., *post*, at p. 6), this is a consequence of the SVPA, not our opinion.

[***27]

Moreover, by the time of the SVP proceeding, Otto was fully aware of the statements' potential significance. Nevertheless, Otto's own expert opined Otto had been convicted of sexually violent predatory offenses against two or more victims. As the trial court stated, "there has been really no [*214] substantial dispute that the criteria" regarding the predicate prior convictions "were met in this matter."

Implicit in the above discussion are other factors (in addition to the reliability of the victims' hearsay statements) that diminish the risk of an erroneous deprivation of rights as a result of reliance on the hearsay statements, and the probable value of additional or substitute procedural safeguards. Otto had the opportunity to present the opinions of two psychological experts, and cross-examine any prosecution witness who testified. Moreover, the trial court retained discretion under Evidence Code section 352 to exclude unreliable hearsay, which acted as a further safeguard against any due process violation.

[**1070] Nor does reliance on the victims' hearsay statements deny Otto any right of confrontation. There is no right to confrontation under the state and federal [***28] confrontation clause in civil proceedings, but such a right does exist under the due process clause. (*Malinda S.*, *supra*, 51 Cal. 3d at p. 383, fn. 16 ["both the federal and state Constitutions confine the express right of confrontation to criminal defendants"].) Here, Otto had the opportunity to cross-examine any prosecution witness who testified. Because he did not attempt to call any witnesses other than a psychological expert, we need not decide in this case whether he had a due process right to call witnesses such as the victims or other percipient witnesses. We note, however, Otto had the opportunity to confront these witnesses at the time the underlying charges were filed, but instead chose to accept a plea bargain. According to his reply brief, "one of the purposes of" this bargain "was to spare the victims' having to testify."

For these reasons we also reject Otto's related argument that admission of and reliance on the victims' hearsay statements shifts the burden of proof. Rather, it

simply reflects the view that such evidence is sufficiently reliable to be considered by the trier of fact and the evaluating psychological experts.

Third, we consider [***29] the government's interest, including the function involved, and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. The express purpose of the SVPA articulates the strong government interest in protecting the public from those who are dangerous and mentally ill. Requiring the government to adduce live testimony from the victims could potentially impede this purpose. The SVP proceeding occurs at the end of the defendant's sentence, which may be years after the events in question. As one Court of Appeal has observed, if the People can "obtain civil commitment of sexually violent predators only in cases where the conviction record was extensive, and [*215] included victim testimony ... as to the details of the sexually violent offense," in those cases where "the defendant pled guilty before the preliminary hearing, or the victims' testimony was not sufficient to establish the details of the offense as required by the SVP Act, the state would never be able to meet its burden." (*Howard*, *supra*, 70 Cal. App. 4th at p. 155 [concluding victim hearsay statements contained in a probation report admissible at SVP probable [***30] cause hearing].)

Fourth, as delineated above, reliance on the hearsay evidence does not impede Otto's dignitary interest in being informed of the nature, grounds, and consequences of the SVP commitment proceeding, or disable him from presenting his side of the story before a responsible government official.

DISPOSITION

The judgment of the Court of Appeal is affirmed.

BROWN, J.

WE CONCUR:

BAXTER, J.

WERDEGAR, J.

CHIN, J.

CONCURRING OPINION BY GEORGE, C.J.

CONCURBY:
GEORGE

CONCUR:

CONCURRING OPINION BY GEORGE, C.J.

I concur in the majority's conclusion that Welfare and Institutions Code section 6600, subdivision (a)(3), authorizes the admission of hearsay contained in documentary evidence that is introduced to prove the details underlying a prior conviction at issue in a sexually violent predator commitment proceeding. I further concur in the majority's determination that the admission of the particular hearsay statements in the present case did not deny defendant due process of law. I write separately, however, because I disagree with the majority's suggestion that the conviction of a crime, after trial or upon a plea of guilty, to which such [***31] hearsay statements relate constitutes the most critical factor demonstrating the reliability of the statements. (Maj. opn., *ante*, pp. 12-13.) As I shall explain, such a conviction does not necessarily establish the reliability of hearsay statements contained in presentence reports. The circumstances of each case must be evaluated to assess whether hearsay contained in documentary evidence is sufficiently reliable to be admitted in a proceeding under the [**1071] Sexually Violent Predators Act (SVP Act) (Welf. & Inst. Code, § 6600 et seq.). **n1**

n1 Subsequent undesignated statutory references are to the Welfare and Institutions Code.

A prerequisite to a commitment pursuant to the SVP Act is a factual finding beyond a reasonable doubt that the defendant is a sexually violent predator. (§ 6604.) Such a finding must include a determination that the defendant has been convicted of a sexually violent offense against two or more victims. (§ 6600, subd. (a)(1).)

Sexually violent offenses, [***32] within the meaning of section 6600, include specified crimes that (1) are committed by force, violence, duress, menace, [*216] or fear of immediate and unlawful bodily injury (*id.*, subd. (b)); or (2) involve substantial sexual conduct with a child under the age of 14 years (§ 6600.1, subd. (a)). " 'Substantial sexual conduct' means penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender." (§ 6600, subd. (b).)

Among the crimes that can support a finding that the defendant has committed a sexually violent offense

is a violation of Penal Code section 288, subdivision (a), which provides in relevant part: "Any person who willfully and lewdly commits any lewd or lascivious act ... upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony ...." As the majority recognizes, no particular form of physical contact is required to constitute a violation [***33] of this statute; a conviction is authorized for any and all sexually motivated touching of a child under the age of 14 years. (*People v. Martinez* (1995) 11 Cal. 4th 434, 438, 452, 903 P.2d 1037.) Thus, Penal Code section 288, subdivision (a), does not require that the crime have been accomplished by force, violence, duress, menace, or fear of injury, or that it involved substantial sexual conduct. Therefore, a defendant's violation of this statute does not necessarily establish that he or she committed a sexually violent offense within the meaning of Welfare and Institutions Code section 6600.

Accordingly, in a proceeding under the SVP Act, evidence that the defendant was convicted of violating Penal Code section 288, subdivision (a) -- without additional evidence of the circumstances of the crime -- does not prove that the defendant has been convicted of a sexually violent offense. Welfare and Institutions Code section 6600, subdivision (a)(3), authorizes the People to prove such circumstances with documentary evidence, including sentencing reports. As established in [***34] the majority opinion, this provision also authorizes the admission of hearsay statements contained in these reports to establish the details of the crime.

The majority concludes, as do the People, that due process of law requires that hearsay statements contained in sentencing reports bear special indicia of reliability before they can be admitted to prove the details of a prior conviction in an SVP proceeding. This conclusion is supported by our decision in *In re Lucero L.* (2000) 22 Cal. 4th 1227, 998 P.2d 1019 (*Lucero L.*), which held that the out-of-court statements of children who are subject to juvenile dependency hearings (§ 300), if not corroborated by other evidence, are sufficient to support a jurisdictional [*217] finding only if the statements show particular indicia of reliability. In support of this holding, we emphasized a parent's important liberty interest in maintaining custody of his or her child, the risk of an erroneous deprivation of that interest in light of the hearsay declarant's legal incompetence to testify and the parent's inability to cross-examine the child, and the governmental interest in producing an accurate and just resolution of dependency [***35] proceedings. (*Lucero L., supra*, 22 Cal. 4th at p. 1247.) " 'The nonexhaustive list of factors that the United States Supreme Court has cited as relevant to the reliability of hearsay statements made by child witnesses in sexual abuse cases are (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected of a child of a similar age; and (4) lack of motive to fabricate. [**1072] [Citation.]' [Citation]." (*Id.* at p. 1239.)

The private interest at stake in the present case is compelling. A sexually violent predator faces a complete loss of liberty for a period of two years, followed by potentially indefinite recommitment proceedings in which the People might contend that he or she is collaterally estopped from relitigating the issue whether the prior conviction was sexually violent. As in *Lucero L., supra*, 22 Cal. 4th at page 1247, the governmental interest in preventing child abuse is vitally important, but so is the interest in an accurate and just resolution of the proceeding. By requiring that victim hearsay statements in sentencing reports bear special indicia of reliability, the majority [***36] in the present case, as in *Lucero L.*, determines that there is a significant risk of an erroneous deprivation of liberty based upon such hearsay statements.

Although the majority states that relevant factors in assessing the reliability of hearsay statements contained in sentencing reports include the circumstances in which the statements were made, the majority's conclusion that the statements in the present case are inherently reliable is based upon other considerations: (1) Otto's conviction of the crime to which the statements relate; and (2) his failure to challenge the accuracy of the statements in the underlying criminal proceeding. According to the majority, Otto's conviction is the most critical factor demonstrating the reliability of the statements, and this factor "will nearly always be present in an SVP proceeding," because a conviction to which the hearsay statements relate is a prerequisite to considering the sentencing report. (Maj. opn., *ante*, pp. 12-13.) The majority further relies upon the circumstances that Otto chose to enter into a plea agreement rather than confront the witnesses in the criminal proceeding, and that he had the opportunity before he was [***37] sentenced to review and challenge any inaccuracies in the sentencing report.

A conviction, however, does not necessarily constitute a critical factor demonstrating the reliability of hearsay statements in a sentencing report. [*218] Even where a defendant pleads guilty and recites that

the sentencing report contains a factual basis for the plea, the report might contain accounts of victim statements describing conduct that *relates* to the offense, but that nevertheless is *unnecessary* to establish the elements of the offense. For example, a sentencing report might include statements indicating that the defendant, with lewd intent, (1) touched the arm of a minor 13 years of age; (2) threatened the minor with physical violence if the minor resisted that touching; and (3) engaged in other substantial sexual contact with the minor. All three of these statements relate to the crime set forth in Penal Code section 288, subdivision (a). The first statement, by itself, provides a factual basis for a plea of guilty to the offense set forth in that statute. Accordingly, a conviction under this statute does not establish the reliability of the second or third statements, [***38] which would be the only statements supporting a finding that the defendant committed a sexually violent offense within the meaning of the SVP Act.

The circumstance that a defendant is authorized in the underlying criminal proceeding to challenge details in a sentencing report does not necessarily establish that the hearsay statements contained therein are sufficiently reliable to satisfy due process concerns. Penal Code section 1170, subdivision (b), and rule 4.437 of the California Rules of Court guide a sentencing court's decision whether to impose the lower, middle, or upper term when a penal statute specifies three possible terms of imprisonment. The purpose of the presentence report is to assist the court in assessing whether mitigating or aggravating circumstances justify the imposition of the lower or upper term rather than the middle term. In this context, "either party or the victim ... may submit a statement in aggravation or mitigation to dispute facts in the record or the probation officer's report, or to present additional facts." (Pen. Code, § 1170, subd. (b), see also Cal. Rules of Court, rule 4.437(e).)

These provisions [***39] seldom are relevant when a defendant enters into an agreement to plead guilty in exchange for the prosecution's recommendation that the defendant receive a [**1073] particular sentence. In this situation, the defendant has little, if any, incentive to challenge particular statements contained in the presentence report. Indeed, as the majority recognizes, the purpose of such plea agreements often is to avoid requiring that the victims testify at trial. If a defendant decides to challenge information contained in a presentence report, he or she possesses the right to call witnesses and present other evidence in mitigation of the punishment to be imposed. (Pen. Code, § 1204.) A prosecutor might decide to withdraw a plea agreement if the defendant chooses to pursue such a course of action. Thus, by concluding that hearsay statements in presentence reports are reliable because the defendant can challenge them before sentencing (or because the defendant [*219] could have cross-examined the declarants by going to trial), the majority effectively will discourage some defendants from entering into plea agreements and encourage them instead to cross-examine individuals who made the statements [***40] appearing in the reports. Such an effect thwarts -- rather than furthers -- the purposes underlying Welfare and Institutions Code section 6600, subdivision (a)(3).

In the present case, Otto did not subpoena the hearsay declarants or any other witnesses for the purpose of challenging the accuracy of the statements contained in the presentence report describing the details of his crime. n2 Nor did he demonstrate that these witnesses were unavailable. Furthermore, as the majority opinion explains, the presentence report describes little, if any, touching that could support a conviction but that would not constitute substantial sexual conduct, and the report indicates that Otto admitted significant sexual conduct with the victims. Under these particular circumstances, I agree that the statements are sufficiently reliable to establish that Otto was convicted of a sexually violent offense within the meaning of section 6600, without considering whether the circumstances surrounding the making of the statements afford them special indicia of reliability.

n2 The majority reserves the issue whether a defendant in a proceeding under the SVP Act has a due process right to call as witnesses the declarants of hearsay statements introduced against the defendant or other percipient witnesses. Nothing in the SVP Act suggests that the defendant is precluded from calling such witnesses, and the majority does not allude to any other legal justification for prohibiting the presentation of testimony relevant to factual issues to be litigated in the jury or court trial to which the defendant is entitled under section 6603. (Cf. *In re Malinda S.* (1990) 51 Cal. 3d 368, 382-385, 272 Cal. Rptr. 787, 795 P.2d 1244 [parents have due process right to subpoena and examine individuals whose hearsay statements are contained in social studies admitted in juvenile dependency proceedings].)

[***41]

In sum, although I believe that a defendant's failure to challenge statements in a sentencing report sometimes can be a relevant factor in assessing the reliability of such statements, as can be the fact of his or her earlier conviction, I disagree with the majority to the extent it suggests that these factors necessarily or generally establish special indicia of reliability in a proceeding pursuant to the SVP Act. As in *Lucero L.*, *supra*, 22 Cal. 4th 1227, if the declarant of hearsay statements contained in a presentence report is legally incompetent or otherwise unavailable to testify if called as a witness by the defendant, such statements can support a necessary finding in a proceeding under the SVP Act only if they are corroborated by other evidence or the circumstances surrounding the making of the statements demonstrate that they are inherently reliable. In the case of hearsay statements made by child witnesses in sexual abuse cases, reliability can be established by demonstrating, among other things, spontaneity and consistent repetition, the mental state of the declarant, use of terminology [*220] unexpected of a child of a similar age, and lack of a motive to [***42] fabricate the statement.

GEORGE, C.J.

I CONCUR:

KENNARD, J.

11 of 19 DOCUMENTS

STACY CORNETTE et al., Plaintiffs and Appellants, v. DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.

S089010

SUPREME COURT OF CALIFORNIA

26 Cal. 4th 63; 26 P.3d 332; 2001 Cal. LEXIS 4235; 109 Cal. Rptr. 2d 1; 2001 Cal. Daily Op. Service 5857; 2001 Daily Journal DAR 7185

July 12, 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, Los Angeles County. Court of Appeal of California, Second Appellate District, Division Three. B125741. Super. Ct. No. BC081191. Frank Gafkowski, Jr. *

* Retired judge of the former Municipal Court for the Southeast Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

DISPOSITION:
Affirmed the judgment of the Court of Appeal.

COUNSEL:
Attorneys for Appellant:

Grassini & Wrinkle and Roland Wrinkle, for Plaintiffs and Appellants.

Attorneys for Respondent:

William M. McMillan, Breland C. Gowan, David R. Simmes, Larry R. Danielson, Jill Siciliano and Kenneth G. Nellis, for Defendant and Respondent.

Pollak, Vida & Fisher, Daniel P. Barer and Girard Fisher, for 105 California Cities and California State Association of Counties, as Amici Curiae on behalf of Defendant and Respondent.

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

OPINIONBY:
BROWN

OPINION:

[**333] [*66]

A public entity is liable for injury proximately caused by a dangerous condition [***2] of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have [**334] taken preventive measures. (Gov. Code, § 835, subd. (b); n1 *Baldwin v. State of California* (1972) 6 Cal. 3d 424, 427, 99 Cal. Rptr. 145, 491 P.2d 1121 (*Baldwin*) .)

n1 Hereafter, unless otherwise indicated, all section references are to the Government Code.

However, a public entity may avoid such liability by raising the affirmative defense of *design immunity*. (§ 830.6.) A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2)

discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Grenier v. City of Irwindale* (1997) 57 Cal. App. 4th 931, 939 (*Grenier*); *Higgins v. State of California* (1997) 54 Cal. App. 4th 177, 185 [***3] (*Higgins*); *Hefner v. County of Sacramento* (1988) 197 Cal. App. 3d 1007, 243 Cal. Rptr. 291,

1013-1014 (*Hefner*) .)

Design immunity does not necessarily continue in perpetuity. (*Baldwin*, *supra*, 6 Cal. 3d at p. 434.) To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings. (§ 830.6; *Baldwin*, 6 Cal. 3d at p. 438.)

The third element of design immunity, the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design, must be tried by the court, not the jury. Section 830.6 makes it quite clear that "the trial or appellate court" is to determine whether [***4] "there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost [*67] its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises from an automobile accident suffered by plaintiffs Stacy and Rodney Cornette while they were driving northbound on the Antelope Valley Freeway (State Route 14) in Los Angeles County . Another northbound vehicle sideswiped plaintiffs' car and forced it across the open median of the freeway and into the southbound lanes, where it came to rest [***5] before being hit by a southbound vehicle. The accident occurred just beyond the end of a median barrier that defendant Department of Transportation (Caltrans) had constructed from the south. Plaintiffs, both of whom suffered substantial injuries, filed suit against a number of parties. We are concerned only with their claim against Caltrans, which was based on the allegedly dangerous condition of the highway created by the absence of a median barrier at the location of the accident.

When the case was called for trial, Caltrans, which had raised the affirmative defense of design immunity, asked the court to bifurcate the proceeding and try that issue first. (Code Civ. Proc., § 597.) The trial court granted this request and went on to rule that none of the issues relating to the existence of design immunity or its loss would be submitted to the jury; rather, these issues would be tried solely by the court as the trier of fact. This was done over the objection of plaintiffs who contended that, with the exception of the third element of design immunity (substantial evidence of the [**335] reasonableness of the adoption of the design), all of the issues relating to design immunity or its loss [***6] should be tried to the jury.

There was no real dispute about whether the absence of a median barrier at the location of the accident had made the highway dangerous by the time the accident occurred on May 23, 1992. Plaintiffs stipulated that designing the freeway without a median barrier was reasonable when the freeway was built in 1964. However, the physical conditions had changed in the interim. Both the traffic volume and the number of cross-median accidents had significantly increased. As a result, on August 21, 1990, Caltrans decided to install a median barrier along a five-mile stretch of the freeway that included the location where this accident would later occur, and on July 27, 1991, the Caltrans district office recommended that a high priority be given to the project because five more cross-median accidents, three with injuries and [*68] two with fatalities, had occurred in 1990. Unfortunately, the project was not completed until January 18, 1996, long after this accident occurred.

What was in dispute was (1) when Caltrans had notice that changed physical conditions had made the freeway at that location dangerous without a median

barrier; and (2) whether the installation of the [***7] barrier was unreasonably delayed. The evidence presented by plaintiffs tended to show that Caltrans had notice by May 30, 1989, that the cross-median accident rate at that location greatly exceeded Caltrans guidelines for the installation of median barriers, and that, given the high priority the agency should therefore have attached to the project, Caltrans reasonably should have installed at least a temporary median barrier before the accident occurred almost three years later. The evidence presented by Caltrans, on the other hand, tended to show that Caltrans did not have notice until August 1990, and that a median barrier project usually takes Caltrans four and a half to five years to complete, so that Caltrans could not have been reasonably expected to have installed the barrier before this accident occurred in 1992.

Resolving the factual disputes in favor of Caltrans, the trial court found that Caltrans had established design immunity and had not lost it. Judgment was entered for Caltrans, plaintiffs appealed, and the Court of Appeal reversed and remanded for a new trial. The trial court, the Court of Appeal held, had improperly denied plaintiffs their right to a jury trial [***8] of the disputed issues pertaining to the question whether Caltrans had lost its design immunity. We affirm the judgment of the Court of Appeal.

DISCUSSION

I. A Public Entity May Rely Upon Design Immunity as a Defense to a Claim of Liability for a Dangerous Condition

Section 835, subdivision (b) provides that a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. n2 (*Baldwin, supra*, 6 Cal. 3d at p. 427.) The state's failure to erect median barriers to prevent cross-median accidents may result in such liability. (*Ducey v. Argo Sales Co.* (1979) 25 Cal. 3d 707, 720, 159 Cal. Rptr. 835, 602 P.2d 755.)

> n2 Section 835 provides: "Except as provided by statute, a public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and either: [P] (a) A negligent or wrongful act or omission of an employee of the public entity within the scope of his employment created the dangerous condition; or [P] (b) The public entity had actual or constructive notice of the dangerous condition under Section 835.2 a sufficient time prior to the injury to have taken measures to protect against the dangerous condition."

[***9]

[*69] However, under section 830.6, the public entity may escape such liability by raising the affirmative defense of "design immunity." Section 830.6 provides in relevant part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or [**336] an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

In other words, a public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the [***10] plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Grenier, supra*, 57 Cal. App. 4th at p. 939; *Higgins, supra*, 54 Cal. App. 4th at p. 185; *Hefner, supra*, 197 Cal. App. 3d at pp. 1013-1014.)

The rationale for design immunity is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. (*Baldwin, supra*, 6 Cal. 3d at pp. 432, fn. 7, 434, 99 Cal. Rptr. 145, 491 P.2d 1121.) " ' "To permit reexamination in

tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." ' [Citation.]" (*Cameron v. State of California* (1972) 7 Cal. 3d 318, 326, 102 Cal. Rptr. 305, 497 P.2d 777 (*Cameron*) .)

II. A Public Entity's Design Immunity Defense May be Lost by Proof of Changed Conditions

As originally [***11] enacted, section 830.6 made no provision for loss of design immunity, and when this court first addressed the question, we held that design immunity, once acquired, persisted regardless of any subsequent [*70] change of conditions. "In *Cabell* [*v. State of California* (1967) 67 Cal. 2d 150, 430 P.2d 34, 60 Cal. Rptr. 476], we held that section 830.6 immunized the state from liability arising from the breaking of a glass door which was installed and maintained according to state specifications even though the glass had shattered on three previous occasions causing personal injuries. In *Becker* [*v. Johnston* (1967) 67 Cal. 2d 163, 60 Cal. Rptr. 485, 430 P.2d 43,] we reached the same conclusion concerning a highway intersection designed in 1927, when ' "they also had horses and buggies ..." ' (67 Cal. 2d at p. 173) using local roads, despite evidence of eight accidents in the four years preceding plaintiff's injury." (*Baldwin*, *supra*, 6 Cal. 3d at p. 431.) Indeed, we quoted with approval from a practice guide stating that a " 'plan or design ... judged ... reasonable when adopted is not actionable even though its defective nature is considered wholly unreasonable [***12] under present circumstances and conditions.' [Citation.]" (*Cabell*, 67 Cal. 2d at p. 153, quoted in, *Baldwin*, 6 Cal. 3d at p. 432, fn. 6.)

In 1969, the California Law Revision Commission recommended that the Legislature effectively overrule *Cabell* and *Becker* by amending section 830.6 to provide that design immunity "should be considered to have terminated when the court finds that (1) the plan or design, as effectuated, has actually resulted in a 'dangerous condition' at the time of an injury, (2) prior injuries have occurred that demonstrate that fact, and (3) the public entity has had knowledge of these prior injuries and a reasonable time to protect against the dangerous condition." (Recommendation Relating to Sovereign Immunity (Sept. 1969) 9 Cal. Law Revision Com. Rep. (1969) p. 819 (Recommendation).)

While the Legislature did not adopt this recommendation, we overruled *Cabell* and *Becker* in *Baldwin*. (*Baldwin*, *supra*, 6 [**337] Cal. 3d at p. 427.) The question presented in *Baldwin* was "whether a public entity retains its statutory immunity from liability for injury caused by the plan or design of a construction of, or an improvement to, public property [***13] where the plan or design, although approved in advance as being safe, nevertheless in its actual operation becomes dangerous under changed physical conditions." (6 Cal. 3d at p. 426, 99 Cal. Rptr. 145, 491 P.2d 1121.) The dangerous condition in that case was an intersection on a state highway that did not have a left-turn lane, a design which was reasonable at the time it was constructed because the traffic volume in the area was light. However, in the 25 years that elapsed before Mr. Baldwin's accident, the traffic volume had greatly increased, resulting in a large number of serious rear-end collisions of the sort suffered by Mr. Baldwin, and this dangerous condition was repeatedly brought to the attention of the state. (6 Cal. 3d at pp. 427-431, 99 Cal. Rptr. 145, 491 P.2d 1121.) Under these circumstances, we held, the state could no longer rely on the defense of design immunity. "Once the entity has notice that the plan [*71] or design, under changed physical conditions, has produced a dangerous condition of public property, it must act reasonably to correct or alleviate the hazard." (6 Cal. 3d at p. 434, 99 Cal. Rptr. 145, 491 P.2d 1121,fn. omitted.) Such notice, we explained, "may be actual or constructive and must be a sufficient time prior to the injury to have permitted the public entity [***14] to take measures to protect against the danger. (§ 835, subd. (b).)" (*Baldwin*, 6 Cal. 3d at p. 434, fn. 8, 99 Cal. Rptr. 145, 491 P.2d 1121.) In enacting section 830.6, "the Legislature did not intend that public entities should be permitted to shut their eyes to the operation of a plan or design once it has been transferred from blueprint to blacktop." (*Baldwin*, 6 Cal. 3d at p. 427, 99 Cal. Rptr. 145, 491 P.2d 1121.) Overruling *Cabell* and *Becker* to the extent they were inconsistent, we summarized our holding as follows: "Where a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under changed physical conditions produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6." (*Baldwin*, 6 Cal. 3d at p. 438, 99 Cal. Rptr. 145, 491 P.2d 1121, fn. omitted.)

In 1979, the Legislature responded to *Baldwin* by

amending section 830.6 to specify the circumstances under which a public entity retains its design immunity despite having received notice that [***15] the plan or design has become dangerous because of a change of physical conditions.

Assembly Bill No. 893 (1979-1980 Reg. Sess.) (Assembly Bill No. 893) amended section 830.6 by adding the following three sentences: "Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the [***16] condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning." (Stats. 1979, ch. 481, § 1, pp. 1638-1639.)

[*72] Although referenced elsewhere in several legislative analyses, the purpose of the legislation was best explained by its author in a letter to the Governor urging him to approve [**338] it. "Although the staff of the Joint Committee agreed with *Baldwin*, it felt there should be some recognition of the practical limitations which have been imposed upon governments by Article XIII A of the California Constitution (Proposition 13) and ever increasing liability insurance costs. This recognition is achieved by AB 893. The bill is consistent with and carries out the concepts contained in the Law Revision Commission Comment to Govt. Code Section 830.6. The amendment allows entities a reasonable time to finance and take remedial action or to provide adequate warning of the dangerous condition. The public is sufficiently protected by those conditions [***17] which must be satisfied by the entity in order to be immunized." (Assemblyman John T. Knox, letter to Governor Edmund G. Brown, Jr., re Assem. Bill No. 893, Aug. 30, 1979, pp. 1-2.)

Therefore, under *Baldwin* and section 830.6 as amended, to demonstrate loss of design immunity a plaintiff must establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings.

III. While Section 830.6 Reserves the Third Element of Design Immunity for the Court's Determination, It Does Not So Reserve the Three Elements of Loss of Design Immunity

Section 830.6 clearly makes the resolution of the third element of design immunity, the existence of substantial evidence supporting the [***18] reasonableness of the adoption of the plan or design, a matter for the court, not the jury. "The trial or appellate court" is to determine whether "there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor." (§ 830.6.)

The California Law Revision Commission recommended that the determination of the elements of the loss of design immunity also be reserved to the court. "[Design] immunity should be considered to have terminated *when the court finds* that (1) the plan or design, as effectuated, has actually resulted in a 'dangerous condition' at the time of an injury, (2) prior injuries have [*73] occurred that demonstrate that fact, and (3) the public entity has had knowledge of these prior injuries and a reasonable time to protect against the dangerous condition." (Recommendation, *supra*, 9 Cal. Law Revision Com. Rep. at p. 819, italics added.)

As Assemblyman Knox's letter indicates, the Legislature had the recommendations of the California Law Revision [***19] Commission before it when it enacted Assembly Bill No. 893. (Assemblyman John T. Knox, letter to Governor Edmund G. Brown, Jr., re Assem. Bill No. 893, *supra*, at p. 1.) Nevertheless, the Legislature did *not* choose to follow the recommendation of the Law Revision Commission that

it expressly reserve for the trial court the issues involved in loss of design immunity. (See § 830.6.)

Why the Legislature chose not to do so, we do not know; the legislative history is silent on this question. However, the one element of design immunity the Legislature did expressly reserve for the court, the existence of substantial evidence supporting the reasonableness of the adoption of the plan or design, differs significantly from the three elements of loss of design immunity. "In enacting section 830.6, the Legislature was concerned lest juries be allowed to second-guess the discretionary determinations of public officials by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan." (*Baldwin*, *supra*, 6 Cal. 3d at p. 434.) The questions involved in loss of design immunity, e.g., whether the plan or design [***20] has become dangerous because of a change of physical conditions, are not the identical [**339] questions considered by the government officers who adopted or approved the plan. Therefore, the Legislature would arguably not have had the same rationale for taking such questions away from the jury. Again, "where experience has revealed the dangerous nature of the public improvement under changed physical conditions, the trier of fact will not simply be reweighing the same technical data and policy criteria which went into the original plan or design. Rather, there will then be objective evidence arising out of the actual operation of the plan--matters which, of necessity, could not have been contemplated by the government agency or employee who approved the design. No threat of undue interference with discretionary decision-making exists in this situation." (6 Cal. 3d at p. 435.)

We decline Caltrans's invitation to supply the language the Legislature omitted. When one part of a statute contains a term or provision, the omission of that term or provision from another part of the statute indicates the Legislature intended to convey a different meaning. (*People v. Gardeley* (1996) 14 Cal. 4th 605, 621-622, 927 P.2d 713.) [***21] A court may not rewrite a statute, either by inserting or omitting language, to make [*74] it conform to a presumed intent that is not expressed. (Code Civ. Proc., § 1858; *Morillion v. Royal Packing Co.* (2000) 22 Cal. 4th 575, 585, 995 P.2d 139; *California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal. 4th 627, 633, 927 P.2d 1175.)

As Caltrans observes, several opinions of the Court of Appeal state that all of the elements necessary to establish design immunity are legal issues for the court to decide. n3 However, as the Court of Appeal in the present case observed, this view was expressed in the prior cases "without critical comment or explanation and without reference to the text of [section 830.6]." Moreover, as the Court of Appeal here further observed, all of these cases ultimately rely on one of two opinions, *Mozzetti v. City of Brisbane*, 67 Cal. App. 3d 565, 136 Cal. Rptr. 751 or *Cameron*, *supra*, 7 Cal. 3d 318. (See fn. 3, *ante*.)

n3 See, e.g., *Alvarez v. State of California* (1999) 79 Cal. App. 4th 720, 728, citing *Cameron*, *supra*, 7 Cal. 3d at page 325; *Higgins*, *supra*, 54 Cal. App. 4th at pages 184-185, citing *Uyeno v. State of California* (1991) 234 Cal. App. 3d 1371, 1376, 286 Cal. Rptr. 328; *Uyeno*, at page 1376, citing *Mozzetti v. City of Brisbane* (1977) 67 Cal. App. 3d 565, 572, 136 Cal. Rptr. 751 (*Mozzetti*) and *Muffett v. Royster* (1983) 147 Cal. App. 3d 289, 306, 195 Cal. Rptr. 73; *Bane v. State of California* (1989) 208 Cal. App. 3d 860, 867, 256 Cal. Rptr. 468, citing *Cameron*, at page 325; *Hefner*, *supra*, 197 Cal. App. 3d at page 1014, citing *Muffett*, at pages 306-307; *Muffett*, at page 306, citing *Mozzetti*, *supra*, 67 Cal. App. 3d 565; *Mozzetti*, at page 572.

[***22]

Mozzetti did state that "design immunity is a legal issue for the court." (*Mozzetti*, *supra*, 67 Cal. App. 3d at p. 572, 136 Cal. Rptr. 751.) The statement, however, was dictum. The defendants requested an instruction on design immunity, the trial court gave such an instruction, and the defendants then claimed on appeal that the instruction was prejudicially erroneous because the issues involved in the defense of design immunity are to be determined by the court rather than the jury. The Court of Appeal rejected the contention, holding that the defendants were estopped from complaining of the purported instructional error because they invited it; moreover, they had failed to present sufficient evidence on any one of the three elements of design immunity. (67 Cal. App. 3d at pp. 572-574.) The Court of Appeal in *Mozzetti* was simply not presented with the question whether the elements involved in *loss* of design immunity should be presented to the jury when, as here, the evidence as to those elements is disputed.

In *Cameron*, the plaintiffs were injured when the automobile in which they were passengers went out of control while the driver was attempting to negotiate an

S-curve on a state highway. [***23] In their suit against the state, the plaintiffs claimed the curve was improperly banked, creating a dangerous condition that caused the accident. The trial court's ruling, we observed, [*75] would be "most accurately designated a ruling on a motion for directed verdict to the effect that [**340] the state had established as a matter of law all the elements of the defense of design immunity contained in section 830.6." (*Cameron*, *supra*, 7 Cal. 3d at p. 324.) We reversed, holding that the state had presented *no* evidence that the banking built into the curve "was the result of or conformed to a design approved by the public entity vested with discretionary authority." (7 Cal. 3d at p. 326.) An appreciation of the procedural context of the case is critical to a proper understanding of our decision in *Cameron*. We did not say or even suggest that the first two elements of design immunity, much less the three elements required to prove loss of design immunity, were issues of law for the court to decide if it were not ruling on a motion for a directed verdict.

The question whether loss of design immunity is a question reserved for the court was not directly addressed in *Baldwin*. However, [***24] we appear to have assumed it was *not* reserved to the court because we used the term "trier of fact," n4 a choice of terminology that is significant both because it is used interchangeably to refer to a judge or jury (Garner, Dict. of Modern Legal Usage (2d ed. 1995)

> n4 "Where experience has revealed the dangerous nature of the public improvement under changed physical conditions, the *trier of fact* will not simply be reweighing the same technical data and policy criteria which went into the original plan or design." (*Baldwin*, *supra*, 6 Cal. 3d at p. 435, italics added.)

p. 891) and because it recognizes the factual, rather than strictly legal, character of the inquiry. Moreover, the context in which the term was used strongly suggests the *Baldwin* court meant *juries* when it referred to the *trier of fact*, for in the immediately preceding paragraph, the court speaks of the purpose of design immunity as addressing the Legislature's concern "lest *juries* be allowed to second-guess the [***25] discretionary determinations of public officials by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan." (*Baldwin*, *supra*, 6 Cal. 3d at p. 434, italics added.) Quoting the New York Court of Appeals opinion in *Weiss v. Fote* (1960) 7 N.Y.2d 579, 588 [167 N.E.2d 63, 200 N.Y.S.2d 409], the *Baldwin* court continues, " 'We are of the opinion that the traditional reliance on a *jury* verdict to assess fault and general tort liability is misplaced where a duly authorized public planning body has entertained and passed on the very same question or risk as would ordinarily go to the *jury*.' " (*Baldwin*, 6 Cal. 3d at p. 435, italics added.)

Caltrans's remaining arguments are confusing. Article 1, section 16 of the California Constitution provides in pertinent part that "trial by jury is an inviolate right and shall be secured to all ...." The constitutional right to a jury trial is the right as it existed at common law, when the state [*76] Constitution was first adopted. (*Crouchman v. Superior Court* (1988) 45 Cal. 3d 1167, 1173-1174, 248 Cal. Rptr. 626, 755 P.2d 1075.) [***26] Caltrans makes a feint in the direction of arguing that a plaintiff has no constitutional right to a jury trial as to loss of design immunity because the underlying action--the action against a public entity under section 835 for an injury caused by a dangerous condition of its property--did not exist at common law. However, Caltrans then pulls up short and concedes the point: "There is no doubt--and we do not contend otherwise--that a plaintiff has a right to a jury trial in such an action."

Caltrans then switches direction and makes a very different argument-- that "the design immunity defense is a *special proceeding* and there is no right to a jury trial in a special proceeding unless the applicable statute expressly so provides." (Italics added.) The second of these compound assertions--that there is no right to a jury trial in a special proceeding unless it is made applicable by statute--is unexceptionable. (See, e.g., *Vallejo etc. R. R. Co. v. Reed Orchard Co.* (1915) 169 Cal. 545, 556, 147 P. 238; *Canavin v. Pacific Southwest Airlines* (1983) 148 Cal. App. 3d 512, 534, fn. 10, 196 Cal. Rptr. 82; *Kinder v. Superior Court* (1978) 78 Cal. App. 3d 574, 581, 144 Cal. Rptr. 291.) [***27] However, the operative assertion--that the design immunity defense is a special proceeding--is patently incorrect. Judicial remedies are either actions or special proceedings. (Code [**341] Civ. Proc., § 21.) An action "is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." (Code Civ. Proc., § 22.) "Every other remedy is a special proceeding." (Code Civ. Proc., § 23.) Caltrans does not attempt to explain why the defense of design immunity should be considered a special

proceeding, except to say that "[a] special proceeding may be commenced independently of the pending action." This does not advance Caltrans's case because, as plaintiffs point out, "the bifurcated trial of the changed conditions exception to the design immunity defense was not 'commenced independently of the pending action'--it was part and parcel of the pending action." In conclusion, Caltrans is simply wrong about design immunity being a special proceeding; it is an affirmative defense in an action brought under Government Code section 835 [***28] to, in the words of Code of Civil Procedure section 22, "redress ... a wrong."

Next, relying on *Windsor Square Homeowners Assn. v. Citation Homes* (1997) 54 Cal. App. 4th 547, Caltrans contends the issues involved in determining whether design immunity has been lost are to be tried to the court because they are "mixed questions of law and fact." *Windsor Square* is quite inapposite. The question presented there was [*77] whether the facts underlying the defense of res judicata are to be tried to the court. (*Id.* at pp. 550, 557.) The Court of Appeal's explanation for its conclusion that such factual issues are to be tried to the court makes it abundantly clear why *Windsor Square* is distinguishable from this case. "The issues [underlying the applicability of the res judicata defense] are often mixed fact-law determinations, involving, for instance, the assertion of jurisdiction, a decision better made by the court alone. Ordinarily, the facts that need to be determined are fairly simple--for example, what the complaint alleges in the first action versus what the complaint alleges in the second action. The pleadings must be [***29] studied to determine what claims were or could have been raised, who were the parties sued, whether the party against whom the bar is asserted was in privity with a party to the prior suit, whether the prior adjudication was a judgment on the merits. While all these issues may have factual predicates, they are peculiarly legal determinations." (*Id.* at p. 557.) It is simply not true that the issues involved in loss of design immunity, e.g., whether the public entity had notice of the dangerous condition and had a reasonable time to remedy it, are peculiarly legal determinations.

Finally, an amici curiae brief was filed by 89 California cities in support of Caltrans; the California State Association of Counties and 16 more California cities subsequently joined the brief. The amici curiae's brief raises a flurry of arguments, and plaintiffs have moved to strike most of them on the ground they were not presented in the trial court and not urged by the parties on appeal. Because amicus curiae presentations assist the court by broadening its perspectives on the issues raised by the parties, we are inclined, except in cases of obvious abuse of the amicus curiae privilege, [***30] not to employ orders to strike as a means of regulating their contents. (*Bily v. Arthur Young & Co.* (1992) 3 Cal. 4th 370, 405, fn. 14, 834 P.2d 745.) Plaintiffs' motion to strike is accordingly denied. However, we will confine our discussion to what amici curiae denominate as the "central point" of their brief, which is that "there are *two* times when a public entity may engage in a discretionary design decision. The first is the initial approval of the design. The second is when, in light of later notice that the design may be dangerous in actual operation, the entity evaluates whether the design is still reasonable. This second decision is no less an exercise of discretion than the first. Therefore, the protection of the substantial evidence test should apply equally to *both.... Baldwin* suggests this conclusion, and the wording of the 1979 amendment to Government Code section 830.6 confirms it."

The passage in *Baldwin* that amici curiae find suggestive is the following: "It is clear that the declarations submitted in support of the state's motion in [*78] this case were insufficient to warrant entry of summary judgment. As we have [***31] previously stated, these declarations [**342] contain facts amply demonstrating the *initial* applicability of the design immunity provided by section 830.6. However, understandably relying upon *Cabell* and *Becker*, *the state failed to make any showing whatsoever on the crucial issue of whether the immunity remains.* Since, as we now hold, the planning immunity may be dissolved by evidence that the plan or design under changed physical conditions has produced a dangerous condition, *it was incumbent on the state to present facts indicating that the immunity is still intact.* In the absence of such a showing, the state as moving party, has not established all elements necessary to sustain a judgment in its favor. [Citations.] Consequently, the entry of summary judgment was erroneous." (*Baldwin*, *supra*, 6 Cal. 3d at pp. 439-440, 99 Cal. Rptr. 145, 491 P.2d 1121, second and third italics added.)

Amici curiae concede that "*Baldwin* did not specify what facts would establish that immunity was not lost. In *Baldwin*, the State did not attempt to show facts indicating the immunity remained. Therefore, this Court had no opportunity to pass upon what facts would be required." However, amici curiae contend, [***32] "*Baldwin* hinted at the answer. It quoted from *Weiss v. Fote* [, *supra*,] 7 N.Y.2d 579, 200 N.Y.S.2d 409, 167 N.E.2d 63, a case the California Law Revision Commission had considered when drafting section 830.6. (*Baldwin*, [*supra*,] 6 Cal. 3d at p. 433.) *Baldwin*

quotes *Weiss* for the proposition that 'once having planned the intersection, the State was under a continuing duty to review its plan in the light of its actual operation ....' (*Ibid.*, quoting *Weiss*, [*supra*,] 167 N.E.2d at p. 67.) *Baldwin* then interpreted *Weiss* to mean that once the entity [has notice that] the design, under changed physical conditions, has produced a dangerous condition of public property, 'it must act reasonably to correct or alleviate the hazard.' (*Baldwin*, *supra*, 6 Cal. 3d at p. 434.) But *Baldwin* did not elaborate what action would suffice to retain the immunity."

To the contrary, the state could have retained its immunity by correcting or alleviating the hazard, and the *Baldwin* court clearly indicated the sort of measure that would have corrected the hazard. The intersection in *Baldwin* had been [***33] designed without a left-turn lane, and because of a large increase in traffic over the years, the design had become dangerous. (*Baldwin*, *supra*, 6 Cal. 3d at pp. 427-429.) Simply erecting a barrier to prevent left turns would have corrected the hazard. (6 Cal. 3d at p. 437.) The state failed to show that it had undertaken any such corrective measures. Moreover, although section 830.6 had not yet been amended, this court might have been receptive to a showing that the state had not had sufficient time to obtain the funds for such a barrier or to install it. We noted that "section 835.4 ... provides that even if a plaintiff proves the existence of a dangerous condition under section 835, the [*79] public entity may avoid liability if it establishes that 'the action it took to protect against the risk of injury created by the condition or its failure to take such action was reasonable.' The reasonableness of the action or inaction by the government body is to be determined 'by taking into consideration the *time* and *opportunity* it had to take action and by weighing the probability and gravity of potential injury to persons and property foreseeably exposed to the risk of injury [***34] against the practicability and cost of protecting against the risk of such injury.' (§ 835.4.)" (*Baldwin*, 6 Cal. 3d at pp. 436-437, italics added.) So far as the opinion reflects, the state made no such showing.

We now turn to the assertion by amici curiae that the wording of the 1979 amendment to section 830.6 confirms their contention that the amendment immunizes a second design decision--when an entity, having been put on notice that the original design may have become dangerous because of changed physical conditions, decides that the design is still reasonable--and that review of this second design decision is also reserved to the trial or appellate court and is also subject to the substantial evidence test.

Amici curiae rely upon the phrase in the introductory clause of the first of the three sentences that were added to section 830.6 in 1979: "Notwithstanding notice that constructed [**343] or improved public property may *no longer* be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee ...." (Stats. 1979, ch. 481, § 1, p. 1638, italics added.) Amici curiae profess to find in *Baldwin* [***35] and the Legislature's use of the phrase *no longer* "two interlocking keys of the design immunity puzzle." "The 1979 amendment's 'notwithstanding clause,' " amici curiae contend, "recites the kind of proof that will retain the immunity: Proof that the public property *still* 'conforms with a ... design ... which reasonably could be approved by the legislative body or other body or employee.' " And this decision--the decision that the original design could still be so approved--is the second design decision that amici curiae contend is reserved to the court and subject to the substantial evidence test.

The problem with amici curiae's argument is that is not what the Legislature said. What the Legislature said is that the immunity continues for sufficient time to permit the public entity to remedy the dangerous condition, or, if it cannot remedy it, to post warnings. The language in question does not allude to a *finding* by the public entity as to whether its design is or is not reasonable in light of changed circumstances, but merely indicates that, notwithstanding the public entity's *notice* that its design immunity *may* have become unreasonable, its immunity continues [***36] to provide it with reasonable time and opportunity to remedy or warn of the inadequacy of the existing [*80] design. "Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the

existence of the condition not conforming to the approved plan or design or to the approved standard." (Stats. 1979, ch. 481, [***37] § 1, p. 1638.)

In conclusion, we affirm the judgment of the Court of Appeal. n5

n5 Both plaintiffs and amici curiae request that we take judicial notice of various items in the legislative history of the 1979 amendment to section 830.6. We grant the requests. We also grant the request made by amici curiae that we take judicial notice of the *signed* copy of the trial court's statement of decision.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

BAXTER, J.

WERDEGAR, J.

CHIN, J.

25 Cal. 4th 1235, *; 25 P.3d 1096, **;
2001 Cal. LEXIS 3799, ***; 108 Cal. Rptr. 2d 617

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EVA CAMARGO et al., Plaintiffs and Appellants, v. TJAARDA DAIRY et al., Defendants and Respondents.

S088632

SUPREME COURT OF CALIFORNIA

25 Cal. 4th 1235; 25 P.3d 1096; 2001 Cal. LEXIS 3799; 108 Cal. Rptr. 2d 617; 66 Cal. Comp. Cas 843; 2001 Cal. Daily Op. Service 5674; 2001 Daily Journal DAR 6933

July 5, 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, Kern County. Court of Appeal of California, Fifth Appellate District. F031741. Super. Ct. No. 233850. Robert J. Anspach, Judge.

DISPOSITION:
The judgment of the Court of Appeal is reversed and the matter is remanded for further proceedings consistent with this opinion.

COUNSEL:
Attorneys for Appellant:

Law Offices of Federico Castelan Sayre, Federico Castelan Sayre and Timothy A. Black, for Plaintiffs and Appellants.

Ian Herzog; Bruce Broillet; Thomas Stolpman; Daniel U. Smith; William L. Veen; Robert S. Arns; Kevin Calcagnie; and Rebecca Quinn for Consumer Attorneys Association as Amicus Curiae on behalf of Plaintiffs and Appellants.

Attorneys for Respondent:

Borton, Petrini & Conron, John F. Petrini and Michael J. Stump, for Defendants and Respondents.

Deborah J. La Fetra for Pacific Legal Foundation as Amicus Curiae on behalf of Defendants and Respondents.

John P. Carpenter for the Association of General Contractors of California as Amicus Curiae on behalf of Defendants and Respondents.

William J. Moran and Eileen F. [***2] Braunreiter for Automobile Club of Southern California and California State Automobile Association as Amici Curiae on behalf of Defendants and Respondents.

Sedgwick, Detert, Moran & Arnold and Frederick D. Baker for American Chemistry Council as Amicus Curiae on behalf of Defendants and Respondents.

Fred J. Hiestand for the Civil Justice Association of California as Amicus Curiae on behalf of Defendants and Respondents.

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

OPINIONBY:
BROWN

OPINION:

[**1097]

[*1238] Alberto Camargo was killed when his

tractor rolled over as he was driving over a large mound of manure in a corral belonging to Tjaarda Dairy. Camargo was an employee of Golden Cal Trucking, and Golden Cal Trucking was an independent contractor Tjaarda Dairy had hired to scrape the manure out of its corrals and to haul it away in exchange for the right to purchase the manure at a discount. Plaintiffs, Camargo's wife and five children, sued defendants Tjaarda Dairy and Perry Tjaarda on the theory, among others, that they were *negligent in hiring* Golden Cal Trucking because they failed to determine whether Camargo was qualified [***3] to operate the tractor safely. The trial court granted defendants' motion for summary judgment. With regard to the cause of action for negligent hiring, the trial court relied on our then-recent decision in *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal. 4th 253, 955 P.2d 504 (*Toland*), for its conclusion that an injured employee of an independent contractor may not bring such an action against the hirer of the contractor. Plaintiffs appealed, limiting their appeal to this issue, and the Court of Appeal reversed. The question presented, therefore, is whether the rationale of our decisions in *Privette v. Superior Court* (1993) 5 Cal. 4th 689, 854 P.2d 721 (*Privette*) and *Toland*, which involved tort liability under the *peculiar risk* doctrine, also applies to the tort of *negligent hiring*. The answer to this question is *yes*, the *Privette/Toland* rationale does bar an employee of an independent contractor from bringing a negligent hiring action against the hirer of the contractor.

DISCUSSION

I. *Privette*, the Peculiar Risk Doctrine, and the Rationale for

Precluding an Employee of an Independent Contractor [***4] from

Relying on That Doctrine in a Suit Against the Hirer of the Contractor

In *Toland*, we summarized the peculiar risk doctrine and explained why we had concluded in *Privette* that under the doctrine a hirer's liability does not extend to the hired contractor's employees. "Under the doctrine of peculiar risk, a person who hires an independent [**1098] contractor to do inherently dangerous work can be held liable for tort damages when the contractor causes injury to others by negligently performing the work. The doctrine serves to ensure that innocent bystanders or neighboring landowners injured [*1239] by the hired contractor's negligence will have a source of compensation even if the contractor turns out to be insolvent. As we explained in [*Privette, supra*, 5 Cal. 4th at page] 694, courts created the peculiar risk doctrine in the belief that 'as between two parties innocent of any personal wrongdoing--the person who contracted for the work and the hapless victim of the contractor's negligence--the risk of loss occasioned by the contracted work was more fairly allocated to the person for whose benefit the job was undertaken.' [P] In *Privette ...*, we unanimously held [***5] that under the peculiar risk doctrine the hiring person's liability does not extend to the hired contractor's employees. Because the Workers' Compensation Act (Lab. Code, § 3200 et seq.) shields an independent contractor from tort liability to its employees, applying the peculiar risk doctrine to the independent contractor's employees would illogically and unfairly subject the hiring person, who did nothing to create the risk that caused the injury, to greater liability than that faced by the independent contractor whose negligence caused the employee's injury. (5 Cal. 4th at pp. 698-700.) As we concluded: 'The property owner should not have to pay for injuries caused by the contractor's negligent performance of the work when workers' compensation statutes already cover those injuries.' (*Id.* at p. 699.)" (*Toland, supra*, 18 Cal. 4th at p. 256.)

This rationale--that the hirer should not have to pay for injuries caused by the contractor's negligent performance because the workers' compensation system already covers those injuries--is, we pointed out in *Privette*, supported by related policy considerations. "As one court observed, [***6] the 'principal' who hires an independent contractor should be subject to no greater liability 'than its [independent contractor] agent,' whose exposure for injury to an employee is limited to providing workers' compensation insurance. [Citation.] Other courts have reasoned that the rule of workers' compensation exclusivity, which shields an independent contractor who pays workers' compensation insurance premiums from further liability to its employees for on-the-job injuries, should equally protect the property owner who, in hiring the contractor, is indirectly paying for the cost of such coverage, which the contractor presumably has calculated into the contract price. ... [P] ... [P] Courts and legal commentators have expressed concern that to allow an independent contractor's employees who incur work-related injuries compensable under the workers' compensation system to also seek damages under the doctrine of peculiar risk from the person who hired the contractor would give those employees an unwarranted windfall. As these authorities

point out, to permit such recovery would give these employees something that is denied to other workers: the right to recover tort damages [***7] for industrial injuries caused by their employer's failure to provide a safe working environment. This, in effect, would exempt a single class of employees, those who work for independent contractors, from the statutorily [*1240] mandated limits of workers' compensation. [Citations.] Moreover, to impose vicarious liability for tort damages on a person who hires an independent contractor for specialized work would penalize those individuals who hire experts to perform dangerous work rather than assigning such activity to their own inexperienced employees. [Citations.]" (*Privette*, *supra*, 5 Cal. 4th at pp. 699-700.)

In *Privette*, the complaint, initially, also alleged negligent hiring, but that cause of action was dropped, so we did not there reach the question we address now. (*Privette*, *supra*, 5 Cal. 4th at pp. 692, fn. 1, 702.)

II. *Toland* and the Application of the *Privette* Rationale to the Peculiar Risk Doctrine as Set Forth in Section 413, as Well as Section 416, of the Restatement Second of Torts

The doctrine of peculiar risk, insofar as it was relevant in *Privette* and

Toland, is [**1099] described in sections 413 and 416 of the Restatement [***8] Second of Torts. **n1** Under section 413, a person who hires an independent contractor to do inherently dangerous work, but who fails to provide in the contract or in some other manner that special precautions be taken to avert the peculiar risks of that work, can be liable if the contractor's negligent performance of the work causes injury to others. "Because section 413 rests the liability of the hiring person on his or her omission to provide for special precautions in the contract or in some other manner, it is sometimes described as a rule of 'direct liability.' " (*Toland*, *supra*, 18 Cal. 4th at p. 259.)

n1 All section references are to the Restatement Second of Torts.

Under section 416, even if the hiring person has provided for special precautions in the contract or otherwise, the hiring person can nevertheless be liable if the contractor fails to exercise reasonable care to take such precautions and the contractor's performance of the work causes injury to others. "Because the hiring person's liability [***9] under section 416 ... flows from the independent contractor's negligent failure to take special precautions in performing the inherently dangerous work, as required by 'the contract or otherwise,' the hiring person's liability is often referred to as 'vicarious liability.' [Citations.]" (*Toland*, *supra*, 18 Cal. 4th at p. 260, fn. omitted.)

In *Toland*, a subcontractor's employee sued the general contractor for on-the-job injuries, asserting that *Privette* did not bar recovery for direct liability under section 413, but only for vicarious liability under section 416. We rejected the argument, noting that the distinction between the two sorts of liability was not that neat under peculiar risk theory. "Peculiar risk [*1241] liability is not a traditional theory of direct liability for the risks created by one's own conduct: Liability under both sections is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work." (*Toland*, *supra*, 18 Cal. 4th at p. 265.) Accordingly, we held that, "contrary to [***10] plaintiff Toland's assertion, our decision in *Privette*, *supra*, 5 Cal. 4th 689, bars employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, *irrespective* of whether recovery is sought under the theory of peculiar risk set forth in section 416 or section 413 of the Restatement Second of Torts. In either situation, it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage." (*Toland*, *supra*, 18 Cal. 4th at p. 267.)

III. Application of the *Privette/Toland* Rationale to Negligent

Hiring Cases Under Section 411

Section 411, entitled "Negligence in Selection of Contractor," provides: "An employer is subject to liability for physical harm to *third persons* caused by his failure to exercise reasonable care to employ a competent and careful contractor [P] (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or [P] (b) to perform any duty which the employer owes [***11] to *third persons*." (Rest.2d Torts, at p. 376, italics added.)

Defendant contends an employee of a contractor is

not [*1242] a *third person* for the purposes of section 411, and in support of its position, defendant notes that not one of the eight illustrations to section 411 involves an employee of a contractor. (See Rest.2d Torts, at pp. 377-382.)

This omission cannot be dismissed as an oversight. Section 411, like sections 413 and 416--the sections setting out the peculiar risk doctrine we considered in *Privette* and *Toland*--appears in chapter 15 of the Restatement Second of Torts, and as we noted in *Toland*, a tentative draft to the Restatement "stated that 'when the Sections in this Chapter speak of liability to "another," or "others," or to "third persons," it is to be [**1100] understood that *the employees of the contractor*, as well as those of the defendant himself, are *not* included.' (Rest.2d Torts (Tent. Draft No. 7, Apr. 16, 1962) ch. 15, special note, p. 18, italics added.)" (*Toland*, *supra*, 18 Cal. 4th at pp. 266-267.) The overwhelming majority of the courts of other jurisdictions that have addressed the question have concluded that an employee of a contractor [***12] is *not* a third person for the purposes of section 411. (See, e.g., *Hess v. Upper Mississippi Towing Corp.* (5th Cir. 1977) 559 F.2d 1030, 1033; *Best v. Energized Substation Service, Inc.* (Ohio Ct.App. 1993) 88 Ohio App. 3d 109, 623 N.E.2d 158, 162; *Mentzer v. Ognibene* (Pa.Super.Ct. 1991) 408 Pa. Super. 578, 597 A.2d 604, 607-609; *Chapman v. Black* (Wash.Ct.App. 1987) 49 Wn. App. 94, 741 P.2d 998, 1003-1005; *Valdez v. Cillessen & Son, Inc.* (N.M. 1987) 105 N.M. 575, 734 P.2d 1258, 1263; but see *Sievers v. McClure* (Alaska 1987) 746 P.2d 885, 890-891.)

Without grappling with the reasoning of the cases that are unfavorable to them, plaintiffs simply dismiss them as "out-of-state case law." The significant point, they insist, is that *California* courts have upheld negligent hiring actions brought by employees of contractors against the hirers of the contractors.

Plaintiffs rely on five opinions of the Courts of Appeal: *Grahn v. Tosco Corp.* (1997) 58 Cal. App. 4th 1373 (*Grahn*); *Smith v. ACandS, Inc.* (1994) 31 Cal. App. 4th 77, 37 Cal. Rptr. 2d 457 (*Smith*); *Chevron U.S.A., Inc. v. Superior Court* (1992) 4 Cal. App. 4th 544 [***13] (*Chevron*); *Holman v. State of California* (1975) 53 Cal. App. 3d 317, 124 Cal. Rptr. 773 (*Holman*); and *Gettemy v. Star House Movers* (1964) 225 Cal. App. 2d 636, 37 Cal. Rptr. 441 (*Gettemy*). We do not find these cases persuasive on this point. Three of the five--*Chevron*, *Holman*, and *Gettemy*--were decided without the benefit of our decision in *Privette*, much less *Toland*. Moreover, the question whether an employee of a contractor is a "third person" for the purposes of section 411 was, so far as the opinions reflect, never raised in *Chevron*, *Holman*, or *Gettemy*. (See *Chevron*, at p. 549; *Holman*, at pp. 335-337; *Gettemy*, at pp. 644-645.)

Smith was decided in the interim between *Privette* and *Toland*, and the plaintiff there made claims under both the peculiar risk and the negligent hiring doctrines. A pipe fitter who suffered from asbestosis and asbestos-related pleural disease sued asbestos manufacturers, asbestos installers, premises owners, and others. The jury found Pacific Gas and Electric Company liable for hiring asbestos insulation contractors whose work created a peculiar risk of [***14] harm to others. The issue submitted to the jury was "whether [Pacific Gas and Electric Company] was vicariously liable for the negligence of insulation contractors--not Smith's pipe fitting employer." (*Smith*, *supra*, 31 Cal. App. 4th at p. 95.) The plaintiff in *Smith* sought to distinguish *Privette* on the ground it "does not prevent tort recovery against nonnegligent landowners by a hired contractor's employee who is injured by the negligence of *another* contractor working on the premises." (31 Cal. App. 4th at p. 94.) Rejecting the attempted distinction, the Court of Appeal reversed, concluding that under *Privette*, "a landowner that hires several independent contractors to work simultaneously on a project on its land is not vicariously liable [*1243] under the doctrine of peculiar risk for the negligence of any of the hired contractors which injures any of the contractors' employees." (*Smith*, at p. 95.)

In *Smith*, the Court of Appeal reversed the judgment and remanded the case for a new trial on "the question of [Pacific Gas and Electric Company's] general negligence." (*Smith*, *supra*, 31 Cal. App. 4th at p. 97.) Here, plaintiffs characterize the remand in *Smith* [***15] as "allowing the negligent hiring cause of action to be heard before the jury despite the fact that it was an employee of the independent contractor who advanced the negligent hiring claim." However, *Smith* does *not* stand for the proposition that an employee of a contractor may bring a tort action for negligence in hiring *that* contractor. The plaintiff in *Smith* was the employee of a *pipe fitter*, and the question to be determined on remand was whether [**1101] Pacific Gas and Electric Company was negligent in hiring *insulation contractors*. (*Smith*, at p. 97.)

The plaintiff in *Grahn* was a brick mason employed by J. L. Thorpe & Sons (Thorpe), an independent contractor specializing in the installation and repair of refractory and insulation materials in high-temperature

units such as furnaces and boilers in, among other facilities, refineries. Diagnosed with asbestos-related lung disease, Grahn brought suit against 200 defendants, including manufacturers and suppliers of various asbestos-containing insulation products, as well as owners of properties where Grahn had worked for Thorpe. All of the defendants except Tosco Corporation either settled or were dismissed [***16] from the action. One of three theories of negligence Grahn relied upon was that Tosco Corporation was negligent in hiring Thorpe to remove asbestos-containing materials at its refinery. (*Grahn*, *supra*, 58 Cal. App. 4th at p. 1380.) Therefore, unlike *Smith*, the negligence alleged in *Grahn* lay in hiring the contractor who employed the plaintiff.

Like *Smith*, *Grahn* was decided after *Privette* but before *Toland*. Without the benefit of the gloss provided by *Toland*, the Court of Appeal in *Grahn* misunderstood *Privette* to have been bottomed on the ground that the hirer in a peculiar risk case is not *directly* negligent. "In *Privette*, the court had before it only the issue of whether a peculiar risk theory could be used to hold a nonnegligent hirer liable under vicarious liability for the negligence of the independent contractor." (*Grahn*, *supra*, 58 Cal. App. 4th at p. 1384.)

To the contrary, as we explained in *Toland*, the rationale of our decision in *Privette* extends to cases where the hirer is *directly* negligent in the sense of having failed to take precautions against the peculiar risks involved in the work entrusted to the [***17] contractor. To repeat: In *Toland*, we rejected the plaintiff's argument that *Privette* did not bar recovery for direct liability [*1244] under section 413, but only for vicarious liability under section 416. "Peculiar risk liability is not a traditional theory of direct liability for the risks created by one's own conduct: Liability under both sections is in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who has caused the injury by failing to use reasonable care in performing the work." (*Toland*, *supra*, 18 Cal. 4th at p. 265.) "Contrary to plaintiff Toland's assertion, our decision in *Privette*, *supra*, 5 Cal. 4th 689, bars employees of a hired contractor who are injured by the contractor's negligence from seeking recovery against the hiring person, *irrespective* of whether recovery is sought under the theory of peculiar risk set forth in section 416 or section 413 of the Restatement Second of Torts. In either situation, it would be unfair to impose liability on the hiring person when the liability of the contractor, the one primarily responsible [**1102] for the worker's on-the-job [***18] injuries, is limited to providing workers' compensation coverage." (*Toland*, *supra*, 18 Cal. 4th at p. 267, 37 Cal. Rptr. 2d 441.)

For the same reasons, an employee of a contractor should be barred from seeking recovery from the hirer under the theory of negligent hiring set forth in section 411. Admittedly, as the *Grahn* court observed, under section 411, the hirer is, in a sense, being taxed with his *own* negligence under a theory of *direct* liability. (*Grahn*, *supra*, 58 Cal. App. 4th at p. 1385.) However, the same could be said with regard to an action brought under the peculiar risk theory set forth in section 413. More importantly, under both sections 411 and 413, the liability of the hirer is "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor, because it is the hired contractor who caused the injury by failing to use reasonable care in performing the work." (*Toland*, *supra*, 18 Cal. 4th at p. 265.) Therefore, in a negligent hiring case under the theory set forth in section 411, just as in peculiar risk cases under the theories set forth in sections 413 and 416, "it would be unfair to impose liability on the [***19] hiring person when the liability of the contractor, the one primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage." (*Toland*, *supra*, 18 Cal. 4th at p. 267, 74 Cal. Rptr. 2d 878, 955 P.2d 504.)

Two of the related policy considerations we relied upon in *Privette* also support our conclusion here that an employee of an independent contractor should not be permitted to bring a negligent hiring action against the hirer of the contractor: (1) The rule of workers' compensation exclusivity, which shields an independent contractor who pays workers' compensation insurance premiums from further liability to its employees, should equally apply to the person hiring the contractor because the hirer has indirectly paid the cost of such coverage inasmuch as it was presumably calculated into the [*1245] contract price (*Privette*, *supra*, 5 Cal. 4th at p. 699); and (2) permitting such a recovery would give employees of independent contractors an unwarranted windfall, something that is denied other workers--the right to recover tort damages for industrial injuries caused by their employer's failure to provide a safe working environment (5 Cal. 4th at pp. 699-700). n2

n2 Today we have concluded that the rationale of our decisions in *Privette* and *Toland*, which involved tort liability under the peculiar risk doctrine, also applies to the tort of negligent hiring. Review has been granted in cases that present related questions--whether the

Privette/Toland rationale should apply as well to the tort of negligent exercise of retained control (*Hooker v. California Dept. of Transportation*, 2000 Cal. LEXIS 8574, review granted Nov. 1, 2000, S091601) or the tort of negligent provision of unsafe equipment (*McKown v. Wal-Mart Stores, Inc.* (2000) 82 Cal. App. 4th 562, review granted Oct. 18, 2000, S091097)--and our opinion today should not be read as having prejudged those questions.

[***20]

Insofar as they are inconsistent with this opinion, the following cases are disapproved: *Grahn*, *supra*, 58 Cal. App. 4th 1373; *Smith*, *supra*, 31 Cal. App. 4th 77, *Chevron*, *supra*, 4 Cal. App. 4th 544, *Holman*, *supra*, 53 Cal. App. 3d 317, and *Gettemy*, *supra*, 225 Cal. App. 2d 636.

The judgment of the Court of Appeal is reversed and the matter is remanded for further proceedings consistent with this opinion.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

BAXTER, J.

CHIN, J.

CONCURRING OPINION BY WERDEGAR, J.

CONCURBY:
WERDEGAR

CONCUR:

CONCURRING OPINION BY WERDEGAR, J.

I concur under the compulsion of *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal. 4th 253, 955 P.2d 504 (*Toland*). If, as the majority held in *Toland*, the hirer's responsibility *for its own negligence* under the peculiar risk theory embodied in section 413 of the Restatement Second of Torts is deemed so " 'vicarious' or 'derivative' " (*Toland*, *supra*, at p. 265) that to recognize tort liability for the results of that negligence would be "unfair" (*id.* at p. 267), the same must be said of the hirer's liability [***21] *for its own negligence* in choosing an unqualified contractor (Rest.2d Torts, § 411).

In a separate opinion in *Toland*, I took issue with the majority's blanket approach, arguing that in some cases of peculiar risk negligence the hirer, rather than the contractor, will have the superior knowledge of, or ability to control, the circumstances creating a risk of injury, and that in those cases imposing tort liability on the hirer would be both fair and economically efficient despite the contractor's limited liability under the workers' compensation law. (*Toland*, *supra*, 18 Cal. 4th at pp. 271, 275-280 (conc. & dis. opn. of Werdegar, J.).) The same could be said of the negligent hiring theory [*1246] raised in this case, but, in light of the majority's adherence here to its *Toland* approach, the point is moot.

An odd aspect of the majority opinion here, as in *Toland*, is its partial reliance on very broad arguments that, if given their full logical scope, would seem to bar virtually all liability on the part of hirers for injuries to contractors' employees, however direct and personal the hirer's negligence, while the majority nonetheless disavows so general a scope for its [***22] holding. (See maj. opn., *ante*, 2001 Cal. LEXIS 3799 at pp. *19 & fn. 2; *Toland*, *supra*, 18 Cal. 4th at [**1103] pp. 281-282 (conc. & dis. opn. of Werdegar, J.).) Whether these arguments are merely makeweights, or are the majority's true ground of decision, will, perhaps, be revealed when the court considers theories of hirer liability that cannot with any plausibility be deemed vicarious or derivative, such as those raised in the cases mentioned in footnote 2 of the majority opinion.

WERDEGAR, J.

25 Cal. 4th 1138, *; 25 P.3d 649, **;
2001 Cal. LEXIS 3792, ***; 108 Cal. Rptr. 2d 445

13 of 19 DOCUMENTS

J. W. HARROTT, Plaintiff and Appellant, v. COUNTY OF KINGS et al., Defendants and Respondents.

S055064

SUPREME COURT OF CALIFORNIA

25 Cal. 4th 1138; 25 P.3d 649; 2001 Cal. LEXIS 3792; 108 Cal. Rptr. 2d 445; 2001 Cal. Daily Op. Service 5468; 2001 Daily Journal DAR 6649

June 28, 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, Kings County. Court of Appeal of California, Fifth Appellate District. F023079. Super.Ct.No. 94C1532. Peter M. Schultz, Judge.

DISPOSITION:
The judgment of the Court of Appeal is affirmed and the matter remanded for further proceedings consistent with this opinion.

COUNSEL:
Attorneys for Appellant:

John S. Dulcich, for Plaintiff and Appellant.

Donald Kilmer; Trutanich Michel, C. D. Michel; Benenson & Kates and Don B. Kates for the National Rifle Association of America, as Amicus Curiae on behalf of Plaintiff and Appellant.

Attorneys for Respondent:

Denis A. Eymil, County Counsel and William James Murphy, Deputy County Counsel, for Defendants and Respondents.

Morrison & Foerster, James P. Bennett, Barry R. Himmelstein; Dennis Henigan and Brian J. Siebel for Center to Prevent Handgun Violence, California Police Chiefs' Association, California State Sheriffs' Association, California Peace Officers' Association and City and County of San Francisco as Amici Curiae on behalf of Defendants and Respondents.

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

OPINIONBY:
BROWN

OPINION:

[**650] [*1141]

Mr. Harrott is an attorney. He received a gun collection in payment for legal services rendered to clients who had pleaded guilty to receiving stolen property. The Kings County Sheriff's Department, which was in possession of the gun collection, did not assert that one of the weapons, a semiautomatic rifle (the rifle), was stolen property, but nevertheless refused to deliver it to Mr. Harrott on the ground it was an assault weapon proscribed by the Roberti-Roos Assault Weapons Control Act of 1989 (Stats. 1989, ch. 19, § 3, p. 64; hereafter AWCA). Mr. Harrott brought this petition for writ of mandate to compel the sheriff's department to deliver the rifle to him. The trial court denied the writ, holding the rifle to be an assault weapon, and the Court of Appeal reversed. We granted review and held the case pending our decision in *Kasler v. Lockyer* (2000) 23 Cal. 4th 472 (*Kasler*) .

In *Kasler*, *supra*, 23 Cal. 4th 472, in the course of upholding the AWCA against various constitutional challenges, we summarized the statutory provisions that govern the question [***3] whether a semiautomatic firearm is considered an assault weapon. "Prior to amendment of the AWCA in 1999 (the 1999 amendments) (Stats. 1999, ch. 129, § 7, et seq.), semiautomatic firearms were designated as assault weapons by (1) being listed by type, series, and model in section 12276 [of the Penal Code], or (2) by being declared an [**651] assault weapon under a procedure set forth in section 12276.5. Under the latter procedure, which is commonly referred to as the add-on provision, certain superior courts, upon petition by the Attorney General, may be called upon to declare a firearm an assault weapon because of its essential similarity to a listed assault weapon. With its 1999 amendments to the AWCA, the Legislature took a third approach to designating assault weapons--defining [*1142] them in section 12276.1, subdivision (a) in terms of generic characteristics, for example, a 'semiautomatic, centerfire rifle that has the capacity to accept a detachable magazine' and also has a 'pistol grip that protrudes conspicuously beneath the action of the weapon.' (*Id.*, subd. (a)(1)(A),

Stats. 1999, ch. 129, § 7.) It bears repeating that the 1999 amendments were additive [***4] in this respect. Neither the list method of designating assault weapons in section 12276 nor the add-on provision of section 12276.5 was abandoned or textually modified by the 1999 amendments." (*Kasler*, at pp. 477-478.)

In order to frame the question before us, we must be clear about what the trial court did *not* hold. First, because this case was tried prior to the adoption of the 1999 amendments, the trial court did *not* decide the rifle belonging to Mr. Harrott was an assault weapon under Penal Code section 12276.1. **n1 Second, the trial court did *not* declare the rifle an assault weapon under the add-on provision of section 12276.5. The court did not purport to do so, and it would not have had the authority to do so, because the Kings County Superior Court is not one of the superior courts designated in section 12276.5, subdivision (a) (superior courts "of a county with a population of more than 1,000,000"). Moreover, the Attorney General had not filed the petition called for by that section. Finally, the trial court did *not* find the rifle to be one of the models specifically listed in section 12276. n2 Rather, the trial court declared** [***5] **the rifle to be an assault weapon on the ground it was an "AK series" weapon under section 12276, subdivisions (a)(1)(A) and (e). The court found that the differences between Mr. Harrott's rifle and one of the Chinese-made AK models specifically listed in section 12276, subdivision (a)(1)(A)--the AK47S--were only "minor," thus satisfying the test for a** [***6] **" 'series' " weapon stated in subdivision (e) of section 12276. n3**

n1 Unless otherwise indicated, all further section references are to the Penal Code.

n2 Interestingly, in his petition for writ of mandate, Mr. Harrott identified the rifle as an "AK-47 2822," and the "AK47" *is* one of the models of assault weapons specifically listed in section 12276, subdivision (a)(1)(A). However, the hearing below proceeded on the assumption that the rifle was *not* one of the models specifically listed in section 12276, subdivision (a). In a final twist, the Attorney General, in an amicus curiae brief filed in this court, asserts for the first time that the rifle *is* an assault weapon specifically listed in section 12276, subdivision (a)(1)(A), namely, a "made in China ... AK47 ...."

n3 The term *series* is used in section 12276 with respect to only two types of semiautomatic firearms, both of which are rifles: the "AK series" at issue here (§ 12276, subd. (a)(1)) and the "Colt AR-15 series" (§ 12276, subd. (a)(5)).

Section 12276, subdivision (a)(1) provides: "As used in this chapter [the AWCA], 'assault weapon' shall mean the following designated semiautomatic firearms: [P] (a) All of the following specified rifles: [P] (1) All AK series including, but not limited to, the models identified as follows: [P] (A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S. [P] (B) Norinco 56, 56S, 84S, and 86S. [P] (C) Poly Technologies AKS and AK47. [P] (D) MAADI AK47 and ARM."

Section 12276, subdivision (e) provides: "The term 'series' includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer."

There are [***7] two more statutory provisions that are critical to the framing of the issue in this case: Section 12276.5, subdivision (g) provides the Attorney [*1143] General "shall prepare a description for identification purposes, including a picture or diagram, of each assault weapon listed in Section 12276, and any firearm declared to be an assault weapon pursuant to this section, and shall distribute the description to all law enforcement agencies responsible for enforcement of this chapter." Section 12276.5, subdivision (h) directs the Attorney General to "promulgate a list that specifies all firearms designated as assault weapons in Section 12276 or declared to be assault weapons pursuant to this section. The Attorney General shall file that list with [**652] the Secretary of State for publication in the California Code of Regulations."

The California Department of Justice criminalist called by the County of Kings (County) testified the rifle was *not* in his opinion an AK series weapon. He reasoned as follows: Pursuant to section 12276.5, subdivision (g), the Attorney General had prepared an assault weapons identification guide (Cal. Atty. Gen., Assault Weapons Identification Guide (1993); hereafter [***8] Identification Guide) setting out each of the assault weapons listed in section 12276, as well as the firearms declared to be assault weapons pursuant to section 12276.5. The Identification Guide designated the AK series weapons by their *manufacturers' markings*. The markings on this rifle did not match any of the markings in the Identification Guide. Therefore, the rifle was not an assault weapon. The expert called by Mr. Harrott reached the same conclusion on the same grounds.

Nevertheless, the trial court held the rifle was an AK series weapon, and thus, an assault weapon. It did so on the theory that the ultimate legal question as to whether the rifle was an AK series weapon was a question for the court, not the Attorney General, to decide. The test to be applied by the decisionmaker is set out in subdivision (e) of section 12276: "The term 'series' includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer." That test was satisfied here, the trial court found, because the criminalist called by the County conceded that any variations between this rifle and an AK reference weapon (the [***9] AK 47S) were only minor.

The question presented by this case, therefore, is whether the superior court had the authority to declare Mr. Harrott's rifle an AK series assault weapon under section 12276, subdivisions (a)(1)(A) and (e) when it had not been identified as such in the Identification Guide published by the [*1144] Attorney General pursuant to section 12276.5, subdivision (g), and had not been included in the list of assault weapons promulgated by the Attorney General pursuant to section 12276.5, subdivision (h).

We conclude the answer to this question is *no*, for reasons well stated by the Court of Appeal in reversing the judgment of the trial court. "The legislative history of the amendments to the [AWCA] reveal strong concern that law enforcement personnel be clearly advised which firearms are 'assault weapons' within the meaning of the [AWCA] so as to prevent erroneous confiscation of legal weapons. The Legislature's concern that such a list be current and completely inclusive is demonstrated by the requirement that when a firearm has been declared to be an assault weapon pursuant to a section 12276.5 proceeding, the Attorney General's list must be amended within 90 days [***10] to include the specified firearm. There is no corresponding provision that if a trial court independently declares a firearm to be an assault weapon, it must notify the Attorney General. Since decisions of the trial court are not published, if we were to read the [AWCA] as urged by the county, the Legislature's purpose in mandating promulgation of a complete and current list would be thwarted. Without notice to the Attorney General, any trial court could, at any time, declare firearms to be assault weapons, thereby rendering the Attorney General's list obsolete and frustrating the intent of the Legislature."

Moreover, the Court of Appeal noted, "the Attorney General's list [must] be complete and accurate .... [because] section 12280, subdivision (b) makes it a crime to possess a firearm which has been designated ... an assault weapon unless it has been registered. ... Were trial courts independently authorized to declare additional firearms to be assault weapons without the participation of or notice to the Attorney General, the likelihood the list would be incomplete is substantially increased. Thus, ordinarily law-abiding citizens could suddenly find themselves in violation [***11] of the [AWCA] and subject to prosecution despite having periodically checked the Attorney General's list and reviewed

section 12276, subdivision (a) to ensure their firearms had not been declared ... assault weapons."

The reasoning of the Court of Appeal was validated by our subsequent decision in *In re Jorge M.* (2000) 23 Cal. 4th 866 [**653] (*Jorge M.*) . In *Jorge M.*, we considered the question whether the offense of possession of an unregistered assault weapon (§ 12280, subd. (b)) "can properly be categorized as a public welfare offense, for which the Legislature intended guilt without proof of any scienter." (*Jorge M.*, at p. 872.) We concluded that in a prosecution for this offense, "the People bear the burden of proving the defendant knew or reasonably should have known the firearm [*1145] possessed the characteristics bringing it within the AWCA." (*Id.* at p. 887, italics & fn. omitted.) In reaching this conclusion, we considered seven factors "courts have commonly taken into account in deciding whether a statute should be construed as a public welfare offense." (*Id.* at p. 873.) One of these factors is the *difficulty of ascertaining* [***12] *facts.* "This interpretive guideline holds with particular strength when the characteristics that bring the defendant's conduct within the criminal prohibition may not be obvious to the offender." (*Id.* at p. 881.)

As was mentioned above, prior to its amendment in 1999, the AWCA did not define *assault weapons* generically. In 1989, when the AWCA was originally enacted, the Legislature was sharply divided, and if the proponents of the legislation had insisted upon a generic definition, the bill would apparently have died in the Assembly that session. (*Kasler*, *supra*, 23 Cal. 4th at p. 487.) Recognizing that the perfect can be the enemy of the good, the Legislature compromised and enacted an admittedly imperfect bill under which "semiautomatic firearms were designated as assault weapons by (1) being listed by type, series, and model in section 12276, or (2) by being declared an assault weapon under a procedure set forth in section 12276.5." (*Kasler*, at pp. 477-478.) As a result, anomalous situations could arise. That is, prior to the amendment of the AWCA in 1999, two semiautomatic firearms made by different manufacturers, or two different models made by [***13] the same manufacturer, could be virtually identical in appearance, and yet one might be banned while the other not. In *Jorge M.*, we recognized it could be difficult to ascertain whether a semiautomatic firearm has the characteristics making it an assault weapon under the AWCA as originally enacted. "The Attorney General maintains the weapons listed in section 12276 are 'highly dangerous offensive weapons which are unambiguously hazardous. Assault weapons are typically used by soldiers in a war. ... The assault weapons listed in section 12276, like the SKS with detachable magazine, are not "ambiguous substances" such that a person would not be aware of the dangerous character of the weapon after looking at one.' The minor, in contrast, again stresses that the AWCA restricts only a subset of semiautomatic firearms, leaving the remainder available for lawful uses such as hunting and target shooting, and that even those semiautomatic firearms classified as assault weapons may, if registered, be lawfully possessed and used for these purposes. (See § 12285, subd. (c).) [P] On this point the minor has the better argument. ... [P] As to whether the possessor of a weapon listed [***14] in section 12276 would, in all or most cases, 'be aware of the dangerous character of the weapon after looking at one,' the Attorney General does not demonstrate, or even attempt to demonstrate, that the listed weapons are universally distinguishable by their appearance from firearms not listed in section 12276. Comparison of the photographs of listed rifles in [*1146] the [Identification Guide] with photographs of unlisted rifles in a general reference work (Walter, Rifles of the World [(2d ed. 1998)]) fails to bear out the assumption. While many of the rifles depicted in the Identification Guide are of particularly menacing appearance, with folding or telescoping stocks, forward pistol grips, bullpup configuration or other unusual external features, others, with fixed wooden stocks and a relatively conventional rifle appearance, are not obviously unsuited, to the untrained eye at least, for hunting, ranching and farming uses, or target shooting. (See, e.g., Identification Guide at pp. 6 [Baretta AR-70], 7 [CETME Sporter], 18 [SKS with detachable magazine], 23 [Springfield Armory BM 59], 26 [Valmet M62S], 28 [Valmet M78S].) Conversely, several unlisted semiautomatic rifles [***15] [**654] have unusual military-type features and appear, again to the untrained eye, unlikely sporting or working guns. (See, e.g., Walter, Rifles of the World, *supra*, at pp. 384 [PMC Paratrooper], 404 [Ruger Mini-14/5RF], 442 [Universal Paratrooper], 439 [Stoner Model 63A1].)" (*Jorge M.*, *supra*, 23 Cal. 4th at pp. 882-883.)

Two points made in our discussion in *Jorge M.* bear significantly on the question before us now: (1) In order to determine whether a firearm is an assault weapon under the AWCA, an ordinary citizen will have to rely heavily on the markings listed in the

Identification Guide; and (2) even after consulting the Identification Guide, the ordinary citizen may still not be able to determine whether the firearm is considered an assault weapon. "We observe that section 12276 lists weapons primarily by manufacturer and model. 'Accordingly, the identification markings are the most important factor in determining if a particular firearm is an "assault weapon" ' within the meaning of section 12276. (Identification Guide, *supra*, Foreword.) Yet the Identification Guide also suggests markings may vary from gun to gun: 'Department of Justice staff has attempted [***16] **to locate examples of each of the identified "assault weapons" to identify accurately the markings on them. However, some of the identified "assault weapons" were not physically located and some which were found were not marked as specified in Section 12276.' (Identification Guide, *supra*, Foreword.) Accompanying the Identification Guide's photograph of a Valmet M78S (listed in § 12276, subd. (a)(16)) is the note, 'No firearm marked M78S** has been located. However, the firearm pictured may be the **M78S**.' A similar note accompanies the photograph of a SIG PE-57 (listed in § 12276, subd. (a)(12)). (Identification Guide, *supra*, at pp. 20, 28.) Consequently, although most firearms listed in section 12276 are likely to be readily identifiable, some instances in which the possessor of a semiautomatic firearm could reasonably be in doubt as to whether the weapon is subject to regulation under the AWCA are also likely." (*Jorge M.*, *supra*, 23 Cal. 4th at p. 884.)

This case amply illustrates the difficulty an ordinary citizen might have, when a gun's markings are not listed in the Identification Guide, in determining whether a semiautomatic firearm should be considered [***17] an assault [*1147] weapon under the AWCA. **n4 Perhaps the grossest feature of the rifle belonging to Mr. Harrott, its stock, was dissimilar to the AK series reference weapon, while features that might be familiar only to a gun buff, such as the "sear," n5 were interchangeable with those of the reference weapon, and still others, such as the "receiver cover," n6 were not.**

n4 Not only would ordinary citizens find it difficult, without the benefit of the Identification Guide, to determine whether a semiautomatic firearm should be considered an assault weapon, ordinary law enforcement officers in the field would have similar difficulty. While we do not rely on the individual views of proponents of legislation in interpreting a statute (see, e.g., *Quintano v. Mercury Casualty Co.* (1995) 11 Cal. 4th 1049, 1062, fn. 5, 906 P.2d 1057), we note that the author of the legislation that requires the Attorney General to produce the Identification Guide recognized this difficulty. "I am writing to request your signature on SB 2444 which would enable law enforcement personnel in the field the means to be able to recognize what actually is or is not an 'assault weapon,' as defined under state law. [P] Unfortunately, a great many law enforcement officers who deal directly with the public are not experts in specific firearms identification. ... [P] There are numerous makes and models of civilian military-looking semi-automatic firearms which are not listed by California as 'assault weapons' but which are very similar in external appearance. This situation sets the stage for honest law-enforcement mistakes resulting in unjustified confiscations of non-assault weapon firearms. Such mistakes, although innocently made, could easily result in unnecessary, time-consuming, and costly legal actions both for law enforcement and for the lawful firearms owners affected. [P] SB 2444 will benefit everyone concerned by assuring that law enforcement officers are assisted in the proper performance of their duties through having at their disposal a reliable means of accurately identifying each listed 'assault weapon.' " (Sen. Don Rogers, letter to Governor Deukmejian re: Sen. Bill No. 2444 (1989-1990 Reg. Sess.), Aug. 23, 1990.) [***18]

n5 A *sear* is "the catch that holds the hammer of a gunlock at cock or half cock." (Webster's 3d New Internat. Dict. (1965) p. 2048.)

n6 A *receiver* is "the metal frame in which the action of a firearm is fitted and to which the breech end of the barrel is attached." (Webster's 3d New Internat. Dict., *supra*, at p. 1894.)

[**655] **Moreover, as the amicus curiae brief filed in support of Mr. Harrott by the National Rifle Association (NRA) points out, the authority claimed by the trial court here--to hold a firearm to be an assault weapon under section 12276, even though its**

markings do not appear in the Identification Guide--could lead to the same weapon being treated differently from county to county and even within the same county. "The course taken by the Sheriff and the Kings County Superior Court would substitute chaos for the AWCA's plan of uniform, statewide determinations of which guns are [assault weapons]. If allowed to stand, the trial court decision in *Harrott* would subject California's gun owners, particularly hunters, to whimsical and capricious prosecution. Kern County [***19] might have no problem with a particular firearm, but a single judge in Kings County could turn a truly innocent citizen ... into a felon. A hunter who left Kern (where a Clayco rifle is completely legal) to hunt in Kings County could be arrested and prosecuted for the minimum four-year sentence felony of transporting an [*1148] 'assault weapon' under section 12280, subdivision (a)." n7 Trial court decisions are not precedents binding on other courts under the principle of stare decisis. (*Santa Ana Hospital Medical Center v. Belshe* (1997) 56 Cal. App. 4th 819, 831; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 922, p. 960.) Therefore, as the NRA notes, "the trial court decision in *Harrott* binds only the parties thereto--even in Kings County . If the exact same situation arose again in some other county (or even in Kings), a Clayco owner would be free to bring suit to compel the police to give him his Clayco. While the superior court in which he brought it *could* follow the *Harrott* superior court, it would not have to. [Fn. omitted.] It would be free to reach the opposite conclusion--either by examining the merits for itself or by accepting as binding the Attorney [***20] General's list of AK series guns which does not include the Clayco."

n7 "Clayco" is a brand name used by the Court of Appeal to refer to Mr. Harrott's rifle. We have avoided using the term because the Attorney General asserts that "Clayco" is the name, not of a manufacturer, but of an importer of semiautomatic firearms made by Norinco, a Chinese manufacturer of AK series assault weapons.

Moreover, the NRA argues, just as the Kings County Superior Court had no authority to pronounce Mr. Harrott's rifle an AK series assault weapon under section 12276, subdivision (e), the Attorney General also lacks the authority to identify series weapons under that provision. Such a determination, the NRA contends, could only be made in a section 12276.5 add-on proceeding brought by the Attorney General in one of the courts designated in that section. The Attorney General, on the other hand, contends we have already upheld his authority under section 12276, subdivision (e). "The *Kasler* decision has affirmed the Attorney General's [***21] authority to identify assault weapons with both the add-on provisions of ... section 12276.5 *and identify the 'series' AK and AR-15 assault weapons pursuant to ... section 12276[, subdivisions] (e) and (f).*" (Cal. Dept. of Justice, Firearms Div. Information Bull. No. 2000-04-FD (Aug. 22, 2000) p. 1, italics added, at <http://caag.state.ca.us/firearms/infobuls/200004.pdf> [as of June 28, 2001].)

Although both the NRA and the Attorney General profess to find support for their positions in *Kasler*, in that opinion we expressly declined to reach the question of the Attorney General's authority under section 12276, subdivisions (e) and (f). "Because we have concluded that plaintiffs' equal protection challenge must be rejected even if, as plaintiffs contend, section 12276 covers only the specific makes and models listed in that provision, we need not reach the Attorney General's argument that the challenge is based on a misreading of the AWCA. '[Plaintiffs'] basic premise that various weapons allegedly identical in design produced by different manufacturers [*1149] were not included by [the] Legislature is defeated by the plain language of the statute,' the Attorney General [***22] contends, because subdivision (f) of section 12276 states that the list includes 'any other models which are only variations of those weapons with minor differences regardless of manufacturer.' " (*Kasler*, *supra*, 23 Cal. 4th at p. 491, fn. 2.)

[**656] There is an apparent tension between the authority conferred upon the Attorney General by section 12276.5, subdivision (a)--the power to initiate a *judicial* proceeding to add assault weapons to the list of such weapons in section 12276, n8 and the authority conferred upon the Attorney General by section 12276, subdivision (e)--the power, in the absence of a judicial proceeding, to identify and promulgate a list of the firearms considered to be *series* assault weapons. The tension, however, is only apparent, and we uphold the Attorney General's authority.

n8 Under section 12276.5, certain superior courts, upon a request by the

Attorney General, may declare a firearm an assault weapon "(a) ... because the firearm is either of the following: [P] (1) Another model by the same manufacturer or a copy by another manufacturer of an assault weapon listed in subdivision (a), (b), or (c) of Section 12276 which is identical to one of the assault weapons listed in those subdivisions except for slight modifications or enhancements including, but not limited to: a folding or retractable stock; adjustable sight; case deflector for left-handed shooters; shorter barrel; wooden, plastic or metal stock; larger magazine size; different caliber provided that the caliber exceeds .22 rimfire; or bayonet mount. The court shall strictly construe this paragraph so that a firearm which is merely similar in appearance but not a prototype or copy cannot be found to be within the meaning of this paragraph. [P] (2) A firearm first manufactured or sold to the general public in California after June 1, 1989, which has been redesigned, renamed, or renumbered from one of the firearms listed in subdivision (a), (b), or (c) of Section 12276, or which is manufactured or sold by another company under a licensing agreement to manufacture or sell one of the firearms listed in subdivision (a), (b), or (c) of Section 12276, regardless of the company of production or distribution, or the country of origin."

[***23]

Our decision today--upholding the Attorney General's authority to identify series assault weapons pursuant to section 12276, subdivision (e), but holding that a trial court may not find a semiautomatic firearm a series assault weapon under section 12276, subdivision (e), unless the firearm has first been included in the list of series assault weapons promulgated by the Attorney General pursuant to [**657] section 12276.5, subdivision (h)--is compelled by our examination of the legislative history of the AWCA.

As the AWCA was originally enacted in 1989, section 12276 did not contain subdivision (e). (Stats. 1989, ch. 19, § 3, pp. 64-65.) In 1991, the AWCA was amended by, inter alia, adding subdivision (e) to section 12276, as well as subdivision (h) to section 12276.5. (Stats. 1991, ch. 954, § § 2-3, pp. 4440-4443.) Subdivision (e) of section 12276 provides that *series* includes "all other models that are only variations, with minor differences, of [*1150] those models listed in subdivision (a), regardless of the manufacturer." n9 Subdivision (h) of section 12276.5 provides in pertinent part: "The Attorney General shall promulgate a list [***24] that specifies all firearms designated as assault weapons in Section 12276 or declared to be assault weapons pursuant to this section. The Attorney General shall file that list with the Secretary of State for publication in the California Code of Regulations."

n9 As amended in 1991, section 12276 now provides that the term *assault weapon* means all of the rifles specified in subdivision (a), as well as all of the pistols and shotguns specified in subdivisions (b) and (c), respectively. Subdivision (a) of section 12276 lists the specified rifles in 21 numbered subdivisions, beginning with "(1) All AK series including, but not limited to, the models identified as follows: [P] (A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S. [P] (B) Norinco 56, 56S, 84S, and 86S. [P] (C) Poly Technologies AKS and AK47. [P] (D) MAADI AK47 and ARM." (Stats. 1991, ch. 954, § 2, p. 4440.)

When the AWCA was originally enacted, the Legislature clearly intended to reach all series assault weapons. In amending section 12276 to add subdivision (e), the Legislature articulated the standard under which the Attorney General was to *administratively* identify the semiautomatic firearms considered to be series assault weapons. And importantly, by also amending section 12276.5 to add subdivision (h), we agree that the Legislature, in the words of the author of the bill, provided "additional due process protections for public notification purposes." (Sen. David Roberti, letter to Governor Wilson re: Sen. Bill No. 263 (1991-1992 Reg. Sess.) Sept. 19, 1991, p. 2.) The fact these amendments were enacted together supports the conclusion that subdivision (e) of section 12276 is not self-executing, but, rather, that the specific make and model of an assault weapon must first appear on the list the Attorney General, pursuant [***25] to section 12276.5, subdivision (h), files with the Secretary of State for publication in the California Code of Regulations.

This construction is consistent with one of the Legislature's primary purposes in amending the AWCA in 1991, which was to promote compliance with the requirement of section 12285 that assault weapons be registered. In its earlier iterations, Senate Bill No. 263 only (1) established a registration forgiveness period affording owners who did not comply with the original registration requirement another opportunity, and (2) required the Department of Justice to conduct a public education program regarding the registration requirement. (See Sen. Bill No. 263 (1991-1992 Reg. Sess.) as amended Feb. 11, 1991.) According to a Senate Judiciary Committee report, the Attorney General sought the bill because of very poor compliance with the original January 1, 1991, registration deadline. "Considering the fact that the great majority of gun owners are law abiding citizens, regardless of their opinion of a particular law, it is unlikely that a 90% rate of [*1151] noncompliance can [be] explained as a concerted political statement. Far more likely is the possibility that owners [***26] of assault weapons were simply unaware of the deadline, *or unaware that their particular weapons were included on the list of proscribed firearms.*" (Sen. Com. on Judiciary, rep. on Sen. Bill No. 263 (1991-1992 Reg. Sess.) p. 3, italics added.) "The low rate of compliance evident at the time of the registration deadline led the Attorney General to suggest an extension permitting lawful compliance, on the grounds that *no public interest is served by punishing a large class of individuals for failure to perform due to insufficient disclosure of the law. Certainly, respect for the law is not served by the punishment of individuals lacking an opportunity to know its terms and conditions.* Thus, some additional opportunity for compliance, accompanied by a genuine education effort, seems reasonable." (*Id.* at p. 4, italics added.)

Our construction of the statute, holding that a trial court may not find a semiautomatic firearm to be a series assault weapon under section 12276, subdivision (e), unless the firearm has first been included in the list of series assault weapons promulgated by the Attorney General pursuant to section 12276.5, subdivision (h), best serves the legislative [***27] goal we have just described. A contrary interpretation would be inconsistent with the legislative goal because owners of unlisted weapons would still be unsure whether they had to comply with the registration requirement.

Our interpretation of section 12276, subdivision (e) is reinforced by the rule that a statute must be interpreted in a manner, consistent with the statute's language and purpose, that eliminates doubts as to the statute's constitutionality. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal. 4th 763, 788, 952 P.2d 641.) "A law failing to give a person of ordinary intelligence a reasonable opportunity to know what is prohibited violates due process under both the federal and California Constitutions. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108, 33 L. Ed. 2d 222, 92 S. Ct. 2294; *People v. Heitzman* (1994) 9 Cal. 4th 189, 199, 886 P.2d 1229.)" (*Kasler*, *supra*, 23 Cal. 4th at pp. 498-499.)

Ordinary gun owners of reasonable intelligence, Mr. Harrott contends, cannot be expected to know whether the differences between their semiautomatic firearms and the assault weapons specifically listed in section [***28] 12276, subdivision (a) are, in the language of section 12276, subdivision (e), only "minor." However, our interpretation of the AWCA avoids this problem. To determine whether the differences between their firearms and the series assault weapons listed in section 12276 are considered to be only "minor," gun owners need only consult the California Code of Regulations. [*1152]

Mr. Harrott relies upon *Springfield Armory, Inc. v. City of Columbus* (6th Cir. 1994) 29 F.3d 250 (*Sprngfield Armory*),in which the Sixth Circuit Court of Appeals found the City of Columbus's assault weapon ordinance unconstitutionally vague. "The ordinance defines 'assault weapon' as any one of thirty-four specific rifles, three specific shotguns and nine specific pistols, or 'other models by the same manufacturer with the same action design that have *slight modifications* [**658] *or enhancements....*' " (*Id.* at p. 251, italics added.) "How is the ordinary consumer to determine which changes may be considered slight?" the Sixth Circuit asked. "A weapon's accuracy, magazine capacity, velocity, size and shape and the caliber of ammunition it takes can all be altered." (*Id.* at p. 253.) [***29]

In *Kasler*, the Court of Appeal relied upon *Springfield Armory* in holding section 12276.5 unconstitutionally vague. "Section 12276.5 violates [the standard that a law should give a person of ordinary intelligence an opportunity to know what is prohibited], the Court of Appeal held, 'because it defines the weapons which can be added on as those with "slight" modifications and those which have been "redesigned, renamed, or renumbered" from guns on the list. (§ 12276.5, subd. (a)(1), (2).)

Reasonable persons can understand renaming and renumbering. But what is a "slight" modification or a "redesign?" ' " (*Kasler*, *supra*, 23 Cal. 4th at p. 499.)

"The questions raised by the Court of Appeal in *Kasler*," we pointed out, "are not questions ordinary citizens must answer at their peril. Rather, they are questions the Attorney General must address in deciding whether to petition the superior court for a declaration of temporary suspension (§ 12276.5, subd. (a)), and that the superior court must resolve in determining whether to issue a permanent declaration that a firearm is an assault weapon (§ 12276.5, subd. (f)). If the superior court issues a permanent declaration [***30] that a specified firearm is an assault weapon, then the Attorney General must, within 90 days, promulgate an amended list of the firearms designated as assault weapons in section 12276, or added to the list pursuant to section 12276.5, and the amended list must be filed by the Attorney General with the Secretary of State for publication in the California Code of Regulations. (§ 12276.5, subd. (h).) Therefore, concerned citizens need not struggle with the question whether, for example, a particular firearm is identical to one of the listed assault weapons except for slight modifications. The citizens may simply consult the amended list. (The availability of the amended list distinguishes the cases upon which the Court of Appeal relied in holding the AWCA unconstitutionally vague--*Springfield Armory*, *supra*, 29 F.3d 250, and *Robertson v. City and County of Denver* (Colo. 1994) 874 P.2d 325.) Because the standard set forth in section 12276.5, subdivision (a), is to be applied by the Attorney General and the [*1153] superior court, we need not and do not reach the question whether it would be unconstitutionally vague if ordinary citizens were required to apply it." ([***31] *Kasler*, *supra*, 23 Cal. 4th at p. 499.)

Just as the questions raised by the Court of Appeal in *Kasler* --what is a "slight" modification or a "redesign[]" within the meaning of section 12276.5, subdivision (a)(1) and (2)?--are not questions ordinary citizens have to answer at their peril, so, too, ordinary citizens are not held responsible for answering the question raised by Mr. Harrott--which differences are only "minor" within the meaning of section 12276, subdivision (e)? As we have interpreted the statute, to determine whether the differences between the firearms of concern to them and the series assault weapons listed in section 12276 are considered by the Attorney General to be only "minor" for the purposes of section 12276, subdivision (e), ordinary citizens need only consult the California Code of Regulations. Moreover, the Attorney General's Identification Guide is also available to them.

On the other hand, we reject the argument that a saving construction is unnecessary because the statute is applicable, not only to ordinary gun owners, but also to gun dealers, and the latter should be able to apply section 12276, subdivision (e)'s standard regarding "minor" [***32] differences with reasonable certainty. This argument is based on a false premise. The premise is that we adopt a saving construction only if a statute would otherwise be unconstitutional on its face, that is, in *all* its applications. This premise is simply wrong. " 'If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, [**659] without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable. [Citations.] The basis of this rule is the presumption that the Legislature intended, not to violate the Constitution, but to enact a valid statute within the scope of its constitutional powers.' [Citations.]" (*People v. Superior Court (Romero)* (1996) 13 Cal. 4th 497, 509, 917 P.2d 628.) It can hardly be argued that this statute does not raise serious and doubtful constitutional questions as applied to ordinary citizens. The language found constitutionally [***33] problematic by the Sixth Circuit Court of Appeals in *Springfield Armory*, *supra*, and by the Colorado Supreme Court in *Robertson v. City and County of Denver*, *supra*, was more specific than the language at issue here. (See *Springfield Armory*, *supra*, 29 F.3d at p. 252 ["other models by the same manufacturer with the same action design that have slight modifications or [*1154] enhancements of firearms listed"]; *Robertson v. City and County of Denver*, *supra*, 874 P.2d at p. 334 [" 'all semiautomatic pistols that are modifications of rifles having the same make, caliber and action design but a shorter barrel and no rear stock or modifications of automatic weapons originally designed to accept magazines with a capacity of twenty-one (21) or more rounds' "].)

Our construction of this statute to preserve its constitutionality is supported by the related rule of lenity. The latter rule applies even though this is not

a criminal prosecution because the statute we are construing imposes criminal penalties. "In determining the meaning of [a] statute, we look not only to the particular statutory language, but to the [***34] design of the statute as a whole and to its object and policy. [Citations.] Moreover, [when] the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage. To the extent that the language or history of [a statute] is uncertain, this 'time-honored interpretive guideline' serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. [Citations.]" (*Crandon v. United States* (1990) 494 U.S. 152, 158, 108 L. Ed. 2d 132, 110 S. Ct. 997; see also *United States v. Thompson/Center Arms Co.* (1992) 504 U.S. 505, 517-518, 119 L. Ed. 2d 308, 112 S. Ct. 2102 [applying the rule of lenity in a federal firearms case involving a tax, not a criminal penalty].)

Finally, our construction of the AWCA--that a trial court may not find a firearm a series assault weapon unless it has been first identified as such in the list published by the Attorney General in the California Code of Regulations--comports with the Attorney General's own construction of the statute. The Attorney [***35] General has never supported the trial court's assertion of authority to find Mr. Harrott's rifle an AK series assault weapon. In the brief amicus curiae filed in this court, the Attorney General insists upon his exclusive authority to determine which firearms are series assault weapons. "Series firearms ... have to be specified in a list promulgated by the Attorney General, filed with the Secretary of State and published in the California Code of Regulations pursuant to section 12276.5, subdivision (h)." The testimony of the California Department of Justice criminalist called by the County was consistent with the Attorney General's position in that the criminalist testified that the rifle was *not* in his opinion an AK series weapon because its markings did not match any of the markings listed in the Identification Guide. "Both this court and the United States Supreme Court have recognized on numerous occasions that 'the construction [*1155] of a statute by the officials charged with its administration must be given great weight.' " (*Highland Ranch v. Agricultural Labor Relations Bd.* (1981) 29 Cal. 3d 848, 859, 176 Cal. Rptr. 753, 633 P.2d 949.) It is particularly appropriate [***36] to do so here because of (1) the technical knowledge required to ascertain whether which weapons are knock-offs or clones of listed assault weapons, and (2) the importance, as the Court of Appeal pointed out, of avoiding conflicting rulings by various trial courts. (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 7, 960 P.2d 1031 ["The binding power [**660] of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation"])

The limits of our holding today warrant emphasis. Although we hold the Attorney General has the authority to determine that certain semiautomatic firearms are assault weapons by simply identifying them as such in the list published by the Attorney General in the California Code of Regulations, that authority applies only to the two types of firearms defined in section 12276 by the use of the term *series*, namely, the AK47 series and the Colt AR-15 series. (See fn. 3, *ante*.) In order to have any other semiautomatic firearms declared assault weapons within the meaning [***37] of section 12276, the Attorney General must utilize the add-on procedure set forth in section 12276.5. And, of course, the Attorney General's identification of a particular firearm as a series assault weapon would, in an appropriate case, be subject to challenge on the ground the firearm in question did not satisfy the standard set forth in section 12276, subdivision (e), namely that the variations between it and the AK47 series or the Colt AR-15 series were more than "minor."

Our conclusion that the trial court exceeded its authority in declaring Mr. Harrott's rifle an AK series weapon under section 12276, subdivisions (a)(1)(A) and (e) does not end the matter. As stated in footnote 2, *ante*, the Attorney General now asserts the rifle is an AK47, one of the assault weapons *specifically listed* in section 12276, subdivision (a)(1)(A), and in his petition for writ of mandate, Mr. Harrott did describe the rifle as an "AK-47 2822." Therefore, the case should be remanded to the trial court for a resolution of this question.

CONCLUSION

The judgment of the Court of Appeal is affirmed and the matter remanded for further proceedings consistent with this opinion. [***38]

BROWN, J.

WE CONCUR:

KENNARD, J.

BAXTER, J.

CHIN, J.

DISSENTING OPINION BY GEORGE, C. J.

DISSENTBY:
GEORGE

DISSENT:

[*1156] **DISSENTING OPINION BY GEORGE, C. J.**

I respectfully dissent.

By today's decision, the majority eviscerates a key provision of California's Assault Weapons Control Act (AWCA) that is directed at a type of assault weapon commonly used by drug dealers and gang members, the "AK series" semiautomatic rifle. In the face of the clearest possible statutory language -- defining "assault weapon" for purposes of the AWCA to encompass "*all* AK series [rifles], *including but not limited to, the models identified as follows ...*" (Pen. Code, § 12276, subd. (a)(1), italics added) **n1 -- the majority inexplicably concludes that this provision designates as assault weapons only the particular AK model rifles that are identified specifically by name in the statute, and does not permit the police, other law enforcement authorities, or the courts to treat as assault weapons other AK series semiautomatic rifles that are only minor variations of the listed AK models unless and until the particular AK series rifle has been explicitly included** [***39] **by name and model on a list promulgated by the Attorney General. As explained below, the statutory language in question was adopted because the Legislature recognized the impossibility of compiling a comprehensive list of all AK series rifles (in light of the circumstance that manufacturers, importers, and sellers traditionally have referred to these weapons by different names and continually have issued new AK model rifles containing only minor variations from previous models). The Legislature, notwithstanding these circumstances, concluded that it was essential -- in view of the popularity of AK series rifles among criminals and the relatively inexpensive nature of these weapons -- to ensure that *all* AK series rifles be treated as assault weapons. By refusing to heed the clear statutory language classifying *all* AK series rifles as assault weapons (whether specifically identified by name and model, or not), the majority creates a loophole in California's assault weapons control legislation that the Legislature** [**661] **plainly intended to eliminate. Although the detrimental effect of the majority's holding may be lessened in the future by the expanded reach of the 1999 amendment of** [***40] **the AWCA and the current Attorney General's apparent willingness to attempt to keep up with firearm manufacturers' production of new AK models by adding such weapons to an administratively compiled list, in my view today's decision nonetheless represents a clear and unwarranted frustration of legislative intent.**

n1 All further statutory references are to the Penal Code, unless otherwise indicated.

I

As this court explained in *Kasler v. Lockyer* (2000) 23 Cal. 4th 472, 477-478, before the AWCA was amended [*1157] in 1999 to add a generic definition of "assault weapon" (based upon whether a weapon contains specified general features or characteristics such as a protruding pistol grip and the capacity to accept a detachable magazine or a fixed magazine that can carry more than 10 rounds) (see § 12276.1), the AWCA provided two means by which a weapon could be found to be an "assault weapon" for purposes of the act. These were the following: (1) a weapon was defined as an assault weapon if it was included [***41] within the list designated as assault weapons by the Legislature itself in *section 12276*; and (2) a weapon additionally could be found to an assault weapon if it was "declared" to be an assault weapon in a court action instituted by the Attorney General pursuant to the so-called add-on procedure set forth in *section 12276.5*.

Although most of the weapons included in the list set forth in section 12276 are identified by specific make and model, in some instances section 12276 refers not to a specific make or model but to a designated "series" of weapons. (§ 12276, subd. (a)(1) ["AK series"], (a)(5) ["Colt AR-15 series"].) **n2 The** [**662] **particular subdivision of section 12276 that is at issue in this case -- section 12276, subdivision (a)(1) -- constitutes one such provision, involving "AK series" semiautomatic rifles.**

n2 Section 12276 provides in full:

"As used in this chapter, 'assault weapon' shall mean the following designated semiautomatic firearms:

"(a) All of the following specified rifles:

"(1) All AK series including, but not limited to, the models identified as follows:

"(A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S.

"(B) Norinco 56, 56S, 84S, and 86S.

"(C) Poly Technologies AKS and AK47.

"(D) MAADI AK47 and ARM.

"(2) UZI and Galil.

"(3) Beretta AR-70.

"(4) CETME Sporter.

"(5) Colt AR-15 series.

"(6) Daewoo K-1, K-2, Max 1, Max 2, AR 100, and AR 110C.

"(7) Fabrique Nationale FAL, LAR, FNC, 308 Match, and Sporter.

"(8) MAS 223.

"(9) HK-91, HK-93, HK-94, and HK-PSG-1.

"(10) The following MAC types:

"(A) RPB Industries Inc. sM10 and sM11.

"(B) SWD Incorporated M11.

"(11) SKS with detachable magazine.

"(12) SIG AMT, PE-57, SG 550, and SG 551.

"(13) Springfield Armory BM59 and SAR-48.

"(14) Sterling MK-6.

"(15) Steyer AUG.

"(16) Valmet M62S, M71S, and M78S.

"(17) Armalite AR-180.

"(18) Bushmaster Assault Rifle.

"(19) Calico M-900.

"(20) J&R ENG M-68.

"(21) Weaver Arms Nighthawk.

"(b) All of the following specified pistols:

"(1) UZI.

"(2) Encom MP-9 and MP-45.

"(3) The following MAC types:

"(A) RPB Industries Inc. sM10 and sM11.

"(B) SWD Incorporated M-11.

"(C) Advance Armament Inc. M-11.

"(D) Military Armament Corp. Ingram M-11.

"(4) Intratec TEC-9.

"(5) Sites Spectre.

"(6) Sterling MK-7.

"(7) Calico M-950.

"(8) Bushmaster Pistol.

"(c) All of the following specified shotguns:

"(1) Franchi SPAS 12 and LAW 12.

"(2) Striker 12.

"(3) The Streetsweeper type S/S Inc. SS/12.

"(d) Any firearm declared by the court pursuant to Section 12276.5 to be an assault weapon that is specified as an assault weapon in a list promulgated pursuant to Section 12276.5.

"(e) The term series includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.

"(f) This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which bans the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only

variations of those weapons with minor differences, regardless of the manufacturer. The Legislature has defined assault weapons as the types, series, and models listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons."

[***42] [*1158]

Section 12276, subdivision (a)(1) currently provides in full:

"As used in this chapter [i.e., the AWCA], 'assault weapon' shall mean the following designated semiautomatic firearms:

"(a) All of the following specified rifles:

"(1) *All AK series, including, but not limited to, the models identified as follows*:

"(A) Made in China AK, AKM, AKS, AK47, AK47S, 56, 56S, 84S, and 86S.

"(B) Norinco 56, 56S, 84S, and 86S.

"(C) Poly Technologies AKS and AK47.

"(D) MAADI AK47 and ARM." (Italics added.) [*1159]

Section 12276, subdivision (e), in turn, provides in full:

***"The term 'series' includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer."* (Italics added.)**

In light of this explicit statutory language, I believe the majority clearly is mistaken in concluding that only those AK series rifles specifically identified by make or model in section 12276, subdivision (a)(1)(A) through (a)(1)(D), are designated by section 12276 itself as assault weapons for purposes of the AWCA. Instead, as the plain language of subdivisions (a) and (e) establishes, the Legislature has provided [***43] **in section 12276 that *all* AK series rifles ("including, but not limited to" the specifically identified AK series rifles) are assault weapons for purposes of the AWCA, and further has specified that the term "AK series" includes "all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer."**

II

Not only is the majority's conclusion untenable in view of the plain language of the applicable statutory provisions, but the legislative history of the relevant portions of section 12276 demonstrates that this language was added to the AWCA in 1991 for the specific purpose of making it clear that the firearms that are *legislatively designated* as assault weapons in section 12276 include *all* AK series rifles, *whether the particular model of the rifle is one specifically listed in section 12276 or not*. The majority's interpretation largely frustrates the objective of the 1991 amendments.

When section 12276 first was enacted in 1989 as part of the original Roberti-Roos Assault Weapons Control Act of 1989 (Stats. 1989, ch. 19, § 3, p. 64), the pertinent provisions of subdivision (a) read as follows: [***44]

"As used in this chapter, 'assault weapon' shall mean the following firearms known by trade names:

"(a) All of the following specified rifles:

"(1) Avtomat Kalashnikovs (AK) series.

"(2) Uzi and Galil.

"(3) Beretta AR-70 (SC-70). [*1160]

"(4) CETME G3.

"(5) Colt AR-15 series and CAR-15 series.

"[Listing other rifles in 18 additional separately numbered subparts ((6) - (23)) of subdivision (a).]" (Stats. 1989, ch. 19, § 3, p. 64.)

Although, as the quoted language indicates, two provisions of the 1989 version of section 12276 -- subdivision (a)(1) and (5) -- referred to a "series" of rifles, rather than to a specific make and model, the 1989 version of section 12276 did not define the term "series." **n3**

n3 A memorandum in the legislative history materials of the 1991 legislation explains why, in the 1989 version of section 12276, the AK rifles were listed as a series, whereas most of the other designated weapons were listed by specific manufacturer and model. The memorandum was written in

February 1991 by S.C. Helsley, Assistant Director, Investigation and Enforcement Branch of the California Department of Justice, who apparently was directly and extensively involved in producing the list of assault weapons included in the 1989 legislation.

Assistant Director Helsley's memorandum explains in pertinent part: "My function throughout the process was to generate lists of weapons to be banned or exempted. As these lists were produced, there was ongoing anxiety about how to describe the weapons in the legislation. The 'AK' is the best example. Our attempt to describe them had four distinct stages. They were:

". All AVTOMAT KALASHNIKOV semiautomatic rifles of military style.

". By model AKS, AKM, etc.

". By manufacturer or importer -- Norinco, Poly Technologies, etc., and

". Finally by AVTOMAT KALASHNIKOVS (AK) series.

"The reasoning which led to the final 'series' description was based on four factors. They were:

". Not all AK's were of 'military style.'

". Given the time frame involved, we were not convinced that we could determine all the manufacturers whose AK's had been imported.

". The use of model numbers/names was impractical as wholesalers were advertising weapons with designations that were at odds with the manufacturers description.

". Manufacturers emphasized the semiautomatic AK's lineage with the military version. Advertisements also referred to 'series.'"

The memorandum adds: "Since the law took effect, AK 47's have been assembled in the United States with a whole new set of model numbers ...."

[***45]

[**663] In addition to section 12276, in which the Legislature set forth a list of firearms that it specified were assault weapons for purposes of the AWCA, the 1989 legislation included another provision -- section 12276.5 -- which established an "add-on" procedure that authorizes the Attorney General to institute a proceeding in certain superior courts to obtain a declaration that *another model* of firearm, *not listed in section 12276*, should be considered an assault weapon, upon a showing that the other model "is identical to one of the assault weapons listed in section 12276 except for slight modifications and enhancements ...." (§ 12276.5, subd. (a)(1).) In 1990, the Legislature added a new subdivision to section 12276.5 -- section 12276.5, subdivision (g) [*1161] -- that directed the Attorney General to "prepare a description for identification purposes, including a picture or diagram, of each assault weapon listed in Section 12276, and any firearm declared to be an assault weapon pursuant to this section [i.e., pursuant to the add-on procedure of section 12276.5]," and to "distribute the description to all law enforcement agencies."

Perhaps because the 1989 version of section [***46] 12276 had not included a definition of the term "series," and because it was unclear whether the descriptive pictures or diagrams to be prepared by the Attorney General under section 12276.5, subdivision (g), were intended to limit the scope of section 12276's references to "series" of firearms, some confusion and controversy arose with regard to the proper interpretation and application of those subparts of section 12276 that defined assault weapons to include specified "series" of rifles. The 1991 amendments to section 12276 at issue in this case were aimed specifically at eliminating such confusion and at clarifying the Legislature's intent with regard to the proper application of those portions of section 12276.

As relevant here, the 1991 enactment amended section 12276 by modifying the language of subdivision (a), and by adding two new subdivisions, subdivisions (e) and (f), to section 12276. (Stats. 1991, ch. 954, § 2, pp. 4440-4441.)

As amended in 1991, section 12276, subdivision (a), now reads in relevant part:

"As used in this chapter, 'assault weapon' shall mean the following designated semiautomatic firearms:

"(a) All of the following specified rifles:

"(1) [***47] *All AK series, including but not limited to, the models identified as follows*:

"(A) Made in China AK, AKM, AKS, AK47, 56, 56S, 84S, and 86S.

"(B) Norinco 56, 56S, 84S, and 86S.

"(C) Poly Technologies AKS and AK47.

"(D) MAADI AK47 and ARM.

[Listing other rifles in 20 additional separately numbered subparts ((2) - (21)) of subdivision (a)]." (Italics added.) [*1162]

Section 12276, subdivisions (e) and (f) -- the new subdivisions of section 12276 added by the 1991 legislation -- provide as follows:

"(e) *The term 'series' includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer.*" (Italics added.)

"(f) This section is declaratory of existing law, as amended, and a clarification of the law and the Legislature's intent which [**664] bans the weapons enumerated in this section, the weapons included in the list promulgated by the Attorney General pursuant to Section 12276.5, and any other models which are only variations of those weapons with minor differences, regardless of the manufacturer. *The Legislature has defined assault weapons* as the types, *series*, and models [***48] *listed in this section because it was the most effective way to identify and restrict a specific class of semiautomatic weapons.*" (Italics added; see fn. 2, *ante*.)

Thus, as amended in 1991, the explicit language of section 12276, subdivision (a)(1) -- "[*a*]*ll* AK *series including, but not limited to,* the models as identified as follows" (italics added) -- and of subdivision (e) -- "the term 'series' includes *all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer*" (italics added) -- leaves no doubt that section 12276 *itself* designates as assault weapons not only the specific AK models listed in subdivision (a)(1), but also "all other models that are variations, with minor differences, of those models ...,regardless of the manufacturer."

As the principal author of the 1991 amendment explained, the Legislature determined that such a clarification of the scope of section 12276 was warranted and necessary because of the continuing availability and proliferation of AK series rifles and the attractiveness of such weapons for use in criminal activities. n4 Furthermore, in incorporating [***49] these amendments into *section 12276*, the Legislature obviously concluded that the designation as [*1163] assault weapons of *all* AK series rifles, including AK rifles other than those AK rifles specifically identified by make and model in the amended provision, need not and should not be left to separate add-on proceedings under *section 12276.5*, proceedings which might or might not be instituted by the particular officeholder occupying the position of Attorney General. The add-on provisions of section 12276.5 remain available for use against copycat or knock-off versions of the *non-series* weapons listed in section 12276, but the Legislature clearly determined that *all* of the listed *series* weapons were to be considered assault weapons pursuant to section 12276 itself.

n4 In a letter written to Governor Wilson at the time the enrolled version of the 1991 amendment was before the governor for his signature or veto, Senator Roberti, the principal sponsor of the 1991 legislation (as well as a principal sponsor of the original Roberti-Roos Assault Weapons Control Act of 1989), explained: "The enrolled version of the bill before you does not add any new weapons to the banned assault weapons list. In fact, four weapons were deleted from the list. The NRA arguments that there are now additional weapons on the list result from a disagreement over the meaning of the word 'series' in the original law signed by Governor Deukmejian. *The legislative intent regarding the word series was to cover all models of weapons listed in the category. The most important example is that of the 'AK series.'*

"*Law enforcement believed, and gun experts confirmed, that there would be no agreement on a comprehensive list of all models of AKs. The reason for this is that manufacturers, importers, and sellers call the weapons by different names. There is no systematic procedure by which weapons are designated. Therefore, since the AK was an assault weapon that was relatively inexpensive and popular for drug dealers and gang*

members, the Legislature by designating AK series, intended to cover all models regardless of the manufacturer of the AK.

"The Attorney General believed that by listing the most popular models in the AK series we would enhance public awareness and enforcement actions. *You will note, however, that the list is not inclusive by the models listed because of the original legislative intent to regulate all AK models....*" (Sen. David Roberti, letter to Governor Wilson re: Sen. Bill 263 (1990-1991 Reg. Sess.), Sept. 19, 1991, italics added.)

Although Senator Roberti's letter does not refer explicitly to legislative debates or discussions and thus may not be relied upon to establish general legislative intent (see, e.g., *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal. 3d 692, 699-701, 170 Cal. Rptr. 817, 621 P.2d 856), Senator Roberti's letter, like the letter by Senator Rogers to Governor Deukmejian referred to by the majority (see maj. opn., *ante*, 2001 Cal. LEXIS 3792 p. *17, fn. 4), provides a clear expression of the author's view of the measure, a view that is totally consistent with the legislative language and history.

[***50]

As the majority note, the 1991 amendments to section 12276 constitute only a portion of the 1991 legislation amending the AWCA. One of the objectives of the 1991 enactment was to afford gun owners who had [**665] not registered their assault weapons during the 18-month grace period provided by the 1989 legislation an added period of time to register their weapons without incurring criminal liability, and a number of provisions of the 1991 legislation were directed at that objective. The legislative history of the 1991 enactment makes it clear, however, that in order to gain the necessary support of legislators who advocated stronger gun control legislation, the proponents of the extended grace period were required to accept the amendments to section 12276 that are at issue in this case. n5

n5 As initially introduced in the Senate on January 31, 1991, Senate Bill No. 263 (1990-1991 Reg. Sess.) (hereafter Sen. Bill 263) did not propose any changes in section 12276, and was concerned only with extending the deadline for registering assault weapons and directing the Department of Justice to conduct a public education program to promote such registration. (Sen. Bill 263, as introduced Jan. 31, 1991.) After relatively minor amendments, Sen. Bill 263 was approved by the Senate in that form, but on April 3, 1991, the bill was amended in the Assembly to include, among other changes, some modification to the language of section 12276. (Sen. Bill 263, as amended Apr. 3, 1991, § 2, pp. 5-6.) The final changes to Sen. Bill 263 -- including the new version of section 12276, subdivision (a), and the addition of section 12276, subdivisions (e) and (f) -- did not occur until shortly before the end of the legislative session, when the bill was amended in the Assembly for the last time on September 5, 1991. (Sen. Bill 263, as amended Sept. 5, 1991, § 2, pp. 15-18.) After approval by both houses, the bill was signed into law by the Governor on October 13, 1991.

Contemporary media accounts confirm that the proponents of the extended grace or amnesty period for registration obtained the necessary support for the passage of the 1991 legislation by agreeing to the revised provisions of section 12276 that related primarily to the treatment of all "AK series" rifles as assault weapons. (See, e.g., Ingram, *Lungren, Roberti OK Rewriting of '89 Gun Law*, L.A. Times (Aug. 29, 1991), p. A 3; Ingram, *Bill Extending Assault Gun Deadline Passes Committee*, L.A. Times (Feb. 14, 1991), p. A 42.)

[***51] [*1164]

As this court's opinion in *Kasler v. Lockyer*, *supra*, 23 Cal. 4th 472 related at some length, the assault weapons legislation enacted in 1989 was the product of legislative compromise in which legislators with very different views concerning gun control hammered out a statutory measure that was less than fully satisfactory to each of the competing factions. (See *id.* at pp. 484-488.) The legislative history of the 1991 amendment of the AWCA demonstrates that it too was the product of legislative compromise. The majority's holding in this case, however, is not faithful to the legislative compromise embodied in the

1991 enactment, but instead largely negates both the revision of section 12276, subdivision (a)(1), and the addition of section 12276, subdivision (e), which the proponents of the initial version of Sen. Bill 263 agreed to in order to obtain the necessary support for affording gun owners an extended grace period in which to register assault weapons.

III

The majority is compelled to recognize that the "including, but not limited to" language of section 12276, subdivision (a)(1), and the provisions of section 12276, subdivision (e), that [***52] were added by the Legislature in 1991 must be given *some* meaning. Rather than affording this language its plain meaning, however, the majority holds that the statutory provisions in question should be interpreted as "not self-executing" (maj. opn., *ante*, p. 15) -- that is, as not *themselves* rendering all AK series rifles "assault weapons" for purposes of the AWCA. Instead, the majority interprets these statutory provisions only as granting *the Attorney General* the authority to designate an AK series rifle that is not one of the named AK series rifles an "assault weapon," an authority the Attorney General assertedly may exercise by including the rifle name and model on the list of assault weapons that the Attorney General is required, under section 12276.5, subdivision (h), to compile and submit to the Secretary of State for publication in the California Code of Regulations. **n6**

n6 Section 12276.5, subdivision (h), provides in full: "The Attorney General shall promulgate a list that specifies all firearms designated as assault weapons in Section 12276 or declared to be assault weapons pursuant to this section. The Attorney General shall file that list with the Secretary of State for publication in the California Code of Regulations. Any declaration that a specified firearm is an assault weapon shall be implemented by the Attorney General who, within 90 days, shall promulgate an amended list which shall include the specified firearm declared to be an assault weapon. The Attorney General shall file the amended list with the Secretary of State for publication in the California Code of Regulations. [P] Chapter 3.5 (commencing with Section 11340) of Division 3 of Title 2 of the Government Code, pertaining to the adoption of rules and regulations, shall not apply to any list of assault weapons promulgated pursuant to this section."

[***53]

[666] The majority's conclusion that the "included but not limited to" language of section 12276, subdivision (a)(1), was not intended to be self-executing [*1165] finds absolutely *no* support in the language of the statute or in its legislative history. Whether or not the Attorney General, pursuant to the separate authority granted the Attorney General by section 12276.5, subdivision (i), to "adopt those rules or regulations that may be necessary or proper to carry out the purposes and intent of this chapter," n7 possesses *the authority* to include, in the list of assault weapons promulgated pursuant to section 12276.5, subdivision (h), particular models that the Attorney General determines are "AK series" rifles within the meaning of section 12276, subdivisions (a)(1) and (e) even though they are not listed by name in section 12276, subdivision (a)(1)(A) - (a)(1)(D), *nothing* in section 12276, subdivisions (a)(1) or (e), suggests that such an AK series rifle constitutes an assault weapon *only* if it is so designated by the Attorney General and is included on a list promulgated and published pursuant to section 12276.5, subdivision (h).**

n7 Section 12276.5, subdivision (i), provides in full: "The Attorney General shall adopt those rules or regulations that may be necessary or proper to carry out the purposes and intent of this chapter."

[***54]

By its terms, section 12276, subdivision (a)(1), defines "[*a*]*ll* AK series" rifles (italics added) as assault weapons in exactly the same manner as it defines as assault weapons all of the other firearms that are listed in section 12276, subdivisions (a), (b), and (c). There is no suggestion in section 12276 or any other provision of the AWCA that any category of firearm designated as an assault weapon in section 12276 first must be included on the list of weapons promulgated by the Attorney General under section 12276.5, subdivision (h), before it can be found to constitute an assault weapon for purposes of the AWCA. Indeed, a separate provision of the AWCA, section 12280, subdivision (u) -- also enacted as part of the 1991 legislation -- directly refutes any such notion, providing that "as used in this chapter, the

date a firearm is an assault weapon is the *earliest* of the following: [P] (1) The effective date of an amendment to Section 12276 that adds the designation of the specified firearm. [or] [P] 2. The effective date of the list promulgated pursuant to Section 12276.5 that adds or changes the designation of the specified firearm. ..." (Italics added. [***55]) Thus, under the 1991 amendment of section 12276, subdivision (a)(1), "all AK series" rifles properly are treated as assault weapons *as of the effective date of the 1991 legislation*, rather than as of any subsequent date that a particular rifle may be included on the list promulgated pursuant to section 11276.5, subdivision (h). [*1166]

Not only does the majority's interpretation of the "including, but not limited to" language of section 12276, subdivision (a)(1), as not self-executing find no support in the language of the statute, but it is plainly inconsistent with the intent of the 1991 amendment of section 12276, subdivision (a)(1). Under the majority's interpretation, an Attorney General who is hostile to the regulation of assault weapons would be able to thwart the effect of the 1991 amendment relating to AK series rifles simply by failing to add non-specified AK series rifles to the list promulgated under section 12276.5, subdivision (h). As discussed above, the Legislature intentionally chose to specify *in section 12276* that *all* AK series rifles are assault weapons, rather than to leave the designation of other AK series rifles as assault weapons to add-on proceedings [***56] that might or might not be instituted by an Attorney General *under section 12276.5*. There is nothing in the 1991 legislation that suggests that the Legislature nevertheless intended to leave to an Attorney General the exclusive authority to determine whether, and when, an AK series rifle that is not one of the AK series rifles identified by [**667] name in the statute would be designated an assault weapon for purposes of the AWCA.

Indeed, under the majority's interpretation it appears that notwithstanding the Legislature's amendment of section 12276 in 1991 to clarify that all AK series rifles, "including, but not limited to" the specifically identified AK model rifles, are assault weapons, that amendment had absolutely no effect on the reach or scope of the AWCA *for nearly a decade*. As far as my research discloses (and neither the parties nor the majority suggests otherwise), the list of assault weapons that section 12276.5, subdivision (h), directed the Attorney General to promulgate and to file with the Secretary of State for publication in the California Code of Regulations, never was published *at all* in the 1990's, and was promulgated and published for the first time *in* [***57] *October 2000*. (See Cal. Code Regs., tit. 11, § § 979.10, 979.11, filed Oct. 25, 2000.) In my view, it belies reality to suggest that the Legislature, in enacting the 1991 amendments to section 12276, intended to vest the Attorney General with veto power over whether an AK series rifle is to be considered an assault weapon for purposes of the AWCA. n8

n8 Although the majority asserts that its interpretation of section 12276, subdivisions (a)(1) and (e), as not self-executing is supported by the doctrine that accords deference to an administrative agency's construction of a statute (maj. opn., *ante*, pp. 19-20), that doctrine has considerably less force in the context of an administrative interpretation, like that involved here, that is espoused for the first time by an administrative official in an appellate brief and that is not embodied in either an administrative regulation or in a similar administrative ruling that has been made after formal proceedings in which adversarial views are aired. (See, e.g., *United States v. Mead Corporation* (June 18, 2001 No. 99-1434) U.S. , , 121 S. Ct. 2164 [01 C.D.O.S. 5004, 5005-5006]; *Bowen v. Georgetown Univ. Hospital* (1988) 488 U.S. 204, 212-213, 102 L. Ed. 2d 493, 109 S. Ct. 468; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 9, 960 P.2d 1031; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal. 4th 294, 311, 926 P.2d 1042; *Jones v. Tracy School Dist.* (1980) 27 Cal. 3d 99, 107, 165 Cal. Rptr. 100, 611 P.2d 441; *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal. 3d 86, 92-93, 130 Cal. Rptr. 321, 550 P.2d 593.)

[***58]

In sum, the language and legislative history of the 1991 amendments of section 12276 establish that the Legislature intended to define "assault [*1167] weapon" for purposes of the AWCA to include *all* AK series rifles, including but not limited to the specifically identified AK models, and did not intend to leave all other AK series models unregulated until some future date when an Attorney General might include additional AK series models by name on the

list called for by section 12276.5, subdivision (h).

The majority further suggests that its interpretation of section 12276, subdivisions (a)(1) and (e), as "non-self-executing" is justified in order to avoid constitutional vagueness problems. I disagree. As noted, the statutory language defines "assault weapon" for purposes of the chapter to include "all AK series [semiautomatic rifles] including, but not limited to" a number of specifically named models, and then defines the term "series" to include "all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer." This language is arguably narrower and more specific than other familiar weapons statutes that, [***59] for example, prohibit the possession of (1) a "dirk or dagger" (§ 12020, subds. (a)(4), (c)(24)), (2) "an instrument or weapon of the kind commonly known as a ... billy" (§ 12020, subd. (a)(1)), or (3) a "destructive device" (§ 12301) -- and than a well-established statutory provision that, in another context involving a registration requirement, requires the registration of a "security" before it is offered for sale (Corp. Code, § 25019; see, e.g., *People v. Figueroa* (1986) 41 Cal. 3d 714, 734-740, 224 Cal. Rptr. 719, 715 P.2d 680). Vagueness challenges to these statutes routinely have been rejected by California decisions. (See, e.g., *People v. Rubalcava* (2000) 23 Cal. 4th 322, 332-333; *People v. Grubb* (1965) 63 Cal. 2d 614, 619-621, 47 Cal. Rptr. 772, 408 P.2d 100; *People v. Quinn* (1976) 57 Cal. App. 3d 251, 129 Cal. Rptr. 139.)

In any event, even if there may be some circumstances in which application of section 12276, subdivisions (a)(1) and (e) conceivably might raise constitutional vagueness problems as applied to an ordinary gun owner, it [**668] is abundantly clear that the statutory [***60] provisions in question are not unconstitutionally vague either on their face or as applied to the facts of the present case. The majority's discussion of the vagueness issue fails to take into account that the provisions of the AWCA apply not only to ordinary owners or possessors of weapons but, perhaps even more significantly, to those who manufacture, import, transport, distribute, or offer such weapons for sale within the state. (§ 12280, subd. (a)(1).) Even if in some circumstances an [*1168] ordinary gun owner could not reasonably be expected or required to determine whether a poorly or ambiguously marked rifle is part of the AK series under the "minor differences" standard of section 12276, subdivision (e), a manufacturer, importer, or distributor of semiautomatic weapons surely can be expected to be aware of a weapon's features and design origins and to be able to apply the statutory standard with reasonable certainty. The 1991 amendments here at issue plainly were intended, at the very least, to bar the introduction of new AK series semiautomatic rifles into the California market, and the provisions unquestionably provide adequate notice to manufacturers, importers, and firearm dealers [***61] that "copycat" AK rifles are prohibited in this state. Accordingly, even if in some instances a gun owner might plausibly claim a lack of reasonable notice, the provisions designating *all* AK series rifles as assault weapons for purposes of the AWCA clearly are not unconstitutionally vague *on their face*, i.e., in all applications. Contrary to the majority's assertion, these statutory provisions are not reasonably " 'susceptible of two constructions' " (maj. opn., *ante*, 2001 Cal. LEXIS 3792 at p. *32). Thus, the constitutional vagueness doctrine provides no justification for the majority to rewrite the provisions so as to eliminate their prohibition of the manufacture, importation, or distribution of *all* AK series rifles in this state.

Furthermore, although Harrott is not a manufacturer or importer of weapons, it is equally clear that, on the facts of this case, Harrott cannot reasonably complain of a lack of adequate notice. As the majority's statement of facts discloses, Harrott never possessed the weapon in question, and thus he was not required to determine, subject to potential criminal sanctions, whether it was part of the AK series and therefore a restricted assault weapon. The sheriff [***62] expressly informed Harrott of the sheriff's belief that the rifle was part of the AK series, thereby giving Harrott ample notice that if he did gain possession of the gun he would be subject to criminal prosecution. Ultimately, the weapon's status under section 12276 was determined in a judicial proceeding, with full notice and hearing, and with no potential for unexpected liability.

Accordingly, the constitutional vagueness doctrine provides no justification for the majority's determination to read the provisions of section 12276, subdivisions (a)(1) and (e) as non-self-executing.

IV

Furthermore, contrary to the majority's assertion, this court's decision in *In re Jorge M.* (2000) 23 Cal. 4th 866 lends no support to the majority's reading of the statute. Unlike *Jorge M.*, the present case does not involve a criminal prosecution, and thus there is no

[*1169] need to determine whether plaintiff Harrott did or did not possess the requisite mental state to sustain a criminal conviction. Insofar as *Jorge M.* concluded that it was inappropriate to interpret the criminal provisions of the AWCA as permitting the imposition of criminal liability without proof of scienter [***63] because, under the act, there will be "some instances in which the possessor of a semiautomatic firearm could reasonably be in doubt as to whether the weapon is subject to regulation under the AWCA" (23 Cal. 4th at p. 884), that decision is completely consistent with an interpretation of section 12276, subdivision (a)(1), that recognizes that a rifle may be found to fall within the "AK series" even if it is not one of the specific AK models listed in that subdivision or is not identified by name in the list compiled by the Attorney General. Under *Jorge M.*, if a rifle is found to be an assault weapon because it is merely a variation of one of the listed AK models, the possessor of the weapon will be subject to criminal conviction only if the prosecution proves that he or she "knew or [**669] reasonably should have known" that the firearm possessed the characteristics bringing it within the act. Even when a criminal sanction is not available because the possessor lacks the requisite scienter required by *Jorge M.*, treating a semiautomatic rifle that is a variation of one of the listed AK models as an assault weapon still will significantly serve the purposes of the 1991 legislation [***64] by permitting law enforcement officers to confiscate (or, as in this case, to withhold) a dangerous weapon that otherwise might be used violently in the future against law enforcement officers or crime victims.

Similarly, the majority embraces a clearly specious argument when it endorses the contention of the National Rifle Association that the trial court's interpretation of the statute is invalid because it "could lead to the same weapon being treated differently from county to county and even within the same county." Whenever the terms of a statute are to be applied in the context of particular cases, there is always the possibility that different triers of fact may arrive at different conclusions on similar showings. Thus, even with regard to those semiautomatic weapons that are specifically listed by make and model in section 12276, if the markings on a weapon have been obliterated or if the possessor of the weapon claims that the weapon is actually a lawful weapon that has been improperly marked, it is always possible that different triers of fact may come to different conclusions as to whether an individual firearm falls within the statute. Similarly, in determining whether [***65] or not a particular firearm is an assault weapon in light of the generic characteristics set forth in the recently enacted provisions of section 12276.1, it is possible that different triers of fact could reach different conclusions on similar evidence. This circumstance, however, does not mean that these statutory standards do not each constitute uniform, statewide definitions of the term "assault weapon," just as the term "dirk or dagger," [*1170] for example, constitutes a single, statewide standard even though different triers of fact could reach different conclusions as to whether a particular implement or instrument falls within that category. Under section 12276, subdivision (a)(1), in *all* counties in this state "[*a*]*ll* AK series" semiautomatic rifles, "*including but not limited to*" the specifically listed AK models, are "assault weapons" for purposes of the AWCA, and, in *all* counties, " 'series' includes all other models that are only variations, with minor differences, of those models listed in subdivision (a), regardless of the manufacturer" (*id.*, subd. (e)). The NRA's suggestion to the contrary is totally without merit.

V

Finally, on the record in [***66] this case, I believe the trial court properly found that the semiautomatic rifle in question is an "AK series" rifle under section 12276, subdivision (a)(1), and thus constitutes an "assault weapon" for purposes of the AWCA.

As the majority acknowledges, the petition for writ of mandate filed by Harrott in the superior court itself identified the semiautomatic rifle in question as an "AK47 2822." Nonetheless, Harrott contended in the trial court that the weapon does not fall within the category of "AK series" rifles within the meaning of section 12276, subdivision (a)(1), because the weapon does not have the specific "markings" designated in the 1993 edition of the Assault Weapons Identification Guide prepared by the California Attorney General.

Two experts testified at the hearing in the trial court. Although both testified that the rifle is very similar both in appearance and in function to an AK rifle, and that they both would consider the rifle to be an "AK-type" weapon, the experts also testified that in their opinion the rifle is not an "AK series" weapon. Each expert acknowledged, however, that he based his opinion that the rifle was not an "AK series" rifle on the circumstance [***67] that, at the time of the hearing, the California Attorney General had taken the position that a weapon fell within the "AK series" only if the weapon had the "original markings and a nomenclature of a model and manufacturer."

At the conclusion of the hearing, the trial court

determined, on the basis of the factual matters to which the experts had testified, that the weapon in question constituted an "AK series" weapon as defined by the Legislature. The trial court explained that under [**670] the statutory language, "a weapon which merely looks like an AK47 would not, by that alone, be part of the AK series," but that "a weapon which looks like an AK weapon and functions [*1171] like one and is identical to one with only minor differences would be an AK series weapon." The trial court found that the evidence established that there are no significant differences between the weapon at issue and an AK47, and thus that the rifle is an AK series weapon. The court noted that the experts' opinion testimony indicating that the rifle was not an AK series weapon was based on an interpretation of the statute that was not supported by the statutory language.

In view of the evidence presented at the hearing, [***68] I believe the trial court properly found that the rifle in question is an "AK series" rifle under section 12776, subdivision (a)(1).

Accordingly, I conclude that the judgment of the Court of Appeal, which overturned the ruling of the trial court, should be reversed.

GEORGE, C.J.

I CONCUR:

WERDEGAR,J.

25 Cal. 4th 904, *; 24 P.3d 1191, **;
2001 Cal. LEXIS 3783, ***; 108 Cal. Rptr. 2d 165

14 of 19 DOCUMENTS

ESTATE OF DENIS H. GRISWOLD, Deceased. NORMA B. DONER-GRISWOLD, Petitioner and Respondent, v. FRANCIS V. SEE, Objector and Appellant.

S087881

SUPREME COURT OF CALIFORNIA

25 Cal. 4th 904; 24 P.3d 1191; 2001 Cal. LEXIS 3783; 108 Cal. Rptr. 2d 165; 2001 Cal. Daily Op. Service 5116; 2001 Daily Journal DAR 6305

June 21, 2001, Filed

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

PRIOR HISTORY:
Appeal from the Second Appellate District. Division Six. B128933. Santa Barbara County Super. Ct. No. B216236. Thomas Pearce Anderle, Judge.

DISPOSITION:
Judgment of the Court of Appeal affirmed.

COUNSEL:
For Appellant: Kitchen & Turpin, David C. Turpin; Law Office of Herb Fox and Herb Fox for Objector and Appellant.

For Respondent: Mullen & Henzell and Lawrence T. Sorensen for Petitioner and Respondent.

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

OPINIONBY:
BAXTER

OPINION:

[**1192] [*907]

Section 6452 of the Probate Code (all statutory references are to this code unless otherwise indicated) bars a "natural parent" or a relative of that parent from inheriting through a child born out of wedlock on the basis of the parent and child relationship unless the parent or relative "acknowledged the child" and "contributed to the support or the care of the child." In this case, we must determine whether section 6452 precludes the half siblings of a child born out of wedlock from sharing in the child's intestate estate where the [***2] record is undisputed that their father appeared in an Ohio court, admitted paternity of the child, and paid court-ordered child support until the child was 18 years old. Although the father and the out-of-wedlock child apparently never met or communicated, and the half siblings did not learn of the child's existence until after both the child and the father died, there is no indication that the father ever denied paternity or knowledge of the out-of-wedlock child to persons who were aware of the circumstances.

Since succession to estates is purely a matter of statutory regulation, our resolution of this issue requires that we ascertain the intent of the lawmakers who enacted section 6452. Application of settled principles of statutory [*908] construction compels us to conclude, on this uncontroverted record, that section 6452 does not bar the half siblings from sharing in the decedent's estate.

Factual and Procedural Background

Denis H. Griswold died intestate in 1996, survived by his wife Norma B. Doner-Griswold. Doner-Griswold petitioned for and received letters of administration and

authority to administer Griswold's modest estate, consisting entirely of separate property.

In 1998, [***3] Doner-Griswold filed a petition for final distribution, proposing a distribution of estate property, after payment of attorney's fees and costs, to herself as the surviving spouse and sole heir. Francis V. See, a self-described "forensic genealogist" (heir hunter) who had obtained an assignment of partial interest in the Griswold estate from [**1193] Margaret Loera and Daniel Draves, n1 objected to the petition for final distribution and filed a petition to determine entitlement to distribution.

n1 California permits heirs to assign their interests in an estate, but such assignments are subject to court scrutiny. (See § 11604.)

See and Doner-Griswold stipulated to the following background facts pertinent to See's entitlement petition.

Griswold was born out of wedlock to Betty Jane Morris on July 12, 1941 in Ashland, Ohio. The birth certificate listed his name as Denis Howard Morris and identified John Edward Draves of New London, Ohio as the father. A week after the birth, Morris filed a "bastardy complaint" n2 in the [***4] juvenile court in Huron County, Ohio and swore under oath that Draves was the child's father. In September of 1941, Draves appeared in the bastardy proceeding and "confessed in Court that the charge of the plaintiff herein is true." The court adjudged Draves to be the "reputed father" of the child, and ordered Draves to pay medical expenses related to Morris's pregnancy as well as $ 5 per week for child support and maintenance. Draves complied, and for 18 years paid the court-ordered support to the clerk of the Huron County court.

n2 A "bastardy proceeding" is an archaic term for a paternity suit. (Black's Law Dict. (7th ed. 1999) pp. 146, 1148.)

Morris married Fred Griswold in 1942 and moved to California. She began to refer to her son as "Denis Howard Griswold," a name he used for the rest of his life. For many years, Griswold believed Fred Griswold was his father. At some point in time, either after his mother and Fred Griswold [*909] divorced in 1978 or after his mother died in 1983, Griswold learned that Draves [***5] was listed as his father on his birth certificate. So far as is known, Griswold made no attempt to contact Draves or other members of the Draves family.

Meanwhile, at some point after Griswold's birth, Draves married in Ohio and had two children, Margaret and Daniel. Neither Draves nor these two children had any communication with Griswold, and the children did not know of Griswold's existence until after Griswold's death in 1996. Draves died in 1993. His last will and testament, dated July 22, 1991, made no mention of Griswold by name or other reference. Huron County probate documents identified Draves's surviving spouse and two children -- Margaret and Daniel -- as the only heirs.

Based upon the foregoing facts, the probate court denied See's petition to determine entitlement. In the court's view, See had not demonstrated that Draves was Griswold's "natural parent" or that Draves "acknowledged" Griswold as his child as required by section 6452.

The Court of Appeal disagreed on both points and reversed the order of the probate court. We granted Doner-Griswold's petition for review.

DISCUSSION

Denis H. Griswold died without a will and his estate consists solely of separate property. [***6] Consequently, the intestacy rules codified at sections 6401 and 6402 are implicated. Section 6401, subdivision (c) provides that a surviving spouse's share of intestate separate property is one-half "where the decedent leaves no issue but leaves a parent or parents or their issue or the issue of either of them." (§ 6401, subd. (c)(2)(B).) Section 6402, subdivision (c) provides that the portion of the intestate estate not passing to the surviving spouse under section 6401 passes as follows: "If there is no surviving issue or parent, to the issue of the parents or either of them, the issue taking equally if they are all of the same degree of kinship to the decedent ...."

As noted, Griswold's mother (Betty Jane Morris) and father (John Draves) both predeceased him. Morris had no issue other than Griswold and Griswold himself left no issue. Based on these facts, See contends that Doner-Griswold is entitled to one-half of Griswold's estate and that Draves's issue (See's assignors, Margaret and Daniel) are entitled to the other half pursuant to sections 6401 and 6402.

Because Griswold was born out of wedlock, three additional Probate Code provisions -- section [**1194] 6450, section 6452, [***7] and section 6453 -- must be considered.

[*910] As relevant here, section 6450 provides that "a relationship of parent and child exists for the purpose of determining intestate succession by, through, or from a person" where "the relationship of parent and child exists between a person and the person's natural parents, regardless of the marital status of the natural parents." (*Id.*, subd. (a).)

Notwithstanding section 6450's general recognition of a parent and child relationship in cases of unmarried natural parents, section 6452 restricts the ability of such parents and their relatives to inherit from a child as follows: "If a child is born out of wedlock, neither a *natural parent* nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following requirements are satisfied: [P] (a) The parent or a relative of the parent *acknowledged the child.* [P] (b) The parent or a relative of the parent contributed to the support or the care of the child." (Italics added.)

Section 6453, in turn, articulates the criteria for determining whether a person is a "natural parent" within [***8] the meaning of sections 6450 and 6452. A more detailed discussion of section 6453 appears *post*, at part B.

It is undisputed here that section 6452 governs the determination whether Margaret, Daniel, and See (by assignment) are entitled to inherit from Griswold. It is also uncontroverted that Draves contributed court-ordered child support for 18 years, thus satisfying subdivision (b) of section 6452. At issue, however, is whether the record establishes all the remaining requirements of section 6452 as a matter of law. First, did Draves acknowledge Griswold within the meaning of section 6452, subdivision (a)? Second, did the Ohio judgment of reputed paternity establish Draves as the natural parent of Griswold within the contemplation of sections 6452 and 6453? We address these issues in order.

A. Acknowledgement

As indicated, section 6452 precludes a natural parent or a relative of that parent from inheriting through a child born out of wedlock unless the parent or relative "acknowledged the child." (*Id.*, subd. (a).) On review, we must determine whether Draves acknowledged Griswold within the contemplation of the statute by confessing to paternity in court, where the record [***9] reflects no other acts of acknowledgement, but no disavowals either.

In statutory construction cases, our fundamental task is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Day v. City of Fontana* (2001) 25 Cal. 4th 268, 272, 105 Cal. Rptr. 2d 457, 19 [*911] P.3d 1196.) "We begin by examining the statutory language, giving the words their usual and ordinary meaning." (*Ibid.*; *People v. Lawrence* (2000) 24 Cal. 4th 219, 230, 99 Cal. Rptr. 2d 570, 6 P.3d 228.) If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (*Day v. City of Fontana*, *supra*, 25 Cal. 4th at p. 272; *People v. Lawrence*, *supra*, 24 Cal. 4th at pp. 230-231.) If there is ambiguity, however, we may then look to extrinsic sources, including the ostensible objects to be achieved and the legislative history. (*Day v. City of Fontana*, *supra*, 25 Cal. 4th at p. 272.) In such cases, we " ' "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 [***10] that would lead to absurd consequences." ' " (*Ibid.*)

Section 6452 does not define the word "acknowledged." Nor does any other provision of the Probate Code. At the outset, however, we may logically infer that the word refers to conduct other than that described in subdivision (b) of section 6452, i.e., contributing to the child's support or care; otherwise, subdivision (a) of the statute would be surplusage and unnecessary.

Although no statutory definition appears, the common meaning of "acknowledge" is "to admit to be true or as stated; confess." [**1195] (Webster's New World Dict. (2d ed. 1982) p. 12; see Webster's 3d New Internat. Dict. (1981) p. 17 ["to show by word or act that one has knowledge of and agrees to (a fact or truth) ... [or] concede to be real or true ... [or] admit"].) Were we to ascribe this common meaning to the statutory language, there could be no doubt that section 6452's acknowledgement requirement is met here. As the stipulated record reflects, Griswold's natural mother initiated a bastardy proceeding in the Ohio juvenile court in 1941 in which she alleged that Draves was the child's father. Draves appeared in that proceeding and publicly "confessed" [***11] that the allegation was true. There is no evidence indicating that Draves did not confess knowingly and voluntarily, or that he later denied paternity or knowledge of Griswold to those who were aware of the circumstances. n3 Although the record establishes that Draves did not speak of Griswold to Margaret and Daniel, there is no evidence suggesting

he sought to actively conceal the facts from them or anyone else. Under the plain terms of section 6452, the only sustainable conclusion on this record is that Draves acknowledged Griswold.

n3 Huron County court documents indicate that at least two people other than Morris, one of whom appears to have been a relative of Draves, had knowledge of the bastardy proceeding.

Although the facts here do not appear to raise any ambiguity or uncertainty as to the statute's application, we shall, in an abundance of caution, [*912] test our conclusion against the general purpose and legislative history of the statute. (See *Day v. City of Fontana*, *supra*, 25 Cal. 4th at p. 274; [***12] *Powers v. City of Richmond* (1995) 10 Cal. 4th 85, 93, 893 P.2d 1160.)

The legislative bill proposing enactment of former section 6408.5 of the Probate Code (Stats. 1983, ch. 842, § 55, p. 3084; Stats. 1984, ch. 892, § 42, p. 3001), the first modern statutory forerunner to section 6452, was introduced to effectuate the Tentative Recommendation Relating to Wills and Intestate Succession of the California Law Revision Commission (the Commission). (See 17 Cal. Law Revision Com. Rep. (1984) p. 867, referring to 16 Cal. Law Revision Com. Rep. (1982) p. 2301.) According to the Commission, which had been solicited by the Legislature to study and recommend changes to the then-existing Probate Code, the proposed comprehensive legislative package to govern wills, intestate succession, and related matters would "provide rules that are more likely to carry out the intent of the testator or, if a person dies without a will, the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.) The Commission also advised that the purpose of the legislation was to "make probate more efficient and expeditious." [***13] (*Ibid.*) From all that appears, the Legislature shared the Commission's views in enacting the legislative bill of which former section 6408.5 was a part. (See 17 Cal. Law Revision Com. Rep., *supra*, at p. 867.)

Typically, disputes regarding parental acknowledgement of a child born out of wedlock involve factual assertions that are made by persons who are likely to have direct financial interests in the child's estate and that relate to events occurring long before the child's death. Questions of credibility must be resolved without the child in court to corroborate or rebut the claims of those purporting to have witnessed the parent's statements or conduct concerning the child. Recognition that an in-court admission of the parent and child relationship constitutes powerful evidence of an acknowledgement under section 6452 would tend to reduce litigation over such matters and thereby effectuate the legislative objective to "make probate more efficient and expeditious." (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319.)

Additionally, construing the acknowledgement requirement to be met in circumstances such as these is neither illogical nor absurd with respect to the intent [***14] of an intestate decedent. Put another way, where a parent willingly acknowledged paternity in an action initiated to establish the parent-child relationship and thereafter was never heard to deny such relationship (§ 6452, subd. (a)), and where that parent paid all court-ordered support for that child for 18 years (*id.*, subd. (b)), it cannot be said that the participation [*913] of that parent or his relative in the estate of the [**1196] deceased child is either (1) so illogical that it cannot represent the intent that one without a will is most likely to have had (16 Cal. Law Revision Com. Rep., *supra*, at p. 2319) or (2) "so absurd as to make it manifest that it could not have been intended" by the Legislature (*Estate of De Cigaran* (1907) 150 Cal. 682, 688, 89 P. 833 [construing Civ. Code, former § 1388 as entitling the illegitimate half sister of an illegitimate decedent to inherit her entire intestate separate property to the exclusion of the decedent's surviving husband]).

There is a dearth of case law pertaining to section 6452 or its predecessor statutes, but what little there is supports the foregoing construction. Notably, *Lozano v. Scalier* (1996) 51 Cal. App. 4th 843 [***15] (*Lozano*), the only prior decision directly addressing section 6452's acknowledgement requirement, declined to read the statute as necessitating more than what its plain terms call for.

In *Lozano*, the issue was whether the trial court erred in allowing the plaintiff, who was the natural father of a 10-month-old child, to pursue a wrongful death action arising out of the child's accidental death. The wrongful death statute provided that where the decedent left no spouse or child, such an action may be brought by the persons "who would be entitled to the property of the decedent by intestate succession." (Code Civ. Proc., § 377.60, subd. (a).) Because the child had been born out of wedlock, the plaintiff had no right to succeed to the estate unless he had both "acknowledged the child" and "contributed to the support or the care of the child" as required by section 6452. *Lozano* upheld the trial court's finding of acknowledgement in light of

evidence in the record that the plaintiff had signed as "Father" on a medical form five months before the child's birth and had repeatedly told family members and others that he was the child's father. ([***16] *Lozano*, *supra*, 51 Cal. App. 4th at pp. 845, 848.)

Significantly, *Lozano* rejected arguments that an acknowledgement under Probate Code section 6452 must be (1) a witnessed writing and (2) made after the child was born so that the child is identified. In doing so, *Lozano* initially noted there were no such requirements on the face of the statute. (*Lozano*, *supra*, 51 Cal. App. 4th at p. 848.) *Lozano* next looked to the history of the statute and made two observations in declining to read such terms into the statutory language. First, even though the Legislature had previously required a witnessed writing in cases where an illegitimate child sought to inherit from the father's estate, it repealed such requirement in 1975 in an apparent effort to ease the evidentiary proof of the parent-child relationship. (*Ibid.*) Second, other statutes that required a parent-child relationship expressly contained more formal acknowledgement requirements for the assertion of certain other rights or privileges. (See *id.* at p. 849, citing Code Civ. Proc., § 376, subd. (c), [*914] Health & Safety Code, § 102750, [***17] & Fam. Code, § 7574.) Had the Legislature wanted to impose more stringent requirements for an acknowledgement under section 6452, *Lozano* reasoned, it certainly had precedent for doing so. (*Lozano*, *supra*, 51 Cal. App. 4th at p. 849.)

Apart from Probate Code section 6452, the Legislature had previously imposed an acknowledgement requirement in the context of a statute providing that a father could legitimate a child born out of wedlock for all purposes "by publicly acknowledging it as his own." (See Civ. Code, former § 230.) n4 Since that statute dealt with an analogous subject and employed a substantially similar [**1197] phrase, we address the case law construing that legislation below.

n4 Former section 230 of the Civil Code provided: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this Chapter do not apply to such an adoption." (Enacted 1 Cal. Civ. Code (1872) § 230, p. 68, repealed by Stats. 1975, ch. 1244, § 8, p. 3196.)

In 1975, the Legislature enacted California's Uniform Parentage Act, which abolished the concept of legitimacy and replaced it with the concept of parentage. (See *Adoption of Kelsey S.* (1992) 1 Cal. 4th 816, 828-829, 823 P.2d 1216.)

[***18]

In *Blythe v. Ayres* (1892) 96 Cal. 532, 31 P. 915, decided over a century ago, this court determined that the word "acknowledge," as it appeared in former section 230 of the Civil Code, had no technical meaning. (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.) We therefore employed the word's common meaning, which was " 'to own or admit the knowledge of.' " (*Ibid.* [relying upon Webster's definition]; see also *Estate of Gird* (1910) 157 Cal. 534, 542, 108 P. 499.) Not only did that definition endure in case law addressing legitimation (*Estate of Wilson* (1958) 164 Cal. App. 2d 385, 388-389, 330 P.2d 452; see *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543), but, as discussed, the word retains virtually the same meaning in general usage today -- "to admit to be true or as stated; confess." (Webster's New World Dict., *supra*, at p. 12; see Webster's 3d New Internat. Dict., *supra*, at p. 17.)

Notably, the decisions construing former section 230 of the Civil Code indicate that its public acknowledgement requirement would have been met where a father made a single [***19] confession in court to the paternity of a child.

In *Estate of McNamara* (1919) 181 Cal. 82, 183 P. 552, for example, we were emphatic in recognizing that a single unequivocal act could satisfy the acknowledgement requirement for purposes of statutory legitimation. Although the record in that case had contained additional evidence of the father's acknowledgement, we focused our attention on his [*915] one act of signing the birth certificate and proclaimed: "A more public acknowledgement than the act of [the decedent] in signing the child's birth certificate describing himself as the father, it would be difficult to imagine." (*Id.* at pp. 97-98.)

Similarly, in *Estate of Gird*, *supra*, 157 Cal. 534, we indicated in dictum that "a public avowal, made in the courts" would constitute a public acknowledgement under former section 230 of the Civil Code. (*Estate of Gird*, *supra*, 157 Cal. at pp. 542-543.)

Finally, in *Wong v. Young* (1947) 80 Cal. App. 2d 391, 181 P.2d 741, a man's admission of paternity in a

verified pleading, made in an action seeking to have the man declared the father of the child [***20] and for child support, was found to have satisfied the public acknowledgement requirement of the legitimation statute. (*Id.* at pp. 393-394.) Such admission was also deemed to constitute an acknowledgement under former Probate Code section 255, which had allowed illegitimate children to inherit from their fathers under an acknowledgement requirement that was even more stringent than that contained in Probate Code section 6452. n5 (*Wong v. Young*, *supra*, 80 Cal. App. 2d at p. 394; see also *Estate of De Laveaga* (1904) 142 Cal. 158, 168, 75 P. 790 [indicating in dictum that, under a predecessor to Probate Code section 255, father sufficiently acknowledged an illegitimate child in a single witnessed writing declaring the child as his son].) Ultimately, however, legitimation of the child under former section 230 of the Civil Code was not found because two other of the statute's express requirements, i.e., receipt of the child into the father's family and the father's otherwise treating the child as his legitimate child (see *ante*, fn. 4), [***21] had not been established. (*Wong v. Young*, *supra*, 80 Cal. App. 2d at p. 394.)

> n5 Section 255 of the former Probate Code provided in pertinent part: " 'Every illegitimate child, whether born or conceived but unborn, in the event of his subsequent birth, is an heir of his mother, and also of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock ....' " (*Estate of Ginochio* (1974) 43 Cal. App. 3d 412, 416, 117 Cal. Rptr. 565, italics omitted.)

Although the foregoing authorities did not involve section 6452, their views on parental acknowledgement of out-of-wedlock children were part of the legal landscape when the first modern statutory forerunner to that provision was enacted in 1985. (See former § 6408.5, added by Stats. 1983, ch. 842, § 55, p. 3084, and amended by Stats. 1984, ch. [***22] 892, § 42, p. 3001.) Where, as here, legislation has been judicially construed and a subsequent statute on the same or an analogous subject uses identical or substantially similar language, we may presume that [**1198] the Legislature intended the [*916] same construction, unless a contrary intent clearly appears. (*In re Jerry R.* (1994) 29 Cal. App. 4th 1432, 1437; see also *People v. Masbruch* (1996) 13 Cal. 4th 1001, 1007, 920 P.2d 705; *Belridge Farms v. Agricultural Labor Relations Bd.* (1978) 21 Cal. 3d 551, 557, 147 Cal. Rptr. 165, 580 P.2d 665.) Since no evidence of a contrary intent clearly appears, we may reasonably infer that the types of acknowledgement formerly deemed sufficient for the legitimation statute (and former section 255, as well) suffice for purposes of intestate succession under section 6452. n6

> n6 Probate Code section 6452's acknowledgement requirement differs from that found in former section 230 of the Civil Code, in that section 6452 does not require a parent to "publicly" acknowledge a child born out of wedlock. That difference, however, fails to accrue to Doner-Griswold's benefit. If anything, it suggests that the acknowledgement contemplated in section 6452 encompasses a broader spectrum of conduct than that associated with the legitimation statute.

[***23]

Doner-Griswold disputes whether the acknowledgement required by Probate Code section 6452 may be met by a father's single act of acknowledging a child in court. In her view, the requirement contemplates a situation where the father establishes an ongoing parental relationship with the child or otherwise acknowledges the child's existence to his subsequent wife and children. To support this contention, she relies on three other authorities addressing acknowledgement under former section 230 of the Civil Code: *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal. App. 2d 385, and *Estate of Maxey* (1967) 257 Cal. App. 2d 391, 64 Cal. Rptr. 837.

In *Blythe v. Ayres*, *supra*, 96 Cal. 532, the father never saw his illegitimate child because she resided in another country with her mother. Nevertheless, he "was garrulous upon the subject" of his paternity and "it was his common topic of conversation." (*Id.* at p. 577.) Not only did the father declare the child to be his child, "to all persons, upon all occasions," but at his request the child was named [***24] and baptized with his surname. (*Ibid.*) Based on the foregoing, this court remarked that "it could almost be held that he shouted it from the house-tops." (*Ibid.*) Accordingly, we concluded that the father's public acknowledgement under former

section 230 of the Civil Code could "hardly be considered debatable." (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577.)

In *Estate of Wilson*, *supra*, 164 Cal. App. 2d 385, the evidence showed that the father had acknowledged to his wife that he was the father of a child born to another woman. (*Id.* at p. 389.) Moreover, he had introduced the child as his own on many occasions, including at the funeral of his mother. (*Ibid.*) In light of such evidence, the Court of Appeal upheld the trial court's finding that the father had publicly acknowledged the child within the contemplation of the legitimation statute.

[*917] In *Estate of Maxey*, *supra*, 257 Cal. App. 2d 391, the Court of Appeal found ample evidence supporting the trial court's determination that the father publicly acknowledged his illegitimate son for purposes of legitimation. The father had, [***25] on several occasions, visited the house where the child lived with his mother and asked about the child's school attendance and general welfare. (*Id.* at p. 397.) The father also, in the presence of others, had asked for permission to take the child to his own home for the summer, and, when that request was refused, said that the child was his son and that he should have the child part of the time. (*Ibid.*) In addition, the father had addressed the child as his son in the presence of other persons. (*Ibid.*)

Doner-Griswold correctly points out that the foregoing decisions illustrate the principle that the existence of acknowledgement must be decided on the circumstances of each case. (*Estate of Baird* (1924) 193 Cal. 225, 277, 223 P. 974.) In those decisions, however, the respective fathers had not confessed to paternity in a legal action. Consequently, the courts looked to what other forms of public acknowledgement had been demonstrated by fathers. (See also *Lozano*, *supra*, 51 Cal. App. 4th 843 [examining father's acts both before and after [**1199] child's birth in ascertaining acknowledgement under § 6452].)

That those decisions recognized the [***26] validity of different forms of acknowledgement should not detract from the weightiness of a father's in-court acknowledgement of a child in an action seeking to establish the existence of a parent and child relationship. (See *Estate of Gird*, *supra*, 157 Cal. at pp. 542-543; *Wong v. Young*, *supra*, 80 Cal. App. 2d at pp. 393-394.) As aptly noted by the Court of Appeal below, such an acknowledgement is a critical one that typically leads to a paternity judgment and a legally enforceable obligation of support. Accordingly, such acknowledgements carry as much, if not greater, significance than those made to certain select persons (*Estate of Maxey*, *supra*, 257 Cal. App. 2d at p. 397) or "shouted ... from the house-tops" (*Blythe v. Ayres*, *supra*, 96 Cal. at p. 577).

Doner-Griswold's authorities do not persuade us that section 6452 should be read to require that a father have personal contact with his out-of-wedlock child, that he make purchases for the child, that he receive the child into his home and other family, or that he treat the child as he does his other children. First and foremost, the language of section 6452 [***27] does not support such requirements. (See *Lozano*, *supra*, 51 Cal. App. 4th at p. 848.) We may not, under the guise of interpretation, insert qualifying provisions not included in the statute. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal. 4th 342, 349, 902 P.2d 297.)

Second, even though *Blythe v. Ayres*, *supra*, 96 Cal. 532, *Estate of Wilson*, *supra*, 164 Cal. App. 2d 385, and *Estate of Maxey*, *supra*, 257 [*918] Cal. App. 2d 391, variously found such factors significant for purposes of legitimation, their reasoning appeared to flow directly from the express terms of the controlling statute. In contrast to Probate Code section 6452, former section 230 of the Civil Code provided that the legitimation of a child born out of wedlock was dependent upon three distinct conditions: (1) that the father of the child "publicly acknowledge it as his own"; (2) that he "receive it as such, with the consent of his wife, if he is married, into his family"; and (3) that he "otherwise treat[] it as if it were a legitimate child." (*Ante*, fn. 4; see *Estate of De* [***28] *Laveaga*, *supra*, 142 Cal. at pp. 168-169 [indicating that although father acknowledged his illegitimate son in a single witnessed writing, legitimation statute was not satisfied because the father never received the child into his family and did not treat the child as if he were legitimate].) That the legitimation statute contained such explicit requirements, while section 6452 requires only a natural parent's acknowledgement of the child and contribution toward the child's support or care, strongly suggests that the Legislature did not intend for the latter provision to mirror the former in all the particulars identified by Doner-Griswold. (See *Lozano*, *supra*, 51 Cal. App. 4th at pp. 848-849; compare with Fam. Code, § 7611, subd. (d) [a man is "presumed" to be the natural father of a child if "he receives the child into his home and openly holds out the child as his natural child"].)

In an attempt to negate the significance of Draves's in-court confession of paternity, Doner-Griswold emphasizes the circumstance that Draves did not tell his

two other children of Griswold's existence. The record here, however, stands in sharp contrast [***29] to the primary authority she offers on this point. *Estate of Baird*, *supra*, 193 Cal. 225, held there was no public acknowledgement under former section 230 of the Civil Code where the decedent admitted paternity of a child to the child's mother and their mutual acquaintances but actively concealed the child's existence and his relationship to the child's mother from his own mother and sister, with whom he had intimate and affectionate relations. In that case, the decedent not only failed to tell his relatives, family friends, and business associates of the child (193 Cal. at p. 252), but he affirmatively denied paternity to a half brother and to the family coachman (*id.* at p. 277). In addition, the decedent and the child's mother masqueraded under a fictitious name they assumed and gave to the child in order to keep the decedent's mother [**1200] and siblings in ignorance of the relationship. (*Id.* at pp. 260-261.) In finding that a public acknowledgement had not been established on such facts, *Estate of Baird* stated: "A distinction will be recognized between a mere failure to disclose or publicly acknowledge paternity [***30] and a willful misrepresentation in regard to it; in such circumstances there must be no purposeful concealment of the fact of paternity." (*Id.* at p. 276.)

[*919] Unlike the situation in *Estate of Baird*, Draves confessed to paternity in a formal legal proceeding. There is no evidence that Draves thereafter disclaimed his relationship to Griswold to people aware of the circumstances (see *ante*, fn. 3), or that he affirmatively denied he was Griswold's father despite his confession of paternity in the Ohio court proceeding. Nor is there any suggestion that Draves engaged in contrivances to prevent the discovery of Griswold's existence. In light of the obvious dissimilarities, Doner-Griswold's reliance on *Estate of Baird* is misplaced.

Estate of Ginochio, *supra*, 43 Cal. App. 3d 412, likewise, is inapposite. That case held that a judicial determination of paternity following a vigorously contested hearing did not establish an acknowledgement sufficient to allow an illegitimate child to inherit under section 255 of the former Probate Code. (See *ante*, fn. 5.) Although the court noted that the decedent ultimately paid the child support ordered by the court, [***31] it emphasized the circumstance that the decedent was declared the child's father *against his will* and at no time did he admit he was the father, or sign any writing acknowledging publicly or privately such fact, or otherwise have contact with the child. (*Estate of Ginochio*, *supra*, 43 Cal. App. 3d at pp. 416-417.) Here, by contrast, Draves did not contest paternity, vigorously or otherwise. Instead, Draves stood before the court and openly admitted the parent and child relationship, and the record discloses no evidence that he subsequently disavowed such admission to anyone with knowledge of the circumstances. On this record, section 6452's acknowledgement requirement has been satisfied by a showing of what Draves did and did not do, not by the mere fact that paternity had been judicially declared.

Finally, Doner-Griswold contends that a 1996 amendment of section 6452 evinces the Legislature's unmistakable intent that a decedent's estate may not pass to siblings who had no contact with, or were totally unknown to, the decedent. As we shall explain, that contention proves too much.

Prior to 1996, section 6452 and a predecessor statute, former section 6408, expressly provided [***32] that their terms did not apply to "a natural brother or a sister of the child" born out of wedlock. n7 In construing former section 6408, *Estate of Corcoran* (1992) 7 Cal. App. 4th 1099 held that a half sibling was a "natural brother or sister" within the meaning of such [*920] exception. That holding effectively allowed a half sibling and the issue of another half sibling to inherit from a decedent's estate where there had been no parental acknowledgement or support of the decedent as ordinarily required. In direct response to *Estate of Corcoran*, the Legislature amended section 6452 by eliminating the exception for natural siblings and their issue. (Stats. 1996, ch. 862, § 15, p. 9; see Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as amended June 3, 1996, pp. 17-18 (Assembly Bill No. 2751).) According to legislative documents, the Commission had recommended deletion of the statutory exception because it "creates an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." (Assem. Com. on Judiciary, [***33] Analysis of Assem. Bill No. 2751 (1995-1996 Reg. Sess.) as introduced [**1201] Feb. 22, 1996, p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.)

n7 Former section 6408, subdivision (d) provided: "If a child is born out of wedlock, neither a parent nor a relative of a parent (except for the issue of the child *or a natural brother or sister of the child or the issue of that brother or sister*) inherits from or through the child on the basis of the relationship of parent and child between that parent and child unless both of the

following requirements are satisfied: [P] (1) The parent or a relative of the parent acknowledged the child. [P] (2) The parent or a relative of the parent contributed to the support or the care of the child." (Stats. 1990, ch. 79, § 14, p. 722, italics added.)

This legislative history does not compel Doner-Griswold's construction of section 6452. Reasonably read, the comments of the Commission merely indicate its concern over the "undesirable [***34] risk" that unknown siblings could rely on the statutory exception to make claims against estates. Neither the language nor the history of the statute, however, evinces a clear intent to make inheritance contingent upon the decedent's awareness of or contact with such relatives. (See Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at p. 6; see also Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2751, *supra*, at pp. 17-18.) Indeed, had the Legislature intended to categorically preclude intestate succession by a natural parent or a relative of that parent who had no contact with or was unknown to the deceased child, it could easily have so stated. Instead, by deleting the statutory exception for natural siblings, thereby subjecting siblings to section 6452's dual requirements of acknowledgement and support, the Legislature acted to prevent sibling inheritance under the type of circumstances presented in *Estate of Corcoran*, *supra*, 7 Cal. App. 4th 1099, and to substantially reduce the risk noted by the Commission. n8

n8 We observe that, under certain former versions of Ohio law, a father's confession of paternity in an Ohio juvenile court proceeding was not the equivalent of a formal probate court "acknowledgement" that would have allowed an illegitimate child to inherit from the father in that state. (See *Estate of Vaughan* (Ohio 2001) 90 Ohio St. 3d 544, 740 N.E.2d 259, 262-263.) Here, however, Doner-Griswold does not dispute that the right of the succession claimants to succeed to Griswold's property is governed by the law of Griswold's domicile, i.e., California law, not the law of the claimants' domicile or the law of the place where Draves's acknowledgement occurred. (Civ. Code, § § 755, 946; see *Estate of Lund* (1945) 26 Cal. 2d 472, 493-496, 159 P.2d 643 [where father died domiciled in California, his out-of-wedlock son could inherit where all the legitimation requirements of former section 230 of the Civil Code were met, even though the acts of legitimation occurred while the father and son were domiciled in two other states wherein such acts were not legally sufficient].)

[***35]

[*921] B. Requirement of a Natural Parent and Child Relationship

Section 6452 limits the ability of a "natural parent" or "a relative of that parent" to inherit from or through the child "on the basis of the parent and child relationship between that parent and the child."

Probate Code section 6453 restricts the means by which a relationship of a natural parent to a child may be established for purposes of intestate succession. n9 (See *Estate of Sanders* (1992) 2 Cal. App. 4th 462, 474-475.) Under section 6453, subdivision (a), a natural parent and child relationship is established where the relationship is presumed under the Uniform Parentage Act and not rebutted. (Fam. Code, § 7600 et seq.) It is undisputed, however, that none of those presumptions applies in this case.

n9 Section 6453 provides in full: "For the purpose of determining whether a person is a 'natural parent' as that term is used is this chapter: [P] (a) A natural parent and child relationship is established where that relationship is presumed and not rebutted pursuant to the Uniform Parentage Act, Part 3 (commencing with Section 7600) of Division 12 of the Family Code. [P] (b) A natural parent and child relationship may be established pursuant to any other provisions of the Uniform Parentage Act, except that the relationship may not be established by an action under subdivision (c) of Section 7630 of the Family Code unless any of the following conditions exist: [P] (1) A court order [**1202] was entered during the father's lifetime declaring paternity. [P] (2) Paternity is established by clear and convincing evidence that the father has openly held out the child as his own. [P] (3) It was impossible for the father to hold out the child as his own and paternity is established by clear and convincing evidence."

[***36]

Alternatively, and as relevant here, under Probate Code section 6453, subdivision (b), a natural parent and

child relationship may be established pursuant to section 7630, subdivision (c) of the Family Code, n10 if a court order was entered

during the father's lifetime declaring paternity. n11 (§ 6453, subd. (b)(1).)

n10 Family Code section 7630, subdivision (c) provides in pertinent part: "An action to determine the existence of the father and child relationship with respect to a child who has no presumed father under Section 7611 ... may be brought by the child or personal representative of the child, the Department of Child Support Services, the mother or the personal representative or a parent of the mother if the mother has died or is a minor, a man alleged or alleging himself to be the father, or the personal representative or a parent of the alleged father if the alleged father has died or is a minor. An action under this subdivision shall be consolidated with a proceeding pursuant to Section 7662 if a proceeding has been filed under Chapter 5 (commencing with Section 7660). The parental rights of the alleged natural father shall be determined as set forth in Section 7664." [***37]

n11 See makes no attempt to establish Draves's natural parent status under other provisions of section 6453, subdivision (b).

See contends the question of Draves's paternity was fully and finally adjudicated in the 1941 bastardy proceeding in Ohio. That proceeding, he [*922] argues, satisfies both the Uniform Parentage Act and the Probate Code, and should be binding on the parties here.

If a valid judgment of paternity is rendered in Ohio, it generally is binding on California courts if Ohio had jurisdiction over the parties and the subject matter, and the parties were given reasonable notice and an opportunity to be heard. (*Ruddock v. Ohls* (1979) 91 Cal. App. 3d 271, 276, 154 Cal. Rptr. 87.) California courts generally recognize the importance of a final determination of paternity. (E.g., *Weir v. Ferreira* (1997) 59 Cal. App. 4th 1509, 1520, 70 Cal. Rptr. 2d 33 (*Weir*); *Guardianship of Claralyn S.* (1983) 148 Cal. App. 3d 81, 85, 195 Cal. Rptr. 646; cf. *Estate of Camp* (1901) 131 Cal. 469, 471, 63 P. 736 [same for adoption determinations].)

Doner-Griswold [***38] does not dispute that the parties here are in privity with, or claim inheritance through, those who are bound by the bastardy judgment or are estopped from attacking it. (See *Weir*, *supra*, 59 Cal. App. 4th at pp. 1516-1517, 1521.) Instead, she contends See has not shown that the issue adjudicated in the Ohio bastardy proceeding is identical to the issue presented here, that is, whether Draves was the natural parent of Griswold.

Although we have found no California case directly on point, one Ohio decision has recognized that a bastardy judgment rendered in Ohio in 1950 was res judicata of any proceeding that might have been brought under the Uniform Parentage Act. (*Birman v. Sproat* (Ohio Ct.App. 1988) 47 Ohio App. 3d 65, 546 N.E.2d 1354, 1357 [child born out of wedlock had standing to bring will contest based upon a paternity determination in a bastardy proceeding brought during testator's life]; see also Black's Law Dict., *supra*, at pp. 146, 1148 [equating a bastardy proceeding with a paternity suit].) Yet another Ohio decision found that parentage proceedings, which had found a decedent to be the "reputed father" of a child, n12 satisfied [***39] an Ohio legitimation statute and conferred standing upon the illegitimate child to contest the decedent's will where the father-child relationship was established prior to the decedent's death. (*Beck v. Jolliff* (Ohio Ct.App. 1984) 22 Ohio App. 3d 84, 489 N.E.2d 825, 829; see also *Estate of Hicks* (Ohio Ct.App. 1993) 90 Ohio App. 3d 483, 629 N.E.2d 1086, 1088-1089 [parentage issue must be determined prior to the father's death to the extent the parent-child relationship is being established under the chapter governing descent and distribution].) While we are not bound to follow these Ohio authorities, they persuade us that the 1941 bastardy proceeding decided the identical issue presented here.

n12 The term "reputed father" appears to have reflected the language of the relevant Ohio statute at or about the time of the 1941 bastardy proceeding. (See *State ex rel. Discus v. Van Dorn* (Ohio Ct.App. 1937) 56 Ohio App. 82, 10 N.E.2d 14, 16.)

Next, Doner-Griswold argues [***40] the Ohio judgment should not be given res judicata effect because the bastardy proceeding was quasi-criminal in nature. [*923] It is her position that Draves's confession may have reflected only a decision to avoid a jury trial instead of an adjudication of the paternity issue on the merits.

To support this argument, Doner-Griswold relies upon *Pease v. Pease* (1988) 201 Cal. App. 3d 29, 246 Cal. Rptr. 762 (*Pease*). In that case, a grandfather was sued by his grandchildren and others in a civil action alleging the grandfather's molestation of the grandchildren. When the grandfather cross-complained against his former wife for apportionment of fault, she filed a demurrer contending that the grandfather was collaterally estopped from asserting the negligent [**1203] character of his acts by virtue of his guilty plea in a criminal proceeding involving the same issues. On appeal, the judgment dismissing the cross-complaint was reversed. The appellate court reasoned that a trial court in a civil proceeding may not give collateral estoppel effect to a criminal conviction involving the same issues if the conviction resulted from a guilty plea. "The issue of appellant's guilt was not fully [***41] litigated in the prior criminal proceeding; rather, appellant's plea bargain may reflect nothing more than a compromise instead of an ultimate determination of his guilt. Appellant's due process right to a hearing thus outweighs any countervailing need to limit litigation or conserve judicial resources." (*Id.* at p. 34, fn. omitted.)

Even assuming, for purposes of argument only, that *Pease*'s reasoning may properly be invoked where the father's admission of paternity occurred in a bastardy proceeding (see *Reams v. State ex rel. Favors* (Ohio Ct.App. 1936) 53 Ohio App. 19, 4 N.E.2d 151, 152 [indicating that a bastardy proceeding is more civil than criminal in character]), the circumstances here do not call for its application. Unlike the situation in *Pease*, neither the in-court admission nor the resulting paternity judgment at issue is being challenged by the father (Draves). Moreover, neither the father, nor those claiming a right to inherit through him, seek to litigate the paternity issue. Accordingly, the father's due process rights are not at issue and there is no need to determine whether such rights might outweigh any countervailing need [***42] to limit litigation or conserve judicial resources. (See *Pease*, *supra*, 201 Cal. App. 3d at p. 34.)

Additionally, the record fails to support any claim that Draves's confession merely reflected a compromise. Draves, of course, is no longer living and can offer no explanation as to why he admitted paternity in the bastardy proceeding. Although Doner-Griswold suggests that Draves confessed to avoid the publicity of a jury trial, and not because the paternity charge had merit, that suggestion is purely speculative and finds no evidentiary support in the record.

[*924] Finally, Doner-Griswold argues that See and Griswold's half siblings do not have standing to seek the requisite paternity determination pursuant to the Uniform Parentage Act under section 7630, subdivision (c) of the Family Code. The question here, however, is whether the judgment in the bastardy proceeding initiated by Griswold's mother forecloses Doner-Griswold's relitigation of the parentage issue.

Although Griswold's mother was not acting pursuant to the Uniform Parentage Act when she filed the bastardy complaint in 1941, neither that legislation nor the Probate Code provision should be construed to ignore [***43] the force and effect of the judgment she obtained. That Griswold's mother brought her action to determine paternity long before the adoption of the Uniform Parentage Act, and that all procedural requirements of an action under Family Code section 7630 may not have been followed, should not detract from its binding effect in this probate proceeding where the issue adjudicated was identical with the issue that would have been presented in a Uniform Parentage Act action. (See *Weir*, *supra*, 59 Cal. App. 4th at p. 1521.) Moreover, a prior adjudication of paternity does not compromise a state's interests in the accurate and efficient disposition of property at death. (See *Trimble v. Gordon* (1977) 430 U.S. 762, 772 & fn. 14, 52 L. Ed. 2d 31, 97 S. Ct. 1459 [striking down a provision of a state probate act that precluded a category of illegitimate children from participating in their intestate fathers' estates where the parent-child relationship had been established in state court paternity actions prior to the fathers' deaths]).

In sum, we find that the 1941 Ohio judgment was a court order "entered during the father's lifetime declaring [***44] paternity" (§ 6453, subd. (b)(1)), and that it establishes Draves as the natural parent of Griswold for purposes of intestate succession under section 6452.

DISPOSITION

"'Succession to estates is purely a matter of statutory regulation, which can not be changed by the courts.'" (*Estate of De* [**1204] *Cigaran*, *supra*, 150 Cal. at p. 688.) We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

The judgment of the Court of Appeal is affirmed.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

WERDEGAR, J.

CHIN, J.

CONCURBY: BROWN

CONCUR:

[*925] **CONCURRING OPINION BY BROWN, J.**

I reluctantly concur. The relevant case law strongly suggests that a father who admits paternity in court with no subsequent disclaimers "acknowledges the child" within the meaning [***45] of subdivision (a) of Probate Code section 6452. Moreover, neither the statutory language nor the legislative history supports an alternative interpretation. Accordingly, we must affirm the judgment of the Court of Appeal.

Nonetheless, I believe our holding today contravenes the overarching purpose behind our laws of intestate succession--to carry out "the intent a decedent without a will is most likely to have had." (16 Cal. Law Revision Com. Rep. (1982) p. 2319.) I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. Finally, I have *no* doubt that most, if not all, children born out of wedlock would have balked at bequeathing a share of their estate to a "forensic genealogist."

To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent [***46] has some sort of parental connection to that child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. (See, e.g., *Bullock v. Thomas* (Miss. 1995) 659 So. 2d 574, 577 [a father must "openly treat" a child born out of wedlock "as his own" in order to inherit from that child].) More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here.

BROWN, J.

25 Cal. 4th 508, *; 22 P.3d 324, **;
2001 Cal. LEXIS 3088, ***; 106 Cal. Rptr. 2d 548

15 of 19 DOCUMENTS

HOECHST CELANESE CORPORATION, Plaintiff and Appellant, v. FRANCHISE TAX BOARD, Defendant and Respondent.

S085091

SUPREME COURT OF CALIFORNIA

25 Cal. 4th 508; 22 P.3d 324; 2001 Cal. LEXIS 3088; 106 Cal. Rptr. 2d 548; 2001 Cal. Daily Op. Service 3851; 2001 Daily Journal DAR 4703

May 14, 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, Sacramento County. Court of Appeal of California, Third Appellate District. C030702. Super.Ct.No. 96AS01954. William M. Gallagher, 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:

Morrison & Foerster, Eric J. Coffill, Carley A. Roberts and Lisa R. Brenner, for Plaintiff and Appellant.

Attorneys for Respondent:

Bill Lockyer, Attorney General, Lawrence K. Keethe and George C. Spanos, Deputy Attorneys General, for Defendant and Respondent.

Paull Mines and Anne E. Miller for Multistate Tax Commission as Amicus Curiae, on behalf of Defendant and Respondent.

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

OPINIONBY:
BROWN

OPINION:

[*513] [**328] States have long struggled to devise an equitable and constitutional method for [***2] taxing corporations that do business in multiple states and countries. Like many other states, California has adopted the Uniform Division of Income for Tax Purposes Act (7A pt. 1 West's U. Laws Ann. (1999) U. Div. of Income for Tax Purposes Act, § 1 et seq., p. 361) (UDITPA) in an attempt to resolve this dilemma (see Rev. & Tax. Code, § § 25120- 25141). **n1** Under this scheme of taxation, all taxpayer income is divided into business or nonbusiness income. Business income is apportionable to each state using a three-factor formula. Nonbusiness income is allocable only to the taxpayer's commercial domicile. In this case, we consider whether a reversion of surplus pension plan assets is taxable by California as apportionable business income. We conclude that it is.

n1 All further statutory references are to the Revenue and Taxation Code unless otherwise

indicated.

FACTUAL BACKGROUND

Hoechst Celanese Corporation (Hoechst), formerly Celanese Corporation, [***3] is a Delaware corporation with its principal place of business in New Jersey and its commercial domicile in New York. It manufactures and sells a diversified line of chemicals, fibers and specialty products. Since the late 1960's, Hoechst has conducted business operations in California and filed California franchise tax returns.

In 1947, Hoechst created its first pension plan. Since then, Hoechst's pension plans have undergone numerous changes. For example, the original pension plan required contributions from both Hoechst and its participating employees. In 1969, however, the plan became noncontributory, and only Hoechst had to make contributions. Despite the constant evolution of these plans, their purpose has remained the same. Hoechst has created and maintained these plans "for the general benefit of its employees" in an effort to "retain its current employees and to attract other qualified employees."

The version of the pension plan at issue here was known as the Celanese Retirement Income Plan (CRIP I), and was subject to the terms of the Employee Retirement Income Security Act of 1974 (U.S.C. § 1001 et. seq.) (ERISA).

CRIP I dated back to the original 1947 plan and resulted [***4] from the merger in 1982 of several pension plans created and maintained by Hoechst and its controlled subsidiaries. It was a qualified plan under Internal Revenue Code section 401(a) (26 U.S.C. § 401(a)) and covered both active [*514] and retired employees. Under the terms of CRIP I, each plan member only had a "nonforfeitable right" to a predefined level of benefits. (*Hughes Aircraft Co. v. Jacobson* (1999) 525 U.S. 432, 440, 142 L. Ed. 2d 881, 119 S. Ct. 755 (*Hughes Aircraft*).)

In conjunction with CRIP I, Hoechst created and maintained a trust known as the Celanese Retirement Income Plan Trust (CRIP Trust I). The trust was tax exempt, and Chase Manhattan Bank acted as the trustee. To fund CRIP I, Hoechst made periodic contributions to the CRIP Trust I, and the trust invested these contributions in order to insure adequate funding for the pension plan. These contributions discharged Hoechst's financial obligations and liabilities to CRIP I subject to any limitations imposed by ERISA. As permitted by law, Hoechst claimed tax deductions for these contributions on its federal and California tax returns. Any surplus assets in excess of those necessary [***5] to meet any obligations and liabilities owed under ERISA and CRIP I (surplus pension plan assets) were used to reduce future contributions by Hoechst to the CRIP Trust I and were not used to increase any benefits provided under the plan.

Because the CRIP Trust I held the pension plan assets, Hoechst did not own or hold legal title to these assets and could not use these assets to fund any of its corporate activities. Hoechst, however, retained an interest [**329] in any surplus pension plan assets. These surplus assets would revert to Hoechst *only* upon termination of the plan and satisfaction of all benefits and liabilities owed under CRIP I and ERISA. Until such a reversion, none of the pension plan assets, including any contributions or capital gains, were taxable as Hoechst's income.

Even though Hoechst did not hold legal title to the pension plan assets, it did have some control over them through its power over CRIP I and the CRIP Trust I and their predecessors. For example, Hoechst had the power to amend or discontinue the pension plans at any time, subject to ERISA limitations. The board of directors of Hoechst also had the power to appoint and replace the trustees of the pension [***6] plan assets at any time--a power that it exercised on numerous occasions.

Hoechst also retained the power to administer its pension plans, including the power to prescribe procedures to follow in obtaining evidence necessary to establish the right of any person to payments under the plans, to interpret the terms of the plans, to prescribe procedures for determining and recording the periods for calculating benefits, and to determine the right of any person to benefits under the plans. To exercise these powers, Hoechst created an [*515] administrative committee composed of Hoechst employees, including corporate officers. Known as the Employee Benefits Administration Committee, the committee handled all paperwork for the plans, determined eligibility for benefits and considered requests for increases in benefits. The committee met in either New York or North Carolina three to six times a year on an irregular basis, depending on the rate that applications accumulated.

Hoechst also created a separate committee responsible for the supervision and review of the financial operation of its pension plans and trusts. The Celanese Pension Plan Investment Committee was comprised of Hoechst's chief [***7] financial officer,

some of its vice-presidents, its controller and an individual from its human resources department. The committee established, supervised and reviewed the funding and investment policies of the plans and trusts and appointed the investment fund managers who determined the actual investments made by the plans and trusts. Although the committee did not control the specific investments chosen by the fund managers, it had the power to change fund managers and guide their overall investment strategy. On many occasions, Hoechst exercised this power and replaced these fund managers for various reasons, including inadequate performance. For example, in 1978, the committee "drastically revised" the investment strategy of its pension plan and "introduced new managers with a different perspective on their mission."

Due to years of wise investments, the CRIP Trust I accumulated more assets than necessary to fund the defined benefits owed to plan members under CRIP I and ERISA. In 1983, Hoechst decided to recapture these surplus assets in order to preclude their use in a takeover bid. To recapture the surplus assets, Hoechst divided CRIP I into two separate plans with essentially [***8] the same provisions as CRIP I. The newly created Celanese Retirement Income Plan (CRIP II) covered active employees, and the Celanese Retirement Security Plan (CRSP) covered retired employees. Like their predecessor, both plans were qualified benefit plans under Internal Revenue Code section 401(a).

Concurrent with its division of CRIP I, Hoechst divided the CRIP Trust I into two separate trusts. The Celanese Retirement Income Plan Trust (CRIP Trust II) funded the newly created CRIP II, while the Celanese Retirement Security Plan Trust (CRSP Trust) funded the newly created CRSP. As part of the split-up, Hoechst allocated all assets of the CRIP Trust I between the CRIP Trust II and the CRSP Trust. In making this allocation, Hoechst made sure that all benefits owed to CRIP II and CRSP members were fully funded as required under the terms of CRIP I and ERISA.

[*516] Using the funds allocated to the CRSP Trust, Hoechst purchased annuities to provide the benefits owed to its retirees. Hoechst then terminated both CRSP and the CRSP Trust in 1985. Upon termination, all surplus assets of that plan and trust reverted to Hoechst. This surplus totaled approximately [**330] $ 388.8 million. After the [***9] reversion, Hoechst placed these surplus pension plan assets in its general fund to be used for general corporate purposes.

As part of its 1985 federal tax returns, Hoechst reported the income from the reversion as "miscellaneous income." Hoechst also reported the income from the reversion as "taxable income of the business" in its 1985 New York tax return, and paid New York state income tax on a small percentage of this income. **n2** In its 1985 California tax return, however, Hoechst did not apportion any part of the reverted income to California. Consequently, the State Franchise Tax Board (Board) issued a "Notice of Additional Tax Proposed to Be Assessed for 1985" and proposed to impose an additional franchise tax of $ 292,142 plus interest based on the income from the reversion.

n2 New York has not adopted the UDITPA.

Hoechst filed a timely protest. The Board denied the protest and affirmed the proposed assessment in its entirety. Hoechst then appealed to the State Board of Equalization (SBE). Citing [***10] *Appeal of Borden, Inc.* (Feb. 3, 1977) (1971-1978 Transfer Binder) Cal.Tax Rptr. (CCH) paragraph 205-515, page 14,897-57 (*Borden*), and *Appeal of Kroehler Manufacturing Co.* (Apr. 6, 1977) (1971-1978 Transfer Binder) Cal.Tax Rptr. (CCH) paragraph 205-646, page 14,897-122 (*Kroehler*), the SBE held that: (1) the definition of "business income" in subdivision (a) of section 25120 created both a transactional and a functional test; and (2) income from the reversion was business income under the functional test. Thus, the reverted income was apportionable and subject to taxation in California. The SBE also found the tax assessment constitutional under the operational purpose test enunciated in *Allied-Signal, Inc. v. Director, Div. of Taxation* (1992) 504 U.S. 768, 778, 119 L. Ed. 2d 533, 112 S. Ct. 2251 (*Allied-Signal*).

Hoechst then filed a timely claim for refund with the Board. As part of the claim, Hoechst attached a check for $ 715,791.35--which covered the original assessment plus interest. In the claim, Hoechst asked for a full refund, alleging that the income from the reversion did not constitute business income under section 25120. Hoechst further [***11] argued that apportionment of the income from the reversion to California violated the due process and commerce clauses of the United States Constitution.

After the Board denied the claim, Hoechst filed a complaint for refund of taxes with the superior court. After a hearing, the court ruled in favor of the [*517] Board. Specifically, the court found that: (1) the statutory definition of "business income" established both a transactional and a functional test; (2) the income from the reversion was apportionable business income

subject to taxation in California under the functional test; and (3) taxation of the income from the reversion by California did not violate the due process and commerce clauses of the United States Constitution.

Hoechst appealed, and the Court of Appeal reversed. Although the court applied both a transactional and functional test, it concluded that the reversion did not satisfy either test. First, the court found that the reversion did not meet the transactional test because the reversion was an extraordinary event that did not occur in the regular course of Hoechst's trade or business. Second, the court found that the reversion failed the functional test because [***12] Hoechst did not own or hold title to the pension plan assets that generated the income. Thus, the income from the reversion was nonbusiness income--and not business income--and was only subject to taxation in Hoechst's commercial domicile, New York.

We granted review to determine whether: (1) income from a reversion of surplus pension plan assets constitutes business income apportionable to California; and (2) subjecting income from a reversion to taxation in California violates the federal due process and commerce clauses.

DISCUSSION

I

Pursuant to "the unitary business principle," a state may "tax a corporation on [**331] an apportionable share of the multistate business carried on in part in the taxing State." (*Allied-Signal*, *supra*, 504 U.S. at p. 778.) California employs this " 'unitary business' principle and formula apportionment in applying [its franchise] tax to corporations doing business both inside and outside the State." (*Container Corp. v. Franchise Tax Bd.* (1983) 463 U.S. 159, 162-163, 77 L. Ed. 2d 545, 103 S. Ct. 2933 (*Container Corp.*).) Under the "unitary business/formula apportionment method," a state "calculates the local tax base [***13] by first defining the scope of the 'unitary business' of which the taxed enterprise's activities in the taxing jurisdiction form one part, and then apportioning the total income of that 'unitary business' between the taxing jurisdiction and the rest of the world on the basis of a formula taking into account objective measures of the corporation's activities within and without the jurisdiction." (*Id.* at p. 165.) Like many other states that use this method of taxation, California has adopted the UDITPA almost verbatim. (*Container Corp.*, at p. 165; § 25120 et seq.) [*518]

Originally promulgated by the National Conference of Commissioners on Uniform State Laws (Commissioners) in 1957, the UDITPA has two main objectives: "(1) to promote uniformity in allocation practices among the 38 states which impose taxes on or measured by the income of corporations, and (2) to relieve the pressure for congressional legislation in this field." (Keesling & Warren, *California's Uniform Division of Income for Tax Purposes Act* (1967) 15 UCLA L.Rev. 156, 156 (Keesling & Warren).) Initially, the UDITPA received a tepid response as few states adopted it. In 1965, however, Congress [***14] proposed comprehensive legislation regulating state taxation of interstate commerce. Spurred by the specter of congressional intervention, many states, including California, adopted the UDITPA. (See Peters, *The Distinction Between Business Income and Nonbusiness Income* (1973) 25 So. Cal. Tax Inst. 251, 279 (Peters).) Currently, 22 states plus the District of Columbia have adopted the UDITPA. **n3** In addition, some states have modeled their corporate tax scheme after the UDITPA. (See, e.g., *Polaroid Corp. v. Offerman* (N.C. 1998) 349 N.C. 290, 507 S.E.2d 284, 294 (*Polaroid*) [North Carolina's "Corporate Income Tax Act is modeled after [the] UDITPA"]; *Kroger Co. v. Dept. of Revenue* (Ill.App.Ct. 1996) 284 Ill. App. 3d 473, 673 N.E.2d 710, 714, 220 Ill. Dec. 566 (*Kroger*) [the Illinois Income Tax Act "was modeled after the UDITPA"].)

n3 These states are: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Kentucky, Maine, Michigan, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. (7A pt. 1 West's U. Laws Ann. (2000 supp.) UDITPA, note, p. 13.)

[***15] California's Uniform Division of Income for Tax Purposes Act (California UDITPA) mirrors the UDITPA. (Compare § § 25120-25141 with 7A pt. 1 West's U. Laws Ann., *supra*, UDIPTA, § § 1-22, pp. 361-403.) Like the UDITPA, the California UDITPA divides all corporate income into two categories--business income and nonbusiness income--and uses the UDITPA definition of these categories. (§ 25120.) " 'Business income' means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).)

" 'Nonbusiness income' means all income other than business income." (§ 25120, subd. (d).) All business income is "apportioned to this state" through a formula based on the property, sales and payroll of the taxpayer. (§ 25128.) n4 In contrast, nonbusiness income is generally "allocated in full to the state in which the taxpayer is domiciled." (*Robert Half Internat., Inc. v. Franchise Tax Bd.* (1998) 66 Cal. App. 4th 1020, 1023, [*519] 78 Cal. Rptr. 2d 453 [***16] (*Robert Half*).) The tax treatment of corporate income therefore depends on its classification as business or nonbusiness income.

n4 Since 1993, the Legislature has amended the original apportionment formula--which used to be identical to the formula used in the UDITPA. (Compare § 25128 with Stats. 1966, ch. 2, § 7, p. 179.) The present formula, however, is still based on the property, sales and payroll of the taxpayer. (See § 25128.)

[**332] Because section 25120 defines "nonbusiness income" in relation to business income, the definition of "business income" is the key to determining whether corporate income is apportionable or allocable. To construe this definition, we apply the well-established rules of statutory construction and seek to " 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*Wilcox v. Birtwhistle* (1999) 21 Cal. 4th 973, 977, 987 P.2d 727 (*Wilcox*), quoting *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal. 4th 382, 387, 853 P.2d 978.) [***17] As always, we begin with the words of a statute and give these words their ordinary meaning. (*Wilcox*, at p. 977.) If the statutory language is clear and unambiguous, then we need go no further. (*Lungren v. Deukmejian* (1988) 45 Cal. 3d 727, 735, 248 Cal. Rptr. 115, 755 P.2d 299.) If, however, the language is susceptible to more than one reasonable interpretation, then we look to "extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part." (*People v. Woodhead* (1987) 43 Cal. 3d 1002, 1008, 239 Cal. Rptr. 656, 741 P.2d 154.) Where the Legislature adopts a uniform act, the history surrounding the creation and adoption of that act is also relevant. n5 (See *In re Marriage of Bonds* (2000) 24 Cal. 4th 1, 16-19 (*Bonds*).)

n5 In three separate requests for judicial notice, the Board asked the court to take judicial notice of: (1) a Bill Analysis and Fiscal Impact Report submitted by the New Mexico Taxation and Revenue Department in connection with New Mexico House Bill No. 349 (1999 Reg. Sess.); (2) a transcript of the January 12, 1996, hearing of the California Assembly Committee on Taxation; (3) the 1966 reprinting of the model UDITPA issued by the National Conference of Commissioners on Uniform State Laws; (4) the legislative history of Assembly Bill No. 11 (1966 Reg. Sess.), which became the California UDITPA; (5) a January 7, 1966 memorandum from Allison Dunham, the Executive Director of the National Conference of Commissioners on Uniform State Laws, to the Special Committee on UDITPA; and (6) a January 21, 1966 memorandum from William J. Pierce, a commissioner of the National Conference of Commissioners on Uniform State Laws, to the Special Committee on UDITPA. In addition, Hoechst asked the court to take judicial notice of a January 14, 1966 memorandum from Donald H. Burnett to R.R. Bullivant, Chairman of the Special Subcommittee on UDITPA. We hereby grant these requests. (Evid. Code, § 452, subd. (h).)

[***18]

In the instant case, Hoechst contends the statutory definition of "business income" creates a single transactional test, and the 1985 reversion of surplus pension plan assets does not satisfy this test or any other test. Thus, the [*520] income from the reversion is nonbusiness income that is only taxable by Hoechst's commercial domicile, New York. The Board counters that the definition establishes both a transactional and functional test, and the reversion meets both tests. Thus, the reverted assets are apportionable to California. As explained below, we conclude that the statutory definition establishes separate transactional and functional tests for business income and that the reversion satisfies *only* the functional test. Therefore, the income from the reversion is apportionable business income.

A. The Business Income Tests

Subdivision (a) of section 25120 states: " 'Business income' means income arising from transactions and activity in the regular course of the taxpayer's trade or

business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business [***19] operations." Thus, the statutory definition of "business income" consists of two clauses joined together by the conjunction and predicate, "and includes." (*Ibid.*) In interpreting this language, all courts agree that the first clause establishes a transactional test. Some courts have, however, construed the second clause as a separate functional test for business income. (*Uniroyal Tire Co. v. Dept. of Finance* (Ala. 2000) 779 So. 2d 227, 230 (*Uniroyal Tire*).) Under this construction, corporate income is business income if it satisfies either the transactional or functional test. (*Ibid.*) Other courts have rejected this approach and construed the two clauses as a single transactional test. Under this construction, the second [**333] clause modifies the first clause and merely exemplifies "what fits within the definition." (*Polaroid, supra*, 507 S.E.2d at p. 290.) Not surprisingly, Hoechst contends the statutory definition of business income establishes only a transactional test, while the Board contends the definition establishes both a transactional and functional test. We agree with the Board.

We initially note that the statutory language is ambiguous and [***20] reasonably susceptible to either interpretation. On the one hand, the grammatical structure of the business income definition arguably creates both a transactional and functional test. " 'Business income' " is the subject of the sentence. (§ 25120, subd. (a).) Two predicate clauses containing different verbs, objects and prepositional phrases and separated by a conjunction follow this subject. As such, the definition arguably contains a "compound predicate" that states two independent definitions of business income. (*Kroger, supra*, 673 N.E.2d at p. 713.) In other words, "the statute could grammatically be read as stating: 'Business income means income arising from transactions [*521] and activity in the regular course of the corporation's trade or business, and [business income] includes income from tangible and intangible property ....' " (*Polaroid, supra*, 507 S.E.2d at p. 290.)

Such an interpretation accords with the different language used in the first and second clauses. The first clause focuses on "transactions and activity" and their relationship to "the regular course of the taxpayer's trade or business." (§ 25120, subd. (a).) In contrast, the second [***21] clause focuses on "property" and its relationship to "the taxpayer's regular trade or business operations." (*Ibid.*) The creation of two separate predicate clauses with different verbs, objects and prepositional phrases strongly suggests that "the second clause contains a definition distinct from that set forth in the first." (*Polaroid, supra*, 507 S.E.2d at p. 298.) The apparent expansion of "the definition of business income" by the second clause bolsters such a conclusion because a broader definition can hardly exemplify a narrower definition. (*Kroger, supra*, 673 N.E.2d at p. 713.)

On the other hand, the addition of the word "includes" after the conjunction linking the two clauses suggests that the second clause is a subset of the first clause under the last antecedent doctrine. (§ 25120, subd. (a).) According to this doctrine, " 'qualifying words, phrases and clauses are to be applied to the words or phrases immediately preceding and are not to be construed as extending to or including others more remote.' " (*White v. County of Sacramento* (1982) 31 Cal. 3d 676, 680, 183 Cal. Rptr. 520, 646 P.2d 191, quoting *Board of Port Commrs. v. Williams* (1937) 9 Cal. 2d 381, 389, 70 P.2d 918.) [***22] Arguably, the word "includes" makes the second clause a qualifying clause that modifies the first clause--and not just "business income." (*Uniroyal Tire, supra*, 779 So. 2d at p. 232.) In other words, "the concluding twenty-six words ... are added to include transactions involving disposal of fixed assets by taxpayers *who emphasize the trading of assets as an integral part of regular business.*" (*Phillips Petroleum Co. v. Iowa Dept. of Rev. & Fin.* (Iowa 1994) 511 N.W.2d 608, 610, italics added (*Phillips Petroleum*).)

The language of the second clause provides some support for such an interpretation. The second clause states that the "acquisition, management, *and* disposition" of property must be "integral parts" of the taxpayer's "regular" "business operations." (§ 25120, subd. (a), italics added.) The use of "and" suggests that the second clause merely exemplifies the first because the sale of property " 'that is not regularly disposed of, but rather is held indefinitely,' " arguably cannot be an integral part of the taxpayer's business operations. (*Uniroyal Tire, supra*, 779 So. 2d at p. 234, quoting Faber, *When* [*522] *Does the Sale of Corporate* [***23] *Assets Produce Business Income for State Corporate Franchise Tax Purposes?* (May-June 1995) The Tax Executive 179, 187.)

Moreover, the apparent breadth of the second clause equally supports the rejection of the functional test. As the Alabama Supreme Court observed: "If income is business income under the transactional test, [**334] then, a fortiori, it is business income under the functional test. In other words, the functional test would

include everything that the transactional test includes--and much more." (*Uniroyal Tire*, *supra*, 779 So. 2d at pp. 235-236.) As such, construing section 25120 to create two alternative tests for business income arguably renders the first clause mere surplusage, in violation of the rules of statutory construction. (See *People v. Cruz* (1996) 13 Cal. 4th 764, 782, 919 P.2d 731.)

In light of these competing arguments, we conclude that the statutory language is ambiguous as to the existence of a separate functional test. At a minimum, we cannot find that either interpretation is unreasonable based solely on the statutory language. Indeed, the conflicting opinions of our sister courts interpreting the very same language demonstrate that [***24] reasonable minds may disagree over whether the business income definition creates a functional test. **n6** Therefore, we must now turn to extrinsic aids in an effort to ascertain the Legislature's intent. These aids establish that the Legislature intended to create both a transactional and functional test for business income.

n6 Compare *Uniroyal Tire*, *supra*, 779 So. 2d at p. 236 (transactional test only); *Phillips Petroleum*, *supra*, 511 N.W.2d at page 610 (same); *Western Natural Gas Co. v. McDonald* (Kan. 1968) 202 Kan. 98, 446 P.2d 781, 783 (*Western Natural Gas*) (same); *McVean & Barlow, Inc. v. New Mexico Bureau of Revenue* (N.M.Ct.App. 1975) 88 N.M. 521, 543 P.2d 489, 492 (*McVean*) (citing the functional test language but applying the principles of the transactional test); *Associated Partnership I, Inc. v. Huddleston* (Tenn. 1994) 889 S.W.2d 190, 195 (*Associated Partnership I*) (transactional test only), with *Pledger v. Getty Oil Exploration Co.* (Ark. 1992) 309 Ark. 257, 831 S.W.2d 121, 124-125 (*Pledger*) (applying a separate functional test); *Dist. of Columbia v. Pierce Associates, Inc.* (D.C. 1983) 462 A.2d 1129, 1131 (*Pierce Associates*) (same); *Texaco-Cities Service Pipeline Co. v. McGaw* (Ill. 1998) 182 Ill. 2d 262, 695 N.E.2d 481, 485, 230 Ill. Dec. 991 (*Texaco-Cities*) (same); *Montana Dept. of Revenue v. American Smelting and Refining Co.* (Mont. 1977) 173 Mont. 316, 567 P.2d 901, 907 (*American Smelting*) (same); *Polaroid*, *supra*, 507 S.E.2d at page 295 (same); *Simpson Timber Co. v. Dept. of Revenue* (Or. 1998) 326 Ore. 370, 953 P.2d 366, 369 (*Simpson Timber*) (same); *Ross-Araco Corp. v. Commonwealth of Pennsylvania* (Pa. 1996) 544 Pa. 74, 674 A.2d 691, 696-697 (*Ross-Araco*) (same).

[***25]

As an initial matter, the legislative history behind the UDITPA strongly supports the inclusion of a functional test. Because the Legislature adopted the UDITPA almost verbatim (Keesling & Warren, *supra*, 15 UCLA L.Rev. [*523] at p. 156), we look to the history behind the UDITPA for guidance (see *Bonds*, *supra*, 24 Cal. 4th at pp. 16-19). This history reveals that the UDITPA definition of "business income" derives from "California decisional law" which employed a separate functional test for business income. (Peters, *supra*, 25 So. Cal. Tax Inst. at p. 278.)

The first draft of the UDITPA did not distinguish between business and nonbusiness income. (Peters, *supra*, 25 So. Cal. Tax Inst. at pp. 272-273.) After concerns about the constitutionality of the first draft arose, John S. Warren, a California tax administrator, suggested that the Commissioners divide all income into apportionable business income and allocable nonbusiness income. As part of his suggestion, Warren proposed a definition of business income based on language used in certain SBE decisions. (*Id.* at pp. 275-276.) The Commissioners liked Warren's proposal, and "the final draft of the [UDITPA] [***26] contained the definitions of business income and nonbusiness income proposed by Mr. Warren." (Peters, at p. 276.) Thus, the UDITPA's definition of business income was based on pre-UDITPA decisions of the SBE, and the UDITPA's distinction between business and nonbusiness income was "in line with ... California practice" at the time of its enactment. (Keesling & Warren, *supra*, 15 UCLA L.Rev. at pp. 163-164; see also *Polaroid*, *supra*, 507 S.E.2d at p. 294 ["the uniform definition of business income, as set forth in UDITPA, finds its origins in early California jurisprudence"].) Accordingly, our interpretation of the business income definition should be guided by the SBE's pre-UDITPA decisions applying language similar to the language of the UDITPA.

These SBE decisions consistently applied an *independent* functional test when determining whether income constituted business income. In doing so, the SBE used language [**335] virtually identical to the language in the second clause of the statutory definition. For example, in *Appeal of Marcus-Lesoine, Inc.* (July 7, 1942) 2 SBE 338, 340-341 (*Marcus-Lesoine*), the SBE held that interest income from conditional [***27] sales contracts constituted business income *solely* because "the acquisition, management and liquidation of the intangibles constituted integral parts of the

corporation's regular business operations." Similarly, the SBE found that copyright royalties were business income *solely* because the "acquisition, management and disposition of the intangibles constituted integral parts of the corporation's regular business operations." (*Appeal of Houghton Mifflin Co.* (Mar. 28, 1946) 3 SBE 344, 345 (*Houghton Mifflin*).) The SBE also relied *solely* on the functional test when it held that patent royalties constituted business income. (*Appeal of National Cylinder Gas Co.* (Feb. 5, 1957) 6 SBE 153, 154 ["We have consistently held ... that income from intangibles is includible in unitary income and subject to [apportionment] if the acquisition, management and disposition of the intangibles [*524] constitute integral parts of the unitary business"]; *Appeal of Intern. Business Machines Corp.* (Oct. 7, 1954) 6 SBE 5, 6-7 ["we have previously held that income from such intangibles [patents] is subject to [apportionment] where the acquisition, management and disposition of the [***28] intangibles constitute integral parts of the owner's regular business operations"].) Because these SBE decisions construe the language of the second clause as an independent test for business income, we hold that a separate functional test exists.

The comments to section 1, subdivision (a) of the UDITPA prepared by the Commissioners (Commissioners Comments) bolster our holding. The comment states in part that "income from the disposition of property used in a trade or business of the taxpayer is includible within the meaning of business income." (Comrs. Com., UDITPA, com. foll. § 1, subd. (a), p. 2, reprinted at <http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/uditp57.htm> [as of May 14, 2001].) By focusing on the "property" and its relationship to the "trade or business" and using the "disposition" language of the second clause (*ibid.*), the Commissioners Comment strongly suggests that a separate functional test for business income exists. Indeed, the comment ostensibly makes all income from the disposition of property used in the taxpayer's business apportionable even if the disposition does not occur "in the regular course of the taxpayer's trade or business." (7A [***29] pt. 1 West's U. Laws Ann., *supra*, UDITPA, § 1, subd. (a), pp. 361-362.)

Administrative decisions interpreting the statutory definition of "business income" also support the inclusion of a separate functional test. Although we are not bound by administrative decisions construing a controlling statute, we accord " 'great weight and respect to the administrative construction.' " (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 12, 960 P.2d 1031 (*Yamaha*), quoting *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal. 3d 923, 931, fn. 7, 163 Cal. Rptr. 782, 609 P.2d 1.) The amount of deference given to the administrative construction depends " 'upon *the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.*' " (*Yamaha*, at pp. 14-15, italics added by *Yamaha*, quoting *Skidmore v. Swift & Co.* (1944) 323 U.S. 134, 140, 89 L. Ed. 124, 65 S. Ct. 161.)

In light of these considerations, we find the SBE decisions construing [***30] the language of the second clause of the statutory business income definition as an independent functional test for business income highly [*525] persuasive. In *Borden*, *supra*, (1971-1978 Transfer Binder) Cal.Tax Rptr. (CCH), paragraph 205-616, page 14,897-59, the SBE first addressed the validity of the functional test and held that section 25120 authorized a separate "functional test for business income." In a thorough and well-reasoned opinion, the SBE discussed the legislative history behind the UDITPA and relied heavily on those California administrative decisions that formed the basis for the business income definition. (*Borden*, at pp. 14,897-58 to 14,897-59.) The SBE also cited language in regulations proposed [**336] by the Multistate Tax Commission and enacted in California that supported the existence of a separate functional test. (*Id.* at p. 14,987-59.) Finally, the SBE rejected the contrary conclusion reached by the Kansas and New Mexico courts in *Western Natural Gas*, *supra*, 446 P.2d at page 783, and *McVean*, *supra*, 543 P.2d at page 492, because these courts did not consider the UDIPTA's history or the regulations. (*Borden*, at p. 14,897-59.) During the [***31] 24 years since *Borden*, the SBE has consistently applied both a transactional and functional test when determining whether income constitutes business income under subdivision (a) of section 25120. n7 Because the SBE thoroughly considered the issue, reached a reasonable conclusion, and consistently applied this conclusion over the past 24 years, we see no reason to overturn the SBE's longstanding construction. (See *Yamaha*, *supra*, 19 Cal. 4th at pp. 12-15.)

n7 (See, e.g., *Appeal of CTS Keene, Inc.* (Feb. 10, 1993) [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH)[P] 402-589, p. 27,569;

Appeal of Dial Finance Co. of Cal. (Feb. 10, 1993) [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 402-586, p. 27,553; *Appeal of American Biltrite Inc.* (Nov. 19, 1992) [1991-1992 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 402-531, p. 27,407-3; *Appeal of VSI Corp.* (May 2, 1991) [1991-1992 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-937, p. 26,240 (*VSI Corp.*); *Appeal of Masonite Corp.* (Nov. 15, 1988) [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-677, p. 25,335; *Appeal of R.H. Macy & Co.* (July 26, 1988) [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-639, p. 25,195; *Appeal of U-Haul Co. of Van Nuys* (Mar. 3, 1987) [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-489, p. 24,667; *Appeal of Mark Controls Corp.* (Dec. 3, 1986) [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-451, p. 24,566 (*Mark Controls*); *Appeal of National Dollar Stores, Inc.* (Sept. 10, 1986) [1984-1986 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-403, p. 24,429 (*National Dollar Stores*); *Appeal of Armour Oil Co.* (June 10, 1986) [1984-1986 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-355, p. 24,325; *Appeal of Southwestern Development Co.* (Sept. 10, 1985) [1984-1986 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-157, p. 23,898; *Appeal of Calvo Growers of Cal.* (Feb. 28, 1984) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 400-673, p. 23,035; *Appeal of Johns-Manville Sales Corp.* (Aug. 17, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 400-476, p. 22,741; *Appeal of Amwalt Group, Inc.* (July 28, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 400-433, p. 22,693 (*Amwalt Group*); *Appeal of Occidental Petroleum Corp.* (June 21, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 400-394, p. 22,609 (*Occidental Petroleum*); *Appeal of Standard Oil Co. of Cal.* (Mar. 2, 1983) [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 400-383, p. 22,561 (*Standard Oil*); *Appeal of DPF, Inc.* (Oct. 28, 1980) [1978-1981 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 206-429, p. 14,965-36; *Kroehler, supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 205-646, p. 14,897-122; *Appeal of New York Football Giants, Inc.* (Feb. 3, 1977) [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 205-600, p. 14,897-31 (*New York Football Giants*).)

[***32]

[*526] Finally, construing the second clause of the definition as a separate functional test fulfills one of the primary objectives behind the UDITPA--to promote uniformity among the states. (Keesling & Warren, *supra*, 15 UCLA L.Rev. at p. 156.) Although courts in other jurisdictions that have adopted the UDITPA have disagreed over the existence of a separate functional test, the state legislatures in these jurisdictions have not. In four of the five states where the state court rejected the functional test, the state Legislature amended the definition of business income to include such a test. n8 (See Iowa Code, § 422.32; Kan. Stat., § 79-3271, subd. (a) [taxpayer may elect to apply the functional test]; N.M. Stat., § 7-4-2, subd. A; Tenn. Code, § 67-4-2004.) Thus, virtually all states adopting [***33] the UDITPA now construe the second clause of the business income definition as a separate functional test. In the interests of promoting uniformity, we do the same. Accordingly, Hoechst's income from the reversion of surplus pension plan assets is apportionable as business income if it satisfies *either* the transactional test or the functional test.

n8 Only Alabama has not amended its definition of business income to include a functional test. Of course, the Alabama Supreme Court only issued its decision rejecting the functional test in August 2000.

B. The Transactional Test

Under the transactional test, corporate income is business income if it arises "from transactions and activity in the regular course of the taxpayer's trade or business." (§ 25120, subd. (a).) Upon construing and applying this statutory language, we conclude that Hoechst's reversion of surplus [**337] pension plan assets fails to meet the transactional test.

The language of the transactional test is unambiguous, and courts have construed this language in a consistent manner. "The controlling factor by which" the transactional test "identifies business income is the nature of the particular transaction" that generates the income. (*Western Natural Gas*, *supra*, 446 P.2d at p. 783.) To create business income, these "transactions and activity" must occur "in the *regular* course of the taxpayer's trade or [***34] business." (§ 25120, subd. (a), italics added.) "Relevant considerations include the

frequency and regularity of similar transactions, the former practices of the business, and the taxpayer's subsequent use of the income." (*Associated Partnership I, supra*, 889 S.W.2d at p. 195.) "Unprecedented, ... once-in-a-corporate-lifetime occurrences" do not meet the transactional test because they do not occur in the regular course of any business. (*Phillips Petroleum, supra*, 511 N.W.2d at pp. 610-611.) Thus, income arising from "extraordinary" events such as a "complete liquidation [*527] and cessation of business" cannot satisfy the transactional test. (*Uniroyal Tire Co., supra*, 779 So. 2d at p. 236.)

Here, the reversion and the activities necessary to execute the reversion were extraordinary occurrences. They were not normal trade or business activities of Hoechst, which manufactured and sold a diversified line of chemicals, fibers and specialty products. Indeed, the 1985 reversion of surplus pension plan assets was the first and only such transaction in Hoechst's corporate history. Because the reversion was a "once-in-a-lifetime corporate occurrence," it [***35] cannot meet the transactional test. (*Phillips Petroleum, supra*, 511 N.W.2d at pp. 610-611.)

In reaching this conclusion, we reject the Board's attempt to define the relevant "transactions and activity" as the purchase and sale of securities by the fund managers appointed by Hoechst. (§ 25120, subd. (a).) These investments did not result in *any taxable income* to Hoechst *until and unless*: (1) the investments generated more assets than necessary to fund the defined benefits owed to plan members; and (2) Hoechst acted to recapture these surplus assets. Thus, the only transaction or activity that generated any taxable income for Hoechst was the reversion itself. Accordingly, the income from the reversion does not satisfy the transactional test and is apportionable to California only if it meets the functional test.

C. The Functional Test

Under the functional test, corporate income is business income "if the acquisition, management, and disposition of the [income-producing] property constitute integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).) After reviewing the statutory language and the applicable extrinsic aids, [***36] we hold that the reversion satisfies the functional test. Therefore, the income from the reversion is business income apportionable to California.

We begin our analysis by examining the statutory language. In contrast to the transactional test, which focuses on the income-producing "transactions and activity," the functional test focuses on the income-producing "property." (§ 25120, subd. (a).) This property may be "tangible" or "intangible" (*ibid.*), and the nature of the relationship between this property and the taxpayer's "business operations" is the critical inquiry (*Texaco-Cities, supra*, 695 N.E.2d at p. 486 [the functional test "focuses upon the role or function of the property as being integral to regular business operations"]).

[*528] Before defining the relationship necessary to meet the functional test, we reject at the outset Hoechst's contention that the statutory term "property" implies that the taxpayer must own or hold legal title to the property. Such an interpretation only considers the term "property" in isolation and ignores the conditional clause that places this term in context: "if the acquisition, management, and disposition of the *property* constitute [***37] integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a), italics added.) This conditional clause--and not the vague implications of the term "property"--defines the relationship [**338] between the property and the taxpayer required by the functional test.

The conditional clause contains two key phrases: "acquisition, management, and disposition of the property" and "integral parts of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).) The first phrase--"acquisition, management, and disposition of the property"--appears to refer to the taxpayer's interest in and power over the income-producing property. (*Ibid.*) In construing this phrase, the parties focus on the meaning of the word "and." (*Ibid.*) Hoechst contends "and" has a conjunctive meaning, while the Board contends "and" has a disjunctive meaning in the statute. (*Ibid.*) Because "and" is ordinarily conjunctive and because nothing suggests a legislative intent to give "and" a different meaning, we agree with Hoechst. (See *Wilcox, supra*, 21 Cal. 4th at p. 977.) We do not, however, end our inquiry there. Rather, we find it both instructive and [***38] necessary to consider the meaning of the terms "acquisition," "management," and "disposition" in the context of the business income definition. (§ 25120, subd. (a).)

Upon doing so, we conclude that the phrase "acquisition, management, and disposition" "refers to the conditions of ownership of property by the taxpayer." (*Kroger, supra*, 673 N.E.2d at p. 714, 673 N.E.2d at p. 714.) Such a conclusion follows logically from the ordinary meanings of these words. At the time of the enactment of the California UDITPA, "acquisition"

signified the "act of acquiring" (Webster's 3d New Internat. Dict. (1961) p. 19), and "acquire" meant "to come into possession, control, or power of disposal of " (*id.* at p. 18). "Management" referred to the "act ... of managing," and "manage" meant "to control and direct: handle either well or ill: cope with: CONDUCT, ADMINISTER" and "to direct or carry on business or affairs: SUPERVISE, ADMINISTER." (*Id.* at p. 1372.) Finally, "disposition" denoted "*the act or the power* of disposing or disposing of " and, as relevant here, "dispose of " meant "to transfer into new hands or to the control of someone else ... RELINQUISH, BESTOW." (*Id.* at p. 654, italics [***39] added.) In light of these definitions, the phrase "acquisition, management, and disposition of the property" establishes that the taxpayer must: (1) obtain some interest in and [*529] control over the property; (2) control or direct the use of the property; and (3) transfer, or have the power to transfer, control of that property in some manner.

Under this construction, legal ownership or title to the property is not necessary. Such a limitation is too restrictive because property ownership "finds expression through multiple methods." (*Union Oil Co. v. State Bd. of Equal.* (1963) 60 Cal. 2d 441, 447, 34 Cal. Rptr. 872, 386 P.2d 496.) "Ownership is not a single concrete entity but a bundle of rights and privileges as well as of obligations." (*Ibid.*, fn. omitted.) Indeed, corporations often control and use property to generate business income without owning or holding legal title to that property. Consequently, we believe the phrase "acquisition, management, and disposition" encompasses the myriad of ways that corporations may control and use the rights and privileges commonly associated with property ownership.

The Commissioners Comments to the UDITPA confirm our belief. [***40] In the comment to section 1 of the UDITPA, the Commissioners state that "income from the disposition of property" is business income if the property is "*used* in a trade or business of the taxpayer." (Comrs. Com., UDITPA, com. foll. § 1, subd. (a), p. 2, reprinted at <http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/udiftp57.htm> [as of May 14, 2001], italics added.) In making this statement, the Commissioners clearly contemplated that the functional test would focus on the taxpayer's control and use of the property and not on legalistic formulations of property ownership.

Of course, mere control and use of the income-producing property is not enough to satisfy the functional test. Rather, the taxpayer's control and use of the property must still be "an integral part of the taxpayer's regular trade or business operations." (§ 25120, subd. (a).) The critical terms in this second key phrase of the functional test are "integral," "regular," and "operations." (*Ibid.*) As explained below, these [**339] terms establish that the taxpayer's control and use of the property must contribute materially to the taxpayer's production of business income so that the property becomes interwoven [***41] into and inseparable from the taxpayer's business.

We begin our interpretation of this phrase by defining the terms "regular" and "operations." "Regular" means "NORMAL" or "TYPICAL." (Webster's 3d New Internat. Dict., *supra*, at p. 1913.) In the business context, "operations" mean "the whole process of planning for and operating a business" or "a phase of a business or of business activity." (*Id.* at p. 1581.) As such, the [*530] phrase "regular trade or business operations" is unambiguous and refers to the normal or typical business activities of the taxpayer. (§ 25120, subd. (a).)

To reach this conclusion, we reject Hoechst's contention that the word "regular" limits the functional test to normal or customary corporate events. Although "regular" has the same meaning in the transactional and functional tests, it is not used in the same way in these tests. In the transactional test--which focuses on the income-producing transaction--"regular" modifies "course of the taxpayer's trade or business" and makes the nature of the transaction relevant. (*Associated Partnership I*, *supra*, 889 S.W.2d at p. 195.) In the functional test--which focuses on the income-producing property--"regular" [***42] modifies "trade or business operations" and follows the phrase "an integral part of." (§ 25120, subd. (a).) Consequently, "regular," as used in the functional test, does not refer to the nature of the transaction, and the extraordinary nature or infrequency of the income-producing transaction is irrelevant. (See *Citicorp of North America, Inc. v. Franchise Tax Bd.* (2000) 83 Cal. App. 4th 1403, 1430 (*Citicorp*); see also *Pierce Associates*, *supra*, 462 A.2d at p. 1131; *Texaco-Cities*, *supra*, 695 N.E.2d at p. 484; *Polaroid*, *supra*, 507 S.E.2d at p. 289; *Ross-Araco*, *supra*, 674 A.2d at p. 693.)

Thus, the phrase "regular trade or business operations" (§ 25120, subd. (a)) establishes that the taxpayer's control and use of the income-producing property must be part of the taxpayer's normal or typical business activities. The statutory term "integral" then provides the touchstone for determining whether the property has a close enough relationship to the taxpayer

to satisfy the functional test. (*Ibid.*) Not surprisingly, the parties disagree over the meaning of "integral." (*Ibid.*) Hoechst contends "integral" means [***43] "necessary or essential to." The Board counters that "integral" only means "contributing to." We, however, find neither interpretation to be accurate. Instead, we hold that "integral" requires an organic unity between the taxpayer's property and business activities whereby the property contributes materially to the taxpayer's production of business income. **n9**

> n9 In describing the functional test in terms of the production of *business income*, we mean the production of income that unquestionably fits within the statutory definition of business income.

As an initial matter, we note that the dictionary definition of "integral" arguably supports both parties' positions. As defined by Webster's Third International Dictionary, *supra*, at page 1173, "integral" means "of, *relating to*, or serving to form a whole: *essential to* completeness: organically joined [*531] or linked: CONSTITUENT, INHERENT." (Italics added.) The relevant case law also lends support to both interpretations. On the one hand, we have suggested [***44] that "integral" means " 'dependent upon or contributes to' " in the multistate taxation context. (*Superior Oil Co. v. Franchise Tax Bd.* (1963) 60 Cal. 2d 406, 413-414, 34 Cal. Rptr. 545, 386 P.2d 33, quoting *Edison California Stores, Inc. v. McColgan* (1947) 30 Cal. 2d 472, 481, 183 P.2d 16.) On the other hand, other jurisdictions have used the "essential to" language when construing the functional test. (See, e.g., *Texaco-Cities*, *supra*, 695 N.E.2d at p. 485; *Union Carbide Corp. v. Offerman* (N.C. 2000) 351 N.C. 310, 526 S.E.2d 167, 171 (*Union Carbide*).)

Nonetheless, we believe that both interpretations are problematic and do not capture the true meaning of "integral." (§ 25120, subd. (a).) Construing "integral" as "contributing to" makes the test too expansive [**340] and creates constitutional problems. Although property that is integral to a taxpayer's business undoubtedly contributes to that business, "integral" must imply something more than a mere contribution. Otherwise, the functional test would encompass all corporate transactions and run afoul of the constitutional limits on state taxation. (See *ASARCO, Inc. v. Idaho State Tax Com.* (1982) 458 U.S. 307, 326, 73 L. Ed. 2d 787, 102 S. Ct. 3103 [***45] (*ASARCO*) [property must do more than contribute to the taxpayer's business in order to be taxed by a state].) Construing "integral" as "necessary or essential to," however, is too restrictive. Under this interpretation, many sales of corporate property could not satisfy the functional test because a corporate taxpayer presumably will not sell property unless the property is no longer necessary or essential to its business. Such an outcome conflicts with the explanatory comments to the UDITPA which contemplate the apportionment of gains realized from any sale of property used in the taxpayer's trade or business. (Comrs. Com., UDITPA, com. foll. § 1, subd. (a), p. 2, reprinted at <http://www.law.upenn.edu/bll/ulc/fnact99/1920_69/uditftp57.htm> [as of May 14, 2001].)

Thus, the meaning of "integral" must fall somewhere in between these two interpretations. In forging this middle ground, we once again look to the SBE decisions underlying the functional test for guidance. (See *ante*, at p. 18; see also Keesling & Warren, *supra*, 15 UCLA L.Rev. at pp. 163-164; *Polaroid*, *supra*, 507 S.E.2d at p. 294.) These decisions reveal that the meaning of "integral" [***46] comes from our decision in *Holly Sugar Corp. v. Johnson* (1941) 18 Cal. 2d 218, 115 P.2d 8 (*Holly Sugar*). (See *Houghton Mifflin*, *supra*, 3 SBE at p. 346 [relying on *Holly Sugar*].) In *Holly Sugar*, we held that losses suffered by a taxpayer from the forced liquidation of stock were apportionable because "the stockholding was an integral [*532] part of [the taxpayer's] unitary sugar business." (*Holly Sugar*, at p. 225.) The stockholding was "integral" because it could not "reasonably be characterized as an extraneous investment separate and apart from the California business" of the taxpayer. (*Id.* at p. 224.) Rather, "the activities of the two companies" constituted "one indivisible, composite whole, each portion giving value to every other portion." (*Ibid.*) Because of "this organic unity of operation," we regarded the liquidation of the stockholding as an "integral" part of the unitary business of the taxpayer. (18 Cal. 2d at pp. 224-225.)

In the context of the business income definition, the word "integral" therefore refers to an "organic unity" between the income-producing property and the taxpayer's business activities. (*Holly Sugar*, *supra*, 18 Cal. 2d at p. 224.) [***47] The property must be so interwoven into the fabric of the taxpayer's business operations that it becomes "indivisible" or inseparable from the taxpayer's business activities with both "giving value" to each other. (*Ibid.*) Such a relationship exists when the taxpayer controls and uses the property to contribute materially to the taxpayer's production of

business income. (See *Borden*, *supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 205-616, p. 14,897-59; *New York Football Giants*, *supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH)

P 205-600, p. 14,897-33.) In this way, we capture the true meaning of "integral." (See Webster's 3d Internat. Dict., *supra*, at p. 1173 ["integral" means "serving to *form a whole*: essential to *completeness*: *organically joined or linked* " (italics added)].)

Forming these interpretations of the statutory language into a cohesive whole, we conclude that income is business income under the functional test if the taxpayer's acquisition, control and use of the property contribute materially to the taxpayer's production of business income. In making this contribution, the income-producing property becomes interwoven [***48] into and inseparable from the taxpayer's business operations. Such an interpretation of the functional test flows from the ordinary meaning of the statutory language and the California decisions that formed the basis for the UDITPA definition of "business income."

We further note that our interpretation is consistent with Court of Appeal decisions applying the functional test. For example, the Court of Appeal has found business income [**341] where the income-producing property contributed materially to the taxpayer's production of business income. In *Citicorp*, the court held that income from a taxpayer's sale of buildings constituted business income under the functional test because "the buildings were constructed or acquired to serve as important locations for [the taxpayer's [*533] business] operations." (*Citicorp*, *supra*, 83 Cal. App. 4th at pp. 1429-1430.) Thus, the court premised its finding of business income on the buildings' material contribution to the taxpayer's production of business income and concluded that the buildings were an indivisible part of the taxpayer's business operations. (See *ibid.*; see also *Times Mirror Co. v. Franchise Tax Bd.* (1980) 102 Cal. App. 3d 872, 877-878, 162 Cal. Rptr. 630 [***49] [income from the taxpayer's sale of a subsidiary's stock was business income because the subsidiary generated business income].)

In contrast, the Court of Appeal has found nonbusiness income where the taxpayer's control and use of the property did not contribute materially to the generation of business income. In *Robert Half*, the court found that losses incurred from the repurchase of a stock warrant constituted nonbusiness income. (*Robert Half*, *supra*, 66 Cal. App. 4th at p. 1028.) Although the court mistakenly focused on the extraordinary nature of the transaction (see 66 Cal. App. 4th at p. 1025), it reached the correct result. The taxpayer's control and use of the warrants did not contribute materially to the production of any business income and were separate and distinct from the taxpayer's business operations. Therefore, losses from the repurchase of the warrants did not satisfy the functional test.

Our interpretation of the functional test also accords with the SBE's interpretation over the past two decades. On the one hand, the SBE has consistently found business income under the functional test where the taxpayer's control and use of the property contributed materially [***50] to the production of business income and became an indivisible part of the taxpayer's business. For example, the SBE found that losses from the sale of goodwill constituted business income because the taxpayer's acquisition and maintenance of this goodwill "contributed materially to the production of business income." (*Borden*, *supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 205-616, p. 14,897-59.) The SBE also held that compensation received for the loss of exclusive territorial rights constituted business income because these rights were "an important aspect of the business" and "contributed materially to the production of business income." (*New York Football Giants*, *supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 205-600, p. 14,897-33.) Similarly, the SBE found that dividends from a joint venture were business income because these ventures "contributed materially to the production of operating income ... and clearly served to further the operation of " the taxpayer's business. (*Standard Oil*, *supra*, [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 400-383, at p. 22,571.) Finally, the SBE held that income from stock sales constituted [***51] business income because "the assets and activities represented by the stock were fully integrated and [*534] functioning parts of [the taxpayer's] existing unitary business." (*Occidental Petroleum*, *supra*, [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 400-394, p. 22,616.)

On the other hand, the SBE has consistently refused to find business income under the functional test where the taxpayer's control and use of the property did not contribute materially to the production of business income and were separate from the taxpayer's business. For example, the SBE found that rental income from a condominium constituted nonbusiness income because the rental business had no connection to the taxpayer's architectural business. (*Amwalt Group*, *supra*, [1981-1984 Transfer Binder] Cal.Tax Rptr. (CCH)

P 400-433, p. 22,696.) Similarly, the SBE held that

income from the sale of stock in a company constituted nonbusiness income where the taxpayer exercised no control over and received no special benefits from that company. (*Mark Controls*, *supra*, [1986-1990 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-452, p. 24,569.) Finally, the SBE held that property used to obtain tax benefits [***52] did not give rise to business income because the property did not contribute to the production of business income [**342] and was not connected to any business activity of the taxpayer. (*VSI Corp.*, *supra*, [1991-1992 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-937, pp. 26,241 to 26,242; *National Dollar Stores*, *supra*, [1984-1986 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 401-403, p. 24,432.)

Finally, our interpretation is largely consonant with the decisions of other jurisdictions that have adopted the functional test. These jurisdictions have focused on the taxpayer's use of the property and typically find business income where the taxpayer uses that property to produce business income. (See, e.g., *Pierce Associates*, *supra*, 462 A.2d at p. 1132 [insurance proceeds for flood damage to manufacturing facility used by the taxpayer to generate business income]; *Texaco-Cities*, *supra*, 695 N.E.2d at pp. 486-487 [income from sale of pipeline and related assets used by the taxpayer to produce business income]; *American Smelting*, *supra*, 567 P.2d at pp. 907-909 [royalties from patents developed and used by the taxpayer, income from leases of mines and rental [***53] of homesites to workers, interest income from short-term investments, income from sale of stock in companies used by the taxpayer for access to raw materials or as customers]; *Simpson Timber*, *supra*, 953 P.2d at pp. 369-370 [proceeds from condemnation of timbered property used by the taxpayer as a source of raw materials].) These jurisdictions, however, refuse to find business income where the taxpayer has no control over the property or does not use the property in the production of business income. (See, e.g., *Pledger*, *supra*, 831 S.W.2d at p. 125 [interest income from intercorporate note passively held and not controlled by the taxpayer]; [*535] *Ross-Araco*, *supra*, 674 A.2d at p. 697 [income from sale of land never improved or used by the taxpayer]; *Laurel Pipe Line Co. v. Commonwealth of Pennsylvania* (Pa. 1994) 537 Pa. 205, 642 A.2d 472, 475 [income from sale of pipeline not used by the taxpayer for over three years].)

Having established the contours of the functional test, we now apply it to Hoechst's reversion of surplus pension plan assets and conclude that the reversion meets this test. In reaching this conclusion, we find two SBE decisions instructive. [***54] In *Appeal of American Snuff Co.* (Apr. 20, 1960) [1959-1962 Transfer Binder] Cal.Tax Rptr. (CCH) paragraph 201-538, page 12,053 (*American Snuff*), the SBE held that interest income from loans made to the taxpayer's employees constituted business income under the functional test. Because the taxpayer made these loans "for the purpose of increasing the efficiency of the employees and they, accordingly, contributed to the operations of the unitary business," the SBE concluded that "the acquisition, management and disposition of " the loans "constituted integral parts of the" taxpayer's "regular business operations." (*Ibid.*) Seventeen years later, the SBE applied the same reasoning and found that a rebate of surplus funds in a retirement plan constituted business income. (*Kroehler*, *supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 205-647, p. 14,897-123.) Because the plan served "as an inducement to retain the current employees of the Furniture Division and to attract other qualified employees," and because employees were necessary to conduct the taxpayer's business operations, the SBE held that the "acquisition, management, and disposition of " the plan [***55] "constituted integral parts of [the taxpayer's] manufacturing and sales business." (*Ibid.*)

Taken together, these decisions establish that property maintained and used by a taxpayer to retain and attract employees is integral to the taxpayer's business operations. Although these decisions are not binding, we find them especially persuasive because of their longevity, consistency and reasoning. (See *Yamaha*, *supra*, 19 Cal. 4th at pp. 12-14.) Indeed, *American Snuff*--which predates the California UDITPA--is arguably controlling because the Legislature presumably enacted the UDITPA with the understanding that it did not alter existing California law. (See Keesling & Warren, *supra*, 15 UCLA L.Rev. at pp. 163-164 [the UDITPA distinction between business and nonbusiness income "is in line with ... existing California practice"].) Moreover, at least one other state court applying the functional test has applied similar reasoning to reach a similar conclusion. (See *American Smelting*, *supra*, 567 P.2d at p. [**343] 907 [holding that rental income from homesites rented to employees constituted business income because the homesites [***56] were an integral part of the taxpayer's business operations].)

[*536] In light of the reasoning of these decisions, the income from Hoechst's reversion of surplus pension plan assets constitutes business income under the functional test. Hoechst created the income-producing property--the pension plan and trust--in order to retain its current employees and to attract new employees. Hoechst had "broad authority to amend [the] plan"

(*Hughes Aircraft, supra*, 525 U.S. at p. 442), and retained an interest in any surplus pension plan assets. It funded the plan with its business income and used these contributions to reduce its tax liability. Hoechst exercised control over the plan and its assets through various committees composed of its officers and employees. For example, Hoechst controlled: (1) the appointment of trustees over the pension plan assets; (2) the appointment of investment fund managers; and (3) the administration of the plan and its assets. In doing so, Hoechst directed the plan's overall investment strategy. Indeed, Hoechst regularly changed trustees and fund managers for various reasons, including inadequate performance, and even "drastically altered" the plan's investment [***57] strategy in 1978. The surplus pension plan assets generated from this new investment strategy then allowed Hoechst to reduce or suspend its contributions to the plan otherwise required under ERISA. (See *Hughes Aircraft, supra*, 525 U.S. at p. 441, 119 S. Ct. 755.) Finally, Hoechst disposed of the pension plan assets by transferring these assets to two new plans and trusts, terminating one of these plans and trusts, and reverting the surplus assets of the terminated plan and trust to itself. Because the pension plan assets contributed materially to Hoechst's production of business income via their effect on Hoechst's labor force, the "acquisition, management and disposition of " these assets "constitute integral parts of " Hoechst's "business operations." (*American Snuff, supra*, [1959-1962 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 201-538, p. 12,053; *Kroehler, supra*, [1971-1978 Transfer Binder] Cal.Tax Rptr. (CCH) [P] 205-647, p. 14,897-123.)

In reaching this conclusion, we recognize that Hoechst did not own or hold legal title to the pension plan assets, and that ERISA imposed many restrictions on Hoechst's control and use of these assets. (See *Shaw v. Delta Air Lines, Inc.* (1983) 463 U.S. 85, 91, 77 L. Ed. 2d 490, 103 S. Ct. 2890.) [***58] Nonetheless, Hoechst's control and use of the pension plan assets still contributed materially to its production of business income by improving the efficiency and quality of its workforce which, in turn, generated Hoechst's business income. Thus, the pension plan assets were integral to Hoechst's business operations, because these assets were interwoven into and inseparable from Hoechst's employee retention and recruitment efforts--an essential part of any business operation.

We further note that apportioning income from the reversion to California is equitable in light of the tax benefits received by Hoechst in connection [*537] with its control and use of the pension plan assets. Not only did Hoechst receive an operational benefit from its pension plan contributions, it also received a tax deduction for these contributions throughout the lifetime of the plans. Absent their use in the pension plans, these contributions would have been taxable as business income by California. Thus, Hoechst essentially received the pension plans' contribution to its California business operations *tax free* prior to its reversion of surplus pension plan assets. In fact, absent apportionment of the income [***59] from the reversion, Hoechst would receive a windfall because New York--Hoechst's commercial domicile--taxed only a small percentage of the reverted income. Under these circumstances, subjecting income from the reversion to taxation in California is both fair and reasonable.

Finally, the absence of any reference to these pension plan assets in Hoechst's financial statements is irrelevant. These omissions are the product of accounting standards in effect prior to 1985 and do not necessarily reflect the actual relationship between the assets and Hoechst's business operations. In any event, national accounting standards adopted in 1985 now require "expanded disclosures [**344] intended to provide more complete and more current information" about pension plan assets in financial statements. (Fin. Acctg. Stds. Bd., Summary of Statement No. 87, Employers' Accounting for Pensions (Dec. 1985) p. 3, at <http://www.rutgers.edu/Accounting/raw/fasb/st/summary/stsum87.htm> [as of May 14, 2001].) The Financial Accounting Standards Board created these standards in an effort to make clearer the link between "pension plan finances" and "the corporations' operations." (*Improving FAS 87* (Oct. 18, 1999) [***60] Pensions & Investments, p. 12.) Thus, the failure of Hoechst to report the earnings of its pension plan on its books of account has no bearing here.

We are mindful that the North Carolina Supreme Court reached a contrary conclusion in *Union Carbide, supra*, 526 S.E.2d at page 171. We, however, find the reasoning of the North Carolina Supreme Court questionable in several respects. First, *Union Carbide* seemed to define "integral" as "essential to." (*Ibid.*) As a result, the court applied an overly restrictive interpretation of the functional test. Second, *Union Carbide* appeared to focus on the surplus rather than the income-producing property--the pension plan assets. (*Ibid.*) Thus, the court mistakenly concluded that the pension plan assets did not contribute to the taxpayer's production of business income. Finally, the North Carolina Supreme Court did not consider the California decisions that gave rise to the UDITPA definition of business income even though the court recognized the California roots of the UDITPA. (*Polaroid, supra*, 507

S.E.2d at p. 294.) Because of these deficiencies, we decline to follow *Union* [*538] *Carbide* despite the UDITPA's interest [***61] in promoting uniformity. In any event, our reasoning is consistent with the reasoning used by most other jurisdictions that apply the functional test (see *ante*, at p. 31), and conforms to the reasoning used by the Montana Supreme Court in an analogous situation (see *American Smelting*, *supra*, 567 P.2d at p. 907). Accordingly, we conclude that the reversion created business income under the functional test.

II

Even though Hoechst's reversion of surplus pension plan assets falls within the statutory definition of business income, subjecting the income from the reversion to taxation in California must still pass constitutional muster. Under the federal due process and commerce clauses, "a State may not tax value earned outside its borders." (*ASARCO*, *supra*, 458 U.S. at p. 315.) The taxpayer bears the " 'burden of showing by "clear and cogent evidence" that [the state tax] results in extraterritorial values being taxed.' " (*Exxon Corp. v. Wisconsin Dept. of Revenue* (1980) 447 U.S. 207, 221, 100 S. Ct. 2109, 65 L. Ed. 2d 66, quoting *Butler Brothers v. McColgan* (1942) 315 U.S. 501, 507, 86 L. Ed. 991, 62 S. Ct. 701, in turn quoting *Norfolk & Western R. Co. v. North Carolina ex rel. Maxwell* (1936) 297 U.S. 682, 688, 80 L. Ed. 977, 56 S. Ct. 625.) [***62] As explained below, Hoechst does not meet this burden. Therefore, apportionment of the income from the reversion to California is constitutional.

In limiting a state's taxing power, courts "are guided by the basic principle that the State's power to tax an individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities." (*Allied-Signal*, *supra*, 504 U.S. at p. 778, quoting *Wisconsin v. J.C. Penney Co.* (1940) 311 U.S. 435, 444, 85 L. Ed. 267, 61 S. Ct. 246.) Thus, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (*Miller Bros. Co. v. Maryland* (1954) 347 U.S. 340, 344-345, 98 L. Ed. 744, 74 S. Ct. 535.) Corporate income "earned in the course of activities unrelated to [corporate activities in the taxing] State" is not includible in any apportionment formula. (*Mobil Oil Corp. v. Comr. of Taxes of Vermont* (1980) 445 U.S. 425, 439, 63 L. Ed. 2d 510, 100 S. Ct. 1223.) The rationale behind this limitation is self-evident: "In a Union of 50 States, to permit each State to tax [***63] activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple [**345] taxation." (*Allied-Signal*, *supra*, 504 U.S. at pp. 777-778.)

[*539] In construing these constitutional limitations on a state's taxing power, the United States Supreme Court has focused "on the objective characteristics of the [income-producing] asset's use and its relation to the taxpayer and its activities within the taxing State." (*Allied-Signal*, *supra*, 504 U.S. at p. 785.) This relationship must involve a "flow of value ...." (*Container Corp.*, *supra*, 463 U.S. at p. 178, italics omitted.) As such, only income from assets that "serve an operational rather than an investment function" are apportionable to a state for tax purposes. (*Allied-Signal*, *supra*, 504 U.S. at p. 787.) The mere fact that a transaction has a "business purpose" is not enough. (See 504 U.S. at p. 788.) Although the United States Supreme Court has not clearly differentiated operational and investment functions, it has stated that an asset serves an operational function if it helps the taxpayer "make better use ... of [its] existing business-related [***64] resources." (*Container Corp.*, *supra*, 463 U.S. at p. 178.)

Here, the income-producing asset--the pension plan and trust--undoubtedly served an operational function for Hoechst. Hoechst funded the plan and trust with its apportionable business income. It managed the plan and trust by choosing the trustee and appointing a committee of its officers and employees to oversee the trust's administration, to choose its investment managers, and to guide its overall investment strategy. More importantly, Hoechst created and maintained the plan and trust in order to induce its current employees to stay and to attract new employees. As such, the pension plan and trust undoubtedly helped Hoechst "make better use" of an important and existing business-related resource--its employees. (*Container Corp.*, *supra*, 463 U.S. at p. 178.) Indeed, Hoechst can hardly claim that the pension plan and trust were separable from its employee recruitment and retention efforts--a crucial part of its business operations in California. Accordingly, subjecting an apportionable share of the reverted pension plan assets to taxation in California does not violate the federal due process or commerce clause. [***65]

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.

MOSK, J.

KENNARD, J.

BAXTER, J.

CHIN, J.

DISSENTING OPINION BY WERDEGAR, J.

DISSENTBY:
WERDEGAR

DISSENT:

[*540] **DISSENTING OPINION BY WERDEGAR, J.**

I respectfully dissent.

The Uniform Division of Income for Tax Purposes Act (Rev. & Tax. Code, § 25120 et seq.) (UDITPA) was intended to help the several states avoid laying conflicting claims on the income of multistate businesses, thereby facilitating compliance with the due process and commerce clauses of the United States Constitution. In today's decision, the court encourages conflicting claims by defining as allocable "business income" (Rev. & Tax. Code, § 25120, subd. (a)) precisely the same type of income that the highest court of a sister state in the only other decision directly on point has defined as nonallocable "nonbusiness income" (*id.*, subd. (d); *Union Carbide Corp. v. Offerman* (N.C. 2000) 351 N.C. 310, 526 S.E.2d 167). The court today, in other words, has ensured the UDITPA [***66] will not achieve its intended purpose. To what degree the act will fail, only time will tell.

I suspect the act will fail to a large degree, because the majority's definition of business income is potentially all-encompassing. What the majority calls the "transactional test" captures income from transactions and activity in the regular course of the taxpayer's business. The so-called "functional test" addresses income from property. "Income is business income under the functional test," the majority declares, "if the taxpayer's acquisition, control and use of the property contribute materially to the taxpayer's production of business income." (Maj. opn., *ante*, 2001 Cal. LEXIS 3088 at p. *46.) The taxpayer's creation and indirect management of the ERISA [**346] trust, the majority reasons, "contributed materially to its production of business income by improving the efficiency and quality of its workforce which, in turn, generated Hoechst's business income." (Maj. opn., *ante*, 2001 Cal. LEXIS 3088 at p. *57.)

The majority's broad definition of business income under the functional test has two problems, both of which strike at the heart of the UDITPA's purpose of fostering the uniform, constitutional allocation of a single taxpayer's [***67] income among the various states entitled to claim a portion thereof.

The first problem is that the majority's definition of business income under the functional test potentially reaches *all* income from business-owned property, thereby rendering illusory, or nearly illusory, the category of nonallocable "nonbusiness" income recognized in the UDITPA. (Rev. & Tax. Code, § 25120, subd. (d).) The majority permits the casual reader to assume that some corporate investments, even after today's far-reaching decision, may not be sufficiently integral to the corporation's business [*541] operations for their sale to generate allocable business income. (See maj. opn., *ante*, at pp. 31-32.) The assumption seems to make the decision less far-reaching and therefore more palatable. But the courts and administrative agencies that wrote the opinions the majority cites for reassurance on this point did not have the benefit of today's decision. After today's decision, income from property is allocable business income if there is "an organic unity between the taxpayer's property and business activities whereby the property contributes materially to the taxpayer's production [***68] of business income." (Maj. opn., *ante*, 2001 Cal. LEXIS 3088 at p. *43.) If this test captures income from an ERISA trust, which a corporation does not own and in which the corporation has only a contingent, reversionary interest, then the test must also capture income from other investments in property owned by the corporation and expected at some point to produce income available for business activities. Because a corporation must be able to draw upon its assets for business purposes as and when necessary, the wise management of cash and surplus assets to achieve an appropriate balance of liquidity, risk and return is just as essential to the production of business income as the wise management of human resources. We can, therefore, be sure the State Board of Equalization will soon ask itself whether income from the cash management accounts and other investments, wherever located, of corporations doing some business in California is not subject to taxation in California on the same basis as reversionary income from an ERISA trust. While the majority correctly observes that the former type of income has not been taxed by nondomiciliary states as allocable business income in the past (see maj.

opn., [***69] *ante*, at pp. 31-32), the majority's decision offers no principled basis for predicting that such income will not be taxed as business income in the future.

The second problem is that the majority's definition betrays a narrow, parochial focus on the decisions of our own State Board of Equalization. We cannot safely assume our sister states will share the majority's firm conviction that California law is best. While Californians who participated in drafting the UDITPA may well have been influenced in that exercise by their knowledge of California law (see maj. opn., *ante*, at p. 15), it does not follow that we may properly assume the UDITPA adopted prior California law wholesale, or that we may treat the pre-UDITPA decisions of a single state's administrative agency as equivalent to authoritative interpretations of a uniform, multistate law. The official comments to the UDITPA do not even mention California law.

That said, I nevertheless agree with the majority that it may be "equitable" (maj. opn., *ante*, at p. 35) for California to tax the reversion to the extent Hoechst Celanese Corporation has deducted its contributions to the pension [*542] plan on its prior California tax [***70] returns. But equity in this sense is not a concern of the UDITPA. It is, instead, the domain of the tax benefit rule, a judicially developed principle that cancels out an earlier deduction when careful examination shows [**347] that a later event is fundamentally inconsistent with the premise on which the deduction was initially based. (*Hillsboro National Bank v. Commissioner* (1983) 460 U.S. 370, 373, 383, 75 L. Ed. 2d 130, 103 S. Ct. 1134.)

WERDEGAR, J.

25 Cal. 4th 489, *; 22 P.3d 313, **;
2001 Cal. LEXIS 3087, ***; 106 Cal. Rptr. 2d 535

16 of 19 DOCUMENTS

BLUE RIDGE INSURANCE COMPANY, Plaintiff and Appellant, v. BRIGITTE JACOBSEN et al., Defendants and Appellants.

S083934

SUPREME COURT OF CALIFORNIA

25 Cal. 4th 489; 22 P.3d 313; 2001 Cal. LEXIS 3087; 106 Cal. Rptr. 2d 535; 2001 Cal. Daily Op. Service 3736; 2001 Daily Journal DAR 4583

May 10, 2001, Filed

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

SUBSEQUENT HISTORY:
Counsel Amended May 10, 2001.

PRIOR HISTORY:
Ninth Cir.Ct.App. No. 98-55052 U.S. Dist. Ct. No. CV-93-4268-IH.

DISPOSITION:
We answer the question certified by the Ninth Circuit Court of Appeals in the Affirmative.

COUNSEL:
Attorneys for Appellant:

McCormick, Barstow, Sheppard, Wayte & Carruth, James P. Wagoner, Wendy S. Lloyd and Paul J. O'Rourke, for Plaintiff and Appellant.

Horvitz & Levy, Peter Abrahams and David S. Ettinger for American Insurance Association, American International Group, Inc., National Association of Independent Insurers and Truck Insurance Exchange as Amici Curiae, on behalf of Plaintiff and Appellant.

Attorneys for Respondent:

Wasserman, Comden & Casselman and Glen A. Brown, Jr., for Defendants and Appellants.

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

OPINIONBY:
BROWN

OPINION:

[**314]

[*492] In response to the request of the Ninth Circuit Court of Appeals, we answer the following certified question: "Whether an insurer defending a personal injury suit under a reservation of rights may recover settlement payments made over the objection [***2] of the insured when it is later determined that the underlying claims are not covered under the policy." (*Blue Ridge Ins. Co. v. Jacobsen* (9th Cir. 1999) 197 F.3d 1008, 1009 (*Blue Ridge*); Cal. Rules of Court, rule 29.5.) Here, at the time it accepted defense of the insureds, the insurer reserved its right to dispute coverage for any settlement contribution made to the injured third party. However, when a reasonable settlement offer was subsequently tendered, the insureds refused to agree the insurer could settle if the insureds would be liable for reimbursing the insurer for any noncovered claims. They also refused to either assume their own defense, or agree the settlement offer was unreasonable, and hence could not be the basis for a later bad faith action based on the [*493] failure to settle. Under such circumstances, we conclude an insurer may be reimbursed for a reasonable settlement payment made over the objection of its insureds.

I. FACTUAL AND PROCEDURAL BACKGROUND

The following statement of undisputed facts is derived in part from the Ninth Circuit's opinion. (*Blue Ridge, supra*, 197 F.3d at pp. 1009-1011.) During the 1970's until late 1989, defendants [***3] and insureds Brigitte and John Jacobsen operated a dog kennel business in Sun Valley, California. They specialized in importing champion German Shepherd and Rottweiler dogs from Germany and reselling them in the United States. Robert and E'dee Bolognesi, plaintiffs in the underlying action, also operated a dog kennel business. The Bolognesis had purchased several dogs from Brigitte Jacobsen, some directly from her kennel, and some specifically imported from Germany by her at their request.

Although Brigitte Jacobsen closed her kennel business in 1989, in 1991 she assisted the Bolognesis in purchasing a German Schutzhund III male Rottweiler dog-Benno Vom Gelderland. Approximately five months later, Benno severely mauled E'dee Bolognesi. E'dee was 29, and the mother of a young child. The Bolognesis sued the Jacobsens, alleging theories of product liability, negligence, and fraud. The Jacobsens tendered the defense to their homeowner's insurer, Blue Ridge Insurance Company (Blue Ridge).

Blue Ridge disputed coverage on the grounds that the Bolognesis' claims fell within either the "business pursuits" or the "professional services" exclusion to the homeowner's policy. Blue Ridge agreed [***4] to defend the Jacobsens subject to a reservation of rights which provided: "Because it appears [**315] likely that your liability in this action, if any, will not be covered under the policy, Blue Ridge Insurance Company hereby reserves its rights to ... (b) Refuse to indemnify you with respect to any judgment or settlement; (c) Initiate a separate action to determine our duty to defend or indemnify you; (d) Obtain recovery from you of any costs or expenses, including fees for legal services ...; (e) Request your participation in any settlement of the above-titled action with the understanding that any contribution made by us is subject to the reservation of our right to dispute coverage, unless we expressly waive in writing all such reservations." Blue Ridge provided the Jacobsens with independent counsel for defense in the underlying action. (See Civ. Code, § 2860, subd. (a).)

Shortly thereafter, Blue Ridge brought a declaratory judgment action seeking adjudication of the coverage issue. In response to the Jacobsens' [*494] motion, the district court stayed the action pending resolution of the underlying state court proceeding. It was this federal declaratory relief [***5] action that ultimately led to the question certified to this court by the Ninth Circuit Court of Appeals.

On May 23, 1996, the Bolognesis made a policy limits settlement demand of $ 300,000 to the Jacobsens. The "plaintiff makes no secret of the purpose of this policy limits demand: it is to 'open up' or 'delimit' the policy should Blue Ridge Insurance fail to accept this offer and plaintiff later obtain an eight figure judgment. Although plaintiffs would actively pursue the assets of the Jacobsens after obtaining such a judgment, if ... the judgment was not satisfied, plaintiffs would also consider accepting from the Jacobsens an assignment of rights against their insurance carriers for any possible bad faith and extracontractual liability which might have arisen as a result of Blue Ridge Insurance Company's failure to settle this case within policy limits when presented with the opportunity." The letter further stated E'dee Bolognesi's medical bills to date totaled more than $ 200,000. She suffered 17 fractures to her left arm, and both arms were torn apart with severe tissue loss. She required a venous transplantation from her leg to her arm, together with muscle and skin grafting, [***6] leaving her with terrible scarring. She had undergone 17 separate surgeries. The attack "was all the more devastating because it struck E'dee Bolognesi-a beautiful young woman of 29-just as she was about to enter the prime of life." The offer was to expire on June 7, 1996. This date was subsequently extended to June 12, 1996.

A series of letters between Blue Ridge and counsel for the Jacobsens ensued. On June 4, 1996, Blue Ridge informed the Jacobsens that it had determined the settlement offer was reasonable. It proposed to accept the demand under a reservation of its right to seek recovery of the settlement amount from the Jacobsens. It also gave the Jacobsens the option to assume their own defense if they found the settlement offer unreasonable. If Blue Ridge did not hear from the Jacobsens by June 10, 1996, it would assume they had no objection and would "proceed to accept the settlement demand under a full and complete reservation of rights including the right to seek reimbursement from [the Jacobsens] for the amounts so paid."

On June 10, 1996, the Jacobsens responded. "The simple answer to your letter is no." The Jacobsens stated they contested liability and that [***7] there was substantial evidence E'dee Bolognesi had voluntarily assumed the risk of her injury. "Under the terms of your

client's policy, it has the ability to settle claims without the consent of the Jacobsens. Should your client care to exercise its rights under the policy to settle the claim, then it may do so, pay the settlement and close its books on this matter. However, the Jacobsens [*495] will not consent to settlement of this matter on the terms you suggest. [P] Moreover, *to the extent that your client views the settlement demand as 'reasonable,' then it has an obligation to accept that settlement demand or face the prospect of having 'blown' its policy limits.* To the extent that your client views the settlement demand as unreasonable, then there is further evidence that your client's offer to the Jacobsens has been made in bad faith. The fact that the Jacobsens would not consent to your settlement will not be a defense in an action for a wrongful refusal to settle." Counsel also [**316] noted the expiration date of the settlement offer had been extended to June 19, 1996.

On June 14, 1996, Blue Ridge responded, reiterating its proposal to accept the settlement under a reservation [***8] of rights, but first offering the Jacobsens the opportunity to assume their own defense. In response to the Jacobsens' " 'blown' " policy limits comment, Blue Ridge said the comment "appears to constitute a statement of your clients' position to the effect that since Blue Ridge has determined that the settlement demand is reasonable, your clients believe that it is Blue Ridge's obligation to accept that settlement proposal. While Blue Ridge does not necessarily share your view of the law in this regard, Blue Ridge does propose to do exactly what you contend Blue Ridge is obligated to do: namely, accept the settlement proposal; but before doing so, ... it is offering your clients an opportunity to reassume their own defense. If we are incorrect in our interpretation of your June 10, 1996 letter in this regard, please advise." As to the question of liability, Blue Ridge stated: "While [you] assert[ ] that your clients 'contest liability' and note[ ] the existence of evidence to support a claim that Mrs. Bolognesi voluntarily assumed the risk of her injury, you must candidly concede that there is likewise evidence to support a finding of liability on the part of the Jacobsens [***9] as well as evidence negating the defense of assumption of risk."

The Jacobsens responded later the same day. "Your client [Blue Ridge] has no right to settle a claim, absent an agreement with its insured, and seek reimbursement from its insured for the amount of the settlement. The Jacobsens are unwilling to give Blue Ridge that agreement. The Jacobsens have advised you of the reasons why they believe that the defense of the claim is necessary and justified. [P] ... [P] If Blue Ridge desires to settle the underlying lawsuit, it may do so subject to the terms and conditions of the policy. But in pursuing such a course of conduct, it is protecting its own interests. As such, it is not entitled to reimbursement for payments made in settlement."

On June 18, 1996, Blue Ridge responded, stating, "If ... your position, on behalf of the Jacobsens, is that the case is one of no liability and that you [*496] are not and will not contend that Blue Ridge has an obligation to pay the settlement demand, then please so state in unequivocal terms. Such a statement by you, on behalf of the Jacobsens, would be considered by Blue Ridge as relieving Blue Ridge of any obligations to settle the case [***10] for what Blue Ridge considers to be a reasonable settlement figure within its policy limits, and would amount to a waiver by your clients of any claim of breach of the covenant of good faith and fair dealing based upon the failure of Blue Ridge to accept the demand within the policy limits." "Blue Ridge has evaluated and considers the settlement demand reasonable and thus, intends to pay the same under reservation of rights absent an unequivocal statement from you on behalf of the Jacobsens that they wish to either assume their defense or that they consider the case one of no liability and will not contend that Blue Ridge has an obligation to pay the settlement demand."

On June 19, 1996, the Jacobsens responded, essentially asserting that Blue Ridge was depriving its insureds of the opportunity to contest the personal injury action and driving them into bankruptcy.

On June 24, 1996, Blue Ridge responded, disputing these allegations, and reiterating comments made in earlier correspondence. On June 27, 1996, the Jacobsens sent another letter, noting that the plaintiffs had agreed to extend the time to respond to the settlement offer to July 1, 1996. "Your client has the ability to [***11] accept this settlement offer. Indeed, it has admitted that the settlement offer is reasonable. The Jacobsens, on the other hand, do not have $ 300,000." "The Jacobsens will never be in a position to meaningfully respond to any judgment that Blue Ridge might get." "The Jacobsens simply cannot agree to any settlement outside the terms of the policy - they cannot afford it. If Blue Ridge does not accept this settlement offer, it does so at its own risk. If it does accept this settlement offer, it should be in a position to close its books and walk away from this matter."

Having failed to secure the Jacobsens' consent, Blue Ridge then sought to intervene in the underlying action for the purpose of obtaining [**317] the trial court's permission to participate in the settlement under a

reservation of rights. The motion to intervene was denied. Blue Ridge subsequently accepted the Bolognesis' settlement demand on behalf of the Jacobsens, but over their objection. The trial court in the underlying action found the settlement to be in good faith.

After settlement of the state court action, the stay was lifted in the federal action, and Blue Ridge amended its complaint to assert a claim for reimbursement [***12] of the $ 300,000 settlement payment. Blue Ridge did not seek reimbursement of defense fees and costs.

[*497] The district court entered summary judgment in favor of Blue Ridge on the coverage and reimbursement claims, and found the $ 300,000 settlement to be reasonable. The Ninth Circuit affirmed the district court's findings regarding coverage and the reasonableness of the settlement. Hence, these questions are not before us. The court was "uncertain, however, whether California law provides Blue Ridge with a right to seek reimbursement of the $ 300,000 settlement under these circumstances, particularly in light of the Jacobsens' express withholding of their consent to the settlement and their assertion of no liability in the underlying personal injury action." (*Blue Ridge*, *supra*, 197 F.3d at p. 1011.) "Specifically, it is unclear whether, under [California law], an agreement is a prerequisite to reimbursement." (*Id.* at p. 1013.)

II. DISCUSSION

A. *Background*

An insurance policy is a contract in which the insurer agrees to pay up to a specified sum should certain losses occur. In exchange, the insured pays the insurer premiums for this coverage against [***13] risk of loss. (*Buss v. Superior Court* (1997) 16 Cal. 4th 35, 45, 939 P.2d 766 (*Buss*); *Bank of the West v. Superior Court* (1992) 2 Cal. 4th 1254, 1264, 833 P.2d 545.)

An insurer has the right and broad duty to defend the insured against third party claims potentially within the policy's coverage. (See, e.g., *Montrose Chemical Corp. v. Admiral Ins. Co.* (1995) 10 Cal. 4th 645, 659, fn. 9, 913 P.2d 878.) The duty to indemnify is much narrower. (*Ibid.*; *Buss*, *supra*, 16 Cal. 4th at pp. 46-47, fn. 10.) The homeowner's policy here provided, "If a claim is made or a suit is brought against an insured for damages because of bodily injury or property damage caused by an occurrence *to which this coverage applies*, we will: [P]... pay up to our limit of liability for the damages for which the insured is legally liable." (Italics added.) As the language suggests, Blue Ridge was not obligated to indemnify the Jacobsens for noncovered claims. (*Montrose*, at p. 659, fn. 9.)

An insurer may agree to defend a suit subject to a reservation of rights. (*Truck Ins. Exchange v. Superior Court* (1996) 51 Cal. App. 4th 985, 994.) [***14] In this manner, an "insurer meets its obligation to furnish a defense without waiving its right to assert coverage defenses against the insured at a later time." (Croskey et al., Cal. Practice Guide: Insurance Litigation (The Rutter Group 2000) [P] 7:723, p. 7B-61.) As we stated 35 years ago, "if the insurer adequately reserves its right to assert the [*498] noncoverage defense later, it will not be bound by the judgment. If the injured party prevails, that party or the insured will assert his claim against the insurer. At this time the insurer can raise the noncoverage defense previously reserved." (*Gray v. Zurich Insurance Co.* (1966) 65 Cal. 2d 263, 279, 54 Cal. Rptr. 104, 419 P.2d 168, fn. omitted.)

An insurer can reserve its right to assert noncoverage unilaterally merely by giving notice to the insured. (Cf. *American Motorists Ins. Co. v. Allied-Sysco Food Services, Inc.* (1993) 19 Cal. App. 4th 1342, 1356, disapproved on other grounds in *Buss*, *supra*, 16 Cal. 4th at p. 50, fn. 12.) By accepting the insurer's defense under these circumstances, the insured is deemed to have accepted this condition. (*American Motorists* [**318] *Ins. Co.*, at p. 1356; *Val's Painting & Drywall, Inc. v. Allstate Ins. Co.* (1975) 53 Cal. App. 3d 576, 586, 126 Cal. Rptr. 267 [***15] (*Val's Painting*); see also *Walbrook Ins. Co. Ltd. v. Goshgarian & Goshgarian* (C.D.Cal. 1989) 726 F. Supp. 777, 783-784 [applying California law to conclude reservation of right to recover defense costs effective even when an insured objects to the reservation but accepts the defense]; *Buss*, at p. 61, fn. 27 [dicta regarding unilateral reservation of right to reimbursement for certain defense costs].)

The issue in this case concerns the insurer's ability to seek reimbursement for settlement of what are later determined to be noncovered claims when the insureds withhold consent to the settlement. Two of our cases, *Johansen v. Cal. State Auto. Assn. Inter-Ins. Bureau* (1975) 15 Cal. 3d 9, 123 Cal. Rptr. 288, 538 P.2d 744 (*Johansen*), and *Buss*, *supra*, 16 Cal. 4th 35, are pertinent. In addition, while we may not agree with all of the reasoning in Court of Appeal cases interpreting *Johansen*, they are useful in understanding why Blue Ridge offered the Jacobsens the alternatives it did.

In *Johansen*, *supra*, 15 Cal. 3d 9, we held an insurer that fails to accept a reasonable settlement offer within the policy [***16] limits because it does not

believe the policy provides coverage, assumes the risk it will be held liable for all resulting damages including a judgment that exceeds the policy limits. (*Id.* at pp. 12, 15.) We further concluded that in determining whether a settlement offer is reasonable, an insurer may not consider the issue of coverage. (*Id.* at p. 16.) Rather "the only permissible consideration in evaluating the reasonableness of the settlement offer ... [is] whether, in light of the victim's injuries and the probable liability of the insured, the ultimate judgment is likely to exceed the amount of the settlement offer." (*Ibid.*)

In so holding in *Johansen*, we rejected the insurer's argument that it was required to settle all cases regardless of whether the policy provided coverage: "An insurer in defendant's position retains the ability to enter an [*499] agreement with the insured reserving its right to assert a defense of noncoverage even if it accepts a settlement offer. If, having reserved such rights and having accepted a reasonable offer, the insurer subsequently establishes the noncoverage of its policy, it would be free to seek reimbursement [***17] of the settlement payment from its insured." (*Johansen*, *supra*, 15 Cal. 3d at p. 19.)

It is the single word "agreement" in this portion of *Johansen* that has given rise to the issue in this case. In *Johansen*, the insurer did not seek reimbursement of a settlement. Hence, we were not in that case directly addressing the steps an insurer must take in order to obtain reimbursement of a settlement for a noncovered claim. Nevertheless, as can be seen in Court of Appeal cases interpreting *Johansen*, our use of the term "agreement" has caused uncertainty as to the precise nature of the prerequisites for obtaining reimbursement of reasonable settlement payments.

For example, in *Val's Painting*, *supra*, 53 Cal. App. 3d 576, 580, Allstate Insurance Company (Allstate) agreed to defend Val's Painting and Drywall, under a reservation of rights. It subsequently settled the underlying actions and sought reimbursement from its insured. (53 Cal. App. 3d at p. 581.) The Court of Appeal agreed Allstate was, in general, entitled to recover settlement amounts paid for claims not covered by the policy. (53 Cal. App. 3d at pp. 587-588, 126 Cal. Rptr. 267.) However, the court further concluded that Allstate's reservation [***18] of rights letter was "insufficient, without more, to constitute the agreement contemplated by *Johansen*." (*Id.* at p. 588.) "Nowhere does the letter expressly state that if Allstate settled the case it would look to Val's for reimbursement for any reasonable amounts paid." (*Ibid.*) The statement that Allstate does not waive any rights or admit any obligations under the policy "cannot, without more, reasonably be interpreted to mean that Allstate was given carte blanche to settle the case with what will turn out to be the insured's own money. [P] [**319] Furthermore, there is no allegation in Allstate's pleading that Val's was informed of the settlement offer, that Val's expressly or impliedly agreed that the claimants should be paid a total of $ 3,200 as a reasonable settlement, that the settlement was reasonable, that Val's was given an opportunity to assume the defense if Val's did not think the settlement reasonable, or that Val's expressly or impliedly agreed that if such sum was paid the question of policy coverage should be left to future determination." (*Ibid.*) The court stated: "Absent an agreement by the insured--express or implied in fact--that the insurer may commit [***19] the insured's own fund toward any reasonable settlement, the insurer is not permitted to seek reimbursement for a particular settlement unless it has secured specific authority to make that settlement or has notified the insured of a reasonable offer by the claimant and given the insured an opportunity to assume the defense." (*Ibid.*) The court remanded to allow Allstate the opportunity to amend its cross-complaint. (*Id.* at pp. 588-589.)

[*500] In *Maryland Casualty Co. v. Imperial Contracting Co.* (1989) 212 Cal. App. 3d 712, 717, 260 Cal. Rptr. 797 (*Maryland*), Imperial Contracting Company (Imperial) refused to consent to Maryland Casualty Company's (Maryland) participation in a proposed settlement under a reservation of rights. The trial court in the third party action issued an order allowing Maryland to participate in the settlement without Imperial's consent and under a reservation of rights. (*Id.* at p. 718.) The order was made "expressly without prejudice to Imperial's rights to litigate all issues, including liability and the amount of damages, in any later action to recover amounts paid in the settlement." (*Ibid.*) The order further [***20] provided that Maryland did not waive its rights in the declaratory relief action and if it prevailed in that action it could seek to recover all sums expended in settlement from its insured. (*Ibid.*) The settlement was subsequently found by the same trial court to be reasonable and in good faith. (*Ibid.*)

The Court of Appeal held Maryland was entitled to seek reimbursement of the settlement from its insured. (*Maryland*, *supra*, 212 Cal. App. 3d at p. 714.) Maryland had obtained an order allowing it to participate in the settlement, and that settlement was subsequently found to be in good faith. (*Id.* at p. 721.) In addition, Maryland reserved its right to dispute coverage at the time it assumed the defense two years

prior to settlement. (*Id.* at pp. 721-722.) Moreover, Imperial was notified of the settlement offer, and its "failure to consent was tied solely to Maryland's failure to settle earlier for a more reasonable sum. In other words Imperial did not tell Maryland that it was not liable or that it wanted to take over the litigation. [P] ... In view of the insured's refusal to agree, Maryland properly sought and obtained trial court [***21] sanction to join in the settlement." (*Id.* at p. 722.) Under these circumstances, Maryland satisfied the concerns underlying *Val's Painting*, and was not required to offer Imperial an opportunity to assume the defense. (*Maryland*, at p. 722.)

In *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal. App. 4th 1372, 1392-1393 (*Golden Eagle*), the trial court granted the insurer, Golden Eagle Insurance Company, authority to attempt to settle, found the resulting settlement to be reasonable and in good faith, but further found the insurer was not entitled to seek reimbursement. The Court of Appeal agreed, concluding the insurer was estopped from denying coverage because it accepted defense of the insured's suit without a reservation of rights, failed to afford the insureds a reasonable opportunity to assume their own defense, and did not have the insured's authority for the settlement made in the underlying action. (*Id.* at pp. 1390-1391.) The Court of Appeal distinguished *Maryland* on the ground that in *Maryland*, "the insured knew from the outset it might be responsible for paying a judgment in the [*501] underlying action [***22] .... Thus, when it appeared the case might be in a position to be settled, there was in fairness no need for the insurer to offer the defense to the insured." (*Golden Eagle*, at p. 1393.) Here, however, it "was not until virtually the eve of trial that Golden [**320] Eagle first informed the [insureds] it was disputing coverage after all and it was not until trial was underway that Golden Eagle first informed the [insureds] of its intent to settle for an amount in excess of its alleged policy limits." (*Ibid.*)

In *Buss*, *supra*, 16 Cal. 4th 35, we held an insurer may seek reimbursement from the insured for defense costs that can be allocated solely to claims not even potentially covered. (*Id.* at pp. 39-40, 50.) We concluded reimbursement should be available because the insurer had not bargained to bear these costs and the insured had not paid the insurer premiums for the risk. (*Id.* at pp. 50-51.) "The insurer therefore has a right of reimbursement that is implied in law as quasi-contractual, whether or not it has one that is implied in fact in the policy as contractual. As stated, under the law of restitution such a right runs [***23] against the person who benefits from 'unjust enrichment' and in favor of the person who suffers loss thereby. The 'enrichment' of the insured by the insurer through the insurer's bearing of unbargained-for defense costs is inconsistent with the insurer's freedom under the policy and therefore must be deemed 'unjust.' " (*Id.* at p. 51, fn. omitted.)

In addition, we stated in *Buss*, "We note that the Court of Appeal assumed that, in order to obtain reimbursement for defense costs, the insurer must reserve its right thereto. To the extent that this right is implied in law as quasi-contractual, it *must* indeed be reserved. (Cf. 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 92, p. 123 [stating that, 'in an action in quasi-contract ...,a *demand* is ordinarily a necessary prerequisite' (original italics)].) Through reservation, the insurer gives the insured notice of how [the insurer] will, or at least may, proceed and thereby provides [the insured] an opportunity to take any steps that it may deem reasonable or necessary in response--including whether to accept defense at the insurer's hands and under the insurer's control [citation] or, instead, [***24] to defend itself as it chooses. To the extent that this right is implied in fact in the policy as contractual, it *should* be reserved. Through reservation, the insurer avoids waiver." (*Buss*, *supra*, 16 Cal. 4th at p. 61, fn. 27, 65 Cal. Rptr. 2d 366, 939 P.2d 766.) We further stated, in dicta, **n1** "We also note that the Court of Appeal was evidently of the view that the insurer can reserve its right of reimbursement for defense costs by itself, without the insured's agreement. Such a view is in accord with the 'modern [*502] trend.' (*Walbrook Ins. Co. Ltd. v. Goshgarian & Goshgarian*, *supra*, 726 F. Supp. at p. 783.) More important, it is sound. Because the right is the insurer's alone, it may be reserved by it unilaterally." (*Buss*, at p. 61, fn. 27.)

n1 In *Buss*, "not only did [the insurer] reserve all its rights, contractual and otherwise," but, "receiving consideration, Buss agreed thereto." (*Buss*, *supra*, 16 Cal. 4th at p. 61, fn. 27.) Therefore, our comment regarding the insurer's ability to unilaterally reserve its right to reimbursement of defense costs was dicta.

[***25]

B. Analysis

As noted, the issue here is whether Blue Ridge may seek reimbursement for the settlement paid on the Jacobsens'

behalf even in the absence of the Jacobsens' express agreement. We conclude it may. Here, the Jacobsens were on notice both by the policy language and by Blue Ridge's express reservation of rights when it assumed the defense that Blue Ridge might seek reimbursement from them for what were ultimately determined to be noncovered claims. Moreover, Blue Ridge notified the Jacobsens of its intention to accept what was ultimately determined to be a reasonable settlement offer, and offered the Jacobsens the opportunity to assume their own defense. Under such circumstances, Blue Ridge satisfied the prerequisites for seeking reimbursement for noncovered claims included in a reasonable settlement payment: (1) a timely and express reservation of rights; (2) an express notification to the insureds of the insurer's intent to accept a proposed settlement offer; and (3) an express offer to the insureds that they may assume their own defense when [**321] the insurer and insureds disagree whether to accept the proposed settlement.

Under *Johansen*, if an insurer fails to accept [***26] a reasonable settlement offer within the policy limits, and the judgment exceeds the policy limits, the insurer risks liability for the entire judgment and any other damages incurred by the insured. Moreover, the insurer may not consider the issue of coverage in determining whether the settlement is reasonable. (*Johansen*, *supra*, 15 Cal. 3d at pp. 12, 15, 16.)

In light of *Johansen*, were we to conclude insureds could, as in this case, refuse to assume their own defense, insisting an insurer settle a lawsuit or risk a bad faith action, but at the same time refuse to agree the insurer could seek reimbursement should the claim not be covered, the resulting Catch-22 would force insurers to indemnify noncovered claims. If an insurer could not unilaterally reserve its right to later assert noncoverage of any settled claim, it would have no practical avenue of recourse other than to settle and forgo reimbursement. An insured's mere objection to a reservation of right would create coverage contrary to the parties' agreement in the insurance policy and violate basic notions of fairness.

Moreover, applying *Buss*'s reasoning regarding reimbursement of defense costs to reimbursement [***27] of reasonable settlement costs, the insurer only has a [*503] duty to indemnify the insured for covered claims, and no duty to pay for noncovered claims because the insured did not pay premiums for such coverage. (See *Buss*, *supra*, 16 Cal. 4th at pp. 50-51.) Hence, if the insurer, as in this case, satisfies the prerequisites noted above, it should be deemed to have an implied-in-law right of reimbursement to avoid the insureds' unjust enrichment. "Even if the policy's language were unclear, the hypothetical insured could not have an objectively reasonable expectation that it was entitled to what would in fact be a windfall." (*Id.* at p. 51.)

Indeed, the right to reimbursement is implied by the terms of the insurance policy. Here, Blue Ridge agreed that as to "bodily injury or property damage caused by an occurrence to which this coverage applies," the insurer would indemnify the insured. By implication, Blue Ridge had no obligation to pay for noncovered claims. Because notice was given at the outset both by the reservation of rights and policy language that Blue Ridge might seek reimbursement if there were no coverage, the Jacobsens had full knowledge of [***28] the possible consequences of accepting the defense by the insurer. They could not later object on the ground Blue Ridge was not entitled to condition payment of the settlement on reservation of its right to seek reimbursement for any noncovered claim.

In addition, the Jacobsens conceded in their correspondence with Blue Ridge that Blue Ridge had the right under the policy to settle third party claims against the Jacobsens. n2 It seems anomalous to conclude that if Blue Ridge exercised this right over the insureds' objection to the insurer's reservation of right to seek reimbursement, it forfeited its right to later recoup payments it was not contractually obligated to make.

n2 The policy provided: "We may investigate and settle any claim or suit that we decide is appropriate."

Finally, as the amici curiae n3 note, in addition to avoiding the insured's unjust enrichment, a rule allowing unilateral reservation of the right to seek reimbursement of settlement payments for noncovered claims advances significant [***29] public policy considerations. In particular, it encourages insurers to defend and settle cases for which insurance coverage is uncertain. In so doing, it transfers from the injured party to the insurer the risk that the insured may not be financially able to pay the injured party's damages. Although the insurer may preserve its right to seek reimbursement from its insured, as a practical matter the insured may not have the assets necessary to compensate the insurer in full or even in part.

n3 Amici curiae American Insurance Association, American International Group, Inc., National Association of Independent Insurers, and Truck Insurance Exchange.

[**322] The Jacobsens assert that an insurer should not be permitted to terminate its defense obligation by settling the claim under a unilateral reservation of [*504] rights or by making a conditional tender of a settlement payment and then forcing the insured to litigate with the insurer or assume its own defense. They argue that through a unilateral action, the insurer turns an [***30] unconditional promise to defend its insured through a final settlement or judgment "into a promise that the insurer can terminate at the drop of a hat."

Here, however, Blue Ridge was *obligated* to accept a reasonable settlement offer as part of its duty of good faith and fair dealing or risk excess exposure. (*Johansen*, *supra*, 15 Cal. 3d at pp. 12, 16, fn. 5; *Crisci v. Security Ins. Co.* (1967) 66 Cal. 2d 425, 430, 58 Cal. Rptr. 13, 426 P.2d 173.) The Jacobsens' apparent objection to the settlement was not that the offer was unreasonable, but that Blue Ridge was reserving its right to seek reimbursement should the claims not be covered by the policy. Indeed, the Jacobsens took the position that since Blue Ridge had determined the settlement was reasonable, it had an obligation to accept the settlement or " 'blow[]' " its policy limits. Hence, they sought to receive either the benefit of an unconditional settlement of an uncovered claim, or, in the alternative, should Blue Ridge fail to settle, the opportunity to make a bad faith claim. By refusing to agree Blue Ridge could reserve its right to reimbursement, or that the settlement offer was unreasonable, [***31] or that they would assume their own defense, the Jacobsens essentially demanded that Blue Ridge settle the case without any recourse against the Jacobsens should the claim not be covered.

The Jacobsens note that Blue Ridge could add a reimbursement provision to its insurance policy or include a deductible. However, as we stated in *Buss* the right to reimbursement is implied in law and need not be expressly stated in the policy. (*Buss*, *supra*, 16 Cal. 4th at p. 51, fn. 13.) Moreover, as discussed above, such a reimbursement right is implicit in the policy terms which provide indemnification only for *covered* claims.

The Jacobsens also summarily argue that Blue Ridge is a volunteer, and hence not entitled to reimbursement. It is not apparent how an insurer that has been precluded from earlier resolving the question of coverage, and that is obligated to accept a reasonable settlement or risk excess exposure, acts as a volunteer in accepting that settlement merely because its insured objects to its reservation of the right to seek reimbursement. As the court stated in *State Farm & Casualty Co. v. Cooperative of American Physicians, Inc.* (1984) 163 Cal. App. 3d 199, 204, 209 Cal. Rptr. 251, [***32] "Absent a final judgment of noncoverage as to any of the policies, all insurers were also under a duty to settle once liability of the insureds became reasonably clear. [Citations.] And failure of the insurers to settle under those circumstances might well have exposed them to bad faith claims by the insureds. [Citations.] Thus, the ruling is not defensible on the basis State Farm was a volunteer."

[*505] The Jacobsens also argue without elaboration that at the time of settlement (and even now) Blue Ridge knew of no evidence which created any liability on the part of the Jacobsens to the state court plaintiffs, and generally contest the Ninth Circuit's conclusion that the settlement was reasonable. They assert the suggestion that the Jacobsens were unjustly enriched by an insurer that settled a no-liability claim for $ 300,000 "defies logic or reason." As noted, however, the issue of whether the settlement was reasonable, which includes a consideration of the Jacobsens' potential liability, is not before us. Moreover, if the Jacobsens believed they had no liability, they were free to assume their own defense.

Finally, the Jacobsens rely on certain out-of-state cases, none of which [***33] persuade us to reach a different result. In *Texas Assn. of Counties County Gov. Risk Management Pool v. Matagorda County*, 2000 Tex. LEXIS 113 (Tex., Dec. 21, 2000, No. 98-0968) 2000 WL 1867945, the Texas Supreme Court held that an insurer was not entitled to reimbursement under a theory of unjust enrichment under facts similar to those in this case. (*Id.* at pp. *1-2, 5.) In particular, the court concluded *Buss* was inapplicable in the settlement [**323] context. (*Id.* at p. *5.) As discussed above, we disagree. The Texas high court further noted that an insurer who cannot obtain the insured's consent to settle may "seek prompt resolution of the coverage dispute in a declaratory judgment action" prior to the time the insured's liability is decided in the underlying suit. (*Id.* at p. *6, S.W.2d at p. .) In California, "we have been solicitous of the fact that a declaratory relief action concerning coverage issues may need to be stayed to avoid prejudice to the insured in its defense of an underlying lawsuit. (*Montrose Chemical Corp. v. Superior Court*, 6 Cal. 4th 287, 301, 861 P.2d 1153, 24

Cal. Rptr. 2d 467 ['To eliminate the risk of inconsistent factual determinations that could prejudice the insured, a [***34] stay of the declaratory relief action pending resolution of the third party suit is appropriate when the coverage question turns on facts to be litigated in the underlying action.'].)" (*Foster-Gardner, Inc. v. National Union Fire Ins. Co.* (1998) 18 Cal. 4th 857, 880, 959 P.2d 265.) That was done here. Unlike the case in *Texas*, Blue Ridge did not have the opportunity to resolve the coverage issue before the settlement in the underlying action was offered. In *Mt. Airy Ins. Co. v. Doe Law Firm* (Ala. 1995) 668 So. 2d 534, the Alabama Supreme Court held an insurer making a settlement payment despite its insured's refusal to sign a nonwaiver of reimbursement agreement acts as a volunteer, a conclusion we reject above. (*Id.* at pp. 536-539) Moreover, it does not appear in *Mt. Airy* that the insurer offered the insured an opportunity to assume its own defense. (*Id.* at p. 536.) In *Medical Malpractice Jt. Und. v. Goldberg* (1997) 425 Mass. 46, 680 N.E.2d 1121, the insurer not only failed to offer the insured the opportunity to assume its own defense, the insurer did not even notify the insured of the settlement [***35] offer prior to accepting it. (680 N.E.2d at pp. 1126, 1129.)

[*506] DISPOSITION

We answer the question certified by the Ninth Circuit Court of Appeals in the affirmative.

BROWN, J.

WE CONCUR:

KENNARD, J.

BAXTER, J.

CHIN, J.

CONCURRING OPINION BY GEORGE, C.J.

CONCURRING OPINION BY MOSK, J.

CONCURBY:
GEORGE; MOSK

CONCUR:

CONCURRING OPINION BY GEORGE, C.J.

I concur in the result reached by the majority opinion and in much of its analysis, with the understanding that nothing contained therein alters the established standard -- not mentioned by the majority -- governing an insurer's evaluation of the reasonableness of a settlement offer in this context. "In determining whether to settle[,] the insurer must give the interests of the insured at least as much consideration as it gives to its own interests ...." (*Crisci v. Security Ins. Co.* (1967) 66 Cal. 2d 425, 429, 58 Cal. Rptr. 13, 426 P.2d 173; see also *Cates Construction, Inc. v. Talbot Partners* (1999) 21 Cal. 4th 28, 44, 980 P.2d 407 ["The assumption of [the duty to defend] obligates the insurer to give at least as much consideration to the welfare of its insured as it gives to its own [***36] interests so as not to deprive the insured of the benefits of the insurance policy."].) An insurer assesses whether a settlement offer is reasonable by determining whether accepting the offer is "the most reasonable manner of disposing of the claim ...." (*Crisci v. Security Ins. Co.*, *supra*, 66 Cal. 2d at p. 430.)

GEORGE, C.J.

WE CONCUR:

MOSK, J.

WERDEGAR, J.

CONCURRING OPINION BY MOSK, J.

I concur with the result and much of the reasoning of the majority opinion and in the Chief Justice's concurring opinion. I write separately to address an issue raised only implicitly by this case. As the majority state: "The Jacobsens took the position that since Blue Ridge had determined the settlement was reasonable, it had an obligation to accept the settlement or ' "blow[]" ' its policy limits. Hence, they sought to receive either the benefit of an unconditional settlement of an uncovered claim, or, in the alternative, should Blue Ridge fail to settle, the opportunity to make a bad faith claim." (Maj. opn., *ante*, 2001 Cal. LEXIS 3087 at p. *30.) In rejecting this position as fundamentally unfair, the majority suggest [**324] that the insured has basically [***37] two options when it disagrees with an insurer about whether to settle a case for which the insurer claims noncoverage: (1) to accept the settlement anyway, including the insurer's reservation of rights that may make the insured liable; or (2) to assume its own defense, however financially burdensome that may be.

A third option, that would neither place the insurer in a "Catch-22" position (maj. opn., *ante*, 2001 Cal. LEXIS 3087 at p. *26) nor place an undue burden on the insured [*507] is to allow the insured to refuse settlement and still retain the insurance defense, but,

consistent with that refusal, waive any right to sue the insurance company for bad faith failure to refuse a settlement. This third option would not allow a windfall for the insured, but it would permit the insured the discretion of refusing a settlement it considers unfair and for which it may ultimately be financially responsible. Indeed, the insurer offered this option in the present case. This option is in harmony with the principle that the insured should truly consent to a settlement in such a situation. (See *Val's Painting & Drywall, Inc. v. Allstate Ins. Co.* (1975) 53 Cal. App. 3d 576, 588, 126 Cal. Rptr. 267.) [***38] Without this option, the insured is forced to choose between accepting an unfair settlement for which it may be liable and having to pay its own legal expenses up front. Although as a practical matter the insured may rarely exercise this third option, and did not seek to do so in this case, it should nonetheless have it.

MOSK, J.

I CONCUR:

WERDEGAR, J.

17 of 19 DOCUMENTS

THE PEOPLE, Plaintiff and Respondent, v. JOEL ROBERT TOBIAS, Defendant and Appellant.

S085471

SUPREME COURT OF CALIFORNIA

25 Cal. 4th 327; 21 P.3d 758; 2001 Cal. LEXIS 2607; 106 Cal. Rptr. 2d 80; 2001 Cal. Daily Op. Service 3313; 2001 Daily Journal DAR 4073

April 26, 2001, Filed

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

SUBSEQUENT HISTORY:
Reposted April 26, 2001 to Correct an Inaccuracy in the Counsel Listing.

Rehearing Denied June 13, 2001, Reported at: 2001 Cal. LEXIS 3813.

PRIOR HISTORY:
Superior Court of California, Santa Clara County. Court of Appeal of California, Sixth Appellate District. HO18424. Super. Ct. No. 198740. James C. Emerson, Judge.

DISPOSITION:
The Court of Appeal in this case concluded that accomplice instructions were necessary in regard to V.'s testimony, but that the failure to give them was harmless error. Accordingly, it affirmed defendant's conviction. We do not need to reach the harmless error question in light of our conclusion that V. was not an accomplice in this case. We affirm the judgment of the Court of Appeal.

COUNSEL:
Attorneys for Appellant:

Dallas Sacher, under appointment by the Supreme Court; and Chris R. Redburn, under appointment by the Court of Appeal, for Defendant and Appellant.

Attorneys for Respondent:

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Rene A. Chacon and Jeremy Friedlander, Deputy Attorneys General, for Plaintiff and Respondent.

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

OPINIONBY:
BROWN [***2]

OPINION:

[*329] [**759]

In this case, we decide whether a child under 18 who has a consensual sexual relationship with a parent is, like the parent, guilty of incest (Pen. Code, § 285) n1 and therefore an accomplice to the parent's crime, whose testimony against the parent is subject to the cautionary rules governing accomplice testimony. The Court of Appeal held that such a child is an accomplice and therefore the trial court should have given accomplice instructions to the jury. Nevertheless, the court found the error harmless and affirmed defendant's conviction.

n1 All further statutory references are to the Penal Code.

We conclude that a child under 18 who has an incestuous sexual relationship with an adult is a *victim*, not a perpetrator, of the incest, and this conclusion remains valid even when the child consents to the sex. In short, the law puts the burden on the adult, not the minor child, to refrain from a sexual relationship. Therefore, a child in this situation can never be an accomplice, [***3] and accomplice instructions are not appropriate. We affirm the judgment of the Court of Appeal, but reject that court's reasoning.

Factual and Procedural Background

In July 1995, when defendant was 38, his 16-year-old daughter, V., moved into his home with her infant child. Prior to 1995, V. lived with her mother, and defendant had no contact with her. V. testified that she moved into her father's apartment because she wanted to get to know him. They began having sexual intercourse within a few weeks. V. stated she did not want to have sex with defendant, but she admitted he did not force her. She continued to live with him after the sexual relationship began, because in other respects "he was a good father, and [she] wanted to be with him." They had sexual intercourse approximately every other day, sometimes every day, for about six months, at which time V. moved out. On June 13, 1996, V. gave birth to a child. Genetic testing later confirmed defendant was the father.

At trial, defendant admitted having sexual intercourse with V., but the evidence conflicted as to the extent of their sexual relationship and who initiated it. Defendant testified he had sexual intercourse with [***4] V. only once. He also claimed V. had not moved into his home until August or September [*330] 1995 and moved out in November, about the time he began having a sexual relationship with a girlfriend. The prosecution impeached defendant's testimony by playing a tape of a conversation he had with police, in which he admitted having sex with V. "probably once a week" over the course of "five [to] six months." In that conversation, he insisted that she sought the sex from him, even threatening to disclose their sexual relationship if he did not comply, and he claimed to have been drunk every time. The prosecution also played a tape of a telephone call between defendant and V., in which defendant spoke without knowing police were recording the conversation. V. asked defendant about the sex, and defendant said, "it was you," "that's what you wanted to do," and "every time you got an urge you came to me." When V. told defendant she was mad at him, he answered, "It sure didn't seem to stop you when you were doing it."

The information charged defendant with 31 counts of incest, one count for each week between July 1, 1995 and February 2, 1996. At the close of the evidence, the prosecution dismissed [***5] the first 3 of the 31 counts. The jury then found defendant guilty of 10 counts, relating to the period between September 9 and November 17. It acquitted him of one count, relating to the period between January 27 and February 2, and it deadlocked with respect to the other 17 counts. The information also charged defendant with one misdemeanor count of failure to register as a sex offender (§ 290, subd. (g)), to which defendant pleaded guilty. In a bifurcated proceeding, the court found true an allegation that defendant had been convicted in 1988 of a lewd or lascivious act on a child (§ 288, subd. (a)), and it found this conviction qualified as a serious felony for [**760] purposes of the three strikes law. (§ 667, subds. (b)-(i).) Defendant stipulated to an 18-year sentence in exchange for dismissal of the 17 counts that remained unresolved.

Defendant appealed, arguing among other things that the trial court should have instructed the jury to consider whether V. was an accomplice. The Court of Appeal agreed. The court felt it was a jury question whether or not V. participated voluntarily in the acts of sexual intercourse with her father, and if she did, she was, like him, guilty of [***6] incest and therefore an accomplice. Because the evidence was sufficient to support an accomplice finding, the Court of Appeal concluded the trial court had a sua sponte obligation to give standard accomplice instructions to the effect that the jury should view the testimony of an accomplice with caution and that accomplice testimony must be corroborated. Nevertheless, the Court of Appeal found the error harmless in light of significant evidence in the record corroborating V.'s testimony. One justice concurred in the court's judgment, but did not join the court's opinion.

We granted review to consider whether a minor who consents to an incestuous sexual relationship with an adult is guilty of incest (§ 285), and [*331] therefore an accomplice to the adult's crime, necessitating accomplice instructions.

Discussion

Section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to

connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [P] An accomplice is hereby defined as one [***7] who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." We have held that "when there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices," including the need for corroboration. (*People v. Frye* (1998) 18 Cal. 4th 894, 965-966, 959 P.2d 183; see also *People v. Zapien* (1993) 4 Cal. 4th 929, 981-982, 846 P.2d 704; *People v. Gordon* (1973) 10 Cal. 3d 460, 466, fn. 3, 110 Cal. Rptr. 906, 516 P.2d 298; *People v. Bevins* (1960) 54 Cal. 2d 71, 76, 4 Cal. Rptr. 504, 351 P.2d 776.)

The cautionary instructions governing accomplice testimony have their roots in English common law. (See *People v. Eckert* (1860) 16 Cal. 110, 112; *People v. Guiuan* (1998) 18 Cal. 4th 558, 565, 957 P.2d 928 (*Guiuan*).) The reason most often cited in support of these instructions is that an accomplice is inherently untrustworthy because he or she "usually testifies in the hope of favor or the expectation [***8] of immunity." (*People v. Coffey* (1911) 161 Cal. 433, 438, 119 P. 901.) In addition, an accomplice may try to shift blame to the defendant in an effort to minimize his or her own culpability. (*Guiuan*, at pp. 574-575 (conc. opn. of Kennard, J.).) In this case, if V. is "liable to prosecution for the identical offense charged against ... defendant" (§ 1111)--that is, if she may be prosecuted for incest--then she is an accomplice, and the trial court should have instructed the jury on the law governing accomplice testimony.

Incest was not a crime under the common law. (*People v. Baker* (1968) 69 Cal. 2d 44, 49, 69 Cal. Rptr. 595, 442 P.2d 675.) Instead, jurisdictions have historically prohibited incest by statute, beginning as early as 1650 with a statute making incest a capital offense in England. California's incest statute, now codified in section 285, was enacted at the first legislative session in 1850 and has remained substantively unchanged. (Stats. 1850, ch. 99, § 123, p. 244.) It provides: "Persons being within the degrees of consanguinity within which marriages are declared by law to be incestuous and void, ... [*332] who commit fornication [***9] or adultery with each other, are punishable by imprisonment in the state prison." (§ 285.) Family Code section 2200 defines marriages as incestuous and void if they are "between parents and children, ancestors and descendants of every degree, and between brothers and sisters of the half as well as the whole blood, and [**761] between uncles and nieces or aunts and nephews."

Despite the unambiguous wording of these statutes, which make no express exception for minors, the Court of Appeal has held, in a consistent line of cases dating back nearly 75 years, that a minor who has incestuous sexual intercourse with an adult is not guilty of incest, even if the minor is older than 14 and participates voluntarily in the incestuous act. (*People v. Hurd* (1970) 5 Cal. App. 3d 865, 875, fn. 5, 85 Cal. Rptr. 718 (*Hurd*) [dictum]; *People v. Batres* (1969) 269 Cal. App. 2d 900, 903-904, 75 Cal. Rptr. 397; *People v. Bowles* (1960) 178 Cal. App. 2d 317, 322, 2 Cal. Rptr. 896; *People v. Jahn* (1950) 99 Cal. App. 2d 236, 237-238, 221 P.2d 333; *People v. Herman* (1950) 97 Cal. App. 2d 272, 276-277, 217 P.2d 440; *People v. Pettis* (1950) 95 Cal. App. 2d 790, 793-794, 213 P.2d 731; [***10] *People v. Hamilton* (1948) 88 Cal. App. 2d 398, 401, 198 P.2d 907; *People v. Lachuk* (1935) 5 Cal. App. 2d 729, 731, 43 P.2d 579; *People v. Kemp* (1934) 139 Cal. App. 48, 52, 34 P.2d 502; *People v. Hobday* (1933) 131 Cal. App. 626, 626-627, 21 P.2d 1008; *People v. Stoll* (1927) 84 Cal. App. 99, 101-102, 257 P. 583 (*Stoll*).) Other jurisdictions have also followed this rule. (Annot., Prosecutrix in Incest Case as Accomplice or Victim (1960) 74 A.L.R.2d 705, 717-719; cf. *Duby v. State* (Tex.Ct.App. 1987) 735 S.W.2d 555, 557; *Bolin v. State* (Tex.Crim.App. 1974) 505 S.W.2d 912.)

The California cases all apply essentially the same reasoning, flowing from dictum in our opinion in *People v. Stratton* (1904) 141 Cal. 604, 75 P. 166 (*Stratton*). In that case, we considered whether the same conduct could constitute both rape and incest. The defendant asserted the crime of incest required the consent of both parties. If one party did not consent, he argued, the crime was rape, but not incest, regardless of family relationship. (*Id.* at pp. 607-608.) [***11] We noted several out-of-state decisions that had adopted that holding, but we rejected it, concluding that the consent of one's sexual partner was not an element of the crime of incest. (*Id.* at pp. 608-609.) At the close of our opinion, we added the following dictum: "If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is *particeps criminis*, and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction. [Citation.] But if ... she is the victim of force, or fraud, or undue influence, *or is too young to be able to give legal assent*, so that she does not willfully and willingly join in the incestuous act, she

cannot be regarded as an accomplice. [Citation.]" (*Id.* at p. 609, second italics added & fn. omitted.)

[*333] At the time we decided *Stratton*, sexual intercourse with a minor (§ 261.5) was not a crime separate from the crime of rape. Instead, rape was defined to include sexual intercourse "where the female is under the age of sixteen years." (Stats. 1897, ch. 139, § 1, p. 201.) In 1913, the Legislature raised this age to 18. [***12] (Stats. 1913, ch. 122, § 1, p. 212.) Though the phrase "age of consent" did not appear in the statute, the case law construing the rape statute reasoned that a woman under the specified age was unable to consent to sexual intercourse as a matter of law, regardless of her actual consent. (See, e.g., *People v. Verdegreen* (1895) 106 Cal. 211, 39 P. 607.) In *Stratton*, we reasoned implicitly that a woman cannot be held criminally liable for incest if she is unable, because of her young age, to legally consent to sexual intercourse. (*Stratton*, *supra*, 141 Cal. at p. 609.)

Stoll, *supra*, 84 Cal. App. 99, 257 P. 583, was the first California case directly raising the question whether a minor can be an accomplice to incest. Quoting our dictum in *Stratton*, the Court of Appeal concluded that if a woman is too young as a matter of law to consent to sexual intercourse, then, "regardless of her actual assent [to the incest], she cannot be said ... to have willfully and willingly joined in the intercourse," and therefore she is not an accomplice, and accomplice instructions are not appropriate. (*Stoll*, at p. 102.) As noted, the Court of Appeal reaffirmed *Stoll* [***13] in a long line of cases ending in 1970 with *Hurd*, *supra*, 5 Cal. App. 3d at page 875, footnote 5.

In 1970, the Legislature created the crime of unlawful sexual intercourse with a minor (§ 261.5) and amended the rape statute [**762] (§ 261) so that it no longer included sex with a minor in the definition of rape. (Stats. 1970, ch. 1301, § § 1, 2, pp. 2405-2406.) As a result, the circumstances surrounding sexual intercourse with a minor became highly relevant, because this conduct might in some cases be a distinct and less serious crime than rape, particularly where the minor engages in the sexual act knowingly and voluntarily. (Compare § 261.5, subds. (b), (c), (d) [punishment for unlawful sexual intercourse with a minor] with § 264, subd. (a) [punishment for rape].) In making this change, the Legislature implicitly acknowledged that, in some cases at least, a minor may be capable of giving legal consent to sexual relations. n2 If that were not so, then every violation of section 261.5 would also constitute rape under section 261, subdivision (a)(1). (Cf. *Michael M. v. Superior Court* (1979) 25 Cal. 3d 608, 614, 159 Cal. Rptr. 340, 601 P.2d 572.) Of course, a [***14] minor might still be found incapable of giving [*334] legal consent to sexual intercourse in a particular case, but by abrogating the rule that a girl under 18 is in all cases incapable of giving such legal consent, the Legislature undermined the reasoning of *Stoll*, as well as the Court of Appeal cases that relied on *Stoll*.

> n2 In his concurring opinion, Chief Justice George disagrees with this conclusion. Nevertheless, he concedes that a minor can be held responsible for committing sex crimes, including presumably incest. (See conc. opn. of George, C.J., *post*, at p. 7.) The concurrence thus begs the question we need to decide: How (if at all) is incest different from other sex crimes such that a minor is not an accomplice when involved in incest with an adult?

The Court of Appeal in this case seized on this point as a basis for rejecting the holding of *Stoll* and its progeny. The court reasoned that, because minors are fully capable, at least in the abstract, of giving legal consent to sexual intercourse, [***15] and because they can be held responsible for numerous sex-related crimes (see, e.g., *In re Tony C.* (1978) 21 Cal. 3d 888, 582 P.2d 957, 148 Cal. Rptr. 366 [13-year-old committed rape]; *In re Jerry M.* (1997) 59 Cal. App. 4th 289 [11-year-old committed a lewd or lascivious act on a child]; *In re Paul C.* (1990) 221 Cal. App. 3d 43, 270 Cal. Rptr. 369 [13-year-old committed a lewd or lascivious act on a child and oral copulation with a minor]; *In re Billie Y.* (1990) 220 Cal. App. 3d 127, 269 Cal. Rptr. 212 [13-year-old committed a lewd or lascivious act on a child]), they can also be held responsible for committing incest with an adult. We agree with the Court of Appeal that the reasoning of *Stoll* has been undermined, but we do not reject *Stoll*'s holding.

The conclusion that a minor cannot be held criminally liable for having incestuous sexual intercourse with an adult need not, as stated in *Stoll*, turn on the minor's categorical inability "to give legal assent" to sexual intercourse. (*Stoll*, *supra*, 84 Cal. App. at p. 102.) Rather, it may rest on the comprehensive legislative scheme establishing that the minor is a *victim* of, [***16] not an accomplice to, the incest. "It has long been settled that where a penal statute expressly outlaws conduct against minors, a minor *who is a victim* of the proscribed conduct is not an accomplice and the

jury need not be instructed that the minor's testimony requires corroboration." (*People v. Mena* (1988) 206 Cal. App. 3d 420, 425, 254 Cal. Rptr. 10 (*Mena*), italics added; see also *People v. Montalvo* (1971) 4 Cal. 3d 328, 331, 93 Cal. Rptr. 581, 482 P.2d 205 [drug-related offense]; *People v. Poindexter* (1958) 51 Cal. 2d 142, 149-150, 330 P.2d 763 [same]; *People v. De Paula* (1954) 43 Cal. 2d 643, 647, 276 P.2d 600 [same].) The rationale underlying this rule is that prosecution of the minor for cooperating with the defendant would be inconsistent with the purpose of the law, which is to protect the minor. Because the minor, even if a willing participant in the defendant's conduct, is a victim and cannot be prosecuted as an accomplice, accomplice instructions are not appropriate. (*Mena*, at p. 425.) An exception to this rule might exist where two minors engage in consensual sexual intercourse, and thus [***17] both are victims of the other's crime (*In re T.A.J.* (1998) 62 Cal. App. 4th 1350, 1364-1365), but this exception clearly does not apply here.

[*335] We recognize that, in some cases, the minor may actually initiate and encourage the incestuous sexual relationship. Several psychological [**763] and emotional conditions might explain this behavior, including the possibility that the minor has been neglected by his or her family and enjoys the closeness and increased attention associated with the sexual conduct. But regardless of who initiates the sexual relationship, the minor remains the victim, and therefore immune from criminal liability under *Mena*, *supra*, 206 Cal. App. 3d 420, unless it can be said that the minor actually raped the adult and thus the adult had no criminal culpability whatsoever.

Of course, the incest statute does not "expressly outlaw[] conduct against minors" (*Mena*, *supra*, 206 Cal. App. 3d at p. 425), and therefore a minor is not an *express* victim under the statute. Nevertheless, a minor who has incestuous sexual intercourse with an adult is clearly a victim. Incest is qualitatively different from other sex crimes in that the act itself is [***18] unlawful, whether or not it is consensual or a minor is involved. Therefore, nothing in the wording of section 285 expressly establishes one of the participants as the victim. Nevertheless, the crime very often involves a minor, and the protection of minors is without a doubt one of the important purposes of the law. When we consider that an adult who violates section 285 with a minor also violates section 261.5, which is a statute clearly intended to protect minors, it is inconceivable that the minor in such a case would be treated as an accomplice to the incest and not a victim. To conclude otherwise would mean that the minor is the victim vis--vis the section 261.5 violation, and therefore his or her testimony need not be corroborated, but an accomplice vis--vis the section 285 violation, and accomplice instructions are necessary. Such a distinction would be baseless.

Moreover, the conclusion that a minor who has incestuous sexual intercourse with an adult is a victim, not a perpetrator, of the incest is consistent with the entire legislative scheme of laws governing sexual abuse. For example, the Legislature has enacted a special statute of limitations applicable to civil actions [***19] for damages resulting from "childhood sexual abuse." (Code Civ. Proc., § 340.1, subd. (a).) " 'Childhood sexual abuse' " is defined as "any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by ... [among other code sections] Section 285 of the Penal Code"--that is, the incest statute. (Code Civ. Proc., § 340.1, subd. (c).) Significantly, "civil actions lie in favor of crime *victims*." (*Angie M. v. Superior Court* (1995) 37 Cal. App. 4th 1217, 1224, italics added.) If the Legislature believed that a minor could be criminally liable for having incestuous sexual intercourse with an adult, it would not have defined the same act as "childhood sexual abuse" that could give rise to a civil action in favor of the minor against the adult. (Code Civ. Proc., § 340.1, subd. (c).)

[*336] Furthermore, section 11166 requires persons in certain occupations to report suspected child abuse, including incest involving a child (§ § 11165.1, 11165.6). The term " 'child' " is defined as any person under 18 (§ 11165), [***20] and section 11164, subdivision (b) describes the child as a "victim." Similarly, section 1203.1g requires defendants who are convicted of "sexual assault on a minor" to pay, in certain circumstances, restitution to the "victim" of the assault, and

" 'sexual assault' " in this context includes incest. Finally, section 1202.05, subdivision (a) prohibits visitation between a child "victim" of incest and the perpetrator. (See also § 5054.2.)

The term "victim" also appears in connection with violations of section 285 in the following code provisions: Penal Code sections 136.7, 273.7, 290, 294, 674, 868.8 (see Stats. 1985, ch. 1174, § 1, p. 3964), 1000.32, 1346, and 1347.5; Code of Civil Procedure sections 128, subdivision (d), and 1219; and Government Code section 13960, subdivision (b)(1). These references do not draw a specific distinction based

on age, but they establish that, at least in some circumstances, a party to incest may be a victim. Considering all these [***21] legislative enactments as part of a comprehensive whole, we think the Legislature has made clear its intent that minors who have incestuous sexual intercourse with adults are victims, not accomplices, and therefore immune from criminal liability.

[**764] The Court of Appeal cited *People v. McRae* (1947) 31 Cal. 2d 184, 185-186, 187 P.2d 741 (*McRae*) and *People v. Robbins* (1915) 171 Cal. 466, 472, 154 P. 317 (*Robbins*) in support of its conclusion that a minor might be an accomplice to incest with an adult. In these cases, we held that a minor who voluntarily engages in oral copulation (*McRae*) or sodomy (*Robbins*) with an adult is an accomplice. We agree these cases are inconsistent with our holding, but we find them unpersuasive.

At one time, sodomy and oral copulation were, like incest, unlawful by the nature of the acts involved, not because of the age of the participants or other surrounding circumstances. In other words, sodomy and oral copulation were crimes even when the participants were adults acting knowingly and voluntarily. In that circumstance, of course, neither participant was more a victim than the other, both could be prosecuted, [***22] and both were accomplices. (See, e.g., *People v. Wayne* (1953) 41 Cal. 2d 814, 826, 264 P.2d 547, overruled on other grounds in *People v. Snyder* (1958) 50 Cal. 2d 190, 197, 324 P.2d 1 ["a witness who has participated in [incest] voluntarily and with knowledge of the wrongfulness of his act is an accomplice"]; *Stratton, supra*, 141 Cal. 604; *People v. Roberts* (1947) 82 Cal. App. 2d 654, 656, 187 P.2d 27; *People v. Adinolfi* (1930) 106 Cal. App. 261, 262, 289 P. 176; *People v. Bowley* (1963) 59 Cal. 2d 855, 857, 31 Cal. Rptr. 471, 382 P.2d 591 [*337] [oral copulation]; *People v. Ellis* (1955) 137 Cal. App. 2d 408, 414, 290 P.2d 266 [sodomy].) But, consistent with the analysis in the present case, when sodomy or oral copulation involved conduct between a minor and an adult, the minor should have been considered a victim, not an accomplice, and accomplice instructions should not have been appropriate. Nevertheless, in *McRae*, with respect to oral copulation, and *Robbins*, with respect to sodomy, we reached the opposite conclusion. (See also *People v. McCollum* (1932) 214 Cal. 601, 602, 7 P.2d 301 [***23] [oral copulation]; *People v. Thurmond* (1959) 170 Cal. App. 2d 121, 123, 338 P.2d 472 [oral copulation]; *People v. Cox* (1951) 102 Cal. App. 2d 285, 286-287, 227 P.2d 290 [oral copulation]; *People v. Reynolds* (1938) 26 Cal. App. 2d 219, 221, 79 P.2d 150 [oral copulation]; *People v. Singh* (1932) 121 Cal. App. 107, 109, 110-111, 8 P.2d 898 [sodomy].)

The holdings in these cases were highly questionable in light of the contemporaneous holding that a girl under 18 could not give legal consent to sexual intercourse and therefore could not be an accomplice to incest. Under these cases, a 17-year-old girl who voluntarily had sexual intercourse and engaged in oral copulation with her father could have been prosecuted for the oral copulation but not the sexual intercourse. The more reasonable rule is the one proposed here: the girl cannot be prosecuted for either crime, because the law considers her to be the victim and puts the burden on the adult to avoid the sexual relationship.

Moreover, the holding in these cases is now moot, because in 1975 the Legislature amended sections 286 and 288a to make sodomy and oral [***24] copulation legal unless done with a minor or in various circumstances indicating a lack of full consent. (Stats. 1975, ch. 71, § § 7, 10, pp. 133-134.) This change in the law effectively abrogated our decisions in *McRae*, *McCollum*, and *Robbins*. Obviously, the Legislature wanted, among other things, to make clear that minors are *victims*, not accomplices, if they engage in sodomy or oral copulation with adults. Similarly, minors are victims, not accomplices, when they engage in incestuous sexual intercourse with adults. The Legislature, however, did not need to amend section 285 when it amended sections 286 and 288a, because of the nearly century-old judicial interpretation to that effect.

Finally, our conclusion that the Legislature did not intend minors to be criminally liable for incestuous relations with adults is consistent with public policies we believe the Legislature intended to advance. The heavy social stigma associated with incest and the love, respect, and (in some cases) fear minors have of adult relatives already work to discourage minors from reporting incest. If minors were also to face criminal liability, their adult [*338] sexual partners might warn them of [***25] this fact as a way of coercing their silence, and minors would then be even less likely to approach law enforcement authorities. As a result, adults could engage in this highly reprehensible [**765] and abusive behavior with relative impunity. We do not believe the Legislature, in enacting the law against incest, intended to create a dynamic that would work to insulate adult offenders from being apprehended. Moreover, if we held that a minor who engages in incestuous sexual intercourse with an adult is an accomplice, we would create the motive to lie that is

the basis for the accomplice instructions. The minor, fearing prosecution, might exaggerate the misdeeds of the adult--perhaps even falsely accusing the adult of rape--in hopes of securing leniency and minimizing his or her own culpability. (See *Guiuan*, *supra*, 18 Cal. 4th at pp. 571-572, 574-575 (conc. opn. of Kennard, J.).) Because the adult is clearly the more culpable party, it follows that the Legislature intended to insulate the minor from liability as a way of encouraging reliable testimony from the minor, and facilitating the adult's prosecution.

The Court of Appeal acknowledged some discomfort with its holding [***26] that a minor might be an accomplice to incest with an adult: "Our holding should not be misunderstood to mean that prosecutors should initiate criminal prosecutions of minors for participating in acts of incest with adults. Such prosecutions would offend our basic values, and we are confident that prosecutors will properly exercise their discretion in furtherance of justice." We conclude that, if such prosecutions would offend our basic values and are inappropriate, then the Legislature probably did not intend to permit them.

Conclusion

The Court of Appeal in this case concluded that accomplice instructions were necessary in regard to V.'s testimony, but that the failure to give them was harmless error. Accordingly, it affirmed defendant's conviction. We do not need to reach the harmless error question in light of our conclusion that V. was not an accomplice in this case.

We affirm the judgment of the Court of Appeal.

BROWN, J.

WE CONCUR:

MOSK, J.

KENNARD, J.

CHIN, J.

CONCURRING OPINION BY GEORGE, C.J.

CONCURRING OPINION BY WERDEGAR, J.

CONCURBY:
GEORGE; WERDEGAR

CONCUR:

CONCURRING OPINION BY GEORGE, C.J.

I concur fully in the majority's holding that a child less [***27] than 18 years of age who engages in consensual incestuous sexual relations [*339] with an adult is not an accomplice to the crime of incest (Pen. Code, § 285). **n1 Unlike the majority, however, I believe this conclusion continues to be supported by the rationale of prior decisions relying upon the circumstance that a minor is incapable of giving *legal* consent to sexual intercourse with an adult. The 1970 amendment of section 261 (defining the crime of rape) and enactment of section 261.5 (defining the crime of unlawful sexual intercourse with a minor) did not abrogate the principle that a minor lacks the capacity to give legal consent to sexual intercourse.**

n1 Further undesignated statutory references are to the Penal Code.

Before 1970, rape was defined to include "an act of sexual intercourse accomplished with a female not the wife of the perpetrator, ... [P] (1) where the female is under the age of 18 years; ..." (Stats. 1913, ch. 122, § 1, p. 212.) Thus, a minor who voluntarily [***28] **engaged in sexual intercourse with an adult was deemed unable to give legal consent to such an act, and actual consent was no defense to rape or related crimes. In *People v. Verdegreen* (1895) 106 Cal. 211, 39 P. 607, for example, we held that actual consent was not a defense to the crime of assault with intent to commit rape. Our opinion explained: "It is the declared policy of our law, as expressed in [section 261], that any female under the age there fixed shall be incapable of consenting to the act of sexual intercourse; and that one committing the act with a girl within that age shall be guilty of rape, notwithstanding he obtain her actual consent. ... To hold that one of this class, although incapable of consenting to sexual commerce, could nevertheless give her assent to an assault upon her person, made for the express purpose of accomplishing the sexual act, would be to largely emasculate the statute, and defeat in great part its beneficent object. ... The incapacity extends to the act and all its incidents. [P] It is true that an** [**766] **assault implies force by the assailant and resistance by the one assaulted; and that one is not, in legal contemplation,** [***29] **injured by a consensual act. But these principles have no application to a case where under the law there can be no consent. Here the law implies incapacity to give consent, and this implication is conclusive." (*Id.***

at pp. 214-215.)

In *People v. Stratton* (1904) 141 Cal. 604, 75 P. 166 (*Stratton*), we extended this reasoning to the crime of incest. In rejecting the defendant's assertion that incest requires the consent of both individuals engaging in the act, we stated in dictum: "If the prosecutrix, being of the legal age of consent, consents to the incestuous intercourse, unquestionably she is *particeps criminis*, and her testimony, like that of any other accomplice, uncorroborated, is insufficient to uphold a conviction. [Citation.] But if, upon the other hand, she is the victim of force, or fraud, or undue influence, or is too young to be able to give legal assent, so that she does not willfully and [*340] willingly join in the incestuous act, she cannot be regarded as an accomplice. [Citation.]" (*Id.* at p. 609.)

In *People v. Stoll* (1927) 84 Cal. App. 99, 257 P. 583 (*Stoll*), the Court of Appeal relied [***30] upon the foregoing passage from *Stratton* in holding that a minor cannot be considered an accomplice to the crime of incest with an adult, because the minor is incapable of giving legal consent to sexual intercourse. Rejecting the defendant's argument that any minor old enough to commit a crime also could be an accomplice to incest, the court stated the defendant had overlooked the circumstance that, regardless of the minor's actual assent, she could not be said as a matter of law to have consented to the intercourse. (*Id.* at pp. 101-102.) As noted in the majority opinion (*ante*, at p. 6), this analysis and holding subsequently have been followed in a consistent line of Court of Appeal decisions.

The majority determines that the reasoning of *Stoll* and its progeny has been undermined by subsequent legislative developments, which, according to the majority, indicate the Legislature implicitly has acknowledged that a minor is capable of giving legal consent to sexual relations. I disagree with the majority opinion's assessment of the effect of this legislation. The Legislature has indicated that a minor *actually* can consent to (i.e., voluntarily participate [***31] in) sexual intercourse, but it has not altered the established principle that a minor *legally* cannot consent to such an act.

In 1970, the Legislature enacted section 261.5, which defines the crime of unlawful sexual intercourse with an individual under the age of 18 years. (Stats. 1970, ch. 1301, § 2, p. 2406.) At the same time it enacted section 261.5, the Legislature amended section 261 to eliminate from the definition of rape an act of sexual intercourse with an individual less than 18 years of age. (Stats. 1970, ch. 1301, § 1, p. 2405.) Under the amended statutory scheme, all sexual intercourse with a minor is unlawful pursuant to section 261.5, but such intercourse does not constitute rape pursuant to section 261 unless it is accomplished under the circumstances specified therein. Pursuant to the 1970 version of section 261, as in the prior version of the statute, sexual intercourse with a female constituted rape if, among other things, she was "incapable, through lunacy or other unsoundness of mind, ... of giving legal consent," or her resistance was overcome by force or violence. (Stats. 1970, ch. 1301, § 1, p. 2405.)

Therefore, in a prosecution charging the rape [***32] of a minor pursuant to the 1970 version of section 261, on the ground that the minor's resistance was overcome by force or violence, the issue whether the minor voluntarily participated in -- or *actually* consented to -- the sexual intercourse sometimes [*341] became relevant. This circumstance, however, does not establish that the Legislature intended that a minor would be capable of giving *legal* consent to sexual relations. On the contrary, by enacting section 261.5, the Legislature simply recodified, in a separate statute, the preexisting principle in section 261, former subdivision (1), that as a legal matter a minor cannot consent to sexual intercourse with an adult so as to relieve the adult of criminal responsibility for engaging in such an act. (See *Michael* [**767] *M. v. Superior Court* (1981) 450 U.S. 464, 494-495 & fn. 9, 67 L. Ed. 2d 437, 101 S. Ct. 1200 (dis. opn. of Brennan, J.) [tracing legislative history of California's statutory rape law as set forth in section 261, former subdivision (1), and section 261.5].) In turn, the amendment to section 261 made the rape of a minor a more serious crime by requiring it to be accomplished under one or more of the additional [***33] circumstances specified in the statute, such as by force or violence that overcame the victim's resistance.

Contrary to the conclusion of the majority, a determination that a minor is unable to give legal consent does not require that every violation of section 261.5 also constitute rape pursuant to section 261, subdivision (a)(1). The 1970 version of this subdivision specified that a rape occurred where the victim was "incapable, *through lunacy or other unsoundness of mind*, ... of giving legal consent." (Stats. 1970, ch. 1301, § 1, p. 2405, italics added.) This provision was retained from the prior version of

the statute, which also had defined rape as sexual intercourse with an individual under the age of 18 years. Thus, the Legislature did not consider a minor to be of "unsound mind" and unable to give legal consent on that ground; otherwise, there would have been no reason to include the separate subdivision regarding sexual intercourse with a minor. Furthermore, the current version of section 261, subdivision (a)(1), specifies that rape occurs "where a person is incapable, *because of a mental disorder or developmental or physical disability*, of giving legal consent [***34] ...." (Italics added.) The status of being a minor cannot reasonably be considered a mental disorder or a developmental or physical disability. Accordingly, if a minor is unable to give legal consent *because of his or her age*, sexual intercourse with a minor who voluntarily participates in the act does not necessarily constitute rape pursuant to section 261, subdivision (a)(1).

In support of its analysis, the majority opinion relies in part upon *Michael M. v. Superior Court* (1979) 25 Cal. 3d 608, 614, 159 Cal. Rptr. 340, 601 P.2d 572 (*Michael M.*), which contains dicta indicating that the Legislature, when it adopted section 261.5, "necessarily acknowledged the obvious truism that minor females are fully capable of freely and voluntarily consenting to sexual relations. If this was not so, the charge brought in these cases would uniformly be one of forcible rape. (§ 261.)" This statement, however, responded to the defendant's contention that section 261.5 "creates adverse [*342] inferences concerning the capacity of minor females to make intelligent and *volitional* decisions." (*Michael M.*, *supra*, 25 Cal. 3d at p. 614, italics added.) As explained previously, [***35] a minor *voluntarily* can engage in sexual relations, but he or she cannot *legally consent* to such acts. The foregoing statements in *Michael M.* were concerned with actual consent, not legal consent, and they do not support the majority's reasoning.

The majority opinion's analysis also conflicts with section 261.6, which states in relevant part: "In prosecutions under Section 261 ...,in which consent is at issue, 'consent' shall be defined to mean positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved." The Court of Appeal correctly has determined that the concept of actual consent defined in section 261.6, as relevant in a prosecution for rape, is distinct from the concept of legal consent.

In *People v. Young* (1987) 190 Cal. App. 3d 248, 235 Cal. Rptr. 361, the defendant was convicted of the forcible rape of a child under the age of 14 years. At the time of the offense, section 261 defined rape as an act of sexual intercourse accomplished with a person not the spouse of the perpetrator "where it is accomplished *against* [***36] *a person's will* by means of force or fear of immediate and unlawful bodily injury on the person or another." (Stats. 1980, ch. 587, § 1, p. 1595, italics added.) n2 The decision of the Court of Appeal stated: "Where ... the [**768] alleged victim is a child below the age of legal consent, whether the child has the capacity to 'consent' to an act of sexual intercourse within the meaning of section 261.6 will usually be a question of fact. When it is charged that an act is against the will of a person, ' "consent is at issue." ' [Citation.]" (*People v. Young*, *supra*, 190 Cal. App. 3d at p. 257.) The court further stated that "in any sexual intercourse case involving a child-victim under the age of 14, ... a defendant is subject to conviction of violations of sections 261.5 (unlawful sexual intercourse with female under age 18) and 288, subdivision (a) (lewd or lascivious acts with child under age 14) *even where the child consents to the sexual intercourse*." (*Id.* at p. 257, fn. 2, italics added.) The Court of Appeal thus properly recognized that a defendant might violate section 261.5 without also violating section 261, and that, although a minor [***37] cannot give legal consent to sexual intercourse, he or she n3 voluntarily and willingly can participate in the act, and thus actually consent within the meaning of section 261.6.

n2 The current version of section 261 defines rape as such an act "accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another." (§ 261, subd. (a)(2).)

n3 Section 261.5 has been amended to be gender-neutral.

Furthermore, the circumstance that a minor can be held criminally responsible for illegal sexual conduct does not undermine the legal principle that [*343] minors cannot give legal consent to sexual intercourse, as the majority opinion suggests. The decision in *Stoll* rejected a similar contention when it concluded the minor victim could not legally consent

to sexual intercourse, even though the minor was more than 14 years of age and thus, pursuant to Penal Code section 26, was deemed capable of committing a crime. [***38] **(*Stoll*, *supra*, 84 Cal. App. at p. 102.) Similarly, although a minor lacks the legal capacity to enter into certain types of contracts (Fam. Code, § 6701), minors nevertheless are civilly liable for their torts (*id.*, § 6600). The Court of Appeal has explained: " 'Infancy, being in law a shield and not a sword, cannot be pleaded to avoid liability for frauds, trespasses, or torts. ...' " (*Ellis v. D'Angelo* (1953) 116 Cal. App. 2d 310, 313, 253 P.2d 675.) By analogy, a minor's potential responsibility for criminal sexual conduct does not compel the conclusion that a minor can give legal consent to sexual intercourse.**

For these reasons, the majority opinion errs in concluding the Legislature has abrogated the rule that a minor cannot give legal consent to sexual intercourse. The rationale underlying *Stoll* and its progeny remains valid and has not been undermined by the 1970 amendment to section 261. Therefore, although I join the majority's decision to adhere to *Stoll*'s holding that a minor cannot be an accomplice to the crime of incest with an adult, I also would adopt the reasoning of *Stoll* as our own. I disagree with [***39] **the notion that, under the governing statutes, the Legislature has rendered a minor, in *any* case, capable of giving *legal* consent to sexual intercourse.**

GEORGE, C.J.

I CONCUR:

BAXTER, J.

CONCURRING OPINION BY WERDEGAR, J.

I concur in the majority's conclusion that accomplice instructions should not have been given. As the majority writes, "despite the unambiguous wording of [Penal Code section 285], which makes no express exception for minors, the Court of Appeal has held, in a consistent line of cases dating back nearly 75 years, that a minor who has incestuous sexual intercourse with an adult is not guilty of incest, even if the minor is older than 14 and participates voluntarily in the incestuous act." (Maj. opn., 2001 Cal. LEXIS 2607, *9.) Under these circumstances, the principle of stare decisis has more than sufficient force to justify the court's conclusion. The principle has special importance in substantive criminal law, because changes in that law can raise ex post facto and due process concerns. "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration [***40] of justice in the courts." (Cardozo, The Nature of the Judicial Process (1921) p. 34.)

While I join in the majority's conclusion, I cannot endorse its analysis. The opinion reflects a strained effort to ground the court's conclusion in [*344] legislative intent. The words of [**769] the statute, however, are the best evidence of legislative intent, and the words of the statute prohibiting incest (Pen. Code, § 285) do not purport to exclude minors from the prohibition. Perhaps the Legislature contemplated the prosecution of minors for incest with other minors, as the majority itself suggests (maj. opn., *ante*, at p. 9), or perhaps the Legislature simply intended to state the prohibition against incest broadly, leaving subtler judgments of culpability to juries and prosecutorial discretion. I write to advocate neither of these interpretations. But given the absolute terms in which Penal Code section 285 speaks, I find entirely unhelpful both the majority's dogged focus on the term "victim," which appears nowhere in section 285, and the majority's effort to find evidence of legislative intent in statutes other than section 285. Neither approach reflects [***41] sound legal analysis. Under these circumstances, I am content simply to follow the long-standing rule, knowing the Legislature may do as it wishes but has not seen fit to change the rule.

WERDEGAR, J.

25 Cal. 4th 230, *; 19 P.3d 1171, **;
2001 Cal. LEXIS 1812, ***; 105 Cal. Rptr. 2d 431

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In re HUGO RANGEL RESENDIZ, on Habeas Corpus.

S078879

SUPREME COURT OF CALIFORNIA

**25 Cal. 4th 230; 19 P.3d 1171; 2001 Cal. LEXIS 1812; 105 Cal. Rptr. 2d 431;
2001 Cal. Daily Op. Service 2643; 2001 Daily Journal DAR 3279**

April 2, 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 June 13, 2001, Reported at: 2001 Cal. LEXIS 3812.

PRIOR HISTORY:
Court of Appeal of California. Fourth Appellate District, Division 3. G023901. Orange County Super. Ct. No. SA97CF1436. Steven L. Perk, Judge.

DISPOSITION:
The judgment of the Court of Appeal is reversed.

COUNSEL:
Attorneys for Appellant: Cynthia M. Sorman and Michelle C. Rogers, under appointments by the Supreme Court; and Richard L. Waldron for Petitioner Hugo Rangel Resendiz.

Law Offices of Norton Toomby and Norton Tooby for California Attorneys for Criminal Justice, California Rural Legal Assistance Foundation, Central American Resource Center, Coalition for Humane Immigrant Rights and Immigrant Legal Resource Center as Amici Curiae on behalf of Petitioner Hugo Rangel Resendiz.

John Philipsborn for California Attorneys for Criminal Justice as Amicus Curiae on behalf of Petitioner Hugo Rangel Resendiz.

Attorneys for Respondent: Daniel E. Lungren and Bill Lockyer, Attorneys General, George Williamson and David P. Druliner, Chief Assistant Attorneys General, Gary W. Schons, Assistant Attorney General, Esteban Hernandez, Janelle M. Boustany, Raquel M. Gonzales and Garrett [***2] Beaumont, Deputy Attorneys General, for Respondent State of California.

Thomas J. Orloff, District Attorney (Alameda), William M. Baldwin, Assistant District Attorney, and Jeff H. Rubin, Deputy District Attorney, for Appellate Committee of the California District Attorney's Association as Amicus Curiae on behalf of Respondent State of California.

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

OPINIONBY:
WERDEGAR

OPINION:

[*235] [**1174]

The question presented is whether petitioner, in deciding to plead guilty to certain offenses for which he now faces deportation, received ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution or article I, section 15 of the California Constitution. The Court of Appeal answered in the affirmative. The Attorney General urges that we adopt a categorical rule barring ineffective assistance

claims based on advice concerning the immigration consequences of a guilty plea. As explained below, we conclude that affirmative misadvice regarding immigration consequences may, depending on the circumstances [***3] of the particular case, constitute ineffective assistance of counsel. Nevertheless, as we agree with the Attorney General that petitioner in this case failed to carry his burden of demonstrating prejudice, we reverse the judgment of the Court of Appeal.

Background

The relevant facts are largely undisputed. Petitioner Hugo Rangel Resendiz is a lawful permanent resident of the United States. He has lived and worked in this country for almost 25 years, most of his adult life. Petitioner has two children who are United States citizens.

In June of 1997, assisted by trial counsel Leonard Basinger, petitioner pled guilty in Orange County Superior Court to possession for sale of cocaine and marijuana (Health & Saf. Code, § § 11351, 11359) and possession of a usable amount of methamphetamine (*id.*, § 11377, subd. (a)). On Basinger's advice, petitioner also initialed and signed a printed plea form stating, inter alia, "I understand that if I am not a citizen of the United States the conviction for the offense charged may have the consequence of deportation, exclusion from admission to the United States, or denial of [***4] naturalization pursuant to the laws of the United States." The signed form contains a paragraph, also initialed by petitioner, stating that the signer has "read, understood, and personally initialed each item above and discussed them with my attorney ...." At the plea hearing, petitioner was one of six defendants read their rights as a group, thusly: "If you are not a naturalized citizen of the United States, your conviction could result in your deportation or denial of naturalization at some later point in time."

[*236] Imposition of sentence was suspended, and petitioner was placed on felony probation for three years on conditions including that he serve 180 days in jail. After petitioner served his jail sentence, he was taken into custody by the United States Immigration and Naturalization Service (INS) and charged with being subject to removal from the United States under section 237(a)(2)(B)(i) (conviction of controlled substance offense other than possession of marijuana for personal use) and section 237(a)(2)(A)(iii) (conviction of "aggravated felony") of the Immigration and Nationality Act (INA) (8 U.S.C. § 1101 et seq.). Immigration authorities placed petitioner [***5] in administrative detention at the Mira Loma facility in Lancaster, California.

Petitioner retained new counsel and filed in the superior court a motion to vacate the judgment convicting him, asking the court to permit him to withdraw the guilty plea on which it was based. At the hearing on his motion, petitioner testified that when he was faced with the question of whether to plead guilty he held a "green card" (i.e., a certificate of permanent residency) and was, therefore, a lawful permanent resident of the [**1175] United States. Petitioner discussed his permanent residency status with his trial counsel, Basinger. Petitioner told counsel that it was concern about keeping his green card that had motivated him to hire a lawyer. According to petitioner, counsel told him that, if he pled guilty, he would have "no problems with immigration" except that he would not be able to become a United States citizen.

Petitioner further testified that he did not remember the court saying anything to him on these topics at the time he entered his plea. But after viewing the plea form bearing his signature and initials, petitioner agreed he had read and spoken with his lawyer about the form. The form contains [***6] a general advisement about possible immigration consequences of a conviction, couched roughly in the language courts are mandated to administer on the record by Penal Code section 1016.5, subdivision (a) (hereafter section 1016.5 and section 1016.5(a)). n1 After reading this printed advisement, petitioner stated he understood its use of the word "may" to mean "like it could [*237] happen." Petitioner also affirmed on cross-examination that he had answered "yes" when the judge asked him at the plea proceeding if he had signed the plea form and talked with his lawyer about it.

n1 Section 1016.5(a) provides that "prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, except offenses designated as infractions under state law, the court shall administer the following advisement on the record to the defendant: [P] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." Owing to changes made after section

1016.5 was enacted, federal immigration law now generally refers to "removal from the United States" or simply "removal" instead of "deportation." (See, e.g., 8 U.S.C. § § 1228 ["Expedited removal of aliens convicted of committing aggravated felonies"], 1229a ["Removal proceedings"].) The parties and the courts below have used the terms interchangeably, as do we.

[***7]

Finally, petitioner testified that, at the time of the plea, he had told his trial attorney that he was innocent of the drug charges against him. According to petitioner, he nevertheless pled guilty after counsel told him that, if he did not, he would be sentenced to five years in jail and that there were "a lot of innocent people going to jail." If he had known he would in fact be deported as a consequence, he would not have pled guilty and, if permitted to withdraw his guilty plea, he was willing to face the possibility of being retried and sent to prison for the maximum possible period, five years and four months.

In ruling on petitioner's motion, the court stated, "I don't think" that "all people are being deported for possession for sale or sale of narcotics." The court opined that such concerns (i.e., concerns, apparently, about the relative certainty of deportation as a consequence of the plea) were, in any event, not dispositive, but, rather, that the important consideration was "whether or not Mr. Resendiz knew that if he entered the plea that it [i.e., deportation] could happen." The court also stated it did not credit petitioner's testimony "when he says the Court didn't [***8] advise him at the time he entered the plea of his rights or the [immigration] consequences," noting petitioner signed and initialed the written plea form after it had been interpreted in Spanish, petitioner's native language. The court denied petitioner's motion to vacate the judgment.

Petitioner thereupon filed a petition for writ of habeas corpus in the Court of Appeal. n2 The Court of Appeal issued an order [**1176] to show cause returnable before the superior court. (Pen. Code, § 1508, subd. (b).)

n2 In his briefing to this court, the Attorney General refers to petitioner's original motion as Resendiz's "motion to withdraw his pleas"; petitioner calls it a "motion to withdraw the plea." Both the Attorney General and petitioner elsewhere on occasion have referred to petitioner's motion as one in "coram nobis." The Court of Appeal referred to petitioner's "motion to withdraw his pleas." In fact, the superior court's minute order denominates the motion as one "to vacate judgment," and at the hearing on the motion the court stated, "This is before the Court on a motion to vacate judgment and to withdraw the guilty plea." Fortunately, despite this degree of confusion in terminology, the parties are agreed that petitioner made the correct procedural choice in selecting habeas corpus as the vehicle for challenging the denial of his motion. (See generally *People v. Gallardo* (2000) 77 Cal. App. 4th 971, 980-983.)

[***9]

In the return, the district attorney acknowledged petitioner told counsel he wanted to protect his green card status, but denied that petitioner received ineffective assistance of counsel. The district attorney also acknowledged [*238] that petitioner's trial counsel does not remember discussing the printed plea form with petitioner. Indeed, the district attorney submitted the declaration of counsel, Basinger, stating he has "no independent specific recollection" of any such interaction. Basinger's declaration also states it is his "custom and habit" to review plea forms carefully with his clients and to explain to noncitizen clients "that a guilty plea is likely to effect [*sic*] the client's ability to become a citizen. I also tell these clients that I make the assumption that the federal government is always wanting to deport non-citizen felons. I explain to them they should assume the government has a policy to deport people in their position." Finally, Basinger's declaration states that he has been an attorney, specializing in criminal defense, for 18 years.

Petitioner in his traverse reiterated his request to withdraw his guilty plea, reasserting both his innocence of the drug [***10] charges and his ignorance when pleading guilty that deportation was a nearly certain consequence. Petitioner argued that the police reports demonstrated he had "a triable case" on the merits of the drug charges, and he asserted that, had he known the immigration consequences a guilty plea would have, he would have exercised his right to proceed to trial.

Petitioner also argued that for his trial counsel to have provided adequate advice about the likely immigration consequences of his guilty plea would not have been unduly burdensome. To his traverse, petitioner appended the INS document, a "Notice to

Appear," that charges him with being subject to removal from the United States on two grounds: for having been convicted of an offense involving a controlled substance, and for having been convicted of an "aggravated felony."

Before ruling on the order to show cause, the superior court read into the record the following stipulation filed by the district attorney and counsel for petitioner. "In lieu of an evidentiary hearing the People and Petitioner stipulate as follows: If called as a witness, Defense Counsel Leonard Basinger would testify that even though he knew Petitioner, his client, [***11] was an immigrant, he did not independently research or investigate the immigration consequences that would result from Petitioner entering a guilty plea. Mr. Basinger also did not contact an immigration attorney to seek advice about the immigration laws of the United States. Immigration laws include the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 [Pub.L. No. 104-208 (Sept. 30, 1996) 110 Stat. 3009-546 (hereafter IIRAIRA)] and the Antiterrorism and Effective Death Penalty Act of 1996 [Pub.L. No. 104-132 (Apr. 24, 1996) 110 Stat. 1214 (hereafter AEDPA)]. It is further stipulated that the Declaration of Leonard Dale Basinger, included as Exhibit 1 to the Return shall be admitted."

[*239] The superior court denied petitioner's petition. In so doing, the court stated, "I'm not even ruling on whether or not there are any deficiencies in Mr. Basinger's representation." The court also stated that it did "not believe it is insufficient and that it falls below an objective standard of reasonableness for Defense Counsel in this County, but even more important than that," the court stated, "I don't believe anything he could have done would have resulted or that it is reasonably [***12] probable that anything additional he could have done would have resulted in a result that is more favorable to [petitioner] ...."

Petitioner then filed a second habeas corpus petition in the Court of Appeal that is [**1177] the subject of our review here. The Court of Appeal unanimously granted the writ, vacating petitioner's conviction and directing the trial court to allow him to withdraw his guilty pleas. We granted review on the Attorney General's petition.

Discussion

Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. (*In re Alvernaz* (1992) 2 Cal. 4th 924, 933, 830 P.2d 747; see generally *Hill v. Lockhart* (1985) 474 U.S. 52, 57-59, 88 L. Ed. 2d 203, 106 S. Ct. 366 (*Hill*).) "It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*In re Alvernaz*, at [***13] p. 934, citing *Hill*, at pp. 56-60; *McMann v. Richardson* (1970) 397 U.S. 759, 771, 25 L. Ed. 2d 763, 90 S. Ct. 1441 (*McMann*).)n3

n3 That the Sixth Amendment does not cover civil proceedings (conc. & dis. opn. of Brown, J., post, at p. 2) is of no consequence. Defendant's Sixth Amendment claim is directed to criminal defense counsel's representation in criminal proceedings.

To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (*Strickland*); *People v. Waidla* (2000) 22 Cal. 4th 690, 718, 996 P.2d 46.) [***14]

[*240] The Attorney General, relying primarily on out-of-state and federal court decisions, urges us to announce a categorical bar to immigration-based ineffective assistance claims. For the following reasons we decline to impose such a categorical bar. Rather, we hold that affirmative misadvice regarding immigration consequences can in certain circumstances constitute ineffective assistance of counsel. We do not address whether a mere failure to advise could also constitute ineffective assistance.

A. Is petitioner's claim categorically barred?

Ordinarily, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." (*Strickland*, *supra*, 466 U.S. at p. 690; see also *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 478 [120 S. Ct. 1029, 1035, 145 L. Ed. 2d 985] [rejecting per se rule

that counsel must file notice of appeal unless defendant instructs otherwise as "inconsistent with *Strickland*'s holding that 'the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances' "].) The Attorney [***15] General, however, proffers two bases, on either of which, the Attorney General implies, we may avoid the task of specifically evaluating the particulars of trial counsel's performance in this case.

1. *Section 1016.5*

The Attorney General argues, as does Justice Brown in her concurring and dissenting opinion, that a trial court's having provided a section 1016.5 advisement "should shield pleas from collateral attack" (conc. & dis. opn. of Brown, J., *post*, 2001 Cal. LEXIS 1812 at p. *66) based on immigration consequences. We disagree.

That defendants have a right to counsel when they undertake the plea evaluation and negotiation specifically provided for in section 1016.5, subdivisions (b) and (d) is not disputed. And that right to counsel " 'is the right to the *effective* assistance of counsel.' " ([**1178] *Strickland*, *supra*, 466 U.S. at p. 686, italics added.) We recognize that "it is the attorney, not the client, who is particularly qualified to make an informed evaluation of a proffered plea bargain." (*In re Alvernaz*, *supra*, 2 Cal. 4th at p. 933.) Thus, whether or not the court faithfully delivers section 1016.5's mandated advisements, "the defendant can be expected to rely on counsel's [***16] independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial." (*In re Alvernaz*, at p. 933; see *People v. Gallardo*, *supra*, 77 Cal. App. 4th at p. 988, fn. 9 [as the [*241] court gave § 1016.5 advice, "the only arrow in [defendant]'s quiver below was ineffective counsel and his only remedy was habeas corpus"].) n4

n4 For this same reason, and contrary to the People's suggestion at oral argument, the Legislature cannot have intended, when enacting section 1016.5, to burden pleading defendants (on pain of waiving subsequent Sixth Amendment claims) with an obligation to raise before the judge at the plea proceeding any concerns they might have about advice they receive from counsel regarding the court's section 1016.5 advisement. Such an intention would be inconsistent with the Legislature's provisions, in the same statute, that courts allow time for additional plea consideration and negotiations if the advisement raises concerns (§ 1016.5, subds. (b) & (d)) and also with its provision that "at the time of the plea no defendant shall be required to disclose his or her legal status to the court" (*id.*, subd. (d)).

[***17]

Under the Sixth Amendment, defendants are entitled so to rely and to expect representation "within the range of competence demanded of attorneys in criminal cases." (*McMann*, *supra*, 397 U.S. at p. 771.) The existence of a state statute requiring courts to deliver a specified immigration advisement cannot deprive defendants of these federal constitutional rights. (*In re Sutter-Butte By-Pass Assessment* (1923) 190 Cal. 532, 536-537, 213 P. 974 [Legislature "cannot, under the guise of creating a new statutory remedy, deprive a litigant of an existing constitutionally guaranteed right"].) Efforts to mine section 1016.5's history for hints the Legislature meant that statute to foreclose some kinds of ineffectiveness claims (see, e.g., conc. & dis. opn. of Brown, J., *post*, at pp. 3-5) are misplaced. What constitutes ineffective assistance of counsel is a question of constitutional law, not of legislative intent. Thus, that a defendant may have received valid section 1016.5 advisements from the court does not entail that he has received effective assistance of counsel in evaluating or responding to such advisements. n5

n5 Nor is *In re Ibarra* (1983) 34 Cal. 3d 277, 193 Cal. Rptr. 538, 666 P.2d 980 to the contrary. That "a defendant who has signed a [guilty plea] waiver form upon competent advice of his attorney has little need to hear a ritual recitation of his rights by a trial judge" (*id.* at p. 286) obviously does not imply the contrary proposition, that a defendant to whom a court has read a pro forma advisement like the one mandated by section 1016.5 cannot profit from competent legal advice about that advisement or concerns it may raise, under the circumstances, for that particular defendant.

[***18]

The Attorney General's suggestion that we construe section 1016.5 as a categorical bar to immigration-based ineffective assistance claims "would deny defendants [who prove incompetence and prejudice] a remedy for the specific constitutional deprivation suffered" (*In re Alvernaz*, *supra*, 2 Cal. 4th at p. 936), viz., the Sixth

Amendment right to effective counsel. Any construction that might engender such constitutional infirmity is to be avoided. (*People v. Superior Court (Zamudio)* (2000) 23 Cal. 4th 183, 199-200, 999 P.2d 686 (*Zamudio*); *San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal. 4th 571, 581, 828 P.2d 147.)

[*242] Nothing, moreover, suggests that the drafters of section 1016.5 intended either to narrow defendants' relationships with their attorneys or to shield incompetent legal advisors. If anything, the statutory scheme contemplates an enhanced, not a diminished, role for counsel. (See § 1016.5, subds. (b) ["court shall allow the defendant additional [**1179] time to consider the appropriateness of the plea in light of the advisement"] and (d) [court "shall grant the defendant a reasonable amount of time to negotiate [***19] with the prosecuting agency in the event the defendant or the defendant's counsel was unaware of the possibility of deportation, exclusion from admission to the United States, or denial of naturalization as a result of conviction"].)

For the foregoing reasons, section 1016.5 does not bar petitioner's claim. n6

n6 Whether review of section 1016.5 claims should be "no broader in scope" than review of *Boykin-Tahl* claims (conc. & dis. opn. of Brown, J., *post*, 2001 Cal. LEXIS 1812 at p. *76) is not a question we need address in this case, as defendant is not making a section 1016.5 claim. Rather, defendant's claim is bottomed on the Sixth Amendment.

2. *Collateral consequences doctrine*

The Attorney General also suggests we categorically bar petitioner's ineffective assistance claim as based on a "collateral" consequence of his criminal conviction. A defense lawyer's giving erroneous advice to a defendant about immigration consequences cannot violate the pleading defendant's right to the effective assistance of counsel, [***20] reasons the Attorney General, because knowledge of immigration consequences is not a prerequisite to a determination that the plea was entered voluntarily.

While potentially "dire" (*People v. Superior Court (Giron)* (1974) 11 Cal. 3d 793, 798, 114 Cal. Rptr. 596, 523 P.2d 636), immigration consequences nevertheless are, in many jurisdictions including California, "considered 'collateral' consequences of a criminal conviction." (*Zamudio*, *supra*, 23 Cal. 4th at p. 198; but see *Peart v. State* (Fla. 2000) 756 So. 2d 42, 47, fn. 5 [implying that, in light of state criminal procedural rule similar to § 1016.5, the court will no longer treat immigration consequences as collateral].) We have not articulated precise definitions of "direct" and "collateral" in this context, but some California courts have, as the Attorney General points out, called "collateral" any consequence of a plea that "does not 'inexorably follow' from a conviction of the offense involved in the plea." (*People v. Crosby* (1992) 3 Cal. App. 4th 1352, 1355; accord, *People v. Moore* (1998) 69 Cal. App. 4th 626, 630.) Indeed, the deportation consequences [***21] of a conviction are not "inexorable" in that deportation "can be instituted only 'upon the order of the Attorney General' (8 U.S.C. § 1227(a)) of the United States, who retains [*243] discretion not to institute such proceedings." (*Zamudio*, at pp. 204-205.) n7 Nevertheless, for the following reasons, we conclude that the "collateral" nature of immigration consequences does not foreclose petitioner's ineffective assistance of counsel claim.

n7 We have stated that the "direct" consequences of a guilty plea include the range of punishment (*Bunnell v. Superior Court* (1975) 13 Cal. 3d 592, 605, 119 Cal. Rptr. 302, 531 P.2d 1086), a restitution fine (*People v. Walker* (1991) 54 Cal. 3d 1013, 1022, 819 P.2d 861), a mandatory parole term (*In re Moser* (1993) 6 Cal. 4th 342, 351-352, 862 P.2d 723) and a sex offender registration requirement (*People v. McClellan* (1993) 6 Cal. 4th 367, 376, 862 P.2d 739). In addition to immigration consequences, California courts have called "collateral" the possibility of future use of a conviction to enhance punishment (*People v. Bernal* (1994) 22 Cal. App. 4th 1455, 1457) and that a conviction will serve to revoke an existing probationary grant (*People v. Martinez* (1975) 46 Cal. App. 3d 736, 745, 120 Cal. Rptr. 362, 121 Cal. Rptr. 443).

[***22]

First, the United State Supreme Court has made clear that ineffective assistance analysis is highly case specific, noting that " 'attorney errors come in an infinite variety ....' " (*Hill*, *supra*, 474 U.S. at pp. 57-58, quoting *Strickland*, *supra*, 466 U.S. at p. 693.) Accordingly, in every case "the performance inquiry must be whether counsel's assistance was reasonable

considering all the circumstances." (*Strickland*, at p. 688; accord, *Roe v. Flores-Ortega*, *supra*, 528 U.S. at p. 478 [120 S. Ct. at p. 1035].)

Second, the collateral consequence doctrine and ineffective assistance claims have [**1180] separate origins. Recognition of the right to competent representation in the guilty plea context directly "stemmed from the [Sixth Amendment's] general principle that all 'defendants facing felony charges are entitled to the effective assistance of competent counsel.' " (*Hill*, *supra*, 474 U.S. at p. 57, quoting *McMann*, *supra*, 397 U.S. at p. 771; see also *McMann*, at p. 770 [distinguishing between the admissibility of a coerced confession and the competence of counsel in advising the confessing defendant to plead guilty].) The [***23] collateral consequences doctrine, on the other hand, originated as a policy-based adjunct to the due process requirement that a court ensure the guilty pleas it accepts are voluntarily given. n8 While the right to the assistance of counsel undoubtedly is " 'included in the conception of due process of law' " (*Powell v. Alabama* (1932) 287 U.S. 45, 67-68, 77 L. Ed. 158, 53 S. Ct. 55), such that claims grounded wholly or partly in the latter may include reference to the former (see, e.g., [*244] *McMann*, at pp. 767, 770-771), it does not follow that every jurisprudential limitation on courts' due process responsibilities applies (or should apply) without alteration to all types of ineffective assistance of counsel claims.

n8 See, e.g., *Michel v. United States* (2d Cir. 1974) 507 F.2d 461, 465-466; *State v. Malik* (Wash.Ct.App. 1984) 37 Wn. App. 414, 680 P.2d 770, 772; see generally Note, *Weakness of the Collateral Consequences Doctrine: Counsel's Duty to Inform Aliens of the Deportation Consequences of Guilty Pleas* (1993) 16 Fordham Internat. L.J. 1094, 1105-1110 (Fordham Note).

[***24]

The Attorney General offers no logical or jurisprudential reason why we should truncate our examination of counsel's Sixth Amendment responsibilities to noncitizen clients by invoking a categorical concept adopted for policy and convenience in delineating the Fifth and Fourteenth Amendment due process responsibilities of trial courts. Nor does any binding authority require that reduction.

To the contrary, even before the high court in *Strickland* expressly grounded the effective assistance guarantee in the Sixth Amendment's "presumption that counsel will fulfill the role in the adversary process that the Amendment envisions" (*Strickland*, *supra*, 466 U.S. at p. 688), courts resolving ineffective assistance claims recognized a "shift of scrutiny in recent cases from the rudiments of the trial to the quality of representation by counsel [that] reflects a shift from the general requirements of the due process clause of the Fourteenth Amendment ... to the more specific [Sixth Amendment] right to counsel." (*Krummacher v. Gierloff* (Or. 1981) 290 Ore. 867, 627 P.2d 458, 461.) We acknowledged the point in *People v. Pope* (1979) 23 Cal. 3d 412, 152 Cal. Rptr. 732, 590 P.2d 859, [***25] stating there that the former " 'farce or sham' " ineffectiveness standard "originated in decisions which held that the right to competent representation derived solely from the due process clause" and "has been thoroughly discredited." (*Id.* at p. 422.) "Courts now recognize that the right to competent representation at trial is grounded in the constitutional right to the assistance of counsel. [Citation.] Accordingly, constitutionally adequate assistance can no longer be measured by the due process standard of [*People v.*] *Ibarra* [(1963) 60 Cal. 2d 460, 386 P.2d 487, 34 Cal. Rptr. 863], but instead must be determined by a standard bottomed on the Sixth Amendment of the United States Constitution and article I, section 15 of the California Constitution." (*Ibid.*, fn. omitted.)

The United States Supreme Court has never embraced the collateral consequences doctrine the Attorney General urges us to adopt in this case. In fact, on review of the Eighth Circuit Court of Appeals' holding that parole eligibility "is a collateral rather than a direct consequence of a guilty plea, of which a defendant need not be informed" in order for the plea to be considered voluntary (*Hill*, [***26] *supra*, 474 U.S. at p. 55), the high court, instead of itself invoking that doctrine, applied "the longstanding test for determining the validity of a guilty plea[, i.e.,] 'whether the [*245] plea represents a voluntary and intelligent choice among the alternative [**1181] courses of action open to the defendant' " (474 U.S. at p. 56). Nor has the high court ever suggested that ineffective assistance claims based on the giving of erroneous immigration advice ought categorically to be barred. Rather, recognizing the tremendous personal stakes involved in deportation and exclusion, the court has admonished, "in this area of the law, involving as it may the equivalent of banishment or exile, we do well to eschew technicalities and fictions and to deal instead with realities." (*Costello v. Immigration Service* (1964) 376 U.S. 120, 131, 11 L.

Ed. 2d 559, 84 S. Ct. 580.)

Some cases applying the collateral consequences doctrine to bar immigration-based ineffective assistance claims purport to draw legal support from the high court's observation in *Brady v. United States* (1970) 397 U.S. 742, 755, 25 L. Ed. 2d 747, 90 S. Ct. 1463, that a defendant must be made fully aware [***27] of the " 'direct consequences' " of a guilty plea before the plea may be considered voluntary under the Fifth Amendment. (*U.S. v. Mora-Gomez* (E.D.Va. 1995) 875 F. Supp. 1208, 1211, fn. 7; see, e.g., *U.S. v. Banda* (5th Cir. 1993) 1 F.3d 354, 356; *U.S. v. Del Rosario* (D.C. Cir. 1990) 284 U.S. App. D.C. 90, 902 F.2d 55, 59.) *Brady*, however, was *not* an ineffective assistance case. The high court there held that "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts" (*Brady v. United States*, at p. 748), expressly deriving that rule from the constitutional guarantee of jury trial and the Fifth Amendment's ban on compelled self-incrimination. As *Brady* did not consider the ineffective assistance of counsel issues before us in this case, it is no authority for deciding them one way or the other. (*Trope v. Katz* (1995) 11 Cal. 4th 274, 287, 902 P.2d 259; *People v. Gilbert* (1969) 1 Cal. 3d 475, 482, fn. 7, 82 Cal. Rptr. 724, 462 P.2d 580.)

The Attorney General cites our decision in *People v. Barella* (1999) 20 Cal. 4th 261, 267-272, 975 P.2d 37 [***28] for the proposition that a "defendant does not have to know the collateral consequences which follow his plea in order for the plea to be constitutional," but *Barella* also is inapposite. There, we held unanimously that "a defendant is not entitled to withdraw or set aside a guilty plea on the ground that the trial court, in accepting the plea, failed to advise the defendant of a limit on good-time or work-time credits available to the defendant." (*Id.* at p. 272.) In so holding, we noted that "the United States Supreme Court has 'never held that the United States Constitution requires the State to furnish a defendant with information about parole eligibility in order for the defendant's plea of guilty to be voluntary' " (*id.* at p. 267) and stated that conduct and work credits are not " 'traditional "direct consequences" of a plea' " because they result from [*246] the defendant's conduct after he arrives at prison and do not " 'follow inexorably from the plea' " (*id.* at p. 270). Thus, *Barella* addressed the court's role in meeting *Boykin-Tahl n9* record requirements so as to assure that a defendant's guilty plea is voluntary, not [***29] counsel's obligation to provide effective assistance at every "critical stage in the criminal process" as required by the Sixth Amendment and article I, section 15. (*In re Alvernaz*, *supra*, 2 Cal. 4th at p. 933.) The high court, as discussed, has never equated these two sets of obligations, nor does the Attorney General offer any persuasive reason why we should reach out to do so in this case.

> n9 *Boykin v. Alabama* (1969) 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 and footnote 5 (for valid guilty plea, due process requires voluntary and intelligent waiver of confrontation right, right to trial by jury, and privilege against compulsory self-incrimination); *In re Tahl* (1969) 1 Cal. 3d 122, 132, 81 Cal. Rptr. 577, 460 P.2d 449 (same).

Defense counsel clearly has far greater duties toward the defendant than has the court taking a plea. Effective counsel, for example, has a general duty to conduct a reasonable investigation of the case enabling counsel to make informed [***30] decisions about how best to represent the client. (*Strickland*, [**1182] *supra*, 466 U.S. at p. 691.) n10 The court has no such duty. "Counsel's function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest." (*Strickland*, at p. 688.) Again, the court has no such duties. "From counsel's function as assistant to the defendant derive the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions" (*ibid.*); the court's function and duties quintessentially *exclude* such assistance, advocacy and consultation.

> n10 See also *Wofford v. Wainwright* (11th Cir. 1984) 748 F.2d 1505, 1508 (discussing counsel's constitutional obligation to "offer his informed opinion as to the best course to be followed in protecting the interests of his client"); *Michel v. United States*, *supra*, 507 F.2d at page 465 (noting where the client is an alien "counsel and not the court has the obligation of advising him of his particular [immigration] position as a consequence of his plea").

[***31]

For the foregoing reasons, to tie defense counsel's Sixth Amendment duties to the constitutional minima the due process clause requires of courts, by carving out, for erroneous advice concerning immigration

consequences, an exception to the general requirement that counsel perform with "reasonableness under prevailing professional norms" (*Strickland*, *supra*, 466 U.S. at p. 688), would be illogical and counterproductive.

A few cases applying the collateral consequences doctrine to bar immigration-based ineffective assistance claims have expressed a concern that, as a matter of policy, to permit such claims "is to take the first step on a long, [*247] slippery slope" that could "spawn endless litigation over effective assistance of counsel claims." (*State v. Christie* (Del.Super.Ct. 1994) 655 A.2d 836, 840.) The concern has no basis in law or logic. That a particular ineffective assistance claim might, depending on the circumstances, be viable despite the collateral nature of immigration consequences simply does not entail the viability of every--or even *any*--subsequent ineffective assistance claim that happens also to refer to a consequence similarly deemed collateral, [***32] and nothing we say here should be taken as suggesting the contrary.

In *People v. Reed* (1998) 62 Cal. App. 4th 593, 601-602, for example, the court rejected the defendant's ineffective assistance claim based on counsel's failure to advise him of a statutory limit on "good time" prison credits. The Attorney General cites *Reed* for its partial reliance on the federal courts' collateral consequences doctrine. (See *id.* at p. 597.) But *Reed* is distinguishable. Unlike this case, *Reed* did not involve allegations of an affirmative misrepresentation in response to a specific inquiry from the defendant. Indeed, the Court of Appeal in *Reed* expressly held open the possibility such misrepresentation might constitute ineffective assistance. (*Id.* at p. 601.)

On several counts, "deportation is far more significant than [some] other [collateral] consequences, such as losing one's driver's license or losing the right to vote." (Fordham Note, *supra*, 16 Fordham Internat. L.J. at p. 1140, fn. omitted.) "Perhaps nowhere outside of the criminal law are the consequences for the individual so serious." (*Wallace v. Reno* (D.Mass. 1998) 24 F. Supp. 2d 104, 112.) [***33] Accordingly, that we decline to bar as collateral ineffective assistance claims based on erroneous immigration consequences advice plainly cannot determine the result in another context. Ultimately, "in any case presenting an ineffectiveness claim, the performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances." (*Strickland*, *supra*, 466 U.S. at p. 688.)

Finally, the Legislature's enactment of section 1016.5, mandating specified immigration warnings in all plea cases, is a circumstance that distinguishes this case from cases involving other types of collateral consequences. Under the statutory mandate, defendants who wish to plead guilty are entitled to receive from the court some advice regarding immigration consequences--a general warning of three immigration consequences that "may" occur. (See § 1016.5(a).) In evaluating [**1183] the court's advice, "the defendant can be expected to rely on counsel's independent evaluation of the charges, applicable law, and evidence, and of the risks and probable outcome of trial." (*In re Alvernaz*, *supra*, 2 Cal. 4th at p. 933.) [*248]

"The [defendant's] interest underlying [an ineffective assistance] [***34] claim is his interest in having, before he judges the desirability of the plea bargain, a general knowledge of the possible legal consequences of facing trial." (*Wofford v. Wainwright*, *supra*, 748 F.2d at p. 1508.) That interest will flow, presumably, more from a particular consequence's practical import than its formal categorization as collateral or direct. Classifying immigration consequences as collateral does not diminish their status as "material legal principles that may significantly impact the particular circumstances" surrounding a given plea. (*People v. Pozo* (Colo. 1987) 746 P.2d 523, 529.) Accordingly, that adverse immigration consequences may for certain due process purposes be collateral to petitioner's conviction should not preclude application of the ordinary *Strickland* standards to his ineffective assistance claim based on alleged immigration misadvice.

For the foregoing reasons, we conclude that neither the existence of section 1016.5 nor the collateral nature of immigration consequences constitutes a per se bar to an ineffective assistance of counsel claim based on counsel's misadvice about the adverse immigration consequences [***35] of a guilty plea. Therefore, we may not in this case avoid "the circumstance-specific reasonableness inquiry required by *Strickland*." (*Roe v. Flores-Ortega*, *supra*, 528 U.S. at p. 478 [120 S. Ct. at p. 1035]; see also *Hill*, *supra*, 474 U.S. at pp. 57-58; *U.S. v. Mora-Gomez*, *supra*, 875 F. Supp. at p. 1213.) Accordingly, we shall proceed to apply *Strickland*'s familiar reasonableness standard to the circumstances of the instant case. (*Strickland*, *supra*, 466 U.S. at p. 688.)

B. Was trial counsel's performance objectively reasonable?

As the Court of Appeal correctly noted, the evidentiary landscape relevant to the competence question before us was created in several superior court proceedings, including those at which petitioner's guilty

plea was entered and accepted, those on petitioner's motion to withdraw his plea, and those following the Court of Appeal's issuance of an order to show cause in response to petitioner's first habeas corpus petition, in which the parties stipulated as to how trial counsel would testify. Petitioner's second habeas corpus petition in the Court of Appeal, the subject of our review, incorporated [***36] all the evidence adduced in the prior proceedings.

Whether trial counsel performed competently, that is, "reasonably under prevailing professional norms" (*Strickland*, *supra*, 466 U.S. at p. 688), presents a mixed question of fact and law. Such questions are "generally subject to independent review as predominantly questions of law--especially so when constitutional rights are implicated"-- [*249] and "include the ultimate issue, whether assistance was ineffective, and its components, whether counsel's performance was inadequate and whether such inadequacy prejudiced the defense." (*People v. Ledesma* (1987) 43 Cal. 3d 171, 219, 233 Cal. Rptr. 404, 729 P.2d 839.)

Where, as here, the superior court has denied habeas corpus relief after an evidentiary hearing (viz., the hearing held on the order to show cause ordered in response to petitioner's first habeas corpus petition) and a new petition for habeas corpus is thereafter presented to an appellate court based upon the transcript of the evidentiary proceedings conducted in the superior court, "the appellate court is not bound by the factual determinations [made below] but, rather, independently evaluates the evidence [***37] and makes its own factual determinations." (*In re Wright* (1978) 78 Cal. App. 3d 788, 801, 144 Cal. Rptr. 535.) n11 [**1184] Accordingly, the Court of Appeal was entitled, as we are now, to undertake "an independent review of the record [citation] to determine whether petitioner has established by a preponderance of substantial, credible evidence [citation] that his counsel's performance was deficient and, if so, that [he] suffered prejudice." (*In re Alvernaz*, *supra*, 2 Cal. 4th at pp. 944-945.)

n11 Upon receiving petitioner's second habeas corpus petition, the Court of Appeal issued an order to show cause returnable before itself and received a formal return and traverse. The court was not required to conduct an additional evidentiary hearing (*People v. Duvall* (1995) 9 Cal. 4th 464, 478, 886 P.2d 1252 [where any factual disputes are already shown in the trial record, " 'the merits of a habeas corpus petition can be decided without an evidentiary hearing' "]; *In re Hochberg* (1970) 2 Cal. 3d 870, 876, 87 Cal. Rptr. 681, 471 P.2d 1) nor, in any event, did either party request that it do so.

[***38]

While our review of the record is independent and "we may reach a different conclusion on an independent examination of the evidence ... even where the evidence is conflicting" (*In re Hitchings* (1993) 6 Cal. 4th 97, 109, 860 P.2d 466), any factual determinations made below "are entitled to great weight ... when supported by the record, particularly with respect to questions of or depending upon the credibility of witnesses the [superior court] heard and observed." (*In re Wright*, *supra*, 78 Cal. App. 3d at p. 801; see also *People v. Ledesma*, *supra*, 43 Cal. 3d at p. 219.) On the other hand, if "our difference of opinion with the lower court ... is not based on the credibility of live testimony, such deference is inappropriate." (*In re Arias* (1986) 42 Cal. 3d 667, 695, 230 Cal. Rptr. 505, 725 P.2d 664; see also *In re Hitchings*, at p. 109.)

Petitioner and amici curiae strenuously urge us to declare that trial counsel's performance in advising petitioner about his guilty plea was constitutionally deficient simply because counsel failed to investigate the likely immigration consequences. We are not persuaded that the [***39] Sixth Amendment [*250] imposes a blanket obligation on defense counsel, when advising pleading defendants, to investigate immigration consequences or research immigration law. In any event, petitioner in this case does not allege a mere failure to investigate, so the question is not squarely presented. n12 As previously noted, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case ...." (*Strickland*, *supra*, 466 U.S. at p. 690.) Petitioner urges the following as establishing that his trial counsel provided him with substandard representation.

n12 Accordingly, amici curiae's request that we judicially notice the existence of certain published immigration reference works is denied.

1. *Counsel knew petitioner was a noncitizen*

The parties stipulated below that trial counsel Basinger, if called, would testify that he knew his client was an immigrant. All concede that counsel knew his

client was a noncitizen.

2. [***40] *Counsel knew petitioner was concerned about immigration consequences*

Petitioner in this case made plain to counsel that he deemed immigration consequences important in deciding whether to plead guilty to the charges against him. Indeed, the People conceded below that petitioner told his trial counsel he wanted to protect his permanent residency status.

We long have recognized that criminal convictions may have "dire consequences" under federal immigration law (*People v. Superior Court (Giron)*, *supra*, 11 Cal. 3d at p. 798) and that such consequences are "material matters" (*id.* at p. 797) for noncitizen defendants faced with [**1185] pleading decisions. Thus, even before the Legislature expressly recognized the unfairness inherent in holding noncitizens to pleas they entered without knowing the consequent immigration risks (see § 1016.5, subd. (d), added by Stats. 1977, ch. 1088, § 1, p. 3495), we held that justice may require permitting one who pleads guilty "without knowledge of or reason to suspect [immigration] consequences" to withdraw the plea. (*People v. Superior Court (Giron)*, at p. 798 [permitting withdrawal of guilty plea to [***41] marijuana possession charge]; see also § 1016.5, subd. (c) ["Nothing in this section . . shall be deemed to inhibit a court, in the sound exercise of its discretion, from vacating a judgment and permitting a defendant to withdraw a plea"].) n13

n13 Our recognition in *People v. Superior Court (Giron)*, *supra*, 11 Cal. 3d 793, that the decision whether to allow the defendant to withdraw his plea was within the trial court's discretion was not based on a determination that the failure of the court and counsel to advise defendant of the deportation consequences of his plea was neither judicial error nor ineffective assistance of counsel. (Cf. conc. & dis. opn. of Brown, J., *post*, at p. 2.) Our decision expressly was "governed by Penal Code section 1018, which provides that a guilty plea may be withdrawn before judgment and for good cause shown." (*Giron*, *supra*, 11 Cal. 3d at p. 796.) No Sixth Amendment claim was raised (see *id.* at p. 797), and consequently we had in *Giron* no occasion to consider ineffective assistance.

[***42]

The United States Supreme Court, too, has recognized that "deportation is a drastic measure and at times the equivalent of banishment or exile." (*Fong* [*251] *Haw Tan v. Phelan* (1948) 333 U.S. 6, 10, 92 L. Ed. 433, 68 S. Ct. 374.) "To banish [noncitizens] from home, family, and adopted country is punishment of the most drastic kind whether done at the time when they were convicted or later." (*Lehmann v. Carson* (1957) 353 U.S. 685, 691, 1 L. Ed. 2d 1122, 77 S. Ct. 1022 (conc. opn. of Black, J.).) Petitioner has lived in this country most of his adult life and has two children who are United States citizens. That petitioner discussed his permanent residency status with his counsel, emphasizing his desire to keep his green card, is therefore not surprising.

3. *Counsel's affirmative representations*

As discussed, petitioner testified that counsel told him that, if he pled guilty, he would have "no problems with immigration" except that he would not be able to become a United States citizen. Even among the federal and other courts cited by the Attorney General, "the clear consensus is that an affirmative misstatement regarding deportation may constitute [***43] ineffective assistance." (*U.S. v. Mora-Gomez*, *supra*, 875 F. Supp. at p. 1212.) n14

n14 See also *People v. Huynh* (1991) 229 Cal. App. 3d 1067, 1083, 280 Cal. Rptr. 506; *Ostrander v. Green* (4th Cir. 1995) 46 F.3d 347, 355, overruled on another point in *O'Dell v. Netherland* (4th Cir. 1996) 95 F.3d 1214; *U.S. v. Del Rosario*, *supra*, 902 F.2d at page 59 and footnote 2; *U.S. v. George* (7th Cir. 1989) 869 F.2d 333, 337; *United States v. Campbell* (11th Cir. 1985) 778 F.2d 764, 768-769; *Downs-Morgan v. United States* (11th Cir. 1988) 765 F.2d 1534, 1541; *United States v. Santelises* (2d Cir. 1975) 509 F.2d 703, 703-704; *United States v. Briscoe* (D.C. Cir. 1970) 139 U.S. App. D.C. 289, 432 F.2d 1351, 1353-1354; *U.S. v. Corona-Maldonado* (D.Kan. 1999) 46 F. Supp. 2d 1171, 1173; *United States v. Nagaro-Garbin* (E.D.Mich. 1987) 653 F. Supp. 586, 590; *People v. Pozo*, *supra*, 746 P.2d at page 527, footnote 5; *People v. Ford* (N.Y. 1995) 86 N.Y.2d 397, 657 N.E.2d 265, 268-269, 633 N.Y.S.2d 270; *People v. Correa* (Ill. 1985) 108 Ill. 2d 541, 485 N.E.2d 307, 310-311, 92 Ill. Dec. 496. There are a very few cases suggesting an affirmative

misrepresentation is constitutionally irremediable (see, e.g., *United States v. Sambro* (D.C. Cir. 1971) 147 U.S. App. D.C. 75, 454 F.2d 918, 921-922; *United States v. Parrino* (2d Cir. 1954) 212 F.2d 919, 921-922), but, as one court has remarked, we properly may "regard those cases as aberrations" (*Strader v. Garrison* (4th Cir. 1979) 611 F.2d 61, 64).

[***44]

In the Court of Appeal, the Attorney General acknowledged that for trial counsel to have assured petitioner he would have no immigration problems if he pled guilty would have been "irresponsible." More importantly, such advice would have been mistaken. Controlled substance violations "are the most damning convictions in the Immigration and Nationality Act. There are very few situations [**1186] where a plea to a narcotics violation would not have a [*252] fatal and permanent immigration consequence" as an "alien convicted of a crime 'relating to' controlled substances is deportable and excludable." (Brady et al., Cal. Criminal Law and Immigration (1997) Drug Convictions, Admissions, Trafficking, Addiction and Abuse, p. 3-1.)

Owing to the enactment of IIRAIRA and AEDPA in 1996, petitioner became subject to expedited removal from the United States upon pleading guilty to the charges against him, both because they involved controlled substances and because drug trafficking is considered an "aggravated felony." n15 The only contingency on which institution of actual removal proceedings at that point hung was that they be instituted "upon the order of the [United States] Attorney General" (8 U.S.C. § 1227 [***45] (a)), which indeed they were.

n15 Title 8 United States Code sections 1101(a)(43)(B) ("aggravated felony" includes "illicit trafficking in a controlled substance"), 1227(a)(2)(A)(iii) (deportability for "aggravated felony"), 1227(a)(2)(B)(i) (deportability for controlled substance offense), 1228 (expedited removal). An exception to removal, "cancellation of removal," is not available to lawful residents convicted of such offenses. (8 U.S.C. § 1229b(b)(1)(C).)

The Attorney General suggests that petitioner's testimony about what his counsel told him was "rebutted" by counsel's declaration asserting it was his custom and practice to tell clients the government "is always wanting" to deport noncitizen felons. n16 Trial counsel does not recall what he actually told petitioner. Petitioner argues that, even if believed, counsel's declaration does not *necessarily* contradict his evidence that, at some point, counsel also told him specifically that a guilty plea would in [***46] fact generate no immigration problems.

n16 The Attorney General also points out that petitioner indicated at the hearing on his motion to vacate the judgment that, at the plea proceeding, he had answered "yes" when the judge asked him if he had signed the plea form and talked with his lawyer about it. As it turns out, petitioner was mistaken; the plea colloquy, in fact, included no such exchange.

The Court of Appeal found counsel's characterization of his custom and habit "unpersuasive." The Attorney General contends the Court of Appeal was insufficiently deferential to the trial court's stated conclusion that counsel's performance met "an objective standard of reasonableness for Defense Counsel in this County." Although the Court of Appeal was not bound to accept the superior court's factual findings, those findings were, as previously noted, entitled to " 'great weight,' " particularly where they involved assessment of witness credibility. (*People v. Ledesma*, *supra*, 43 Cal. 3d at p. 219.) [***47]

Having examined the record, we are not able to determine with certainty whether counsel conformed to his purported custom and habit or whether he [*253] supplemented any customary warning with a more specific, but incorrect, advisement. Ultimately, however, we need not resolve those factual questions. Even assuming that counsel affirmatively misadvised petitioner--and that petitioner thus has satisfied the performance prong of his ineffective assistance claim (*Strickland*, *supra*, 466 U.S. at pp. 687-688)--petitioner to prevail must additionally demonstrate prejudice, and this, we conclude, he has failed to do.

C. Was petitioner prejudiced by counsel's deficient performance?

The test for prejudice that is relevant in light of the preceding is well established. In *Hill*, *supra*, 474 U.S. at pages 58-59, the United States Supreme Court explained

that a defendant who pled guilty demonstrates prejudice caused by counsel's incompetent performance in advising him to enter the plea by establishing that a reasonable probability exists that, but for counsel's incompetence, he would not have pled guilty and would have insisted, instead, on proceeding to trial. (Accord, [***48] *In re Alvernaz*, *supra*, 2 Cal. 4th at pp. 933-934; see also *People v. Brown* (1986) 177 Cal. App. 3d 537, 554, 223 Cal. Rptr. 66.)

[**1187] Petitioner specifically avers that, if counsel had informed him he would be deported as a consequence of his guilty pleas, he would not have pled guilty and would have elected to be tried. As he points out, we previously have recognized that a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as the only ones that could affect his calculations regarding the advisability of pleading guilty to criminal charges. (*Zamudio*, *supra*, 23 Cal. 4th at pp. 206-207.)

The Attorney General rightly reminds us, however, that petitioner's assertion he would not have pled guilty if given competent advice "must be corroborated independently by objective evidence." (*In re Alvernaz*, *supra*, 2 Cal. 4th at p. 938; see also *U.S. v. Horne* (D.C. Cir. 1993) 300 U.S. App. D.C. 169, 987 F.2d 833, 836.) "In determining whether a defendant, with effective assistance, would have accepted [or rejected a plea] offer, pertinent factors to be considered [***49] include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain." (*In re Alvernaz*, at p. 938.)

Petitioner has not contended that his counsel inaccurately communicated the People's plea offer. Nor has he adduced any substantial evidence [*254] suggesting the prosecutor might ultimately have agreed to a plea that would have allowed petitioner to avoid adverse immigration consequences. While the prosecution also did not introduce evidence in this regard, the burden remains petitioner's to prove by a preponderance of the evidence his entitlement to relief. (*In re Johnson* (1998) 18 Cal. 4th 447, 460, 957 P.2d 299.) In the end, petitioner pled guilty as charged; no charges were dropped.

Had petitioner proceeded to trial on the drug charges against him, and had the prosecution chosen to seek maximum penalties, petitioner faced a maximum total punishment of five years and four [***50] months of incarceration. The plea bargain that petitioner reached with the district attorney burdened him with only 180 days of local incarceration and three years of probation. The choice, moreover, that petitioner would have faced at the time he was considering whether to plead, even had he been properly advised, would *not* have been between, on the one hand, pleading guilty and being deported and, on the other, going to trial and avoiding deportation. While it is true that by insisting on trial petitioner would for a period have retained a theoretical possibility of evading the conviction that rendered him deportable and excludable, it is equally true that a conviction following trial would have subjected him to the same immigration consequences.

In determining whether or not a defendant who has pled guilty would have insisted on proceeding to trial had he received competent advice, an appellate court also may consider the probable outcome of any trial, to the extent that may be discerned. (Cf. *Hill*, *supra,* 474 U.S. at p. 59 [probable trial outcome relevant in assessing prejudice from counsel's failure to discover exculpatory evidence or present affirmative [***51] defense]; accord, *Roe v. Flores-Ortega*, *supra*, 528 U.S. at p. 485 [120 S. Ct. at p. 1039].) Petitioner states that he has consistently maintained his innocence and asserts that the police report shows he has a "triable case," but nothing in his declaration or the other evidence he offered indicates how he might have been able to avoid conviction or what specific defenses might have been available to him at trial. Nor did petitioner explain at the hearing on the order to show cause how the evidence might have exonerated him.

Based upon our examination of the entire record, petitioner fails, ultimately, to persuade us that it is reasonably probable he would have forgone the distinctly favorable outcome he obtained by pleading, and instead insisted on proceeding to trial, had trial counsel [**1188] not misadvised him about the immigration consequences of pleading guilty. (See *Hill*, *supra*, 474 U.S. at pp. 58-59; *In re Alvernaz*, *supra*, 2 Cal. 4th at p. 934.)
[*255]

DISPOSITION

For the foregoing reasons, the judgment of the Court of Appeal is reversed.

WERDEGAR, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

CONCURBY:
MOSK; **BROWN**

DISSENTBY:
MOSK; [***52] **BROWN**

DISSENT:

CONCURRING AND DISSENTING OPINION BY MOSK, J.

I concur fully in the lead opinion's legal analysis, set out in parts A and B of the lead opinion and the three prefatory paragraphs preceding part A, as far as it goes. (Lead opn., *ante*, at pp. 7-27.) I would, however, go farther. I believe Penal Code section 1016.5 imposes an affirmative duty on counsel in any criminal case to inquire of the client: "Are you a United States citizen?" If the answer is negative, counsel must advise the client of the immigration and nationality consequences of a criminal conviction. Failure to do so accurately constitutes a breach of duty under state law given the legislative mandate of section 1016.5.

And I strongly disagree with part C, in which the lead opinion concludes petitioner did not suffer prejudice. (Lead opn., *ante*, at p. 26 et seq.) Unquestionably, he has proved by a preponderance of the evidence facts that establish a basis for relief (*In re Cudjo* (1999) 20 Cal. 4th 673, 687, 977 P.2d 66), i.e., he has established a reasonable probability that, but for his lawyer's omission, he would have gone to trial (*Hill v. Lockhart* (1985) 474 U.S. 52, 58-59, 88 L. Ed. 2d 203, 106 S. Ct. 366; [***53] *Burket v. Angelone* (4th Cir. 2000) 208 F.3d 172, 189).

Subjective and objective reasons plainly establish petitioner's entitlement to relief.

Turning first to the objective reasons: In recent years, the immigration consequences of criminal convictions have verged on the monstrously cruel in their harshness compared to many of the crimes on which they are imposed.

Petitioner has been ordered to appear in immigration court for deportation proceedings on grounds of having been convicted of an "aggravated felony." (8 U.S.C. § § 1101(a)(43)(B), 1227(a)(2)(A)(iii).)

"Aggravated felony" is a federal term of art that covers a broad variety of crimes, many of them relatively minor. It includes such misdemeanors as trivial batteries (8 U.S.C. 1101(a)(43)(F)), possession for sale of a marijuana cigarette (8 U.S.C. § 1101(a)(43)(B)), and theft resulting in a one-year suspended sentence (8 U.S.C. § 1101(a)(43)(G), (48)(B)). All of these, even [*256] if misdemeanors under a state law, are aggravated felonies in federal concept.

The statutes are retroactive (110 Stat. 3009, § 321(b), p. 3009-628, codified [***54] at 8 U.S.C. § 1101, foll. (a)(43)(U)), so that an individual, regardless of legal status in and ties to the United States or length of residence here is liable for removal. In recent years, the federal government has sought to deport:

-- a 34-year-old born in Germany who came to the United States about age 1, and who pleaded guilty to misdemeanor battery following a minor struggle in 1990 n1;

[**1189] -- a lawful permanent resident from Guatemala with two United States citizen children who resisted her husband as he engaged in one of the periodic assaults he had inflicted on her for years n2;

-- a Canadian who was duped by her boyfriend into selling him some controlled prescription medications. n3

n1 "In 1988 [Mary Anne Gehris] pulled another woman's hair in a quarrel over a man. She was charged with battery, a misdemeanor, for that and for grabbing the woman around the neck, which she says she did not do. No witnesses appeared in court. On the advice of a public defender, she pleaded guilty. As is the Georgia practice, the judge gave her a one-year sentence, suspended for a year's probation.

"She has not been in any trouble since. She is married to a U.S. citizen and has a 14-year-old child, also a citizen." (Lewis, *Abroad at Home: "This Has Got Me in Some Kind of Whirlwind."* N.Y. Times (Jan. 8, 2000).)

Mary Anne Gehris avoided deportation when the Georgia Board of Pardons and Paroles pardoned her in March 2000. (Lewis, *Abroad at Home: Rays of Hope*, N.Y. Times (Feb. 10, 2001).) [***55]

n2 "Over several years she complained to

the police that her husband was assaulting her. In June 1998, during one of their disputes, her husband sat on [her] and hit her. Defending herself, she bit him. He called the police, who arrested her.

"[She] was charged with domestic assault. In a 10-minute hearing, a Virginia judge urged her to plead guilty without a lawyer. When she did, he sentenced her to six months' probation and 30 days in jail, to be suspended if she finished the probation. She did. She is now separated from her husband.

"At 5 in the morning last Jan. 13 two agents of the Immigration and Naturalization Service came to [her] home and arrested her for deportation. Why? The charging document ... cited a section of the 1996 Immigration Act calling for deportation of anyone convicted of 'a crime of domestic violence.' " (Lewis, *Abroad at Home: The Mills of Cruelty*, N.Y. Times (Dec. 14, 1999); see 8 U.S.C. § 1227(a)(2)(E)(i).)

n3 "Catherine Caza asked the immigration judge, Rex J. Ford, what would happen to her 7-year-old American daughter if she was deported.

" 'Ma'am,' Judge Ford said, 'some of these situations are absolutely heart-wrenching. I will tell you that the law changed and there are no waivers for these things now. I'm not unsympathetic to your situation, but ....' He ordered her deported.

"Ms. Caza, born in Sault St. Marie, Ontario, was brought to the United States at the age of 3, in 1960. She has lived here ever since: 37 years. Her story has twists that make it unusually harsh even by the standards of deportation cases.

"In 1980 in Florida, where she lives, Ms. Caza was taking amphetamine pills prescribed by a doctor. Her boyfriend, as she thought he was, repeatedly asked her to sell him some of the pills. She finally sold him 21, and he turned out to be an undercover Florida policeman. In 1981 she pleaded guilty to a drug charge and was put on probation for five years.

"The drug offense made her deportable. On Feb. 3, 1982, the Immigration and Naturalization Service issued an order to show cause why she should not be deported.

"Ordinarily the I.N.S. presents such an order to an immigration judge within weeks of issuing it. In this case the service did nothing for 15 years. It filed the order against Catherine Caza in immigration court on Feb. 24, 1997.

"The delay is of excruciating significance for Ms. Caza. In 1982 she was eligible for what is called waiver of deportation, which could be granted when deportation would cause extreme hardship to someone who had lived in this country for seven years or more. Changes in immigration law in 1996 made her and others like her ineligible for waiver." (Lewis, *Abroad at Home: "That's The Way It Is,"* N.Y. Times, p. A39 (Dec. 19, 1997).)

[***56]

[*257] Among the results of these laws: language classes conducted in the Bristol County, Massachusetts, jail for people about to be deported to Portugal for relatively minor crimes after decades of residence in the United States. (Chevigny, *This American Life*, Episode No. 170, Immigration (WBEZ radio, Chicago, broadcast Oct. 13, 2000).) The more than 400 immigrants removed from Bristol County alone (*ibid.*) are among the "thousands of immigrants [who] have suffered harsh consequences from the 1996 act[n4]: been torn from their families, deported after decades in America, sent to countries where they know no one and do not speak the language. Some had committed serious crimes; others ... were marked for deportation for trivial offenses committed long ago." (Lewis, *Abroad at Home: Rays of Hope*, *supra*, N.Y. Times.)

n4 The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRAIRA) (Pub. L. 104-208 (Sept. 30, 1996) 110 Stat. 3009-546 et seq.).

Under the current state of the law, [***57] the immigration court is powerless to do anything except deport petitioner. (8 U.S.C. § 1229b(a)(3).)

Neither could the state court have intervened at any point, now that judicial recommendations against deportation have been abolished. (*People v. Leung* (1992) 5 Cal. App. 4th 482, 509; see *People v. Superior Court (Zamudio)* (2000) 23 Cal. 4th 183, 206, 999 P.2d 686.)

Because petitioner's drug convictions render him inadmissible in the future, he will never be allowed to return to the United [**1190] States, even to visit his

family. (8 U.S.C. § § 1182(a)(2)(A)(i)(II), 1182(a)(2)(C)(i).)

If Mexico refuses to accept petitioner, he will enter an American Gulag that few know to exist. The federal government will imprison him indefinitely, as it has imprisoned countless other legally deportable but practically [*258] undeportable individuals. For example, some 1,750 legatees of the Mariel evacuation from Cuba have languished indefinitely in federal prisons (*Rosales-Garcia v. Holland* (6th Cir. 2001) 238 F.3d 704, 711) without constitutional remedy, and without being accused of any crime. (*Carrera-Valdez v. Perryman* (7th Cir. 2000) 211 F.3d 1046, 1048; [***58] but see *Kim Ho Ma v. Reno* (9th Cir. 2000) 208 F.3d 815, 821-822 [such detention barred by statute], cert. granted *sub nom. Reno v. Kim Ho Ma* (2000) U.S. [121 S. Ct. 297, 148 L. Ed. 2d 239], and contra, *Rosales-Garcia*, at p. 715.) Some linger in prison under the legal fiction, approved in the depths of the McCarthy era, that because they were excludable from the shores of the United States, legally they *do not exist* here even though they *are* here, and they may be detained for the rest of their lives. (*Shaughnessy v. United States ex rel. Mezei* (1953) 345 U.S. 206, 215-217, 97 L. Ed. 956, 73 S. Ct. 625; *id.* at p. 217 (dis. opn. of Black, J.).) n5 One estimate finds some 4,000 immigration detainees floating in the limbo of indefinite imprisonment. (Marrero, *Nowhere to Call Home*, Jacksonville, Fla., Times-Union (Feb. 20, 2001).)

n5 The Sixth Circuit, in *Rosales-Garcia*, *supra*, found it necessary to remind the federal government that there are limits to the atavism of the immigration laws. "While the government argues for absolute judicial deference to its plenary power over immigration policies, it is clear to this court that Congress may not authorize immigration officials to treat excludable aliens with complete impunity. For example, the INS [Immigration and Naturalization Service] may not, consistent with the Constitution, execute an excludable alien should it be unable to effect his prompt deportation. It is also evident that Congress cannot authorize the infliction of physical torture upon an excludable alien while he is detained in federal prison." (238 F.3d at p. 721.)

[***59]

Those are the objective reasons that support petitioner's claim for relief.

Subjective reasons confirm the merits of petitioner's claim. The undisputed corroborating evidence that he (1) is willing to risk years in state prison to gain a glimmer of a chance of escaping conviction and thereby avoiding deportation, and (2) that he has United States citizen children, establishes a reasonable probability that if he had known he would be deported, permanently banished, and involuntarily separated from his children unless they chose to move to Mexico and abandon the privileges attendant to living in the United States (all consequences of his guilty plea) he would have elected to proceed to trial. If "a defendant's conclusion that success is remotely possible, even if not likely, is sufficient to induce many to go trial" (*State v. Van Cleave* (Ind. 1996) 674 N.E.2d 1293, 1297), how much more that must be for someone in petitioner's situation, facing lifetime banishment from his home and family. n6 Without a doubt, the foregoing evidence meets the *Hill* burden--i.e., it establishes a reasonable probability that, but for his lawyer's omission, he would have gone to trial. [***60]

n6 As one attorney explained in a radio interview: "I think that it's time that people thought about deportation for what it is. ... It's almost like a little death penalty case every time you do one. ... When you see the families, particularly the mothers, this is about the worst thing that can happen to a family." (Chevigny, *This American Life*, *supra*.)

[*259] Few with petitioner's family and cultural ties to the United States would turn down a chance, even a slight chance, of escaping the talons of the federal law. A rational person could conclude that the great likelihood of spending some five years in a California prison, balanced against the slight chance of avoiding permanent banishment to the developing world, is a worthwhile gamble. (See *Peart v. State* (Fla. 2000) 756 So. 2d 42, 50, fn. 9 (conc. opn. of Anstead, J.).) Obviously petitioner has so concluded. To deny him his choice is tragic, defying any accurate reading of *Hill v. Lockhart*, *supra*, 474 U.S. 52. [***61]

I therefore respectfully dissent with respect to part C of the lead opinion.

MOSK, J.

[**1191] CONCURRING AND DISSENTING

OPINION BY BROWN, J.

I concur in the disposition because I agree that petitioner has failed to show prejudice. I write separately because the lead opinion offers protection nobody needs, for reasons that are nowhere explained, through a method that will impose prohibitive costs on the administration of criminal justice. If we are going to cast a cloud on the validity of hundreds--perhaps thousands--of guilty pleas, we should explain why concerns about immigration entitle a defendant to multiple accurate advisements when the express waiver of constitutional rights is satisfied with one.

As courts throughout the country have held, incorrect information from counsel does not prejudice a defendant who receives correct information from the court. Reviewing courts need only verify the defendant received the correct information before pleading guilty. Resendiz received the Penal Code section 1016.5 n1 advisement from the court, and thus cannot show prejudice.

n1 Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

[***62]

I.

COUNSEL HAD NO DUTY TO ADVISE

We have never before held the right to receive immigration advice from defense counsel is guaranteed by the Sixth Amendment to the United States Constitution or article I, section 15 of the California Constitution. The Sixth Amendment is limited by its text: "In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." The amendment does not cover civil proceedings: "The protections provided by the Sixth Amendment are explicitly confined to 'criminal prosecutions.' " [*260] (*Austin v. United States* (1993) 509 U.S. 602, 608, 125 L. Ed. 2d 488, 113 S. Ct. 2801.) Counsel's performance is thus measured against that of reasonably competent criminal defense counsel, not counsel specializing in civil fields like immigration. (*Wiley v. County of San Diego* (1998) 19 Cal. 4th 532, 542, 966 P.2d 983 [defendants entitled to "counsel acting reasonably ' "within the range of competence demanded of attorneys in criminal cases" ' "].)

The vast majority of other courts, state and federal, have also concluded there is no Sixth Amendment right to receive advice regarding [***63] the immigration consequences of a guilty plea, and the absence of advice cannot constitute ineffective assistance of counsel. (*United States v. Gonzalez* (1st Cir. 2000) 202 F.3d 20, 25; *United States v. George* (7th Cir. 1989) 869 F.2d 333, 337-338, and cases cited therein; *State v. Dalman* (N.D. 1994) 520 N.W.2d 860, 863-864, and cases cited therein; *Commonwealth v. Frometa* (Pa. 1989) 520 Pa. 552, 555 A.2d 92, 94, and cases cited therein.)

In *People v. Superior Court (Giron)* (1974) 11 Cal. 3d 793, 114 Cal. Rptr. 596, 523 P.2d 636 (*Giron*), the defendant pleaded guilty; neither defense counsel, the prosecutor, nor the court advised him he could be deported as a result. (*Id.* at p. 797.) We held the trial court could exercise its discretion in deciding whether to allow the defendant to withdraw his plea under those circumstances. We did not deem the absence of such an advisement to be either judicial error or ineffective assistance of counsel. We refused to hold that defendants who plead guilty have a right to information regarding a collateral consequence like deportation. (*Ibid.*) [***64]

The Legislature responded to *Giron* by enacting section 1016.5. In so doing, the Legislature expressed concern "about the 'many instances involving [noncitizen defendants]' in which 'a plea of guilty or nolo contendere is entered without the defendant knowing that a conviction of such offense is grounds for deportation.' " (*People v. Superior Court (Zamudio)* (2000) 23 Cal. 4th 183, 193, 999 P.2d 686 (*Zamudio*), quoting § 1016.5, subd. (d).) " 'To promote fairness to such accused individuals,' " the Legislature mandated a specific warning about possible deportation consequences. (*Ibid.*)

[**1192] The statute's history discloses the Legislature considered the advisement not merely a hint to discuss the matter with counsel, but a complete and conclusive provision of the information the defendant needed. Senator Alex Garcia, the author of Senate Bill No. 276, explained, "This bill is primarily designed to assure that lawful aliens ... are made fully aware of the consequences of [their] plea." (Sen. Garcia, letter to Governor Brown re: [*261] Sen. Bill No. 276 (1977-1978 Reg. Sess.) Sept. 14, 1977.) Committee reports similarly explained the bill's purpose was to [***65] "assure that a non-citizen criminal defendant is fully apprised of the consequences [of her plea]." (Assem. Com. on Crim. Justice, analysis of Sen. Bill No. 276 (1977-1978 Reg. Sess.) as amended Aug. 25, 1977, p. 1.) There is no evidence the Legislature contemplated

this full apprisal could be modified or impeached by counsel's off-the-record remarks.

The statute would be mere surplusage if it provided defendants with advice that was already constitutionally mandated. The right to notice of the possible collateral consequence of deportation is statutory in origin; the Sixth Amendment to the United States Constitution does not entitle a defendant to immigration advice. The lead opinion does not suggest otherwise.

II.

ANY MISADVICE FROM COUNSEL WAS HARMLESS

IN LIGHT OF THE COURT'S CORRECT ADVISEMENT

The lead opinion notes a clear consensus nationwide that finds an "affirmative misstatement regarding deportation may constitute ineffective assistance" of counsel. (*United States v. Mora-Gomez* (E.D.Va. 1995) 875 F. Supp. 1208, 1212; see lead opn., *ante*, at pp. 24-25.) The cases cited are all distinguishable; none involved a judicial advisement [***66] similar to the one required by section 1016.5. The defendants in those cases were thus vulnerable to counsel's misadvice, as Resendiz was not.

The section 1016.5 advisement should shield pleas from collateral attack. The Legislature designed the advisement to combat ignorance on the part of pleading defendants; a defendant must have the correct information, but it does not matter from whom he receives it. (*People v. Quesada* (1991) 230 Cal. App. 3d 525, 536, 281 Cal. Rptr. 426 (*Quesada*).) The Court of Appeal upheld Quesada's plea because he received the correct information from counsel, even though the court failed to read the requisite advisement. (*Id.* at p. 539.) Consistent with the statute's purpose, Quesada pleaded with awareness of the potential consequences.

As the *Quesada* court observed, the critical question is whether the defendant received the correct information. He is not entitled to multiple warnings on the subject. As the on-the-record pronouncements of the court carry more weight than the private remarks of counsel (*United States v. Parrino* (2d Cir. 1954) 212 F.2d 919, 921), judicial advisement ensures the [*262] plea [***67] is intelligent, notwithstanding contrary guidance from counsel. Although the lead opinion notes the consensus holding that misadvice may constitute ineffective assistance absent judicial advisement, there is an even clearer consensus holding that misadvice, even if it amounts to deficient representation under *Strickland v. Washington* (1984) 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052, is not prejudicial where the court provides the correct advice.

A.

Most apposite to our review is the decisional authority of Florida, the other state whose large noncitizen population has prompted careful consideration of this issue. Florida courts have concluded that the very purpose of that state's section 1016.5 analogue is to guarantee defendants receive correct advice regarding deportation, rather than have them depend on their criminal counsel, who may be unfamiliar with immigration law. So long as Florida defendants receive that judicial advisement, counsel's [**1193] misadvice cannot render the plea unknowing and invalid.

In *State v. Ginebra* (Fla. 1987) 511 So. 2d 960, the Florida Supreme Court cited *Giron* in concluding a defendant had no right [***68] to advice from either the court or counsel concerning immigration consequences, and thus a defendant's ignorance regarding the possibility of deportation did not invalidate the plea. (*Id.* at pp. 961-962.) As California forestalled the potential unfairness of *Giron* by enacting section 1016.5, Florida answered *Ginebra* by adding subsection (c)(viii) to rule 3.172 of the Florida Rules of Criminal Procedure (hereafter subsection (c)(viii)), which requires courts to inform defendants their guilty pleas could lead to deportation. (See *In re Amendments to Florida Rules* (Fla. 1988) 536 So. 2d 992.)

The presence or absence of this judicial advisement now determines whether counsel's misadvice regarding deportation will support vacating a plea. Misadvice may support an ineffective assistance claim when the court fails to advise the defendant. (*Dugart v. State* (Fla.Dist.Ct.App. 1991) 578 So. 2d 789.) But an adequate court advisement is clearly intended to have a prophylactic effect. "Starting with the cases espousing the principle that there is no right to be informed of the collateral consequences of a guilty plea, which were followed [***69] by the 1988 amendment to the Rules of Criminal Procedure instructing judges to advise a defendant that deportation could result if the defendant is not a United States citizen, it is reasonable to conclude that *the supreme court intended to avoid the vacating of guilty pleas on the sole ground that the noncitizen defendant may have been misinformed about deportation as a collateral consequence of pleading*

guilty. Otherwise, [*263] *there was little reason for adopting subsection (c)(viii).*" (*Bermudez v. State* (Fla.Dist.Ct.App. 1992) 603 So. 2d 657, 658, italics added.) Because the court properly advised the defendant, *Bermudez* denied the defendant's claim of ineffective assistance based on counsel's alleged misstatement.

B.

Federal courts likewise hold judicial advisements safeguard pleas from collateral attack, because the court's advice cures any possible harm arising from counsel's error. There is no federal parallel to section 1016.5 or subsection (c)(viii), but analogous cases have consistently affirmed defendants do not suffer prejudice from counsel's misadvice, even if it amounts to deficiency under *Strickland*, where the court provides the correct [***70] information.

In *United States v. Thornton* (9th Cir. 1994) 23 F.3d 1532, the defendant pleaded guilty, received a sentence of life imprisonment, and subsequently challenged his plea as being the product of counsel's erroneous advice. The Ninth Circuit Court of Appeals rejected the claim: "Even if Thornton's attorney and the parties didn't realize the guidelines allowed a life sentence," "the district judge advised him that a life sentence was possible, [citation], thus rendering any advice given by Thornton's counsel, even if erroneous, non-prejudicial." (*Id.* at pp. 1533-1534.) Substitute "deportation" for "a life sentence," and the instant analysis is the same, except that deportation, while significant, is a collateral consequence, not within the control of the sentencing court.

Other circuits are in accord. In *Barker v. United States* (7th Cir. 1993) 7 F.3d 629, the defendant pleaded guilty after allegedly receiving misadvice from counsel about the possible sentence. The Seventh Circuit Court of Appeals found the trial court's advice "cured" any possible harm. "In this case, even if advice from [the] trial attorney had [***71] led to [Barker's] misunderstanding of the consequences of his guilty plea, any such confusion was cured by the trial court [which took] careful and appropriate measures to dispel any confusion on Mr. Barker's part before the plea was accepted." (*Id.* at p. 633; see also *Worthen v. Meachum* (10th Cir. 1988) 842 F.2d 1179, 1184, disapproved on other grounds in *Coleman v. Thompson* (1991) 501 U.S. 722, 749-751, 115 L. Ed. 2d 640, 111 S. Ct. 2546 ["even if Worthen's attorney's alleged mistaken advice about parole rendered his performance inferior to that reasonably expected of attorneys ...,Worthen was not prejudiced by advice that the court specifically told him was incorrect"].)

[**1194] The rule is the same even where (1) the defendant alleges counsel informed the defendant the court's advisement will not apply due to the [*264] defendant's particular circumstances (rather than being wrong generally); and (2) counsel confirms he provided this misadvice. In *Ramos v. Rogers* (6th Cir. 1999) 170 F.3d 560 (*Ramos*), Ramos's collateral attack on his plea included affidavits from both himself and counsel describing an off-the-record [***72] agreement that would have granted Ramos probation after he had served one year in prison. Counsel informed Ramos the deal "would not be discussed on the record during his plea" and thus "[Ramos should] just answer [the court's] questions at the plea as if no deals had been made," and to " 'just go along with what the judge asked me.' " (*Id.* at pp. 562-563.) The Sixth Circuit Court of Appeals rejected Ramos's claim, noting "the state trial court specifically asked Ramos, 'Do you understand that [rape] is not a probationable offense, that you are not going to receive probation under any circumstances?' " (*Id.* at p. 565.) Recalling this express advisement, the Sixth Circuit found no "prejudice when the court specifically informed [Ramos] that his counsel's advice was incorrect." (*Ibid.*) The Ninth Circuit similarly rejected the claim of a defendant whose attorney allegedly advised him that if he pleaded guilty he would be eligible for parole in seven years, and that the court would announce there was no possibility of parole only for the benefit of the public. (*Dennis v. People of State of California* (9th Cir. 1969) 414 F.2d 424, 425.) [***73] The *Dennis* court refused to vacate the plea, emphasizing the colloquy in which both counsel and the court described the sentence as being "*without* possibility of parole." (*Id.* at p. 426, fn. 2.)

Furthermore, the People need not prevail in a credibility contest to protect the plea from collateral attack; the rule is the same even where the trial and appellate court agree that (1) counsel provided misadvice; and (2) it amounted to "ineffective assistance of counsel." (*Warner v. United States* (6th Cir. 1992) 975 F.2d 1207, 1211 (*Warner*).) n2 Trial counsel incorrectly advised Warner, who faced federal and state charges, that the federal district court could impose sentence concurrent to Warner's state sentence. (*Warner*, at p. 1211.) The Sixth Circuit Court of Appeals found no prejudice, however, because the district court advised Warner, "I am not in any way concerned with the State sentence .... I will impose a Federal sentence ... [and] that Federal sentence will go into effect, but in no way

will that be shortened or modified by the State sentence." (*Ibid.*) The Sixth Circuit also rejected Warner's claim he lied to the court, [***74] in denying any off-the-record promises had been made, on the instruction of counsel: "Even if Warner did deny knowledge of a plea agreement in reliance on [counsel's] mistaken advice, this does not amount to prejudice when the court specifically informed him that ... advice was incorrect." (*Id.* at p. 1212.)

n2 The *Warner* court apparently used the phrase "ineffective assistance of counsel" to refer to *Strickland's* first prong.

Most tellingly, the federal district court and the circuit court did vacate Warner's plea to the state charges because the state court never corrected [*265] counsel's misadvice. "These ... findings are not inconsistent. The federal court advised Warner that there would be no concurrent sentences, the state court did not." (*Warner*, *supra*, 975 F.2d at p. 1214.) The presence of correct judicial advice thus distinguishes cases where counsel's misadvice justifies vacating a plea from those where it does not.

III.

APPELLATE REVIEW OF THE INSTANT CLAIM REQUIRES [***75] ONLY A QUICK REVIEW OF THE TRANSCRIPT TO ENSURE THE COURT PROPERLY ADVISED DEFENDANT

Appellate review of claims like Resendiz's may therefore be limited. For a plea to be [**1195] valid, the record must reveal the defendant was informed he could be deported as a consequence of his plea. On-the-record advisement is necessary--and sufficient.

On-the-record advisement serves a dual purpose; it protects both the defendant and his plea. (*Boykin v. Alabama* (1969) 395 U.S. 238, 244, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (*Boykin*); *In re Tahl* (1969) 1 Cal. 3d 122, 132, 81 Cal. Rptr. 577, 460 P.2d 449.) *Boykin* prescribed on-the-record advisement of a defendant's constitutional rights to guarantee the plea was voluntary and knowing. On the one hand, on-the-record advisement ensured defendants did not plead guilty out of ignorance. On the other, "when the judge discharges that function, he leaves a record adequate for any review that may be later sought ... and *forestalls the spin-off of collateral proceedings that seek to probe murky memories.*" (*Boykin*, at p. 244, fns. omitted, italics added.) *Boykin* advised courts to examine defendants to ensure [***76] they understand the nature of the charges, the constitutional rights being waived, and the permissible range of sentences,

" 'if these convictions are to be insulated from attack.' " (395 U.S. at p. 244, fn. 7, quoting *Commonwealth ex rel. West v. Rundle* (Pa. 1968) 428 Pa. 102, 237 A.2d 196, 197-198.)

Determining the knowing nature of a plea is a "simple[] task." (*People v. Allen* (1999) 21 Cal. 4th 424, 442, 981 P.2d 525.) Because on-the-record advisement is both necessary and sufficient, our evaluation of *Boykin-Tahl* challenges is minimal. "The record of the hearing ... should clearly demonstrate the defendant was told of his rights and that he affirmatively waived them. ... [A] quick review of the transcript may be all that is necessary." (*Allen*, at p. 442.) Only in those "unusual cases" where no advisement precedes the plea will further investigation be necessary. (*Ibid.*)

Review of section 1016.5 claims should be no broader in scope. The statutory preference for defendants to understand the possible collateral [*266] consequences of their pleas does not warrant more zealous protection than the constitutional imperative that defendants [***77] understand their constitutional rights and the direct consequences of their pleas. (*People v. Ramirez* (1999) 71 Cal. App. 4th 519, 522.) The record reflects Resendiz received correct advice regarding deportation; no further review is warranted. (Cf. *People v. Allen*, *supra*, 21 Cal. 4th at p. 442.)

CONCLUSION

Defendant, who was advised by the court he could be deported and confirmed he understood this possibility, now seeks to withdraw his plea based on his not knowing he could be deported. To credit his claim rewards disregard for the court and creates an incentive for mendacity.

Defendant's claim must fail because the court provided him with all the information to which he was entitled, and all the information the Legislature has deemed necessary for an intelligent plea. The judicial advisement places a defendant on notice. He may, depending on the importance he attaches to the potential consequence, seek additional time, clarification and expert advice. But if his understanding is contrary to the court's warning, "it [is] imperative that [defendant] not

stand mute during the plea colloquy." (*Resta v. State* (Fla.Dist.Ct.App. 1997) 698 So. 2d 378, 379.) [***78]

The lead opinion encourages "probing murky memories," contrary to *Boykin* (*supra*, 395 U.S. at p. 244, fn. omitted). Memories are likely to be especially murky in cases like this one, where counsel may well be torn between protecting himself from an ineffectiveness finding and protecting a client from conviction and deportation. Even if not every collateral attack is successful, searching beyond the transcript and taking testimony from all involved parties will significantly strain judicial resources.

By enacting section 1016.5, the Legislature responded appropriately and effectively to [**1196] the potential for unfairness to noncitizen defendants. The law was the first of its kind and has served as a national model. n3 Today's opinion signals to criminal defendants that the court's advice is wasted breath; defendants may safely ignore the pronouncement of the court, accept the benefit of the bargain, and plead ignorance years after the fact. Nothing is [*267] created by the lead opinion except confusion. I therefore concur in the disposition only.

n3 Every state that has prescribed a specific text has adopted section 1016.5's warning practically verbatim (Conn. Gen. Stat., § 54-1j(a); D.C. Code,

§ 16-713(a); Hawaii Rev. Stat., § 802E-2; Mass. Gen. Laws, ch. 278, § 29D; Ohio Rev. Code, § 2943.031(A); Wash. Rev. Code, § 10.40.200(2)), and two states have even adopted the legislative findings expressed in section 1016.5, subdivision (d) (Hawaii Rev. Stat., § 802E-1; Wash. Rev. Code, § 10.40.200(1)).

[***79]

BROWN, J.

WE CONCUR:

BAXTER, J.

CHIN, J.

25 Cal. 4th 197, *; 19 P.3d 1148, **;
2001 Cal. LEXIS 1813, ***; 105 Cal. Rptr. 2d 407

19 of 19 DOCUMENTS

HEATHER PRESTON, Plaintiff and Appellant, v. STATE BOARD OF EQUALIZATION, Defendant and Respondent.

S083632

SUPREME COURT OF CALIFORNIA

25 Cal. 4th 197; 19 P.3d 1148; 2001 Cal. LEXIS 1813; 105 Cal. Rptr. 2d 407; 59 U.S.P.Q.2D (BNA) 1020; 2001 Cal. Daily Op. Service 2654; 2001 Daily Journal DAR 3267

April 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 Appeal of California, First Appellate District, Division 3. A081437. San Francisco County Super. Ct. No. 979165. Joseph A. Desmond, Judge.

COUNSEL:
Attorneys for Appellant: Nicholas Blonder for Plaintiff and Appellant.

Daniel E. Abraham; Nielsen, Merksamer, Parrinello, Mueller & Naylor, John E. Mueller and Eric J. Miethke for Graphic Artists Guild as Amicus Curiae on behalf of Plaintiff and Appellant.

Attorneys for Respondent: Bill Lockyer, Attorney General, and Paul D. Gifford, Assistant Attorney General, for Defendant and Respondent.

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

OPINIONBY:
BROWN

OPINION:

[*203] [**1152] In this case, we consider whether: (1) a taxpayer who fails to explicitly raise a contention in her claim for refund may still raise that contention in a subsequent lawsuit for that refund; and (2) a copyright interest in artwork, transferred in conjunction with the [**1153] temporary transfer of the tangible artwork itself, is subject to sales tax. We conclude that a refund claim sufficiently raises any contention that is intertwined [***2] with or clearly implied from contentions explicitly raised in the claim. We further conclude that Revenue and Taxation Code n1 sections 6011, subdivision (c)(10) and 6012, subdivision (c)(10) (hereafter section 6011(c)(10) and section 6012(c)(10)) apply to the transactions at issue in this case and exempt the copyright transfers from taxation.

n1 All further statutory references are to the Revenue and Taxation Code unless otherwise indicated.

FACTUAL BACKGROUND

Heather Preston is a professional artist. From 1981 to 1993, Preston entered into a number of written agreements to provide artwork for use as book illustrations and rubber stamp designs (collectively, Agreements).

Under the terms of the first agreement, dated August 11, 1981, Preston provided Celestial Arts, a book publisher, with eight illustrations for Remember the Secret, a children's book. Celestial Arts received "the right to reproduce the artwork in the book and in publicity and promotion connected [*204] with the

book." In return, Celestial Arts gave [***3] Preston "a 5% of cash received royalty on books sold" and paid her $ 1,500 as an advance against future royalties.

From 1988 to 1993, Preston entered into a series of agreements with All Night Media, a rubber stamp manufacturer. The agreements encompassed 54 designs created by Preston and gave All Night Media "all rights for the use of [Preston's] artwork on any and all rubber stamp products. ..." In return, Preston received a flat fee upon publication of the first All Night Media catalog containing the designs and an additional amount in the form of either a flat fee for each publication of the designs in a subsequent catalog or a 5 percent royalty on sales.

In the last agreement, Preston contracted with Enchante, a book publisher, to supply illustrations for a children's book, The Rainbow Fields. Enchante acquired "all of the exclusive rights comprised in the copyrights" contained in these illustrations, including the "unlimited perpetual right to sell, license, distribute, and otherwise use" these copyrights in any media. In return, Preston received a royalty from Enchante on all book, calendar and poster sales containing the illustrations and a $ 7,500 advance on these royalties. [***4] Preston also retained the right to reproduce the illustrations "solely for portfolio and self-promotion purposes."

Pursuant to these Agreements, Preston transferred "finished artwork in tangible form ...." The clients "then copied or reproduced images from this finished artwork" for use in their products and returned the tangible artwork to Preston. Aside from those rights in the artwork expressly transferred under the Agreements, Preston retained all other rights in the artwork, including title.

In 1994, the State Board of Equalization (Board) conducted a sales and use tax audit of Preston's business records for the period of January 1, 1990, through December 31, 1993 (the audit period). The Board eventually determined that Preston owed sales tax in the amount of $ 1,711.82 and interest in the amount of $ 321.44 based on the amount of royalties she received from the Agreements during the audit period.

Preston paid the tax claimed due and filed a petition for redetermination of her tax liability. One month later, Preston timely submitted a claim for refund. In her six-page claim, Preston raised a number of objections to the assessed tax. For example, she argued that California Code of Regulations, title 18, section 1501 [***5] (hereafter Regulation 1501)--which specifically exempts a manuscript submitted for publication from sales tax--precludes [*205] taxation of the proceeds from her Agreements. She also claimed that these proceeds were not taxable because she only transferred "the right of reproduction [**1154] and the artwork is returned to [her] for [her] files. Hence, a 'sale' of original artwork has not occurred."

After a hearing, the Board concluded that the royalties were taxable gross receipts and denied Preston's petition for redetermination. Preston then paid the interest due. Soon after, the Board denied her claim for refund.

Preston then filed the instant action, seeking a refund of the sales tax and interest that she paid. In her complaint, Preston alleged that "the sales tax paid by plaintiff [Preston] should be refunded because the use rights transferred by her were intangible property." After a one-day hearing, the trial court found that "the items sold by Plaintiff [Preston] were tangible personal property, and not intangible property" and entered judgment for the Board.

The Court of Appeal affirmed. In support, the court concluded that: (1) Preston waived any claim premised on the nontaxability [***6] of the Agreements' transfer of copyrights; (2) attainment of the tangible artwork was the true object of the Agreements because they "would have been worthless" without the tangible artwork; and (3) the Agreements transferred "possession ... of tangible personal property for a consideration" as understood in section 6006, subdivision (a).

We granted review to determine whether: (1) an administrative claim alleging that the taxpayer transferred only the right to reproduce and did not sell her artwork sufficiently raises a claim that the transaction involved the transfer of nontaxable copyrights; and (2) a taxpayer who temporarily transfers possession of tangible artwork solely for reproduction in books and merchandise but otherwise retains ownership of the artwork has to pay sales tax.

DISCUSSION

I

As a preliminary matter, we must determine whether Preston has exhausted her administrative remedies by sufficiently raising the copyright issue in her claim for refund. Although the Board concedes that Preston "alleges that she transferred solely intangible property," it contends she did not sufficiently allege that the transactions were nontaxable transfers of copyrights. [***7] Thus, she failed to exhaust her remedies as to any claim premised on federal copyright law. We

disagree. [*206]

Before filing suit for a tax refund, a taxpayer must present a claim for refund to the Board. (§ 6932.) The claim "shall be in writing and shall state the specific grounds upon which the claim is founded." (§ 6904, subd. (a).) The purpose of these statutory requirements is to ensure that the Board receives sufficient notice of the claim and its basis. (See *Wertin v. Franchise Tax Bd.* (1998) 68 Cal. App. 4th 961, 977 ["the purpose of the statute is to put the board on notice of a claim"].) The Board then has an opportunity to correct any mistakes, thereby conserving judicial resources. (See *Atari, Inc. v. State Bd. of Equalization* (1985) 170 Cal. App. 3d 665, 673, 216 Cal. Rptr. 267 (*Atari*).)

Any lawsuit against the Board must be based "on the grounds set forth in the claim" for refund. (§ 6933.) It may not include issues "*not* raised in the claim." (*Jimmy Swaggart Ministries v. State Bd. of Equalization* (1988) 204 Cal. App. 3d 1269, 1290, 250 Cal. Rptr. 891, italics added, affd. *sub nom. Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.* (1990) 493 U.S. 378, 107 L. Ed. 2d 796, 110 S. Ct. 688.) [***8] "The claim for refund thus frames and restricts the issues for litigation." (*American Alliance Ins. Co. v. State Bd. of Equalization* (1982) 134 Cal. App. 3d 601, 609, 184 Cal. Rptr. 674.) Indeed, courts "are without jurisdiction to consider grounds not set forth in the claim." (*Atari*, *supra*, 170 Cal. App. 3d at p. 672.)

Despite these limits on actions against the Board, a taxpayer need not expressly raise a contention in order to meet [**1155] the statutory exhaustion requirements. Where the contention is intertwined with contentions expressly raised in the refund claim, courts may consider that contention even though the claim did not explicitly raise it. (See *Montgomery Ward & Co. v. Franchise Tax Bd.* (1970) 6 Cal. App. 3d 149, 164-165, 85 Cal. Rptr. 890 (*Montgomery Ward*) [considering unstated contentions because they were "intertwined" with contentions raised in the refund claim].) In other words, unstated contentions clearly implied from contentions expressly raised in a claim for refund are sufficiently stated for purposes of exhaustion. (See *Wallace Berrie & Co. v. State Bd. of Equalization* (1985) 40 Cal. 3d 60, 66, fn. 2, 219 Cal. Rptr. 142, 707 P.2d 204 [***9] (*Wallace Berrie*) [taxpayer satisfied the exhaustion requirement by implicitly raising the contention in his refund claim].)

In this case, Preston more than sufficiently raised the copyright issue in her claim for refund. First, the contention in her claim that the transactions at issue involve only the transfer of the "right of reproduction" and not the " 'sale' of original artwork" sufficiently conveys her reliance on federal copyright law. Because the right "to reproduce the copyrighted work" is one of the rights given to copyright owners by statute (17 U.S.C. § 106), [*207] Preston's refund claim, by definition, raises a contention predicated on federal copyright law.

Second, Preston's discussion of Regulation 1501 adequately raises the copyright issue. In her refund claim, she analogizes an illustrator who submits illustrations for publication to the writer in Regulation 1501 who submits a manuscript for publication and asks "why should one be taxed differently from the other?" n2 Because the manuscript example in Regulation 1501 is premised on the nontaxability of a copyright transfer (see *Navistar Internat. Transportation Corp. v. State Bd. of Equalization* (1994) 8 Cal. 4th 868, 877, 884 P.2d 108 [***10] (*Navistar*)), Preston's analogy implicitly alleges that her transactions are not taxable because they involve only the transfer of nontaxable copyrights.

n2 Specifically, Preston's claim for refund states:

"Concerning book royalties: The facts are that while an illustrator and a writer both work on the same book and are on the same royalty basis, only the illustrator pays sales tax on those royalties while the writer pays none! Is this not totally unfair? An artist uses paper for the same purpose, to convey ideas. Are royalties on a picture book without words taxable and a word book exempt? Both are books. The writer's manuscript is not the only way to convey an 'idea'. 'A picture is worth a thousand words.' For example, a political cartoon may contain no words at all, yet tell a story. This is clearly discriminatory and unfair.

"Unless I am missing something, writers are considered to convey ideas while illustrators are presumed not to. The Board's reasoning is as follows: 'An idea may be expressed in the form of tangible personable [*sic*] property and that property may be transferred for a consideration from one person to another; however, the person transferring the property may still be regarded as the consumer of the property. Thus, the transfer to a purchaser of an original manuscript by the author thereof, for the purpose of publication, is not subject to taxation.' (Reg. 1501.) If the words 'illustrator' and 'illustrations' are substituted for

'author' and 'manuscript' respectively in the above reference, it is obvious that they would equally apply. Why should one be taxed differently from the other? This seems to be the only equitable solution, as there is no honorable reason why they should be treated differently."

[***11]

The absence of the word "copyright" or an explicit reference to federal copyright law is immaterial. Preston's contention that the transactions were nontaxable transfers of copyrights is, without question, intertwined with and clearly implied from the contentions in Preston's refund claim. Thus, she has satisfied the statutory exhaustion requirements. (*Wallace Berrie*, *supra*, 40 Cal. 3d at p. 66, fn. 2; *Montgomery Ward*, *supra*, 6 Cal. App. 3d at pp. 164-165.)

Finally, the Board's reliance on its ignorance of federal copyright law is disingenuous. Many transactions involve copyright transfers. Presumably, the Board must deal with copyright issues when determining the tax consequences of these transactions. The Board must therefore have at least a passing familiarity with copyright law. At a minimum, the Board should be able to recognize that a reference to the right to reproduce-- [**1156] the best known [*208] right given to copyright owners--implicates federal copyright law. (See 17 U.S.C. § 106(1).) Indeed, the right to reproduce is embodied in the word "copyright." Accordingly, Preston sufficiently raised the copyright issue for exhaustion purposes.

II

We [***12] now turn to the propriety of assessing a sales tax in this case and begin by determining whether Preston's Agreements are completely exempt from taxation because they fail to create transfers of tangible property for consideration. Citing the manuscript example found in Regulation 1501, Preston and amicus curiae Graphics Artists Guild contend the Agreements created *no* transfers of tangible property for consideration because the transfers of artwork were incidental to the transfers of copyrights in the artwork. Thus, *all* proceeds from the Agreements should be exempt from taxation. The Board counters that the temporary transfers of artwork pursuant to the Agreements constitute taxable leases. As explained below, we find that the Agreements are not wholly exempt from sales tax because they created taxable transfers of tangible property.

California law imposes a retail tax on "the gross receipts ... from the sale of all tangible personal property ...." (§ 6051.) A "sale" means "any transfer of title or possession, exchange, or barter, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration" (§ 6006, subd. (a)), [***13] and includes "any lease of tangible personal property in any manner or by any means whatsoever, for a consideration" (§ 6006, subd. (g)).

" 'Tangible personal property' means personal property which may be seen, weighed, measured, felt, or touched, or which is in any other manner perceptible to the senses." (§ 6016.)

Because these provisions apply only to tangible personal property, intangible personal property is not subject to sales tax. (See *Navistar*, *supra*, 8 Cal. 4th at p. 874.) Although there is no statutory definition of intangible property, "such property is generally defined as property that is a 'right' rather than a physical object." (*Id.* at p. 875, quoting *Roth Drug, Inc. v. Johnson* (1936) 13 Cal. App. 2d 720, 734, 57 P.2d 1022.) "Thus, for purposes of the law of taxation, intangible property is defined as including personal property that is not itself intrinsically valuable, but that derives its value from what it represents or evidences." (*Ibid.*)

Despite these definitions, distinguishing between tangible and intangible personal property for taxation purposes has proven troublesome. Much of the problem stems [***14] from the fact that the value of a tangible object [*209] often depends on the "intangible rights and privileges" associated with the object. (*Roehm v. County of Orange* (1948) 32 Cal. 2d 280, 285, 196 P.2d 550.) Even where the intangible right--i.e., a copyright--is wholly distinct from the material object (see 17 U.S.C. § 202), determining the tax consequences of a transaction involving the transfer of such a right has been difficult because the transaction often includes the concurrent transfer of tangible property. (See, e.g., *Simplicity Pattern Co. v. State Bd. of Equalization* (1980) 27 Cal. 3d 900, 906, 167 Cal. Rptr. 366, 615 P.2d 555 (*Simplicity Pattern*) [transfer of film negatives and recordings and their copyrights].)

Regulation 1501 has exacerbated the confusion. Regulation 1501 ostensibly defines the criteria for "determining whether a particular transaction involves a *sale of tangible personal property* or the transfer of tangible personal property incidental to the *performance of a service* ...." (Italics added.) It provides that "the basic distinction ... is one of the true objects of the contract; that [***15] is, is the real object sought by the buyer the service per se or the property produced by

the service. If the true object of the contract is the service per se, the transaction is not subject to tax even though some tangible personal property is transferred." (*Ibid.*)

[**1157] The "true object" test described in Regulation 1501, by its terms, applies only to transactions involving "the performance of a service." The regulation, however, contains an example that does *not* appear to involve the performance of a service. (See *Culligan Water Conditioning v. State Bd. of Equalization* (1976) 17 Cal. 3d 86, 96, 130 Cal. Rptr. 321, 550 P.2d 593 ["Service is defined as 'performance of labor for the benefit of another' "].) In the so-called manuscript example, an author transfers "an original manuscript" to a publisher "for the purpose of publication ...." (Reg. 1501.) This transfer appears to involve the transfer of a copyright--and not the performance of a service. (See *Navistar*, *supra*, 8 Cal. 4th at p. 877.) Nonetheless, Regulation 1501 applies the true object test and concludes that the transfer "is not subject to taxation" because the true object of [***16] the transaction is the acquisition of an intangible property right. n3 In doing so, Regulation 1501 suggests that a transfer of tangible property is not taxable if the transfer is incidental to the transfer of intangible property.

n3 The manuscript example in Regulation 1501 states: "An idea may be expressed in the form of tangible personal property and that property may be transferred for a consideration from one person to another; however, the person transferring the property may still be regarded as the consumer of the property. Thus, the transfer to a publisher of an original manuscript by the author thereof for the purpose of publication is not subject to taxation. The author is the consumer of the paper on which he has recorded the text of his creation. However, the tax would apply to the sale of mere copies of an author's work or the sale of manuscripts written by other authors where the manuscript itself is of particular value as an item of tangible personal property and the purchaser's primary interest is in the physical property. Tax would also apply to the sale of artistic expressions in the form of paintings and sculptures even though the work of art may express an original idea since the purchaser desires the tangible object itself; that is, since the true object of the contract is the work of art in its physical form."

[***17]

[*210] We have, however, rejected such a broad interpretation of the manuscript example. In *Simplicity Pattern*, we held that the sale of "film negatives and master recordings used to make audiovisual" training materials created a taxable transfer of tangible property for consideration. (*Simplicity Pattern*, *supra*, 27 Cal. 3d at p. 903.) To reach this holding, we concluded that "a sale" does not become "nontaxable whenever its principal purpose is to transfer the intangible content of the physical object being sold" (27 Cal. 3d at p. 909), and found Regulation 1501 inapplicable because the "transfer was not incidental to any service" (*Simplicity Pattern*, at p. 912). We also distinguished plaintiff's acquisition of negatives and recordings from the manuscript example in Regulation 1501 because "a manuscript furnishes only verbal guidance," while the negatives and recordings were physically useful in the manufacturing process. (*Simplicity Pattern*, at p. 909.) Therefore, the negatives and recordings were analogous to printing plates, and the sale of these negatives and recordings was taxable. (27 Cal. 3d at pp. 909, 912.)

Since *Simplicity Pattern*, appellate [***18] courts have consistently held that a transfer of tangible property physically useful in the manufacturing process in conjunction with a transfer of intangible property rights in that property results in a taxable sale. In *Capitol Records, Inc. v. State Bd. of Equalization* (1984) 158 Cal. App. 3d 582, 587, 204 Cal. Rptr. 802, the Court of Appeal found taxable "royalties [paid] in exchange for ownership of master tapes produced by" independent production companies financed by plaintiff. Relying on *Simplicity Pattern*, the court concluded that Regulation 1501 did not exempt these transactions from taxation because the tapes "were manifestly useful in the manufacturing process, [and] were not furnished as incidents to any service ...." (*Capitol Records*, at p. 596.)

Applying the same reasoning, the Court of Appeal in *A & M Records, Inc. v. State Bd. of Equalization* (1988) 204 Cal. App. 3d 358, 376, 250 Cal. Rptr. 915 (*A & M Records*), concluded that temporary transfers of master tapes created taxable transfers of tangible [**1158] property. In *A & M Records*, plaintiffs obtained an exclusive license to use master tapes and duplicate master tapes [***19] owned by its subsidiaries. In return, plaintiffs paid its subsidiaries royalties "based upon sales of records and tapes

...." (*Id.* at p. 365.) Plaintiffs then leased these duplicate master tapes to record clubs, which used them to produce records and tapes and received royalties from these clubs "on the basis of the number of records and tapes sold ...." (*Ibid.*) Based on *Simplicity Pattern* and *Capitol Records*, the court held that these royalty payments were taxable. In doing so, the court found Regulation 1501 inapplicable because the master tapes "were essential in the [*211] ultimate production of the records and tapes through which plaintiffs made their revenues" (*A & M Records*, at p. 376). Unlike the manuscript in Regulation 1501, "the master tapes are used in the production of records and tapes and are thus not used solely for their intellectual or artistic content." (*A & M Records*, at p. 376.)

Together, these decisions establish that any transfer of tangible property *physically useful* in the manufacturing process is subject to sales tax even though the true object of the transfer is an intangible property right like a copyright. (See [***20] *Simplicity Pattern*, *supra*, 27 Cal. 3d at p. 912 ["Their [the negatives and recordings] value as physical objects permitted measuring the tax on their sale by the price received for their entire worth"].) The purpose or nature of the transfer and the form of payment are irrelevant. (See *A & M Records*, *supra*, 204 Cal. App. 3d at pp. 375-376; *Capitol Records*, *supra*, 158 Cal. App. 3d at p. 596.)

Such a conclusion flows logically from the statutes defining taxable and nontaxable leases. Under subdivision (g) of section 6006, "any lease of tangible personal property *in any manner or by any means whatsoever*, for a consideration" creates a taxable transfer. (Italics added.) Section 6006.3 then broadly defines " 'lease' " to "include[] rental, hire and license." Only leases involving the "*use of tangible personal property* for a period of less than one day for a charge of less than twenty dollars ($ 20) when *the privilege to use the property* is restricted to use thereof on the premises or at a business location of the grantor of the privilege" are statutorily exempt from taxation. (*Ibid.*, italics added.) By broadly [***21] defining taxable leases and narrowly defining the exception in terms of the *use* of the tangible property, sections 6006 and 6006.3 establish that the purpose behind and duration of a transfer of tangible property are irrelevant for determining whether a taxable transfer occurred.

Navistar does not dictate a contrary result. *Navistar* merely held that "physical usefulness" was not "a necessary condition to taxation." (*Navistar*, *supra*, 8 Cal. 4th at p. 879.) After *Navistar*, transfers of tangible property remain taxable even if these transfers are merely incidental to transfers of intangible property rights.

Thus, the temporary transfers of Preston's tangible artwork are taxable transfers of tangible property. Because Preston's Agreements transferred the artwork for use in a manufacturing process performed outside Preston's personal or business premises, they fall within the statutory definition of a taxable lease. (See § § 6006, subd. (g), 6006.3.) Like printing plates, master recordings and film negatives, the tangible artwork was physically useful [*212] and essential in the ultimate production of books and rubber stamps incorporating the copyright in the artwork. Without [***22] the physical artwork, the contracts were essentially "worthless." (*A & M Records*, *supra*, 204 Cal. App. 3d at p. 376.) As such, the artwork is not like a manuscript, which only furnishes "verbal guidance" and is not essential to the manufacturing process. (*Simplicity Pattern*, *supra*, 27 Cal. 3d at p. 909.) The Regulation 1501 manuscript example therefore does not govern, and the temporary transfer of Preston's artwork for purposes of reproduction is subject [**1159] to sales tax. Indeed, Preston has implicitly conceded this point by declining to claim a refund of taxes attributable to her labor costs and arguing for the applicability of sections 6011(c)(10) and 6012(c)(10). Accordingly, we conclude that Preston's Agreements are not entirely exempt from taxation because they involved a transfer of tangible property for consideration.

III

Even though Preston's Agreements involved transfers of tangible property for consideration, they also involved transfers of intangible property--the copyrights in the artwork--for consideration. The Board contends Preston's transfer of tangible artwork in conjunction with the transfer of copyrights in that artwork renders her transactions taxable [***23] *in their entirety*. In support, the Board cites California Code of Regulations, title 18, section 1540 (hereafter Regulation 1540) as amended in January 2000. We, however, decline to adopt the Board's contention, and, instead, hold that sections 6011(c)(10) and 6012(c)(10)--as enacted in 1993--govern Preston's Agreements and apply retroactively to exclude the copyright transfers from sales tax.

A.

We begin by determining whether Preston's Agreements are technology transfer agreements that fall within the purview of sections 6011(c)(10) and

6012(c)(10). Section 6011 defines " 'sales price' " (§ 6011, subd. (a)), and section 6012 defines " 'gross receipts' " (§ 6012, subd. (a)). These sections are mirror images and identify the items to be included in or excluded from any calculation of the amount subject to sales tax pursuant to section 6051. In 1993, the Legislature added sections 6011(c)(10) and 6012(c)(10). These provisions are identical and *exempt* the "amount charged for intangible personal property"--specifically, a *patent or copyright* interest--transferred pursuant to a "technology transfer agreement" from taxation. (§ § 6011(c)(10)(A), [***24] 6012(c)(10)(A).) As explained below, Preston's Agreements constitute technology transfer agreements as understood in sections 6011(c)(10) and 6012(c)(10) and are governed by these provisions if they apply retroactively.
[*213]

The rules for interpreting statutes are well established. "When construing a statute, we must 'ascertain the intent of the Legislature so as to effectuate the purpose of the law.' " (*Wilcox v. Birtwhistle* (1999) 21 Cal. 4th 973, 977, 987 P.2d 727, quoting *DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal. 4th 382, 387, 853 P.2d 978.) "The words of the statute are the starting point." (*Ibid.*) If the ordinary meaning of the language "is clear and unambiguous," then we need look no further. (*Lungren v. Deukmejian* (1988) 45 Cal. 3d 727, 735, 248 Cal. Rptr. 115, 755 P.2d 299.) Otherwise, we may resort to extrinsic sources, such as the legislative history. (See *Horwich v. Superior Court* (1999) 21 Cal. 4th 272, 277, 980 P.2d 927.)

Application of these rules yields one inescapable conclusion: Preston's Agreements are technology transfer agreements as understood in sections 6011(c)(10) and 6012(c)(10). [***25] We begin by examining the statutory language. Subparagraphs (A) through (C) of sections 6011(c)(10) and 6012(c)(10) state that the amount subject to sales tax does "not include": "(10)(A) The amount charged for intangible personal property transferred with tangible personal property in any technology transfer agreement, if the technology transfer agreement separately states a reasonable price for the tangible personal property. [P] (B) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or like tangible personal property has been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the price at which the tangible personal property was sold, leased, or offered to third parties shall be used to establish the retail fair market value of the tangible personal property [**1160] subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred. [P] (C) If the technology transfer agreement does not separately state a price for the tangible personal property, and the tangible personal property or [***26] like tangible personal property has not been previously sold or leased, or offered for sale or lease, to third parties at a separate price, the retail fair market value shall be equal to 200 percent of the cost of materials and labor used to produce the tangible personal property subject to tax. The remaining amount charged under the technology transfer agreement is for the intangible personal property transferred." Sections 6011(c)(10)(D) and 6012(c)(10)(D) then broadly define a " 'technology transfer agreement' " as "any agreement under which a person who holds a patent or copyright interest assigns or licenses to another person the right to make and sell a product or to use a process that is subject to the patent or copyright interest."

Read as a whole and giving the statutory language its ordinary meaning, sections 6011(c)(10) and 6012(c)(10) unambiguously establish that the value [*214] of a patent or copyright interest transferred pursuant to a technology transfer agreement is *not* subject to sales tax even if the agreement also transfers tangible personal property. The lone trigger for this exemption is the presence of a technology transfer agreement. In other words, these provisions [***27] exclude the value of a patent or copyright interest from taxation whenever a person who owns a patent or copyright transfers that patent or copyright to another person so the latter person can make and sell a product embodying that patent or copyright. (See § § 6011(c)(10)(D), 6012(c)(10)(D).)

In this case, Preston owned the copyrights in the transferred artwork. (See 17 U.S.C. § 201(a).) Under the Agreements, she separately and distinctly transferred one of the rights comprised in a copyright--the right to reproduce.

(17 U.S.C. § 106(1).) Pursuant to the Agreements, the transferees manufactured and sold products--i.e., books or rubber stamps--"subject to" the transferred copyright interest. (§ § 6011(c)(10)(D), 6012(c)(10)(D).) Accordingly, Preston's Agreements are technology transfer agreements as defined by paragraph (D).

The absence of the word "copyright" in most of the Agreements is irrelevant. n4 Although an assignment or license of a copyright requires a "writing" (17 U.S.C. § 204(a)), the writing need not mention the word

"copyright." (See *Schiller & Schmidt, Inc. v. Nordisco Corp.* (7th Cir. 1992) 969 F.2d 410, 413 [***28] (*Schiller*) [finding a valid copyright license even though the agreement did "not mention the word 'copyright' "]; *Armento v. Laser Image, Inc.* (W.D.N.C. 1996) 950 F. Supp. 719, 733 (*Armento*) [omission of "the word 'copyright' is not dispositive"].) Where the wording of the agreement clearly transfers one of the rights or any subdivision of the rights specified in title 17 United States Code section 106, a copyright transfer has occurred. (*Armento*, at p. 733.) All of the Agreements assign or license the right to reproduce Preston's artwork. Because the right to reproduce is one of the exclusive rights comprised in a federal copyright (see 17 U.S.C. § 106(1) ["the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: [P] (1) to reproduce the copyrighted work in copies or phonorecords"]), the Agreements create a valid copyright assignment. (See *Schiller*, at p. 413; *Armento*, at p. 733.)

n4 None of the Agreements, except for the one with Enchante, mention the word "copyright."

[***29]

Likewise, the limited scope of the rights transferred in some of the Agreements does not mean that no copyrights were assigned or licensed. "The ownership of a copyright may be transferred in whole *or in part* by any means of conveyance or by operation of law," and "any of the exclusive rights comprised in a copyright, *including any subdivision of any of the rights specified by section 106*, may be transferred ... and owned separately." (17 U.S.C. § 201(d)(1), (2), [*215] italics added.) In light of this broad language, [**1161] "there would appear to be no limit on how narrow the scope of licensed rights may be and still constitute a 'transfer' of ownership, as long as the rights thus licensed are 'exclusive.' " (3 Nimmer & Nimmer, Copyright (2000) Assignments and Licenses, § 10.02[A], p. 10-21.) All of Preston's Agreements, at a minimum, transferred the exclusive right to reproduce her artwork in a particular book or on rubber stamps. Therefore, the Agreements constitute valid assignments or licenses of a copyright interest covered by sections 6011(c)(10) and 6012(c)(10). (See 17 U.S.C. § 201(d)(1), (2).)

The Agreements also do not fall [***30] outside the purview of sections 6011(c)(10) and 6012(c)(10) because they involved the transfer of artwork and not technology. The Legislature broadly defined "technology transfer agreement" to encompass the transfer of *any* copyright interest which, by definition, includes copyrights in artwork. (See 17 U.S.C. § 102(a)(5).) It did not limit the definition to transfers of *high* technology. Indeed, the Legislature could have easily done so by defining "technology transfer agreement" as an assignment or license of "the right to make and sell" a *high technology* "product or to use a" *high technology* process. (§ § 6011(c)(10)(D), 6012(c)(10)(D).) Absent such language, we will not infer such a limitation.

We further reject the Board's contention that Preston's Agreements are not technology transfer agreements because they did not license "the right to make and sell a product ...." (§ § 6011(c)(10)(D), 6012(c)(10)(D).) At oral argument, the Board claimed that Preston's Agreements did not transfer the right to make or sell a product because the transferees could have made or sold their books or rubber stamps without Preston's copyrights. The Board, however, [***31] misconstrues the statutory language. A technology transfer agreement need only license "the right to make and sell a product ... *that is subject to the ... copyright interest*." (*Ibid.*, italics added.) Because copyrights only protect "the *expression* of the idea--not the idea itself " (*Mazer v. Stein* (1954) 347 U.S. 201, 217, 98 L. Ed. 630, 74 S. Ct. 460 (*Mazer*), italics added)--a product "is subject to" a copyright interest (§ § 6011(c)(10)(D), 6012(c)(10)(D)), if the product is a copy of the protected expression or incorporates a copy of the protected expression. (See *Mazer*, at p. 218). Here, Preston's Agreements gave the transferees the right to make and sell books or rubber stamps that incorporate a copy of her copyrighted artwork. Thus, the Agreements necessarily licensed the right to "make and sell a product ... subject to the ... copyright interest." (§ § 6011(c)(10)(D), 6012(c)(10)(D).)

Indeed, the Board's contention reflects a fundamental misunderstanding of the difference between patents and copyrights. Patents give an owner [*216] "the exclusive right to manufacture, use, and sell his invention." (*Zenith Radio Corp. v. Hazeltine Research, Inc.* (1969) 395 U.S. 100, 135, 23 L. Ed. 2d 129, 89 S. Ct. 1562.) [***32] Thus, the license of a patent interest, by definition, gives the licensee the right to make a product or to use a process. In contrast, "copyright protects originality rather than novelty or invention--conferring only 'the sole right of multiplying copies.' " (*Mazer*, *supra*, 347 U.S. at p. 218, fn. omitted.) Thus, the license of a copyright interest can only give the licensee the right to reproduce the copyrighted material in a product--and not the right to make and sell a

product. Because sections 6011(c)(10) and 6012(c)(10) expressly exempt the assignment or license of the right to make and sell a product subject to *either* a patent *or* copyright from taxation, they must encompass agreements, like Preston's, that license the right to reproduce copyrighted material in a product to be manufactured and sold by the licensee.

In any event, the legislative history validates our interpretation of sections 6011(c)(10) and 6012(c)(10), even if the statutory language is ambiguous. These subdivisions grew out of the Board's decision in *Petition of Intel Corporation* (June 4, 1992) [**1162] (1993-1995 Transfer Binder) Cal.Tax Rptr. (CCH) paragraph

402-675, page 27,873 (*Intel* [***33]). In *Intel*, petitioner licensed several patents and copyrights to other companies so they could manufacture integrated circuits embodying these patents and copyrights. As part of the license agreements, petitioner transferred tangible property consisting of "written information, instructions, schematics, database tapes, and test tapes." (*Ibid.*) The Board held that these agreements created two separate and distinct transactions for tax purposes. The first transaction involved the transfer of tangible personal property and was subject to sales tax. The second transaction involved the nontaxable transfer of intangible property. In reaching this conclusion, the Board broadly defined "intangible property" as "the license to use the information under the copyright *or* patent." (*Ibid.*, italics added.)

Soon after *Intel*, Assembly member Charles Quackenbush introduced Assembly Bill No. 103 (1993-1994 Reg. Sess.) (Assembly Bill No. 103)--which eventually became sections 6011(c)(10) and 6012(c)(10). The express purpose of Assembly Bill No. 103 was to "implement a decision of the Board of Equalization (BOE) with regards to an appeal filed by the Intel Corporation." (Assem. [***34] Com. on Rev. & Tax., Rep. on Assem. Bill No. 103, as amended Mar. 17, 1993, p. 2; see also Cal. Dept. Finance, analysis of Assem. Bill No. 103, as amended

Aug. 17, 1993, p. 1 ["the intent of this bill is to codify the Board of Equalization's (BOE) interpretation of Regulation 1501 as it applied to a technology transfer case [*Intel*] before the Board"].) To implement *Intel*, Assembly Bill No. 103 borrowed *Intel*'s broad definition [*217] of intangible property and exempted any transfer of such property from taxation. (Compare *Intel*, *supra*, [1993-1995 Transfer Binder] Cal.Tax Rptr. (CCH) P 402-675, p. 27,873 [holding that "the sale of intangible property which consists of the license to use the information under the *copyright or patent*" was not subject to sales tax (italics added)], with sections 6011(c)(10)(D) and 6012 (c)(10)(D) [defining " 'technology transfer agreement' " as an assignment or license of "the right to make and sell a product or to use a process that is subject to the *patent or copyright* interest" (italics added)].) In doing so, the Legislature presumably intended to adopt the plain meaning of this language and establish [***35] that the amount charged for a license to use *either* a patent *or* copyright is not taxable even if the license also transfers tangible property for consideration.

Such an understanding is confirmed by the enactment process. When Assembly Bill No. 103 reached the Senate, some analyses raised a concern that the proposed legislation was more expansive than *Intel*. "The use of 'or' instead of 'and' [in the definition of technology transfer agreement] broadens the Board's Intel decision to include not only those high technology agreements in which relatively little tangible personal property is transferred along with very valuable intangible rights to make and sell a product, but also copyright agreements involving a substantial proportion of tangible personal property. If taxpayers are able to structure a contract so that a large proportion of the value of the tangible personal property is assigned to the intangible copyright--e.g., in a sale of a painting, assigning all but the price of canvas and oils to the intangible copyright to make posters of the painting--their sales tax liability would be reduced." (Sen. Com. on Rev. & Tax., analysis of proposed amends. to Assem. Bill [***36] No. 103,

July 7, 1993, p. 3.) To address this concern, the Senate Revenue and Taxation Committee proposed to limit the exemption in sections 6011(c)(10) and 6012(c)(10) to patent "and" copyright transfers. (Sen. Com. on Rev. & Tax., analysis of proposed amends. to Assem. Bill No. 103, July 7, 1993, p. 3.)

The Senate, however, rejected this proposal and made *no* changes to the definition of "technology transfer agreement." Instead, the Senate actually broadened "the types of [agreements] that qualify for an exemption ...." (Assem. Floor Analysis, Conc. in Sen. Amends. to Assem. Bill No. 103, as amended

Aug. 17, 1993, p. 2.) In doing so, the Senate apparently concluded that Assembly [**1163] Bill No. 103 adequately addressed the concern "by requiring that a 'reasonable price' or 'fair market retail value' of like

property be used to value the tangible personal property being transferred." (Sen. Com. on Rev. & Tax., rev. analysis of proposed amends. to Assem. Bill No. 103, July 7, 1993, p. 3.)

Soon after the Senate declined to limit the scope of Assembly Bill No. 103, the Board voiced its own concerns over the scope of the proposed [*218] exemption. Noting that it "may be more [***37] broad than intended," the Board claimed that the proposed definition of technology transfer agreement would encompass licenses of copyrights in artwork, photographs, film strips and technical drawings. (State Bd. of Equalization, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993,

pp. 2-3, emphasis omitted.) The Board further acknowledged that the bill, as written, "would provide opportunities for the exclusion of a portion of gross receipts" from taxation whenever a "seller of commercial art" separately charges "for the right to make and sell copies of the original artwork." (*Ibid.*) Several legislative committees echoed these concerns: "The exemption in this bill is somewhat broader than provided under board interpretation, because the bill exempts transactions concerning agreements which license patents or copyright interests, whereas the existing board interpretation concerns licenses of patent and copyright interests. BOE indicates that this bill could exempt many transactions, such as licenses of photographs, film strips or other artwork which currently are subject to taxation." (Appropriations Com., Fiscal Summary of Assem. Bill. No. 103, as amended Aug. 17, 1993, p. [***38] 1; Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill. No. 103, as amended Aug. 17, 1993, p. 2; see also Cal. Dept. Finance, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993, p. 3 ["Because this bill refers to patents or copyrights, there is some concern that it may broaden the Intel decision to include not only high technology agreements where tangible personal property is transferred with very valuable intangible rights to make and sell a product, but also copyright agreements involving a substantial proportion of tangible personal property"].)

Thus, the Legislature was undoubtedly aware that the language of Assembly Bill No. 103 exempted *any* patent *or* copyright transfer from taxation, including transfers of copyrights in artwork. Nonetheless, the Legislature enacted this broad language *without* change. (Compare Stats. 1993, ch. 887, § 1, pp. 4826-4828 with Sen. Amend. to Assem. Bill No. 103, Aug. 17, 1993.) This decision to adopt the broad language of Assembly Bill No. 103 despite repeated warnings about its scope strongly signals a legislative intent to apply sections 6011(c)(10) and 6012(c)(10) to copyrights in artwork. [***39]

The statement of intent in the 1993 legislation enacting sections 6011(c)(10) and 6012(c)(10) does not support a contrary interpretation. This statement provides that: "It is also the intent of the Legislature that the amendments made by this act not create any inference regarding the application of the Sales and Use Tax Law to other transactions involving the transfer of both intangible rights and property and tangible personal property." (Stats. 1993, ch. 887, § 3, p. 4831.) This language merely limits the scope of these provisions to those transfers of intangible property expressly [*219] encompassed within the statutory definition of "technology transfer agreement." In other words, the sales tax exemption created by sections 6011(c)(10) and 6012(c)(10) applies only to the transfer of a patent or copyright interest--and *no other* transfer of an intangible right or property such as a trade secret.

The Board's January 2000 amendments to Regulation 1540, even if they apply retroactively, do not alter our conclusion. n5 Although a regulation enacted by the [**1164] Board " 'is entitled to great weight' " (*International Business Machines v. State Bd. of Equalization* (1980) 26 Cal. 3d 923, 930-931, 163 Cal. Rptr. 782, 609 P.2d 1, [***40] quoting *Rivera v. City of Fresno* (1971) 6 Cal. 3d 132, 140, 98 Cal. Rptr. 281, 490 P.2d 793), we will not apply that regulation unless it " '(1) is "within the scope of the authority conferred" [citation] and (2) is "reasonably necessary to effectuate the purpose of the statute." [Citation.]' " (*Agnew v. State Bd. of Equalization* (1999) 21 Cal. 4th 310, 322, 981 P.2d 52 (*Agnew*), quoting *Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal. 3d 392, 411, 128 Cal. Rptr. 183, 546 P.2d 687.) The present version of Regulation 1540 makes the transfer of a "copyright, or subpart of a copyright (such as a right to reproduce or to prepare derivative works)" in a photograph or work of art subject to sales tax whenever there is a "transfer by a tangible medium of " that photograph or work of art. (*Id.*, subd. (d)(4).) In doing so, Regulation 1540 conflicts with sections 6011(c)(10) and 6012(c)(10), which expressly exempt the transfer of a copyright interest from taxation even if there is a corresponding transfer of tangible property. As such, Regulation 1540 exceeds the scope of the Board's authority and is invalid. n6 (See [***41] *Agnew*, at p. 322.)

n5 Subdivision (d)(4) of Regulation 1540 provides in relevant part: "Charges for the transfer by a tangible medium of a photograph or of finished art for purposes of reproduction are taxable even though there is no transfer of title to the person reproducing the photograph or work of art. Charges for the right to use the photograph or finished art which has been transferred by tangible medium in the production of tangible personal property are taxable. Charges for a license, copyright or subpart of a copyright (such as a right to reproduce or to prepare derivative works) to exploit the photograph or finished art are taxable if they are sold along with the photograph or finished art transferred by tangible media or they are sold by a subsequent contract entered into within one year of the original transfer of the photograph or finished art."

n6 For the same reason, former Regulation 1540 and Annotations Nos. 295.0460, 330.3540 and 420.0280 issued by the Board (2 State Bd. of Equalization, Bus. Taxes Law Guide, Sales & Use Tax Annots. (1999) pp. 3773, 4182, 4578) are invalid to the extent they provide for the taxation of copyright transfers governed by sections 6011(c)(10) and 6012(c)(10). (See *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 7-8, 960 P.2d 1031 ["agency interpretations are not binding or necessarily even authoritative"].)

[***42]

Our previous decisions are consistent with our interpretation of sections 6011(c)(10) and 6012(c)(10). For example, in *Navistar*, we held that the [*220] purchase of drawings and designs and manuals and procedures containing trade secrets were fully taxable as a sale of tangible personal property. We based our holding in part on the absence of a "separate and distinct transfer of an intangible property right." (*Navistar, supra*, 8 Cal. 4th at pp. 877-878, fn. omitted.) Consequently, we declined to apply sections 6011(c)(10) and 6012(c)(10), because "the transfer of patents and copyrights" was not at issue. (*Navistar*, at p. 880.) In contrast, the Agreements in this case involve the separate and distinct transfer of a copyright--an intangible right distinct from "any material object in which the work is embodied." (17 U.S.C. § 202; see also Civ. Code, § 982, subd. (c) [transfer of tangible artwork does not transfer the "right of reproduction" absent an express written agreement].) Thus, *Navistar* is distinguishable. For the same reason, *Intellidata, Inc. v. State Bd. of Equalization* (1983) 139 Cal. App. 3d 594, 598-599, 188 Cal. Rptr. 850, [***43] *Albers v. State Bd. of Equalization* (1965) 237 Cal. App. 2d 494, 496-497, 47 Cal. Rptr. 69, and *People v. Grazer* (1956) 138 Cal. App. 2d 274, 278-279, 291 P.2d 957--which do not involve the transfer of a patent or copyright--are inapposite.

Michael Todd Co. v. County of Los Angeles (1962) 57 Cal. 2d 684, 21 Cal. Rptr. 604, 371 P.2d 340, is also distinguishable. In *Michael Todd*, we held that the value of copyrights may be included in the valuation of a tangible object for purposes of calculating an ad valorem property tax. In the process, we reasserted "the propriety of including nontaxable intangible values in the valuation of otherwise taxable property ...." (*Id.* at p. 694.) We did not, however, hold that "such values are subsumed [in the value of tangible property] as a matter of law." (*Shubat v. Sutter County Assessment Appeals Bd.* (1993) 13 Cal. App. 4th 794, 804, [**1165] 17 Cal.Rptr.2d 1.) Thus, *Michael Todd* does not preclude the Legislature from excluding the value of patents or copyrights transferred in conjunction with tangible personal property from the retail sales tax.

Likewise, our decision in *Simplicity* [***44] *Pattern* is consistent with our interpretation of sections 6011(c)(10) and 6012(c)(10). In *Simplicity Pattern*, plaintiff sold "film negatives and master recordings used to make audiovisual" training materials. (*Simplicity Pattern, supra*, 27 Cal. 3d at p. 903.) The Board assessed the sales tax on these transactions using the value of the item stated in the inventory accounts on plaintiff's books. (27 Cal. 3d at p. 904.) Because the inventory accounts calculated this value based on the "costs of materials and services" used in producing the items, the Board, in effect, taxed the value of the tangible personal property sold by plaintiff. (*Ibid.*; *id.* at p. 904, fn. 1.) Thus, by affirming the Board's assessment, we implicitly followed the approach outlined in sections 6011(c)(10) and 6012(c)(10). Indeed, sections 6011(c)(10)(C) and 6012(c)(10)(C) establish that the "retail [*221] fair market value ... of the cost of materials and labor used to produce the tangible personal property subject to tax" may be used to calculate the sales tax on any transfer of tangible property in a technology transfer agreement. To the extent that *Simplicity Pattern* suggests that copyrights transferred [***45] in a technology transfer agreement may be taxed, however, sections 6011(c)(10) and 6012(c)(10) supersede it. n7

n7 We also disapprove of *A & M Records*, *supra*, 204 Cal. App. 3d at pages 375-376, and *Capitol Records*, *supra*, 158 Cal. App. 3d at page 596, to the extent they conflict with sections 6011(c)(10) and 6012(c)(10).

Finally, our interpretation is consistent with the manuscript example in Regulation 1501. A manuscript "furnishes only verbal guidance to editors and typesetters" and is not physically useful in the reproduction process. (*Simplicity Pattern*, *supra*, 27 Cal. 3d at p. 909, fn. omitted.) Because a publisher that obtains temporary possession of a manuscript does not physically use the manuscript in the publication process, the publisher receives no taxable benefit from this transfer of tangible personal property. (Cf. § 6006.3 [defining a lease in terms of the "use of tangible personal property"].) Thus, under sections 6011(c)(10) and 6012(c)(10), the tangible form of the [***46] manuscript has *no* taxable value to the publisher, and all proceeds from this transfer of the manuscript are exempt from taxation. n8

n8 We note that the manuscript example may no longer reflect the realities of the publishing process. With the advent of modern technology, most publishers ask the author for the manuscript on a computer diskette, which is physically used in the editing and production process. Publishers can also scan handwritten or typed manuscripts directly into their computers. Thus, publishers today may receive some value from the tangible form of the manuscript.

Accordingly, Preston's Agreements are technology transfer agreements, and sections 6011(c)(10) and 6012(c)(10) control the tax consequences of these Agreements if these provisions apply retroactively.

B.

We now turn to the retroactivity issue. Because the legislation adding sections 6011(c)(10) and 6012(c)(10) did not become operative until April 1, 1994--several months after the end of Preston's audit period--these provisions [***47] do not govern here unless they apply retroactively. Even assuming that sections 6011(c)(10) and 6012(c)(10) "substantially change[] the legal consequences of past events" (*Western Security Bank v. Superior Court* (1997) 15 Cal. 4th 232, 243, 933 P.2d 507 (*Western Security*)), we conclude they do.

"Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body [*222] enacting the statute." [**1166] (*Western Security*, *supra*, 15 Cal. 4th at p. 244.) Although statutes "are generally presumed to operate prospectively and not retroactively," this presumption is rebuttable. (*In re Marriage of Bouquet* (1976) 16 Cal. 3d 583, 587, 128 Cal. Rptr. 427, 546 P.2d 1371, fn. omitted.) "When the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us." (*Western Security*, at p. 243.) We may infer such an intent from the express provisions of the statute as well as from extrinsic sources, including the legislative history. (See *Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1210, 246 Cal. Rptr. 629, 753 P.2d 585 [***48] (*Evangelatos*).)

With respect to sections 6011(c)(10) and 6012(c)(10), the pertinent legislative materials reveal an unequivocal legislative intent to give it retrospective effect. In particular, the official statement of intent indicates that the Legislature intended sections 6011(c)(10) and 6012(c)(10) to apply retroactively. Section 3 of the 1993 statute amending sections 6011 and 6012 provides that: "It is the intent of the Legislature in enacting this act to clarify the application of the Sales and Use Tax Law (Part 1 (commencing with Section 6001) of Division 2 of the Revenue and Taxation Code) to technology transfer agreements, as defined." (Stats. 1993, ch. 887, § 3, p. 4831.) This statement alone strongly suggests that the Legislature intended for sections 6011(c)(10) and 6012(c)(10) to "apply to all existing causes of action from the date of its enactment," even if these subdivisions do not, in fact, clarify existing law. (*California Emp. etc. Com. v. Payne* (1947) 31 Cal. 2d 210, 214, 187 P.2d 702 (*Payne*); see also *Western Security*, *supra*, 15 Cal. 4th at p. 243, 62 Cal. Rptr. 2d 243, 933 P.2d 507.)

The legislative history reinforces our interpretation of this statement of intent. [***49] As explained earlier, Assembly Member Quackenbush introduced Assembly Bill No. 103 in order to implement *Intel*. (See *ante*, at pp. 19-20.) Although several analyses warned the Senate about the breadth of Assembly Bill No. 103 and its apparent expansion of *Intel*, the Senate declined to amend the bill. (See *ante*, at pp. 19-20.) Instead, the Senate *added* the statement of intent language found in section 3 of Assembly Bill No. 103 *after* receiving these

warnings. (See Sen. Amend. to Assem. Bill No. 103, Aug. 17, 1993.)

At this point, the Board expressed its own reservations about Assembly Bill No. 103's broadening of *Intel* and the newly added statement of intent language. "Proposed Section 3 of the bill would provide legislative intent language which specifies that this act is intended to clarify the application of the Sales and Use Tax Law with respect to technology transfer agreements, as defined in the bill. However ... the proposed definition of technology [*223] transfer agreements could be interpreted more broadly, and, with this intent language, *could even be extended retroactively*." (State Bd. of Equalization, analysis of Assem. Bill No. 103, as amended [***50] Aug. 17, 1993, p. 4, italics added.) Despite this admonition, the Legislature enacted Assembly Bill No. 103 *without* altering the statement of intent language. (Compare Stats. 1993, ch. 887, § 1, p. 4828 with Sen. Amend. to Assem. Bill No. 103, Aug. 17, 1993.)

Thus, the legislative history makes two things clear. First, the Legislature added a statement giving Assembly Bill No. 103 retrospective effect even though it was aware that the bill may partially change existing law. Second, the Legislature was aware of the retroactivity question during the enactment process and, nevertheless, chose to adopt language giving the statute retrospective effect. Under these circumstances, we conclude that the Legislature intended sections 6011(c)(10) and 6012(c)(10) to apply retroactively. (See *Evangelatos*, *supra*, 44 Cal. 3d at p. 1211 [where the Legislature consciously considers retroactivity and adopts language indicating an intent to give a statute retrospective effect, we may infer such an intent].)

The characterization of the legislation as a "tax levy within the meaning of Article IV of [**1167] the Constitution" does not alter our conclusion. (Stats. 1993, ch. 883, § 5, [***51] p. 4831.) By using this language, the Legislature merely acknowledged the normally accelerated effective date of the legislation in accordance with the dictates of article IV, section 8, subdivision (c) of the California Constitution.

Likewise, the postponement of the operative date of the legislation until "the first day of the first calendar quarter commencing more than 90 days after the effective date of this act" does not mean that the Legislature intended to limit its application to transactions occurring after that date. (Stats. 1993, ch. 887, § 5, p. 4831.) "The effective date [of a statute] is ... the date upon which the statute came into being as an existing law." (*People v. McCaskey* (1985) 170 Cal. App. 3d 411, 416, 216 Cal. Rptr. 54.) "The operative date is the date upon which the directives of the statute may be actually implemented." (*Ibid.*) Although the effective and operative dates of a statute are often the same, the Legislature may "postpone the operation of certain statutes until a later time." (*People v. Henderson* (1980) 107 Cal. App. 3d 475, 488, 166 Cal. Rptr. 20.) The Legislature may do so for reasons other than an intent [***52] to give the statute prospective effect. For example, the Legislature may delay the operation of a statute to allow "persons and agencies affected by it to become aware of its existence and to comply with its terms." (*People v. Palomar* (1985) 171 Cal. App. 3d 131, 134-135, 214 Cal. Rptr. 785.) In addition, the Legislature may wish "to give [*224] lead time to the governmental authorities to establish machinery for the operation of or implementation of the new law." (*Estate of Rountree* (1983) 141 Cal. App. 3d 976, 980, fn. 3, 192 Cal. Rptr. 152.) A later operative date may also "provide time for emergency clean-up amendments and the passage of interrelated legislation." (*Henderson*, at p. 488.) Finally, a later operative date may simply be "a date of convenience ... for bookkeeping, retirement or other reasons." (*Ross v. Bd. of Retirement of Alameda County Employees' Retirement Assn.* (1949) 92 Cal. App. 2d 188, 193, 206 P.2d 903.)

In this case, the Legislature gave no rationale for the postponement. Thus, it may have postponed the operative date for reasons *other than* an intent to give sections 6011(c)(10) and 6012(c)(10) prospective [***53] effect. For example, the Legislature may have wished to give the Board time to enact new regulations for the 1993 tax year or to settle ongoing tax disputes prior to the implementation of the legislation. The Legislature also may have anticipated possible cleanup amendments in light of the Board's reservations over the scope of sections 6011(c)(10) and 6012(c)(10). (See State Bd. of Equalization, analysis of Assem. Bill No. 103, as amended Aug. 17, 1993, pp. 2-3.) The delayed operative date may also reflect nothing more than a legislative desire to correlate the operative date to the filing deadlines for the 1993 tax year. Indeed, the Legislature's decision to make the legislation adding sections 6011(c)(10) and 6012(c)(10) operative on April 1, 1994--just before the April 15 deadline for filing 1993 tax returns--equally suggests an intent to apply these subdivisions retroactively to transactions occurring in 1993. In any event, where, as here, compelling indicators of the Legislature's intent to give a statute retrospective effect exist, the mere postponement of the statute's operative date is not enough to negate these

indicators. (See *Tevis v. City and County of San Francisco* (1954) 43 Cal. 2d 190, 194-196, 272 P.2d 757 [***54] [a charter amendment has retrospective effect even though the amendment delayed its effective date].)

Of course, even where the ascertainable indicators of legislative intent call for retroactive application (*In re Marriage of Bouquet*, *supra*, 16 Cal. 3d at p. 591), we will not apply a statute retroactively if "there is some constitutional objection thereto." (*Payne*, *supra*, 31 Cal. 2d at p. 214.) However, no such objection exists here. Retroactive application of sections 6011(c)(10) and 6012(c)(10) does not violate due process because it can only reduce the tax liability of a claimant and therefore cannot impair any vested property right of the claimant. (See [**1168] *In re Marriage of Bouquet*, 16 Cal. 3d at pp. 591-594.)

Giving sections 6011(c)(10) and 6012(c)(10) retrospective effect also does not constitute a gift of public funds in violation of article XVI, section 6 of the California Constitution. "As a general rule, the Legislature cannot provide relief for taxes which have become fixed and vested." (*Scott v.* [*225] *State Bd. of Equalization* (1996) 50 Cal. App. 4th 1597, 1604.) However, "expenditures of public funds or property which involve a benefit to private persons [***55] are not gifts within the meaning ... of the Constitution if those funds are expended for a *public purpose* ...." (*Payne*, *supra*, 31 Cal. 2d at p. 216, italics added.) "The determination of what constitutes a public purpose is primarily a matter for the Legislature, and its discretion will not be disturbed by the courts so long as that determination has a reasonable basis." (*County of Alameda v. Carleson* (1971) 5 Cal. 3d 730, 746, 97 Cal. Rptr. 385, 488 P.2d 953.) Consistent with this deference to the Legislature, courts have upheld the constitutionality of retroactive tax exemptions that provided relief to "unwary taxpayers" (*Scott*, *supra*, 50 Cal. App. 4th at p. 1605), promoted the use of alternative energy sources (*County of Sonoma v. State Bd. of Equalization* (1987) 195 Cal. App. 3d 982, 993, 241 Cal. Rptr. 215), or prevented "undue hardship on employers" (*Schettler v. County of Santa Clara* (1977) 74 Cal. App. 3d 990, 1004, 141 Cal. Rptr. 731).

Even assuming the Board had a fixed and vested right in the sales tax assessed against Preston, the retroactive application of sections 6011(c)(10) and 6012(c)(10) falls [***56] within this public purpose exception. By enacting these provisions, the Legislature "intended to provide certainty to business taxpayers" and "improve the business climate in California." (Assem. Com. on Rev. & Tax., analysis of Assem. Bill No. 103, as amended Mar. 17, 1993, p. 2; see also Sen. Com. on Rev. & Tax., rev. analysis of proposed amends. to Assem. Bill No. 103, July 7, 1993, p. 2.) Such an intent is undoubtedly a valid public purpose, and sections 6011(c)(10) and 6012(c)(10)--which clarify and limit the tax burden of businesses--is wholly consistent with this purpose. Therefore, retroactive application of sections 6011(c)(10) and 6012(c)(10) does not create an unconstitutional gift of public funds. (See *County of Sonoma v. State Bd. of Equalization*, *supra*, 195 Cal. App. 3d at p. 993.)

Accordingly, we conclude that sections 6011(c)(10) and 6012(c)(10) have retrospective effect and govern the Agreements at issue here. Under these provisions, only the portion of Preston's income attributable to the Agreements' temporary transfer of tangible artwork is taxable. Because the Agreements do "not separately state a price for the tangible personal property" ([***57] § § 6011(c)(10)(B), (C), 6012(c)(10)(B), (C)), the amount subject to taxation is either "the price at which the tangible personal property was sold, leased, or offered to third parties" (§ § 6011(c)(10)(B), 6012(c)(10)(B)), or "200 percent of the cost of materials and labor used to produce the tangible personal property subject to tax" (§ § 6011(c)(10)(C), 6012(c)(10)(C)). We therefore remand for a calculation of the sales tax owed by Preston under the Agreements and the resulting refund owed to her.

[*226] **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.

California imposes a tax on the sale of tangible personal

property but not on the sale of intangible personal property. Here, plaintiff Heather Preston temporarily transferred her original artwork to a publisher for reproduction in children's books. Is such a transfer a sale of intangible property and thus not taxable, or is it a sale of tangible [**1169] property and therefore taxable? The majority holds the latter. (Maj. opn., *ante*, at [***58] pp. 8-13.) The majority also concludes that the technology transfer agreement tax statutes (Rev. & Tax. Code, § § 6011, subd. (c)(10), 6012, subd. (c)(10)) n1 are retroactive and that plaintiff's transfer of her artwork is taxable under those statutes. (Maj. opn., *ante*, at pp. 15-18, 26-32.)

n1 All further statutory references are to the Revenue and Taxation Code.

I disagree on both points.

I

Unlike the majority, I agree with plaintiff that the transfer of her original artwork to a publisher for reproduction in children's books was a transfer of intangible property and therefore not taxable. As plaintiff points out, this transfer, for tax purposes, is indistinguishable from an author's transfer of an original manuscript to a publisher. A Board of Equalization regulation expressly recognizes the latter transaction as a transfer of intangible property and thus not taxable. (Cal. Code Regs., tit. 18, § 1501 (regulation 1501).)

Regulation 1501 provides [***59] in relevant part: "An idea may be expressed in the form of tangible personal property and that property may be transferred for a consideration from one person to another; however, the person transferring the property may still be regarded as the consumer of the property. *Thus, the transfer to a publisher of an original manuscript by the author thereof for the purpose of publication is not subject to taxation. The author is the consumer of the paper on which he has recorded the text of his creation.* However, the tax would apply to the sale of mere copies of an author's works or the sale of manuscripts written by other authors where the manuscript itself is of particular value as an item of tangible personal property and the purchaser's primary interest is in the physical property. Tax would also apply to the sale of artistic expressions in the form of paintings and [*227] sculptures even though the work of art may express an original idea since the purchaser desires the tangible object itself; that is, since the true object of the contract is the work of art in its physical form." (Italics added.) The majority too recognizes that, under this example, the author of the manuscript is exempt [***60] from taxation. (Maj. opn., *ante,* at p. 13.)

Like the author in regulation 1501's example, plaintiff artist expressed on paper her creative efforts, which she transferred to a publisher for reproduction in children's books. The paper was merely the medium of transfer. Just as the "author is the consumer of the paper on which he has recorded the text of his creation" (regulation 1501), plaintiff artist is the consumer of the paper (tangible property) on which she has recorded her artistic expression (intangible property).

The distinction between an author's creative expression in the form of words and, as here, an artist's creative expression in the form of illustrations for a book should make no difference for purposes of taxation. In both, the creative expression represents intangible property. In both, the vehicle for the artist's expression is the paper, which is tangible property. I therefore agree with plaintiff that the transfer of her artistic renderings to a publisher for reproduction in children's books should, for tax purposes, be treated the same as the transfer of an author's manuscript to a publisher.

The majority's holding to the contrary would lead to [***61] anomalous results. Consistent with the manuscript example mentioned in regulation 1501, an author's transfer of a manuscript to a publisher would be exempt from taxation. Yet an artist's transfer of original drawings to the publisher for reproduction as illustrations in the same book would be taxable. Because the transfer of property determined to be tangible even though valued in part for its intangible content is taxed on the full value of the transaction (*Simplicity Pattern Co. v. State Bd. of* [**1170] *Equalization* (1980) 27 Cal. 3d 900, 912, 167 Cal. Rptr. 366, 615 P.2d 555), an author of a manuscript who also happened to draw the illustrations for the book would, under the majority's holding, have to pay taxes on both the transfer of the manuscript and the artwork if the transfer to the publisher occurred at the same time; but if the illustrations were transferred at a different time, only the transfer to the publisher of the illustrations for the book would be taxable.

According to the majority, plaintiff's original artwork is distinguishable from an author's original manuscript because artwork, unlike a manuscript, is physically useful in the manufacturing process and [***62] essential to the ultimate production of books,

whereas a manuscript furnishes only "verbal guidance." The majority, however, provides no support for this broad assertion. The majority also asserts that plaintiff's transfer agreements with the publisher [*228] would be "essentially 'worthless' " without the "physical artwork." (Maj. opn., *ante*, 2001 Cal. LEXIS 1813 at p. *21.) But so would an author's agreement with the publisher to transfer a manuscript without ever providing the manuscript.

To summarize, I see no meaningful difference between an author's transfer of a manuscript to a publisher (nontaxable under the majority's holding) and an artist's transfer of drawings to a publisher for a book's illustrations (taxable under the majority's holding). If the author is not subject to taxation, then neither should the artist here be.

II

Even if I were to agree with the majority that the transfer here is distinguishable from a manuscript under regulation 1501, that artwork is "technology," and that the transfer is governed by the technology transfer agreement statutes (maj. opn., *ante*, at p. 32), I would conclude, contrary to the majority, that these statutes are not retroactive.

At issue [***63] are plaintiff's transfers of illustrations to the publisher for the period January 1, 1990, to December 31, 1993. Thereafter, the Legislature enacted the technology transfer agreement statutes at issue and directed that they become operative on April 1, 1994. (Stats. 1993, ch. 887, § 5, p. 4831.)

A statute is presumed to operate prospectively unless there is "an express declaration of retrospectivity or a clear indication" that the Legislature intended otherwise. (*Tapia v. Superior Court* (1991) 53 Cal. 3d 282, 287, 279 Cal. Rptr. 592, 807 P.2d 434; *Cole v. Fair Oaks Fire Protection Dist.* (1987) 43 Cal. 3d 148, 153, 233 Cal. Rptr. 308, 729 P.2d 743.) Here we have neither.

The majority insists, however, there is a clear indication of the statutes' retroactivity. In enacting the statutes, the Legislature expressed its intent to "clarify the application of the Sales and Use Tax Law ... to technology transfer agreements, as defined." (Stats. 1993, ch. 887, § 3, p. 4831.) I do not share the majority's view that because the Legislature used the word "clarify" when it enacted the technology transfer statutes, it must have intended their retroactive application. [***64] Nor does the statutes' legislative history support such an intent by the Legislature.

From the Legislature's decision to postpone the operative date of the statutes to April 1, 1994, 90 days after their effective date (Stats. 1993, ch. 887, § 5, p. 4831), one can reasonably infer, as I do, that the Legislature intended the technology transfer statutes to apply prospectively. As the [*229] majority notes, a statute's operative date may be postponed to give people time to comply with the statute, to allow government agencies to formulate implementing procedures, or to allow for the passage of related legislation. (Maj. opn., *ante,* at pp. 29-30.) This enables individuals and entities to adjust to future applications of new law.

Here, the statutes in question established new law. The Legislature enacted those statutes in the wake of the Board of Equalization decision in *Petition of Intel Corporation* (June 4, 1992) (1993-1995 Transfer Binder) Cal.Tax Rptr. (CCH) P 402-675, [**1171] page 27,873. (Maj. opn., *ante,* at pp. 19, 28.) The Legislature, however, broadened the types of agreements qualifying for a tax exemption beyond those recognized in *Intel.* (Maj. opn., *ante,* at [***65] pp. 19-22.) Given this change in the law, the Legislature's postponement of the statutes' operative date to a date 90 days after the statutes' effective date tends to support an intent to have the statutes apply prospectively rather than, as the majority concludes, retroactively.

Because there is no clear indication that the Legislature intended to give retroactive effect to the technology transfer agreement statutes enacted after the tax period at issue, I conclude that those statutes are inapplicable here.

CONCLUSION

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

KENNARD, J.

WE CONCUR:

MOSK, J.

WERDEGAR, J.