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SAN REMO HOTEL L.P., et al., Plaintiffs, Cross-defendants and Appellants, v. San Francisco City and County CITY AND COUNTY OF SAN FRANCISCO et al., Defendants, Cross-complainants and Respondents.

S091757

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 643; 41 P.3d 87; 2002 Cal. LEXIS 623; 117 Cal. Rptr. 2d 269; 2002 Cal. Daily Op. Service 2048; 2002 Daily Journal DAR 2463

March 4, 2002, Filed

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

PRIOR HISTORY:
Court of Appeals of California, First Appellate District, Division Five. A083530.

San Remo Hotel v. City and County of San Francisco, 83 Cal. App. 4th 239, 100 Cal. Rptr. 2d 1, 2000 Cal. App. LEXIS 802 (1st Dist. 2000)

Super. Ct. No. 950166.

DISPOSITION:
Affirmed in part and reversed in part.

COUNSEL:
Law Offices of Andrew M. Zacks, Andrew M. Zacks, James B. Kraus; Law Offices of Paul F. Utrecht and Paul F. Utrecht for Plaintiffs, Cross-defendants and Appellants.

Daniel J. Popeo, R. Shaw Gunnarson; and Alexander Dushku for Washington Legal Foundation as Amicus Curiae on behalf of Plaintiffs, Cross-defendants and Appellants.

Law Offices of Richard R. Dale and Richard R. Dale for Harsch Investment Corp. as Amicus Curiae on behalf of Plaintiffs, Cross-defendants and Appellants.

R. S. Radford and John A. Ramirez for Pacific Legal Foundation as Amicus Curiae on behalf of Plaintiffs, Cross-defendants and Appellants.

Nielsen, Merksamer, Parrinello, Mueller & Naylor, John E. Mueller and James R. Parrinello for San Francisco Association of Realtors and The Coalition for Better Housing as Amici Curiae on behalf of Plaintiffs, Cross-defendants and Appellants.

Paul B. Campos; Nicholas J. Cammarota; and David C. Smith for the California Building Industry [***2] Association, Home Builders Association of Northern California and Building Industry Legal Defense Foundation as Amici Curiae on behalf of Plaintiffs, Cross-defendants and Appellants.

Attorneys for Respondent: Louise H. Renne, City Attorney, Andrew W. Schwartz, Susan S. Cleveland and Ellen Forman, Deputy City Attorneys, for Defendants, Cross-complainants and Respondents.

Timothy J. Dowling and William Higgins for 67 California Cities, the County Counsels' Association of California and the International Municipal Lawyers Association as Amici Curiae on behalf of Defendants, Cross-complainants and Respondents.

Goldfarb & Lipman and Richard A. Judd for American Planning Association as Amicus Curiae on behalf of Defendants, Cross-complainants and Respondents.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, J. Matthew Rodgriquez, Assistant Attorney General, and Daniel L. Siegel , Deputy Attorney General, for People of the State of California as Amicus Curiae on behalf of Defendants, Cross-complainants and Respondents.

JUDGES:
WERDEGAR, J. WE CONCUR: GEORGE, C. J., KENNARD, J. MORENO, J. CONCURRING AND DISSENTING OPINION BY BAXTER, J. DISSENTING [***3] OPINION BY BROWN, J.

OPINIONBY:
WERDEGAR

OPINION:

[*649] [**91] Plaintiffs, the owners and operators of

the San Remo Hotel in San Francisco, sought approval from the City and County of San Francisco to rent all rooms in the San Remo Hotel to tourists or other daily renters, rather than to longer term residents. Plaintiffs eventually received approval but, in the process, were required to (1) comply with zoning laws by obtaining a conditional use permit for use of their property as a tourist hotel, and (2) help replace the residential units San Francisco claimed would be lost by the conversion, pursuant to the city's Residential Hotel Unit Conversion and Demolition Ordinance (S.F. Admin. Code, ch. 41) (hereafter the HCO), which plaintiffs elected to do by paying an in lieu fee into a governmental fund for the construction of low-and moderate-income housing.

Plaintiffs challenged the conditional use permit requirement by petition for writ of administrative mandate (Code Civ. Proc., § 1094.5), pled as the first cause of action in their second amended complaint, and challenged the housing replacement requirement by four additional causes of action alleging the taking of private [***4] property without just compensation in violation of article I, section 19 of the California Constitution. **n1** The trial court denied the writ petition and sustained a demurrer to the takings counts. The Court of Appeal reversed.

n1 Plaintiffs sought no relief in state court for violation of the Fifth Amendment to the United States Constitution. They explicitly reserved their federal causes of action. As their petition for writ of mandate, as well, rests solely on state law, no federal question has been presented or decided in this case.

Based on the administrative record and the pleadings, and guided by established legal principles, we conclude the trial court properly denied the [*650] petition for writ of administrative mandate and sustained the demurrer as to the remaining causes of action. We will therefore reverse the judgment of the Court of Appeal insofar as the appellate court reversed the trial court's judgment for defendant City and County of San Francisco.

I. BACKGROUND

Plaintiffs are [***5] San Remo Hotel L.P., a limited partnership; its general partner, T & R Investment Corp.; and its limited partners, Thomas and Robert Field. Defendants are the City and County of San Francisco, and the various agencies and agents through which it acted (collectively the City, or San Francisco).

Because the proceedings below turned on the application and validity of two bodies of local San Francisco law, we first summarize those ordinances.

A. The San Francisco Hotel Conversion Ordinance

The HCO, codified in chapter 41 of the San Francisco Administrative Code, was first enacted in 1981 (S.F. Ord. No. 330-81) and was substantially revised in 1990 (S.F. Ord. No. 121-90). **n2** Its purpose is to "benefit the general [**92] public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." (HCO, § 41.2.) Accompanying the ordinance are findings that the City suffers from a severe shortage of affordable rental housing; that many elderly, disabled and low-income persons reside in residential hotel units; that the number of such units had decreased [***6] by more than 6,000 between 1975 and 1979; that loss of such units had created a low-income housing "emergency" in San Francisco, making it in the public interest to regulate and provide remedies for unlawful conversion of residential hotel units; that the City had instituted a moratorium on residential hotel conversion effective November 21, 1979; and that because tourism is also essential to the City, the public interest also demands that some moderately priced tourist hotel rooms be available, especially during the summer tourist season. (HCO, § 41.3.)

n2 Unless otherwise specified, all references to the HCO are to the 1990 version of the ordinance.

Each hotel room's initial status for purposes of the HCO was determined by having the owner or operator of each hotel file an initial unit usage report stating the number of residential and tourist units in their hotel as of [*651] September 23, 1979. (HCO, § 41.6, subd. (b)(1).) The HCO defines a "Residential Unit" as a "guest room" that was occupied by a "permanent [***7] resident" on September 23, 1979, or that was designated residential under section 41.6's procedures for initial status determination. (HCO, § 41.4, subd. (q).) A "Tourist Unit" is defined as a guest room *not* occupied by a permanent resident on September 23, 1979, or a guest room certified as a tourist unit under section 41.6. (HCO, § 41.4, subd. (s).) A permanent resident is a person who occupies a guest room for at least 32 consecutive days. (*Id.*, subd. (n).)

The HCO makes it unlawful to eliminate a residential hotel unit without obtaining a conversion permit or to rent a residential unit for a term shorter than seven days. (HCO, § 41.20, subd. (a).) Violators are subject to civil penalties. (*Id.*, subd. (c).)

An application to convert residential units to tourist use must include, inter alia, "[a] statement regarding how one-for-one replacement of the units to be converted will be accomplished." (HCO, § 41.12, subd. (b)(9).) The

applicant may satisfy the replacement requirement by constructing or bringing onto the market new residential units comparable to those converted (HCO, § 41.13, subd. (a)(1), (2)); constructing or rehabilitating certain other types of [***8] housing for low-income, disabled or elderly persons (*id.*, subd. (a)(3)); or paying to a public or nonprofit housing developer, or to the City's Residential Hotel Preservation Fund Account, an in lieu fee equal to the replacement site acquisition costs plus a set portion of the replacement construction costs (*id.*, subd. (a)(4), (5)). **n3** The replacement costs are to be determined by the City's Department of Real Estate based on two independent appraisals. (*Ibid.*)

n3 The 1990 revision raised the portion of construction costs to be paid by the applicant from 40 to 80 percent. (1981 HCO, § 41.10, subd. (a)(4); 1990 HCO, § 41.13, subd. (a)(4), (5).) Plaintiffs, however, apparently applied during a "window" period (1990 HCO, § 41.13, subd. (d)) qualifying them for the 40 percent rate.

The 1981 and 1990 versions of the HCO differ in their treatment of temporary tourist rentals of residential units. The 1981 ordinance allowed summer season rentals (May 1-September 30) of vacant residential units [***9] without numerical restriction, with the proviso that the room "shall immediately revert to residential use on application of a prospective permanent resident," but contained no provision for winter tourist rentals. (1981 HCO, § 41.16, subd. (a)(3)(B).) The 1990 revision additionally restricted summer tourist rentals of residential units by, among other things, limiting such [*652] rentals, absent special permission from the City's Bureau of Building Inspection, **n4** to 25 percent of a hotel's residential rooms. (HCO, § 41.19, subd. (a)(3).) The revision, however, also allowed a limited number of residential rooms to be rented to tourists during the winter months as well. (*Id.*, subd. (c).)

n4 The Bureau of Building Inspection is now known as the Department of Building Inspection. For clarity, we shall generally refer to the Department as the Bureau, the name operative at the time of most of the events related herein.

[**93]

B. The San Francisco Planning Code

In 1987, San Francisco adopted article [***10] 7 of its Planning Code, a set of zoning regulations for "neighborhood commercial districts." (S.F. Planning Code, § 701, added by S.F. Ord. No. 69-87.) The San Remo Hotel is within the North Beach neighborhood commercial district (hereafter North Beach district), created in 1987. The North Beach district "functions as a neighborhood-serving marketplace, citywide specialty shopping, and dining district, and a tourist attraction, as well as an apartment and residential hotel zone." (S.F. Planning Code, § 722.1.) While most new commercial development is permitted on the first two stories of buildings, new housing development is encouraged above the second story and "existing residential units are protected by prohibitions of upper-story conversions and limitations on demolitions." (*Ibid.*)

Tourist hotels are a conditional use in the North Beach district. (S.F. Planning Code, § 722.55.) "Conditional uses are permitted in a Neighborhood Commercial District when authorized by the Planning Commission .... Conditional uses are subject to the provisions set forth in Sections 178, 179, and 316 through 316.8 of this Code." (S.F. Planning Code, § 703.2, subd. (b)(1)(B).)

A "permitted [***11] conditional use," the zoning category into which plaintiffs, before the City's zoning administrator, claimed the San Remo Hotel's tourist rental fell, is defined generally in San Francisco Planning Code sections 178 and 179. Generally, a permitted conditional use is defined, inter alia, as "any use or feature which is classified as a conditional use in the district in which it is located and which lawfully existed either on the effective date of this Code, or on the effective date of any amendment imposing new conditional use requirements upon such use or feature." (S.F. Planning Code, § 178, subd. (a)(2).) As to neighborhood commercial districts, a permitted conditional use is "any use or feature in a Neighborhood Commercial District which lawfully existed on the effective date of Ordinance No. 69-87 which is classified as a conditional use by the enactment of Ordinance No. 69-87." (S.F. Planning Code, § 179, subd. (a)(2).)

[*653] A permitted conditional use may continue "in the form in which it lawfully existed" on the effective date of the new conditional use requirement. (S.F. Planning Code, § 178, subd. (b).) But a permitted conditional use "may not be significantly altered, enlarged, [***12] or intensified, except upon approval of a new conditional use application." (*Id.*, subd. (c).)

"Residential conversion," defined as the change in occupancy from residential to nonresidential use (S.F. Planning Code, § 790.84), is prohibited above the first floor in the North Beach district. (S.F. Planning Code, § 722.38.) The Planning Code's definition of residential conversion, however, "shall not apply to conversions of residential hotels, as defined and regulated in [the HCO]." (S.F. Planning Code, § 790.84.)

C. Factual Background

One of plaintiffs' causes of action, the petition for writ of administrative mandate, was decided on an administrative record, while the other counts were dismissed on demurrer. On review of the latter ruling we, like the trial court, may consider only the factual allegations of the complaint and matters subject to judicial notice (Code Civ. Proc., § 430.30, subd. (a)), and not the administrative record. We therefore summarize the factual background of the writ petition separately from that of the remaining counts.

1. The Petition for Writ of Administrative Mandate

By their petition, pled as [***13] the second amended complaint's first cause of action, plaintiffs sought to overturn the City's administrative determination that, under the San Francisco Planning Code, plaintiffs were required to obtain a conditional use permit in order to use all rooms in the San Remo Hotel for tourist rentals. Plaintiffs allege that the City's zoning administrator, in a decision affirmed by the City's Board of Permit Appeals, **n5** should have classified the proposed [**94] tourist use of the San Remo Hotel as a permitted conditional use under section 179, subdivision (a)(2) of the Planning Code. Plaintiffs prayed for a peremptory writ of mandate directing the City to "recognize and acknowledge" that tourist use of the San Remo Hotel "is a permitted conditional hotel use."

n5 The Board of Permit Appeals is now known as the Board of Appeals. For clarity, we shall continue to use the earlier name as it was the name operative at the time of most of the events related herein.

The administrative record shows the following: [***14]

On September 25, 1981, Jean Iribarren, then operating the San Remo Hotel under a lease from plaintiffs Thomas and Robert Field, filed the initial [*654] unit usage report required under the HCO. He reported the San Remo Hotel had 61 units in residential use both as of September 23, 1979, and seven days prior to filing the report, and zero units in tourist use on the same dates. On November 18, 1981, the Bureau of Building Inspection issued Iribarren a certificate of use reflecting the same usage numbers. According to a 1992 declaration by plaintiffs Thomas and Robert Field, Iribarren filed the "incorrect" initial unit usage report without their knowledge. They first discovered the report in 1983 when they resumed operation of the hotel. They protested the residential use classification in 1987, but were told it could not be changed because the appeal period had passed.

On September 9, 1992, the Zoning Administrator of the San Francisco Department of City Planning, responding to plaintiffs' request for a written ruling, determined that operation of the San Remo as a tourist hotel was not a permitted conditional use under section 179, subdivision (a)(2) of the San Francisco Planning Code. [***15] The ruling observes that beginning in May 1982, the San Remo Hotel was included in interim zoning districts requiring conditional use permits for operation of tourist hotels. That requirement became permanent in April 1987 with the establishment of the North Beach district. Planning Code section 790.47 defines a residential hotel as a hotel containing one or more residential units, a term defined by reference to the HCO. Because under the HCO all 62 units in the San Remo Hotel were classified as residential, its zoning classification was also as a residential hotel (a type of "group housing" under the Planning Code). **n6**

n6 The administrative record does not explain the variance between the 61 rooms initially certified by the Bureau of Building Inspection in 1981 and the 62 rooms referred to by the zoning administrator in 1992. The parties appear to agree the hotel now contains 62 rooms.

The zoning administrator considered, but rejected, plaintiffs' claim that because they rented vacant rooms in the [***16] San Remo Hotel to tourists during the summer (permitted under the HCO with some conditions), and in some cases in the winter as well (permitted with special approval under the 1990 HCO), they operated a tourist hotel. According to the administrator, "such temporary authorization for tourist uses does not constitute a change of use and therefore all of the units in the Hotel remain residential units." The zoning administrator further found that, according to annual unit usage reports submitted by the San Remo Hotel to the Bureau of Building Inspection, between 25 and 57 units in the hotel were in fact occupied by residents from 1982 to 1992. Even if only these units were considered residential, and the remaining units deemed to have been in tourist use when the conditional use permit requirement took effect, the administrator ruled, plaintiffs would still be required to obtain a conditional use permit to convert the hotel to complete tourist use, because under San Francisco Planning Code section 178, subdivision (c), [*655] a permitted conditional use may not be significantly altered, enlarged or intensified without new conditional use authorization.

Hotel tax returns also indicate mixed [***17] residential and tourist use. Of the $60,942 in gross rent the San Remo Hotel earned in the quarter ending December 31, 1988, $56,676 was rent for occupancy by permanent residents (not subject to the hotel tax). For the first quar-

ter of 1989, $33,897 of the hotel's $57,563 gross rent was from residential rentals. Even in the summer, a significant portion of the hotel's rental revenue was residential: for the quarter ending September [**95] 30, 1989, gross rent was $121,117, of which $34,469 was earned from residential rentals. According to a May 1991 decision of the Bureau of Building Inspection hearing officer approving plaintiffs' request to rent more than 25 percent of their rooms to tourists in the 1991 summer season, plaintiffs had presented evidence that in May 1991, 30 San Remo Hotel guests had occupied their rooms "for periods ranging from two months to ten years." Nine more had rented for more than a week, but less than a month.

The Board of Permit Appeals upheld the zoning administrator's determination that a conditional use permit was required to change the San Remo Hotel's use to a tourist hotel.

2. The Takings Causes of Action

In their remaining causes of action, [***18] plaintiffs allege that the HCO, and the various actions of City agencies requiring plaintiffs to comply with that ordinance, constituted a taking in violation of the California Constitution. In reviewing a dismissal following the trial court's sustaining of a demurrer, we take the properly pleaded material allegations of the complaint as true. (*ABC Internat. Traders, Inc. v. Matsushita Electric Corp.* (1997) 14 Cal.4th 1247, 1253, 931 P.2d 290; *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967, 831 P.2d 317.)

Plaintiffs allege the following as to the hotel's legal status and history. "From 1916 to the present, the guest rooms in the San Remo Hotel have been rented primarily to transient and tourist guests on a commercial basis." Fewer than 20 percent of the rooms are, or were on August 5, 1987 (the effective date of the neighborhood commercial district zoning ordinance), occupied as primary residences. When plaintiffs purchased the San Remo Hotel in 1970, it was zoned C-2 commercial, with no restrictions on its use as a tourist hotel. After plaintiffs spent more than $250,000 on repairs and renovations, the City issued them a permit [***19] of occupancy for a 62-room hotel. [*656] From 1970 on, the City issued plaintiffs a hotel license and collected hotel taxes on the transient rental of the San Remo Hotel's rooms.

After the 1990 revision of the HCO, which revised the 1981 ordinance to place additional significant restrictions on tourist rental of residential rooms, plaintiffs applied under the HCO to "convert" to tourist use all the San Remo Hotel's rooms designated residential. The City's Planning Department told them they also had to apply for a conditional use permit for the conversion to be allowed under the zoning laws. The planning commission subsequently granted plaintiffs' application for a conditional use permit on three conditions: plaintiffs were to mitigate the loss of housing by complying with the HCO's housing-replacement provisions, offer current long-term residents lifetime leases, and obtain variances from floor-area ratio and parking requirements. Plaintiffs appealed the imposition of these conditions, but the City's Board of Supervisors upheld the planning commission's decision. Plaintiffs ultimately satisfied the conditions, paying a $567,000 in lieu fee assessed by the Department (formerly the Bureau) [***20] of Building Inspection, which thereafter issued a permit for full tourist use of the hotel.

The second amended complaint alleges a taking, in violation of the California Constitution, in the City Planning Commission's requirement that plaintiffs pay a housing-replacement fee as a condition of receiving a conditional use permit. Plaintiffs claim that imposition of the fee "fails to substantially advance a legitimate government interest" and that "the amount of the fee imposed is not roughly proportional to the impact" of the proposed tourist use of the San Remo Hotel. They further allege that "the requirement that plaintiffs pay the City $567,000 to obtain an HCO permit to convert" constituted a taking of their property without just compensation, entitling them to a refund of the fee, and that the City's regulatory scheme as a whole and its application to the San Remo Hotel constituted a taking in violation of the California Constitution. The prayer is for damages of $567,000 plus interest from December 11, 1996 (apparently the date the fee was paid), and other damages according to proof.

[**96]

D. Decisions of the Trial Court and Court of Appeal

The trial court sustained the [***21] City's demurrer to the second through fifth causes of action. Some causes of action were, the court held, barred by *Pfeiffer v. City of La Mesa* (1977) 69 Cal. App. 3d 74, 137 Cal. Rptr. 804, in which the appellate court held that an applicant's compliance with building permit conditions barred a later action for damages resulting from imposition of the conditions. The remaining causes of action challenging the constitutionality of the HCO failed, the court concluded, because the HCO, as a [*657] legislative regulation, was not subject to the heightened scrutiny outlined in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (*Dolan*).

Subsequently, after hearing argument directed to the writ petition, but without receiving evidence outside the administrative record, the trial court denied the requested writ of administrative mandate. Whether reviewed on the

substantial evidence or independent judgment test, the court found, the Board of Permit Appeals' decision finding the San Remo Hotel was in residential [***22] use, thus requiring a conditional use permit for use as a tourist hotel, must be upheld. The trial court relied primarily on the City's 1981 issuance of a certificate of use designating all rooms in the hotel residential, concluding therefrom that "residential use of the San Remo was the only lawful use." Plaintiffs' temporary tourist rental of vacant rooms designated residential, as permitted under the HCO, the court held, did not effect a change of use under the zoning law.

Having denied the writ sought by the first cause of action and sustained a demurrer to the remaining counts without leave to amend, the trial court entered judgment for the City on plaintiffs' complaint. **n7**

> **n7** Judgment was also entered for the City on its cross-complaint for penalties under the HCO, but as no issue regarding the cross-complaint is before us on review, that action need not be described further.

The Court of Appeal reversed. The City's demurrer should have been overruled, the appellate court held, because plaintiffs [***23] pled facts showing that the HCO, as applied to require payment of the $567,000 conversion fee, effected a taking under the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. The claim of a taking in exaction of the in lieu fee was one to which " *Nollan 483 U.S. 825/ Dolan 512 U.S. 374/ Ehrlich* 12 C4th 854[**n8**] heightened or intermediate scrutiny analysis" should apply, because "the monetary sum of $567,000 exacted by the City here is a fee, exaction or payment in a 'discretionary context' which presents 'an inherent and heightened risk that local government will manipulate the police power' in a manner which 'avoids what would otherwise be an obligation to pay just compensation.' (*Ehrlich*, *supra*, 12 Cal.4th at p. 869.)" The fee failed both the "essential nexus" and "rough proportionality" parts of that test, the [*658] Court of Appeal concluded, because it was based on the "fiction" of full residential use created by the 1981 survey and certificate of use. **n9**

> **n8** *Nollan*, *supra*, 483 U.S. 825; *Dolan*, *supra*, 512 U.S. 374; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 911 P.2d 429 (*Ehrlich*).

[***24]

> **n9** The Court of Appeal held *Pfeiffer v. City of La Mesa*, *supra*, 69 Cal. App. 3d 74, upon which the trial court partially relied, inapposite for several reasons, including that it predated enactment of the Mitigation Fee Act (Gov. Code, § 66000 et seq.), which allows a developer to pay a mitigation fee under protest and subsequently litigate its validity. As the City did not challenge this holding in its petition for review or its brief on the merits in this court, its correctness is not before us.

With regard to the writ petition, the Court of Appeal reversed and remanded for factual determinations. The trial court erred, the Court of Appeal held, in holding that the City's classification of all rooms in the San Remo Hotel as residential rendered any tourist use unlawful for purposes of zoning. "The City's local zoning laws applicable to hotels in the early 1980's made no distinction between the use permits for hotels based upon their 'residential' or 'tourist' status under [**97] the HCO. Thus, such Hotel rentals to tourists in the 1980's would have [***25] been legal, under the City's planning code then in effect. We therefore conclude that the Hotel could be an existing legal nonconforming use under the [North Beach district], notwithstanding the 1981 certificate of use." Because the trial court, believing prior tourist use would have been unlawful, had not determined its historical existence, the Court of Appeal remanded for further factual findings by the trial court or administrative agency concerning actual use of the hotel.

We granted the City's petition for review.

II. DISCUSSION

With the above background, we may proceed to resolve the issues raised by the parties. We address, first, the correctness of the trial court's denial of the petition for writ of administrative mandate; second, the proper level of scrutiny applicable to plaintiffs' claim that the HCO housing-replacement fee constituted a taking of their property without just compensation; and third, the merits of plaintiffs' facial and as-applied attacks on the HCO.

A. Did San Francisco Properly Require Plaintiffs To Obtain a Conditional Use Permit for Full Tourist Use of the Hotel?

As already explained, San Francisco's zoning administrator, [***26] in a decision affirmed by the Board of Permit Appeals, determined that the proposed operation of the San Remo Hotel in full tourist use required plaintiffs to apply for and obtain a conditional use permit. After analysis, we conclude the trial court correctly denied the petition for writ of administrative mandate challenging this administrative decision.

[*659] Before the zoning administrator and in the trial court, plaintiffs contended that no conditional use permit was needed because tourist rental of the hotel

was a permitted conditional use under the San Francisco Planning Code. A permitted conditional use in a neighborhood commercial district must have "lawfully existed" on the effective date of the 1987 neighborhood commercial district ordinance. (S.F. Planning Code, § 179, subd. (a)(2).) Section 178, subdivision (a)(2) of the same code defines the same term, in its more general application, as a use that "lawfully existed" at the time such uses became subject to a conditional use permit requirement. Although plaintiffs, echoing the Court of Appeal, focus on the "lawfulness" of tourist use under the 1981 HCO, a prior consideration is whether, and to what extent, tourist use of the [***27] San Remo Hotel "existed" as of 1987 or as of the time the San Remo first became subject to a conditional use permit requirement for tourist use, apparently by interim measures first added in 1982.

The administrative record shows that both residential and tourist rentals were significant uses of the San Remo Hotel at the relevant times. The zoning administrator cited annual unit usage reports filed by the San Remo Hotel with the Bureau (and later, the Department) of Building Inspection, which showed that during the period 1982 to 1992, between 25 and 57 units in the 62-unit hotel were occupied by residents. City hotel tax records from the last part of that period show that, even in the summer, a significant part of the San Remo's rental revenue was derived from (nontaxable) residential rentals, which constituted the majority of revenues in some autumn and winter seasons. As of May 1991, according to a hearing officer's decision allowing summer tourist rentals at the San Remo Hotel, some San Remo residents had occupied their rooms for as long as 10 years. A similar ruling in May 1989 noted that 15 to 20 of the residents then living at the San Remo had been there for six months or longer, [***28] some for "many years." Thus, the record supports the Board of Permit Appeals' finding that the San Remo Hotel was operated "at least in part" as a residential hotel in the early and mid-1980's.

In their application for HCO conversion, plaintiffs sought *not* to maintain the status quo but, in the words of their complaint, to "convert the San Remo Hotel's residentially designated hotel rooms [i.e., all the hotel's rooms] to tourist use." That application, according to plaintiffs, prompted the City to require a conditional use permit. Thus, as the zoning administrator understood plaintiffs' application, they sought authorization [**98] "to convert all of the units of the hotel to tourist use."

The zoning administrator correctly determined that such conversion required a conditional use permit even if some tourist use had previously [*660] lawfully existed. A permitted conditional use may continue "in the form in which it lawfully existed," but "may not be significantly altered, enlarged, or intensified, except upon approval of a new conditional use application." (S.F. Planning Code, § 178, subds. (b), (c).) Clearly a change from *partial* tourist use to *complete* tourist use would be [***29] a significant alteration or enlargement of the existing use, requiring a new conditional use permit.

We agree with plaintiffs that the superior court erred in stating, "The only lawful use of the San Remo ... was residential." The 1981 version of the HCO allowed vacant residential units to be rented on a short-term basis during the May to September tourist season. Since such rentals were also permitted under the San Remo Hotel's historical zoning (i.e., that preceding the 1982 and 1987 zoning changes), some tourist use lawfully existed prior to the 1982 and 1987 zoning restrictions. But the lawful *temporary* rental of *vacant* residential units, permitted with the further restriction that such units must immediately revert to residential use if needed (1981 HCO, § 41.16, subd. (a)(3)(B)), was not authority to use the hotel's rooms *full time* for tourist use, regardless of residential occupancy or demand. As the superior court observed, "This temporary tourist use is not a change of use under the Planning Code." Again, such full-time unrestricted tourist rental would be a significant alteration or enlargement of the historical lawful use, requiring new conditional use permission [***30] under San Francisco Planning Code section 178, subdivision (c). Plaintiffs do not claim that the actual tourist use of the San Remo Hotel went beyond that permitted by the HCO, nor does the record contain evidence of such illegally extensive use in the relevant period; indeed, plaintiff Robert Field stated in the trial court that plaintiffs had always complied with the HCO. Even as to those rooms that had, on occasion, been lawfully rented to tourists, therefore, the zoning administrator and Board of Permit Appeals were correct to require a conditional use permit for permanent tourist use.

Plaintiffs attribute to the City the argument that "the San Remo Hotel's zoning classification as a tourist hotel was changed by the 1981 [HCO]." To rebut the City's supposed claim, plaintiffs cite a 1981 opinion letter by the San Francisco City Attorney that stated the then proposed HCO was not a zoning law and thus could be enacted without a hearing before the San Francisco Planning Commission. (S.F. City Atty., Opn. No. 81-54 (Sept. 14, 1981) pp. 7-8.) In reply, the City disavows any claim that the HCO changed the San Remo Hotel's zoning status, but insists that "the trial court correctly considered [***31] the HCO as a legal restriction on the use of the hotel." As we have explained, however, the critical issue in this case is *not the lawfulness* of the historical tourist use, *but its extent*. The HCO's restrictions on tourist use are pertinent in that they limited the hotel's actual tourist use during the [*661] 1980's. But, as plaintiffs do not claim

they engaged in any tourist use beyond what the HCO permitted, and the record shows no such unauthorized use before 1987, we are not concerned here with whether tourist rentals in violation of the HCO would or would not have constituted a "lawful" use for purposes of the Planning Code provisions on permitted conditional uses. The record demonstrates that prior to 1987 the San Remo Hotel had substantial residential use and, as plaintiffs do not dispute, tourist use was restricted, in compliance with the HCO, to summer rentals of vacant units. Conversion to complete full-time tourist use would therefore be a significant expansion of the hotel's historical tourist use, requiring a conditional use permit. Nothing in the City Attorney's 1981 opinion alters our analysis or affects our conclusion. **n10**

n10 The parties and the Court of Appeal address, at points, the question whether tourist use of the San Remo Hotel qualifies as a "lawful nonconforming use." Like a permitted conditional use, a lawful nonconforming use is one that existed lawfully at the time a new zoning prohibition or restriction came into force, the difference being that a permitted conditional use is conditionally *permitted* by the new zoning law, while a nonconforming use is *prohibited* by that law. (See S.F. Planning Code, §§ 178, subd. (a)(2), 180, subd. (a)(1); *Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 540, fn. 1, 907 P.2d 1324.) Since tourist hotels are a conditionally permitted, rather than a prohibited, use in the North Beach district (S.F. Planning Code, § 722.55), a tourist use, if it had lawfully existed before the neighborhood commercial district restrictions became effective, would be classified as a permitted conditional use rather than a lawful nonconforming use. But regardless of terminology, the same result obtains in this case, since the rule against expansion or alteration of an existing use applies to nonconforming uses as well as to permitted conditional uses. (S.F. Planning Code, §§ 178, subd. (c), 181, subd. (a); *Hansen Brothers Enterprises*, *supra*, at p. 552.)

[***32]

[**99] The Court of Appeal also criticized the City (i.e., the zoning administrator and the Board of Appeals) for characterizing the San Remo Hotel's historical residential use as "group housing" when, at the same time, the San Remo operated under a City-issued "hotel" permit and paid "hotel" taxes. In response, the City cites a zoning provision (S.F. Planning Code, § 209.2, subd. (a)), added in 1978, that defines the housing use category, "Group housing, boarding," in a manner that, on its face, arguably includes a residential hotel. But another part of the same section, also dating from 1978, defines the use "Hotel, inn or hostel," in a manner that includes the San Remo Hotel's historic use *if* the San Remo's rooms were, during the relevant period, used "*primarily* for the accommodation of transient overnight guests" (*id.*, subds. (d), (e), italics added), a question not clearly answered by the administrative record excerpt in the appellate record. Nor does the 1978 law appear to preclude a mixed-use hotel from having both classifications.

Fortunately, we need not determine the correct zoning categorization of the San Remo Hotel's pre-1987 use in order to decide this case. The [***33] question [*662] before us is whether plaintiffs' proposed full tourist use of the hotel qualifies as a permitted conditional use under the current zoning laws. As we have seen, such use does qualify to the extent it lawfully existed when the current laws' restrictions came into effect, but does not qualify to the extent plaintiffs propose to significantly alter or expand it. This is true regardless of whether the San Remo was historically classified as a hotel, as group housing, or both.

In classifying uses for purposes of neighborhood commercial district zoning, we are directed to consider separately each use in a multiple-use structure. (S.F. Planning Code, § 703.2, subd. (b)(1).) That the San Remo might legitimately have been classifiable as a "Hotel, inn or hostel" under the 1978 zoning law (*id.*, § 209.2, subd. (e)) or a "Hotel, tourist" under the 1987 neighborhood commercial district law (*id.*, § 790.46) *as well as* a "hotel, residential" (*id.*, § 790.47) is therefore not determinative. (Cf. *Tenderloin Housing Clinic, Inc. v. Astoria Hotel, Inc.* (2000) 83 Cal.App.4th 139, 144, fn. 2 [hotel with 13 rooms designated for tourist use and 79 for residential [***34] use was both a tourist hotel and a residential hotel under the Planning Code].) The historical extent of tourist use itself determines the extent to which the San Remo Hotel can, under current law, be put to that use without conditional use permits.

Both minority opinions misapprehend the factual context in which the conditional use permit was issued. The concurring and dissenting opinion, which would have us remand the case for factual findings (conc. & dis. opn., *post*, at pp. 7-8), proceeds on the incorrect assumption that conditional use permits are issued on a room-by-room basis, and that a determination of the precise number of rooms in tourist use when the conditional-use permit requirement came into effect would materially affect the permit requirement (*id.* at pp. 6-9). Contrary to suggestions in the concurring and dissenting opinion, the number of rooms for which a new tourist use was proposed is of no import as to whether a conditional use permit was required in the first instance, so long as some expansion

of tourist use was proposed. Nor did the conditional use permit specify the number of rooms subject to one-to-one replacement under the HCO, calculate the in [***35] lieu replacement fee to be assessed, or impose any other condition dependent [**100] on the number of rooms previously in tourist use. Because the record shows *some residential use* at all relevant times, and because plaintiffs' tourist use of the hotel was, as required under the HCO, *temporary* and *subject to preemption by residential demand*, a conditional use permit was required regardless of the exact number of rooms being rented to tourists at any time. Hence, no basis exists for "grandfathering" tourist use in either the entire hotel or individual rooms as a permitted conditional use, as the concurring and dissenting [*663] opinion argues should have been done. (Conc. & dis. opn., *post*, at pp. 682-685.)

The dissent argues at length that the City Planning Commission acted in violation of the state Ellis Act (Gov. Code, §§ 7060 - 7060.7), which allows the withdrawal of residential accommodations from the market. (Dis. opn., *post*, at pp. 4-6, 11-12.) This argument founders on the stubborn fact that, so far as the record or briefing here shows, plaintiffs never took the measures necessary to invoke their statutory rights under the act. [***36] (See Gov. Code, § 7060.4 [permitting local governments to establish notice requirements for withdrawal of accommodations]; S.F. Admin. Code, § 37.9A(f) [establishing such notice requirements].) Hence, we have no occasion here to discuss the preemptive effect of the Ellis Act addressed in *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072, 271 Cal. Rptr. 44, where the plaintiff hotel owner had "in no uncertain terms and in accordance with the [Ellis Act] procedures established by the City, advised the City of his intent to depart the business of renting residential hotel units." (*Id.* at p. 1100.) Nor, contrary to the dissent's suggestion, can the Ellis Act be read as occupying the fields of local real property regulation, zoning, or residential hotel regulation. (See Gov. Code, § 7060.1, subds. (b), (c).)

Similarly, the dissent's claim that "the planning commission chose to require HCO compliance and thereby used the leverage it gained ... to exact a $567,000 fee" (dis. opn., *post*, at p. 8) misrepresents the facts in the appellate record. In their application for [***37] a conditional use permit, plaintiffs—who had already applied for a conversion permit under the HCO (see *ante*, p. 11)—assured the planning commission that they would comply with the HCO. The commission incorporated that assurance as a condition of the permit, *but did not itself assess any fee.*

Because, as the administrative record demonstrates, tourist use of the San Remo Hotel before enactment of the conditional use requirements neither encompassed all the hotel's units nor occurred full time without regard to residential occupancy and demand, plaintiffs' proposal to convert to full-time tourist use constitutes an expansion of the hotel's historical use requiring conditional use authorization. Consequently, the trial court correctly denied the petition for writ of administrative mandate, and the Court of Appeal erred in reversing this aspect of the trial court's judgment.

B. Are In Lieu Fees Assessed Under the HCO Subject to Heightened Scrutiny?

The takings clause of the California Constitution (art. I, § 19) provides: "Private property may be taken or damaged for public use only [*664] when just compensation, ascertained by a jury unless waived, has first been paid [***38] to, or into court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation."

By virtue of including "damage[]" to property as well as its "taking," the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 9, fn. 4, 876 P.2d 1043; accord, *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 298, 142 Cal. Rptr. 429, 572 P.2d 43; see *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 350, 144 P.2d 818; *Reardon v. San Francisco* (1885) 66 Cal. 492, 501, 6 P. 317.) But aside from that difference, not pertinent here, we appear to have construed [**101] the clauses congruently. (See, e.g., *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 957, 962-975, 968 P.2d 993 (*Santa Monica Beach*) [takings challenge to rent control regulation under both clauses considered without separate discussion of the state clause]; *Hensler v. City of Glendale*, *supra*, at p. 9, fn. 4 [***39] [conclusion that U.S. Const., 5th Amend. was not violated "applies equally" to Cal. Const. art. I, § 19].) Despite plaintiffs' having sought relief in this court only for a violation of article I, section 19 of the California Constitution, therefore, we will analyze their takings claim under the relevant decisions of both this court and the United States Supreme Court.

"In determining whether a government regulation of property works a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any 'set formula' for determining whether a taking has occurred, preferring to engage in "essentially ad hoc, factual inquiries" (*Lucas* v. *South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 112 S. Ct. 2886, 2893, 120 L. Ed. 2d 798), which focus in large part on the economic impact of the regulation (see *Penn Central Transp. Co.* v. *New*

York City (1978) 438 U.S. 104, 124 98 S. Ct. 2646, 2659, 57 L. Ed. 2d 631; *Keystone Bituminous Coal Assoc.* v. *DeBenedictis* (1987) 480 U.S. 470, 493-501 107 S. Ct. 1232, 1246-1250, 94 L. Ed. 2d 472). [***40] ... Other than this ad hoc inquiry, the court has held categorically that property is taken when a government regulation 'compels [a] property owner to suffer physical "invasion" of his property' or 'denies all economically beneficial or productive use of land.' (*Lucas*, *supra*, 505 U.S. at pp. 1015-1016 [112 S. Ct. at p. 2893.) The court has also stated that 'the Fifth Amendment is violated when a land-use regulation "does not substantially advance legitimate state interests." ' (*Lucas*, *supra*, 505 U.S. at p. 1016 [112 S. Ct. at p. 2894.)" (*Santa Monica Beach*, *supra*, 19 Cal.4th at p. 964.)

[*665] As in *Santa Monica Beach*, it is the last-mentioned prong of the high court's takings analysis that is at issue here. In particular, the parties debate whether a heightened level of means-ends scrutiny, the force and application of which has been developed in *Nollan*, *supra*, 483 U.S. 825, *Dolan*, *supra*, 512 U.S. 374, *Ehrlich*, *supra*, 12 Cal.4th 854, and *Santa Monica Beach*, *supra*, 19 Cal.4th 952, applies to review of the conversion fee the City required plaintiffs to pay under the HCO.

In *Nollan*, a California [***41] agency conditioned its approval for the plaintiffs to rebuild a beachfront house on their dedication of a public easement providing lateral access across their portion of the beach. Although the easement would constitute a physical invasion of property, the high court recognized it could nonetheless be demanded as a condition of the development permit, if the permit could otherwise have been denied and if the easement condition "served the same legitimate police-power purpose as a refusal to issue the permit." (*Nollan*, *supra*, 483 U.S. at p. 836.) "The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition." (*Id.* at p. 837.) Without this "essential nexus," between the permit condition and the development ban, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.' " (*Ibid.*)

Because the conditional exaction in *Nollan* failed to meet "even the most untailored standards" (*Nollan*, *supra*, 483 U.S. at p. 838), the court did not need to elucidate with any precision the required " 'fit' [***42] " between the exaction and its purposes. But the court cautioned that, when the circumstances created a potential for the government to extort property by withholding otherwise unrelated permits, judicial scrutiny would be searching: "Our cases describe the condition for abridgment of property rights through the police power as a '*substantial* advancing' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual [**102] conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective." (*Id.* at p. 841.) "Thus in *Nollan*, the rule that the government's physical occupation of private property is a per se taking is transformed, in the context of a development application, into a rule of heightened scrutiny to ensure that a required development dedication is not a mere pretext to obtain or otherwise physically invade property without just compensation." (*Ehrlich*, *supra*, 12 Cal.4th 854, 890 (conc. opn. of Mosk, J.).)

Dolan, like *Nollan*, involved [***43] a government agency's conditioning a development permit on dedication of a portion of the applicant's real property. In [*666] *Dolan*, the high court addressed the question it had reserved in *Nollan*, the "required degree of connection between the exactions and the projected impact of the proposed development." (*Dolan*, *supra*, 512 U.S. at p. 386, 114 S. Ct. 2309.) The court concluded that a " 'rough proportionality' " standard "best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Id.* at p. 391.)

The *Dolan* court also briefly addressed the scope of applicability of the heightened scrutiny and shifted burden of persuasion outlined in that decision and in *Nollan*: "Justice Stevens' dissent takes us to task for placing the burden on the city to justify the required dedication. He is correct in arguing that in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that [***44] it constitutes an arbitrary regulation of property rights. [Citation.] Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel. In this situation, the burden properly rests on the city." (*Dolan, supra,* 512 U.S. at p. 391, fn. 8.) Most land use regulations "involve[] essentially legislative determinations classifying ... areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." (*Id.* at p. 385.)

In *Ehrlich*, this court addressed the question of whether the heightened scrutiny outlined in *Nollan* and *Dolan* applied to a *monetary* exaction. The defendant city in *Ehrlich* had conditioned permits for the development of a condominium complex on the site of a former private

tennis club on the owner's payment of a $280,000 fee to be used for city recreational facilities. Though the members of this court disagreed on various parts of the analysis, we unanimously held that this ad hoc monetary exaction *was* subject to *Nollan/Dolan* scrutiny. (*Ehrlich* [***45] , *supra*, 12 Cal.4th at pp. 874–881 (plur. opn. of Arabian, J.); *id.* at pp. 899–901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) In such cases, the exaction must be more than "theoretically" or "plausibly" related to the ends that would be served by permit denial; *Nollan* and *Dolan* require "a *factually* sustainable proportionality between the effects of a proposed land use and a given exaction." (*Ehrlich*, *supra*, at p. 880 (plur. opn. of Arabian, J.).)

In holding the fee at issue subject to *Nollan/Dolan*, we emphasized that because the city had exercised its discretionary powers in imposing and [*667] calculating the recreational impact fee, rather than doing so pursuant to a legislative mandate or formula, imposition of the fee bore much the same potential for illegitimate leveraging of private property as did the real property exactions in *Nollan* and *Dolan*. Thus, the plurality concluded that heightened scrutiny was appropriate "when such exactions are imposed—as in this case—neither generally nor ministerially, but on an individual and discretionary basis. [***46] " (*Ehrlich*, *supra*, 12 Cal.4th at p. 876 [**103] (plur. opn. of Arabian, J.).) The plurality further distinguished "*generally* applicable development fees or assessments," as to which "the courts have deferred to legislative and political processes," from "special, discretionary permit conditions" like the one at issue in *Ehrlich*. (*Id.* at p. 881.) Justice Mosk, concurring, explained that although "general governmental fees" are "judged under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*" (*id.* at p. 897 (conc. opn. of Mosk, J.)), "when a municipality singles out a property developer for a development fee not imposed on others, a somewhat heightened scrutiny of that fee is required to ensure that the developer is not being subject to arbitrary treatment for extortionate motives" (*id.* at p. 900). Finally, Justice Kennard agreed that "because the $280,000 recreational mitigation fee was imposed on Ehrlich's development application individually, and not pursuant to an ordinance or rule of general applicability, the constitutionality of this fee is evaluated using the [***47] *Nollan–Dolan* 'essential nexus' and 'rough proportionality' analysis." (*Id.* at p. 907 (conc. & dis. opn. of Kennard, J.).)

A majority in *Ehrlich* further agreed that to the extent a development mitigation fee is *not* subject to heightened scrutiny under *Nollan* and *Dolan*, there must nonetheless be a "reasonable relationship" between the fee and the deleterious impacts for mitigation of which the fee is collected. (*Ehrlich*, *supra*, 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.).)

In *Santa Monica Beach*, *supra*, 19 Cal.4th 952, considering a challenge to a municipal rent control ordinance, we reviewed and synthesized the prior decisions as follows. "From the above, it can be inferred that the 'substantially advance' standard in the takings context is applied differently depending on the type of government action under consideration. As *Nollan* and *Dolan* both attest, government requirements that property owners dedicate land as a condition of receiving a development permit will receive the highest scrutiny—a type of intermediate scrutiny in which a government's dedication requirements [***48] will pass constitutional muster as long as the government 'makes some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed [*668] development.' (*Dolan*, *supra*, 512 U.S. at p. 391 [114 S. Ct. at pp. 2319–2320, fn. omitted.) ... The most deferential review of land use decisions appears to be for those that pertain to 'essentially legislative determinations' that do not require any physical conveyance of property." (*Santa Monica Beach*, *supra*, 19 Cal.4th at p. 966, quoting *Dolan*, *supra*, 512 U.S. at p. 385.)

"We recognized these different levels of takings scrutiny in [*Ehrlich*, *supra*, 12 Cal.4th 854]. We rejected the claim that the *Nollan* and *Dolan* standards do not apply to development fees imposed on an individualized basis as a condition for development. ... But a different standard of scrutiny would apply to development fees that are generally applicable through legislative action 'because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present.' (*Id.* at p. 876; see also *id.* at p. 897 [***49] (conc. opn. of Mosk, J.); *id.* at p. 903 (conc. and dis. opn. of Kennard, J.).) Thus, individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*," while generally applicable development fees warrant a more deferential type of review. (*Santa Monica Beach*, *supra*, 19 Cal.4th at pp. 966–967.)

The Court of Appeal held that housing replacement fees assessed under the HCO were subject to *Nollan/Dolan/Ehrlich* review because they were exacted discretionarily and applied only to a relatively small number of property owners rather than to "every other property in the City." Plaintiffs defend [**104] that analysis, while the City argues for the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of

property owners.

We agree with the City. Contrary to the Court of Appeal's assertion, and unlike *Ehrlich*, the HCO does not provide City staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee. Under the HCO, the responsible city agency, the Department (formerly the Bureau) of Building [***50] Inspection, "shall ... deny" an application to convert residential units to tourist use if the housing replacement requirement is not satisfied and "shall issue" the permit if the ordinance's requirements, including that for housing replacement, are met. (HCO, §§ 41.14, 41.15.) The *applicant* chooses how to satisfy the replacement requirement, whether by constructing or bringing onto the market new units; by sponsoring such construction by a public or nonprofit private housing developer; or by paying, in lieu of such construction, a fee to a designated City housing fund. (*Id.*, § 41.13.) If the applicant chooses the in lieu fee, its amount is determined according to a set formula based on replacement cost, which in turn is [*669] determined by a different City agency, the City's Department of Real Estate, through two independent appraisals. (*Ibid.*) Thus, no meaningful government discretion enters into either the imposition or the calculation of the in lieu fee. **n11**

n11 That the planning commission allegedly required compliance with the HCO as a condition of the conditional use permit does not alter our conclusion as to City discretion. While issuance of a conditional use permit is generally discretionary (see S.F. Planning Code, §§ 303, 316, 316.8), conversion of residential rooms to commercial use is unconditionally *prohibited* above the first floor in the North Beach district *except* insofar as permitted by the HCO (S.F. Planning Code, §§ 722.38, 790.84). The planning commission, therefore, had no discretion to permit such change in use absent HCO compliance.

[***51]

Nor did the City single out plaintiffs for payment of a housing replacement fee. The HCO is generally applicable legislation in that it applies, without discretion or discrimination, to every residential hotel in the city. All proposals to convert residential to tourist use are subject to the same ordinance. In suggesting that an ordinance, to be considered generally applicable, must apply to "every other property in the City," the Court of Appeal invoked an impossible standard, one that would be met by almost no rationally drawn land use regulation. The HCO applies to all property in the class logically subject to its strictures, that is, to all residential hotel units; no more can rationally be demanded of local land use legislation in order to qualify for deferential review. (We do not speak of a legislative "class" artificially tailored to encompass only a single property; no such claim has been or could be made as to the HCO.) **n12**

n12 According to the City, the ordinance applies to more than 500 properties containing (as stated in the 1990 HCO) more than 18,000 guest rooms. (HCO, § 41.3, subd. (d).) Plaintiffs accept these numbers but nonetheless characterize the City as imposing housing preservation costs on only "a few" property owners. The Court of Appeal, similarly, alluded to "a small group" of property owners as bearing the HCO's costs. Whether or not 500 or more property owners are properly deemed "a few" or a "small group," however, the critical fact remains that the HCO is generally and nondiscriminatorily applicable within a class of properties reasonably defined according to the purpose of the ordinance. (See *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 132 [owners of landmarked properties not arbitrarily singled out to bear costs; law was a comprehensive plan to preserve historic structures, applying to over 400 landmarks and 31 historic districts throughout the city].)

[***52]

In these respects a housing replacement fee assessed under the HCO stands in sharp contrast to the recreational facilities replacement fee we found subject to heightened scrutiny in *Ehrlich*. In that case, the city relied on no specific legislative mandate to impose the fee condition and no legislatively set formula to calculate its size. The condition was imposed ad hoc, entirely at the discretion of the city council and staff. (*Ehrlich*, *supra*, 12 Cal.4th at p. 862.) So far as the court's opinions reveal, the plaintiff's property development proposal was the *only* one upon which such a fee [*670] condition had been imposed. We concluded that applying *Nollan/Dolan* review to such a "special, discretionary [**105] permit condition[]" (*Ehrlich*, *supra*, at p. 881 (plur. opn. of Arabian, J.)) was necessary "to ensure that the developer is not being subject to arbitrary treatment for extortionate motives" (*id.* at p. 900 (conc. opn. of Mosk, J.)). At the same time, we distinguished cases such as the present one, involving a "*generally* applicable development fee or assessment" (*id.* at p. 881 (plur. opn. of Arabian, J.)) imposed not "individually" but "pursuant to an [***53] ordinance or rule of general applicability" (*id.* at p. 907 (conc. & dis. opn. of Kennard, J.)).

The "sine qua non" for application of *Nollan/Dolan* scrutiny is thus the "discretionary deployment of the po-

lice power" in "the imposition of land-use conditions in individual cases." (*Ehrlich*, *supra*, 12 Cal.4th at p. 869 (plur. opn. of Arabian, J.).) Only "individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*." (*Santa Monica Beach*, *supra*, 19 Cal.4th at pp. 966-967; see also *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1022, 953 P.2d 1188 (*Landgate*) [heightened scrutiny applies to "development fees imposed on a property owner on an individual and discretionary basis"].)

Under our precedents, therefore, housing replacement fees assessed under the HCO are not subject to *Nollan/Dolan/Ehrlich* scrutiny.

Plaintiffs argue that a legislative scheme of monetary exactions (i.e., a schedule of development mitigation fees) nevertheless should be subject to the same heightened scrutiny as the ad hoc fees we considered in *Ehrlich*, because of the danger [***54] a local legislative body will use such purported mitigation fees—unrelated to the impacts of development—simply to fill its coffers. Thus, plaintiffs hypothesize that absent careful constitutional scrutiny a city could "put zoning up for sale" by, for example, "prohibiting all development except for one-story single-family homes, but offering a second story permit for $20,000, an apartment building permit for $10,000 per unit, a commercial building permit for $50,000 per floor, and so forth." **n13**

> **n13** Alternatively, plaintiffs suggest that "if this Court believes that some degree of scrutiny less than *Nollan* and *Dolan* is appropriate for legislative exactions," we could articulate a lesser standard by shifting the burden of proof to the property owner while maintaining the substantive *Nollan/Dolan* test. This case having been decided on demurrer, the burden of proof is not at issue; we assume the facts as pled in the second amended complaint. We therefore decline to address burden of proof issues here.

[***55]

We decline plaintiffs' invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich*, *supra*, 12 Cal.4th 854, *Landgate*, *supra*, 17 Cal.4th 1006, and *Santa Monica* [*671] *Beach*, *supra*, 19 Cal.4th 952, between ad hoc exactions and legislatively mandated, formulaic mitigation fees. While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a [***56] reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich*, *supra*, 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); [**106] *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640, 94 Cal. Rptr. 630, 484 P.2d 606.) Plaintiffs' hypothetical city could only "put [its] zoning up for sale" in the manner imagined if the "prices" charged, and the intended use of the proceeds, bore a reasonable relationship to the impacts of the various development intensity levels on public resources and interests. While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster.

Finally, we should not lose sight of the constitutional background. "To put the matter simply, the taking of money is different, under the Fifth Amendment, from the taking of real or personal [***57] property. The imposition of various monetary exactions—taxes, special assessments, and user fees—has been accorded substantial judicial deference." (*Ehrlich*, *supra*, 12 Cal.4th at p. 892 (conc. opn. of Mosk, J.).) "There is no question that the takings clause is specially protective of property against *physical occupation* or invasion .... It is also true ... that government generally has greater leeway with respect to noninvasive forms of land-use regulation, where the courts have for the most part given greater deference to its power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees." (*Id.* at pp. 875-876 (plur. opn. of Arabian, J.).)

Nollan and *Dolan* involved the government's exaction of an interest in specific real property, not simply the payment of a sum of money from [*672] any source available; they have generally been limited to that context. (See, e.g., *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 703, 143 L. Ed. 2d 882, 119 S. Ct. 1624 [*Dolan* "inapposite" to permit denial]; *Clajon*

Production Corp. v. Petera (10th Cir. 1995) 70 F.3d 1566, 1578 [***58] [heightened scrutiny limited to exaction of real property]; *Commercial Builders v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 875 [*Nollan* inapplicable to housing mitigation fee]; cf. *United States v. Sperry Corp.* (1989) 493 U.S. 52, 62, fn. 9, 107 L. Ed. 2d 290, 110 S. Ct. 387 ["It is artificial to view deductions of a percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible"].) In *Ehrlich*, we extended *Nollan* and *Dolan* slightly, recognizing an exception to the general rule of deference on distribution of monetary burdens, because the ad hoc, discretionary fee imposed in that case bore special potential for government abuse. We continue to believe heightened scrutiny should be limited to such fees. (Accord, *Krupp v. Breckenridge Sanitation Dist.* (Colo. 2001) 19 P.3d 687, 698 [to the extent *Nollan/Dolan* review applies to purely monetary fees, it is limited to "exactions stemming from adjudications particular to the landowner and parcel"].) Extending *Nollan* and *Dolan* generally to all government fees affecting property value or development [***59] would open to searching judicial scrutiny the wisdom of myriad government economic regulations, a task the courts have been loath to undertake pursuant to either the takings or due process clause. (See, e.g., *Dolan*, *supra*, 512 U.S. at p. 384 [reiterating "the authority of state and local governments to engage in land use planning" even when such regulation diminishes individual property values]; *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 133 [that landmarks law burdens have more severe impact on some landowners than others does not render its application a taking: "Legislation designed to promote the general welfare commonly burdens some more than others"]; *Usery v. Turner Elkhorn Mining Co.* (1976) 428 U.S. 1, 19, 49 L. Ed. 2d 752, 96 S. Ct. 2882 [wisdom of particular cost-spreading scheme "not a question of constitutional dimension"].)

C. Merits of Plaintiffs' Takings Claims

Plaintiffs attack the housing replacement provisions of the HCO both on their face and as applied to the San Remo Hotel. In the discussion that follows, we address only the [**107] substantive contentions made in this court by the plaintiffs. [***60] **n14**

n14 The concurring and dissenting opinion, in criticizing us first for addressing these issues at all (conc. & dis. opn., *post*, 428 U.S. 1, 13) and then for failing to address issues that have *not* been raised in this court (*id.* at p. 17), seemingly ignores the choices plaintiffs have made in refining their claims as they climbed the appellate ladder. In particular, had plaintiffs wished to resurrect theories asserted in their pleading, but not raised in the City's petition for review, they could have done so by answer to the petition. (See Cal. Rules of Court, rule 28(e)(5).)

Challenging the ordinance on its face, plaintiffs assert there is no connection between the housing replacement fees assessed and the housing lost by [*673] conversion to tourist use. We conclude, to the contrary, that the housing replacement fees bear a reasonable relationship to loss of housing. Under the ordinance, the amount of the in lieu fee is based on the number of rooms being converted from residential [***61] to tourist designation; the number of rooms designated residential is, in turn, based on the self-reported use as of September 23, 1979, shortly before a City moratorium on residential hotel conversion first came into force. (HCO, § 41.3, subd. (g).) On its face, the use of a defined historical measurement point is reasonably related to the HCO's housing preservation goals (see HCO, §§ 41.2, 41.3), and the use of individualized self-reported survey results, with inspection by City staff if needed, and opportunities for appeal by the hotel owner or challenge by other interested parties (HCO, § 41.6), is a facially reasonable means of determining initial status. Plaintiffs fail to demonstrate from the face of the ordinance that fees assessed under the HCO bear no reasonable relationship to housing loss in the *generality* or *great majority* of cases, the minimum showing we have required for a facial challenge to the constitutionality of a statute. (See *Kasler v. Lockyer* (2000) 23 Cal.4th 472, 502; *California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 345, 347, 975 P.2d 622; *id.* at pp. 358-359 (dis. opn. of Werdegar, [***62] J.).) **n15**

n15 In support of their claim of a lack of "nexus" between the City's housing goals and the in lieu fees assessed under the HCO, plaintiffs rely on *Seawall Associates v. City of New York* (N.Y. 1989) 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, in which an ordinance similar in some ways to the HCO (but differing in some respects as well) was found to work a facial taking of hotel owners' property. But in finding that the ordinance did not substantially advance the city's goal of alleviating homelessness, the New York court explicitly exercised the heightened scrutiny described in *Nollan*, which, of course, we have concluded does not apply to the HCO's in lieu fees. (*Seawall*, *supra*, at pp. 1068-1069.) The *Seawall* court, moreover, applied *Nollan* to burdensome land use restrictions generally, not only to exactions imposed as conditions of permit approvals. (See *Seawall*, *supra*, at p. 1068 [discussing the ordinance's "ban on converting, destroying and warehousing [single room occupancy] units"].) To that extent, *Seawall* was impliedly overruled by *Monterey v. Del Monte Dunes at*

Monterey, Ltd., *supra*, 526 U.S. at pages 702–703, in which the high court held heightened scrutiny was "inapposite" to permit denials and other land use restrictions not involving exactions. The New York Court of Appeals acknowledged the overruling in *Bonnie Briar Syndicate v. Mamaroneck* (N.Y. 1999) 94 N.Y.2d 96, 721 N.E.2d 971, 975, 699 N.Y.S.2d 721.)

[***63]

Plaintiffs also assert the City has admitted, in the HCO itself, that the in lieu fees assessed are intended to raise money rather than mitigate the loss of housing. They cite to HCO section 41.3, subdivision (m), a legislative finding in the 1990 ordinance explaining why the in lieu fees were raised from 40 percent of replacement cost to 80 percent. That finding states that [*674] the 40 percent figure was found inadequate because of lower than expected contributions by government sources. "Federal, state and local funds were incorrectly assumed at that time to be available and sufficient to make up the shortfall between the 40 percent in lieu fee and actual replacement costs. For example, in 1979 the federal government was spending 32 billion dollars on housing and is spending only 7 billion dollars in 1989." (HCO, § 41.3, subd. (m).) Contrary to plaintiffs' suggestion, this finding does not tend to show an impermissible revenue–raising purpose for the in lieu fees, but only the legitimate purpose of more fully funding the replacement of housing lost through conversion.

[**108] We note, as well, that the structure of the HCO's housing replacement provisions rebuts plaintiffs' claim that they [***64] are intended merely to raise general revenue. No hotel owner is required to pay a fee to the City as a condition of conversion. Rather, to comply with the replacement provisions and receive a conversion permit, an owner may construct comparable housing units for rent; bring units onto the market from any building not subject to the HCO; construct or rehabilitate, even at less than a one–to–one ratio, apartment units for elderly, disabled or low–income renters, or transitional or emergency housing; or contribute to a private nonprofit housing developer for construction of comparable units. (HCO, § 41.13, subd. (a)(1)–(3), (5).) Even when the hotel owner chooses to pay a fee in lieu of such replacement, the fee is not paid to the City's general fund but to a separate residential hotel preservation account. (HCO, § 41.13, subd. (a)(4).) The HCO was clearly not designed as a means of raising general revenue.

In their last facial claim, plaintiffs assert that the HCO does not preserve available housing because "tiny hotel rooms without baths and without kitchens are not housing." We disagree. While a single room without a private bath and kitchen may not be an ideal form of housing, [***65] such units accommodate many whose only other options might be sleeping in public spaces or in a City shelter. Plaintiffs do not dispute that San Francisco has long suffered from a shortage of affordable housing or that residential hotel units serve many who cannot afford security and rent deposits for an apartment. (See HCO, § 41.3, subds. (a)–(f).) Maintaining the availability of residential hotel rooms is a reasonable means of serving one segment of San Franciscans' housing needs. **n16**

n16 We note as well that plaintiffs' challenge in this respect goes not to the housing replacement fee, or to any other exaction made as a condition of permit approval, but to the City's underlying reasons for restricting residential hotel conversion. A challenger to the justification for such a legislatively imposed, generally applicable restriction on changes in real property use "bears the burden of proving that the regulation 'constitutes an arbitrary regulation of property rights.' " (*Santa Monica Beach*, *supra*, 19 Cal.4th at p. 966, quoting *Dolan*, *supra*, 512 U.S. at p. 391, fn. 8.) Other than to assert that single–room rentals cannot be considered housing, a view we reject, plaintiffs make no attempt at such a showing.

[***66]

Our dissenting colleague argues that the HCO constitutes a facial taking because, in the well–known phrase of Justice Holmes, it affords insufficient [*675] " 'reciprocity of advantage' " to owners of the hotels affected. (Dis. opn., *post*, at pp. 14, 15, quoting *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 415, 67 L. Ed. 322, 43 S. Ct. 158 (*Penna. Coal Co.*).) The dissent would apparently approve an economic regulation affecting property only if each property owner restricted by the regulation were guaranteed, at the same time, a proportionate benefit from the same regulation. Whether Holmes's conception of the justifiable regulation of property was as narrow as the dissent's is unclear, but, in any case, such a restrictive view has generally not controlled the development of takings law.

In *Penna. Coal Co.* itself, Justice Brandeis observed that in many cases where the high court had approved the exercise of police powers to regulate the use of property, the burdened property owner had received no reciprocal benefit from the regulation "unless it be the advantage of living and doing business in a civilized community." (*Penna. Coal Co.*, *supra*, 260 U. [***67] S. at p. 422 (dis. opn. of Brandeis, J.).) In the many difficult cases that have followed, it has generally been the Brandeis view that has prevailed: "Under our system of government, one of the State's primary ways of preserving the

public weal is restricting the uses individuals can make of their property. While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others. [Footnote 21:] *The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received.* Not every individual gets a full dollar return in benefits for the taxes he or she pays; yet, no one suggests that an individual has a right to [**109] compensation for the difference between taxes paid and the dollar value of benefits received." (*Keystone Bituminous Coal Assn. v. DeBenedictis*, *supra*, 480 U.S. at p. 491 & fn. 21, italics added; see also *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. at p. 133 (*Penn Central*) ["that the Landmarks Law has a more severe impact on some [***68] landowners than on others ... does not mean that the law effects a 'taking' "]; *Agins v. Tiburon* (1980) 447 U.S. 255, 262, 65 L. Ed. 2d 106, 100 S. Ct. 2138 [restrictive zoning ordinances "benefit the [property owners] as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision for open-space areas"].) Thus, the necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the [*676] participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.

The federal and state takings clauses, to be sure, place a limit, imprecise as it may be, on the regulatory burdens an individual property owner may be made to bear for public purposes. The breadth or narrowness of the class burdened by the regulation, the extent to which a regulation defeats the owner's reasonable investment-backed [***69] expectations, and the extent to which the affected property is also benefitted by the regulation are certainly pertinent to whether a regulation works a taking. (*Agins v. Tiburon*, *supra*, 447 U.S. at p. 262; *Penn Central*, *supra*, 438 U.S. at pp. 124, 132.) But the HCO neither targets an arbitrary small group of property owners, nor deprives all the burdened properties of so much of their value, without any corresponding benefit, as to constitute a taking on its face. As discussed earlier, the HCO affects *all* the approximately 500 residential hotels in San Francisco, comparable to the "over 400" New York City landmarks the United States Supreme Court relied upon in holding that landmark laws could not be characterized as "discriminatory, or 'reverse spot,' zoning." (*Penn Central*, *supra*, at p. 132.) Also like the landmarks law upheld in *Penn Central*, the HCO allows the property owner to continue the property's preordinance use unhindered; like the landmarks law, therefore, the HCO "does not interfere with what must be regarded as [the property owner's] primary expectation concerning the use of the parcel." (*Id.* at p. 136.) Finally, the [***70] chief purpose of the HCO, ensuring affordable and available housing for those San Franciscans who would otherwise be without it, carries benefits for all the City's property owners, including those operating tourist hotels. (See *id.* at pp. 134-135 [landmarks law benefits all New Yorkers].) We cannot agree with the dissent that a law applying on equal terms to all properties in a sizeable class defined by use, designed to benefit the City as a whole, and merely prohibiting a change of use from residential to commercial unless the owner mitigates the detrimental impact of that change, constitutes a facial taking of property.

The above may help to explain why the dissent's hypothetical concerning governmental appropriation of an automobile is inapposite. A law arbitrarily selecting a private automobile owner to dedicate his or her car to public use or pay for the government to buy another one would, as the dissent suggests (dis. opn., *post*, at p. 3) clearly require compensation. Less clear, but more like the present case, would be a law requiring all common carriers to take certain mitigation measures before converting from passenger to freight [*677] service. A burden placed broadly [***71] and nondiscriminatorily on changes in property's use is not the equivalent of an arbitrary decision to hold an individual's property for ransom. As elsewhere in takings law, the answers are found not in absolute rules for all cases, but by the particularized weighing of public and private interests. (*Agins v. Tiburon*, *supra*, 447 U.S. at pp. 260-261.)

[**110] Finally, the dissent insists that owners of residential hotels cannot be required to continue the use of their property as low-income housing, or to mitigate the impact of ending that use, because they "did not cause poverty in San Francisco." (Dis. opn., *post*, at pp. 2-3.) But, of course, the owners of undeveloped property in *Agins v. Tiburon*, *supra*, 447 U.S. 255, restricted by zoning in how intensely they could develop the property, had not (yet) caused "the ill effects of urbanization" (*id.* at p. 261) the zoning law was designed to protect against, and the owners of New York City's Grand Central Terminal had not (yet) caused the loss of historic structures that motivated that city's landmarks law (*Penn Central*, *supra*, 438 U.S. at p. 107). Here, as in those cases, [***72] it is the detrimental effects of a *change* in the use of property that motivates the regulation. A use not in itself noxious or harmful, such as the operation of a tourist hotel, may nonetheless call for mitigation when the change of property to that use results in the loss of an existing use of

public importance. (See *id.* at p. 134, fn. 30 ["Nor ... can it be asserted that the destruction or fundamental alteration of a historic landmark is not harmful"].)

If, as Justice Holmes warned, the Constitution "does not enact Mr. Herbert Spencer's Social Statics" (*Lochner v. New York* (1905) 198 U.S. 45, 75, 49 L. Ed. 937, 25 S. Ct. 539 (dis. opn. of Holmes, J.)), it just as surely does not enact the late Robert Nozick's Minimal State. (See Nozick, Anarchy, State and Utopia (1974) pp. ix, 171-172, 272-274.) However strongly and sincerely the dissenting justice may believe that government should regulate property only through rules that the affected owners would agree indirectly enhance the value of their properties (dis. opn., *post*, at pp. 14-15), nothing in the law of takings would justify an appointed judiciary in imposing that, or any other, personal [***73] theory of political economy on the people of a democratic state.

Turning to the as-applied challenge, plaintiffs argue "the $567,000 fee imposed by the Hotel Ordinance has no connection at all to the Field Brothers' tourist use of the San Remo Hotel" because (quoting the Court of Appeal) the permit simply " 'allowed an existing use to continue.' " As explained above, however, the mitigation fee was based on the [*678] number of units designated residential that were proposed for conversion, and the residential designation of the San Remo Hotel's rooms was reasonably based on the hotel management's own report of the rooms' use on the HCO's initial status date of September 23, 1979. **n17** Plaintiffs' operative complaint, moreover, contains no allegations specifically relating to the San Remo Hotel's use as of the initial status date. The only use allegation covering that date is a general assertion that the hotel has been "primarily" used by "transient and tourist" guests since 1916. Nowhere do plaintiffs allege that the San Remo Hotel was, in 1979 or at any time, *entirely* in tourist use, as would be required to support their claim that the housing replacement fee has "no connection [***74] at all" to the hotel's historical use. (As discussed earlier, the administrative record indicates that plaintiffs could not truthfully so allege, since it shows mixed tourist and residential use throughout the 1980's.) The complaint, therefore, fails to state a cause of action on the ground that the amount of the fee paid by plaintiffs bore no reasonable relationship to the impacts of their proposed conversion to tourist use.

> **n17** Plaintiffs assert they were unaware of the 1981 survey that established the hotel's initial status, and did not know of the hotel's classification until 1983. No facts alleged in their complaint, however, would show that they were prevented by City action from learning of and participating in the survey and certification process. Under the HCO, the City-issued certificate of use, from which plaintiffs could have appealed, was required to be posted in the hotel lobby when issued in 1981. (HCO, § 41.6(d).) Even when they took possession in 1983, moreover, plaintiffs made no effort to correct the allegedly incorrect designation, waiting until 1987 even to draw it to the City's attention by letter. In any event, plaintiffs do not contend the HCO's survey and classification procedures deprived them of procedural due process, and we express no opinion in that regard.

[***75] [**111]

Plaintiffs further argue that, because the conditional use permit granted them by the City Planning Commission contained a condition requiring them to offer lifetime leases to existing residential tenants, no housing was lost by conversion to tourist use. Plaintiffs' conclusion, however, does not follow from their premise. The HCO seeks to preserve the *supply* of affordable housing units, not merely to extend the tenancy of any individual resident. (HCO, § 41.2.) Rooms designated residential under the ordinance that were vacant or temporarily rented to tourists at the time of conversion were nonetheless housing units that would be lost in the conversion, since after conversion they would no longer be held available, by law, for residential tenants. The same is true of rooms occupied by residential tenants who declined the offered leases. Even as to any rooms for which lifetime leases were accepted, the residential designation to be lost by conversion would have preserved the residential availability of those units after the lessees moved or passed away. Accordingly, even if no current resident were required to move, the City could reasonably base the in lieu fee on the number [***76] of units designated and reserved for residential use that would be [*679] made unavailable by the plaintiffs' proposed conversion of all of the hotel's rooms to tourist use.

Finally, plaintiffs, citing *Ehrlich*, *supra*, 12 Cal.4th at page 883, contend that the size of a development mitigation fee may not constitutionally be based on the loss of the property's prior use. In *Ehrlich*, of course, the court examined the recreational facilities fee under the "rough proportionality" standard (*id.* at p. 882), a type of scrutiny inapplicable here. Perhaps more significantly, the fee in *Ehrlich* was imposed as a condition of a requested change in zoning for the subject property; there was no existing recreational use, the club having already been closed as uneconomical and its facilities demolished. (*Id.* at pp. 861-862, 50 Cal. Rptr. 2d 242, 911 P.2d 429.) The particular recreational facilities previously existing on the property having been permissibly demolished, the city could not use the value of their loss to impose a mitiga-

tion fee for the *change in zoning* sought by the property owner, although the majority held the fee *could* be based on the costs of planning and rezoning other properties for the needed [***77] recreational use. (*Id.* at pp. 883–884 (plur. opn. of Arabian, J.); *id.* at p. 902 (conc. opn. of Mosk, J.).) In the present case, the housing that was to be lost by conversion of rooms from residential to tourist use had *not* been abandoned or demolished; nor had plaintiffs invoked their statutory right (Gov. Code, § 7060) to withdraw residential accommodations from the market. Plaintiffs sought not merely a change in the zoning affecting the site of the San Remo Hotel, but permission to change the use of existing residential facilities on the property. A mitigation fee measured by the resulting loss of housing units was thus reasonably related to the impacts of plaintiffs' proposed change in use.

DISPOSITION

The judgment of the Court of Appeal is reversed insofar as it reversed the superior court's judgment for defendant on plaintiffs' complaint. In all other respects the judgment of the Court of Appeal is affirmed.

WERDEGAR,J.

WE CONCUR:

GEORGE, C. J.

KENNARD,J.

MORENO,J.

CONCURBY:
BAXTER

DISSENTBY:
BAXTER; BROWN

DISSENT:

CONCURRING AND DISSENTING OPINION BY BAXTER, J.

I concur in the majority opinion insofar as it finds the [***78] Court of Appeal erred in assessing plaintiffs' as-applied challenge to the City and County of San Francisco's (City's) housing replacement fee under a standard of heightened scrutiny. I also agree with much of what the majority says about the test that does apply to this exaction. My objections are that in the remainder of its analysis, the majority fails to decide the issues on which we granted review and strains to reach questions that are not fairly included in the review petition.

[*680] I ask different questions and, not surprisingly, come up with different answers. Unlike the majority, I would affirm the Court of Appeal to the extent that it remanded for [**112] further proceedings concerning the petition for writ of administrative mandate and would remand for further proceedings under the correct takings standard.

I

The majority frames the first question as whether the City properly required plaintiffs to obtain a conditional use permit for full tourist use of the hotel. The problem with this formulation is that it treats the issue of the conditional use permit as an all-or-none proposition. This is a mistake. The critical issue is not *whether* plaintiffs needed to obtain [***79] a conditional use permit if they wished to rent all of the hotel's rooms to tourists—as the majority notes, there is evidence in the record to support the finding that *some* rooms had historically been rented to long-term residents (maj. opn., *ante*, at pp. 15, 21)—but *how many* rooms required a permit before plaintiffs could rent them to tourists. To answer *that* question, it is necessary first to determine how many tourist rooms are grandfathered as a permitted conditional use.

As the City points out, the process of converting residential hotel rooms to tourist hotel rooms requires two separate permits: a conversion permit from the City Department of Building Inspection under the Residential Hotel Unit Conversion and Demolition Ordinance (HCO), and a conditional use permit from the City Planning Commission under the City Planning Code. Plaintiffs do not independently challenge here the requirement of obtaining a conversion permit from the Department of Building Inspection, merely the need to obtain a conditional use permit from the Planning Commission.

The parties agree that no duty exists to obtain a conditional use permit to continue a property use that qualifies [***80] as a permitted conditional use. **n1** A permitted conditional use is one that "existed lawfully at the time a new zoning prohibition or restriction came into force" and "is conditionally *permitted* by the new zoning law." (Maj. opn., *ante*, at p. 18, fn. 10.) Thus, a permitted conditional use in the North Beach neighborhood commercial district must have "lawfully existed" on the effective date of the 1987 ordinance. (*Id.* at pp. 14–15, citing S.F. Planning Code, § 179, subd. (a)(2).) [*681] It was on this ground that plaintiffs disputed the need for a conditional use permit. (See maj. opn., *ante*, at p. 7.) **n2**

n1 It follows that no conversion permit would be needed to continue a permitted conditional use, either. Yet, under the result endorsed by the majority, property owners who wish to convert only one residential room to tourist use must also convert all remaining rooms in the building—even rooms grandfathered as a permitted conditional tourist

use—and satisfy the one-for-one replacement requirement for *all* the rooms. Remarkably, the majority makes no effort to justify such a condition under the takings test the court has adopted.

[***81]

n2 The majority purports to find it significant that the conditional use permit did not "specify the number of rooms subject to one-to-one replacement under the HCO, calculate the in-lieu replacement fee to be assessed, or impose any other condition dependent on the number of rooms previously in tourist use." (Maj. opn., *ante*, at p. 20.) Plaintiffs' challenge, however, is not to the contents of the permit, but to the administrative decision that *preceded* issuance of the permit, in which the City refused to grandfather any prior tourist use of the hotel as a permitted conditional use. (See *id.* at p. 7.) Although plaintiffs thereafter applied for a conditional use permit for *all* their hotel rooms, they did so, as the City Planning Commission noted, "under protest" and without waiving their claim that the majority of the rooms should have been grandfathered as a permitted conditional tourist use.

Were plaintiffs on remand to establish the truth of their allegation that at least 53 of their 62 rooms should be grandfathered as a permitted conditional tourist use, it is certainly plausible that they would not undertake the permitting process for the remaining handful of rooms. Without a remand, however, the majority has approved a procedure in which plaintiffs, no matter the number of rooms sought to be converted, are obligated to pay $567,000. It is difficult to imagine how such a scheme satisfies even the most lax of constitutional tests.

[***82]

The City asserts that *no* tourist rental could have "lawfully" existed in the district because of the legal restrictions on tourist rental imposed by the HCO, which was enacted in 1981 and amended in 1990. The [**113] City, however, has been unable to explain why the HCO, which is part of the San Francisco *Administrative* Code, should have been considered by the City Planning Commission in determining whether tourist rental "lawfully existed" under section 179, subdivision (a)(2) of the San Francisco *Planning* Code, where the zoning ordinances are found. Indeed, the City's statements throughout these proceedings preclude any attempt to cut and paste the HCO into the Planning Code.

As the City repeatedly asserts, the HCO is "separate" from the City Planning Code and, in particular, did not change the zoning classification of the San Remo Hotel under the City Planning Code. The City likewise concedes that "neither the Planning Commission nor the Zoning Administrator has responsibility for administering the HCO." The HCO is administered instead by the City Department of Building Inspection.

These concessions are consistent with an opinion letter by the city attorney issued contemporaneously [***83] with the enactment of the HCO in 1981. In that letter, the city attorney stated that the HCO was not a zoning law, that the City Planning Code "makes no distinction between the use of a hotel devoted to permanent residents or to tourists," that the adoption of the HCO "does not render an existing structure or use a non-conforming structure or use," and that whether a tourist use may continue as a permitted conditional use is governed by the applicable sections of the *Planning* Code. (S.F. City Atty., Opn. No. 81-54 (Sept. 14, 1981) pp. 7-8; see maj. opn., *ante*, at p. 17.)

[*682] The city attorney's opinion letter, together with the City's concessions, undercut the City's efforts here to claim that the HCO was a critical component of the determination whether tourist use *lawfully* existed as a permitted conditional use under the City Planning Code. Indeed, the zoning administrator was apparently so uncomfortable with the City's belated change of heart that he declined to accept the City's newly minted position and found instead that "it has been the Department of City Planning's ('Department') *administrative practice* to classify residential hotels designated under the Hotel [***84] Ordinance as residential uses under the Planning Code." (Italics added.) But "administrative practice" is merely a convenience; it does not aid in determining whether a prior use was lawful or unlawful. The body of law relevant to that determination—i.e., the Planning Code—did not distinguish between tourist hotels and residential hotels and therefore did not prohibit tourist rentals at the San Remo. **n3**

n3 The majority's resolution of this hotly disputed issue is, to put it charitably, unclear. The majority begins by declining to wade into the fray, insisting that it is unnecessary to resolve whether the City Planning Commission properly considered the HCO to be a legal restriction on tourist use of the hotel since "the critical issue in this case is *not the lawfulness* of the historical tourist use, *but its extent*." (Maj. opn., *ante*, at p. 17.) Later on, however, the majority appears to leave the sidelines and adopt the City's newly minted position, rejecting plaintiffs' effort to have prior tourist use grandfathered as a permitted conditional use "because plaintiffs' tourist use of the hotel was, as required under the HCO, *temporary* and *subject to preemp-*

tion by residential demand." (Maj. opn., *ante*, at p. 20.) If the latter statement represents the majority's true views, the majority ought in all fairness explain why the city attorney, the zoning administrator, and the Court of Appeal (see *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal. App. 3d 892, 902, 223 Cal. Rptr. 379 [HCO "does not regulate land use in the same manner as zoning laws"]) all are wrong about the role of the HCO in determining whether a permitted conditional use has been established.

[***85]

The superior court, on this same record, impliedly rejected the zoning administrator's restrained construction and found instead that "since the issuance of the Certificate of Use in 1981, residential use of the San Remo Hotel was the only lawful use." The majority holds—and I agree—that the superior court erred. (Maj. opn., *ante*, at p. 16.) But the majority declines to issue the administrative writ on the separate ground that plaintiffs' proposal to rent all of the rooms to tourists is "a significant alteration or enlargement of the historical lawful use" and therefore required a new conditional use permit. (Maj. opn., *ante*, 117 Cal. Rptr. 2d at p. 282, 41 P. 3d [**114] at p. 98.) I agree that a conditional use permit is required to the extent plaintiffs wish to alter or enlarge the historical lawful use. I disagree strongly, however, with the majority's unstated and unproven assumption that this encompasses *all* of the San Remo's rooms. The majority has simply terminated its analysis prematurely.

Nothing in the record supports the majority's implied finding that none of the rooms could be grandfathered as a permitted conditional tourist use. [*683] Indeed, neither the zoning administrator nor the superior court bothered [***86] to determine how many rooms might have been used historically as tourist rooms because of their erroneous belief that the HCO barred *any* tourist use from qualifying as a lawful permitted conditional use. (See maj. opn., *ante*, at p. 14.) Similarly, the Board of Permit Appeals, in affirming the zoning administrator, apparently found it sufficient that the San Remo was a residential hotel "at least in part."

The majority's reliance on the unproven assumption that no rooms could be grandfathered as a permitted conditional use is all the more puzzling given that the opinion elsewhere is quite cognizant of the prospect that some rooms in the same building may be subject to differing classifications. As the majority explains, we must "consider separately each use in a multiple-use structure," such as the San Remo, in classifying uses "for purposes of neighborhood commercial district zoning." (Maj. opn., *ante*, at p. 19, citing S.F. Planning Code, § 703.2, subd. (b)(1).) **n4** The majority also recognizes that "the administrative record shows that both residential and tourist rentals were significant uses of the San Remo Hotel at the relevant times." (Maj. opn., *ante* [***87] , at p. 15.) Accordingly (and as the majority acknowledges), tourist use at the San Remo would qualify as a permitted conditional use—and is grandfathered under the Planning Code—"*to the extent it lawfully existed when the current laws' restrictions came into effect, but does not qualify to the extent plaintiffs propose to significantly alter or expand it*." (*Id.* at p. 19, italics added.)

n4 I do not assume, as the majority suggests, "that conditional use permits are issued on a room-by-room basis." (Maj. opn., *ante*, at p. 20.) I do, however, agree with the quotation in the text from the majority that, in classifying uses for zoning purposes, we must consider separately each use in a multiple-use structure. The *need* for a conditional use permit, in other words, is determined on a room-by-room basis—as the majority acknowledges. (See maj. opn., *ante*, at p. 17 [affirming the need for a conditional use permit "even as to those rooms that had, on occasion, been lawfully rented to tourists ...."].)

[***88]

The majority thus appears to recognize not only that the critical question here is the number of tourist rooms that should be grandfathered as a permitted conditional use, but also that the current record is inadequate to ascertain that number. For example, the zoning administrator described the annual unit usage reports from 1982 to 1992 as showing residents occupying between 25 and 57 of the designated residential units. "Even if only the 25-57 units actually shown to be occupied by residents were designated as residential units," the zoning administrator explained, "[plaintiffs] would still be required to procure a conditional use permit to convert *them* under the terms of Planning Code section 178(c)." (Italics added.) Yet, as the majority recognizes, the number of eligible rooms "during the relevant period" is "not clearly answered" by the zoning administrator's aggregation [*684] of usage reports over a 10-year period. (Maj. opn., *ante*, at p. 19.) Plaintiffs, for their part, offered evidence that no more than 10 to 20 percent of the hotel's room had been rented to long-term residents, which would fix the number of rooms to be converted well below the number suggested by the [***89] zoning administrator. In their complaint, they allege that no more than 9 rooms should have been deemed residential.

As interesting as this dispute may be, it is beyond cavil that the current record is insufficient to resolve how

many tourist rooms [**115] might be grandfathered as a permitted conditional use. Under the circumstances, a remand is appropriate to enable factual findings to be made regarding the actual use of the hotel during the relevant period. **n5** On remand, the City would also be free to argue that plaintiffs had discontinued or abandoned any permitted conditional tourist use they are able to establish. " 'Abandonment of a nonconforming use ordinarily depends upon a concurrence of two factors: (1) An intention to abandon; and (2) an overt act, or failure to act, which carries the implication the owner does not claim or retain any interest in the right to the nonconforming use (8A McQuillin, [Municipal Corporations (3d ed. 1994)], § 25.192; 1 Anderson, American Law of Zoning, § 6.58). Mere cessation of use does not of itself amount to abandonment although the duration of nonuse may be a factor in determining whether the nonconforming use has been abandoned (101 [***90] C.J.S. Zoning § 199).' " (*Hansen Brothers Enterprises, Inc. v. Board of Supervisors* (1996) 12 Cal.4th 533, 569, 907 P.2d 1324; see S.F. Planning Code, § 178, subd. (d) [permitted conditional uses deemed abandoned if discontinued for 3 years]; S.F. Admin. Code, § 41.19, subd. (a)(1) [a tourist unit may be rented to a permanent resident without changing the legal status of the unit]; cf. *Tenderloin Housing Clinic, Inc. v. Astoria Hotel* (2000) 83 Cal.App.4th 139, 144-145.) The current record, however, renders it impossible to determine which rooms, if any, could be rented to tourists as a permitted conditional use and which rooms, if any, have abandoned or discontinued that permitted conditional use. How the majority, which is plainly aware of the significance of the hotel's historical use and the inadequacy of the record on that point, can do anything other than order a remand is a mystery.

n5 It is unclear whether the critical date is in 1987, when the neighborhood commercial district ordinance took effect, or in 1982, when interim measures first took effect (and before plaintiffs resumed operation of the hotel), or some date in between. (See maj. opn., *ante*, at p. 15.) Because the selection of the appropriate effective date may depend in part on the evidence adduced by plaintiffs demonstrating an existing tourist use, it would be premature to resolve the issue here. Inasmuch as the parties agree that the relevant effective date lies somewhere between 1982 and 1987, the purpose of the majority's discussion of usage rates between 1988 and 1991 (see maj. opn., *ante*, at pp. 9-10, 15-16) is lost on me.

[***91]

In sum, the answer to the question framed by the majority—"Did San Francisco Properly Require Plaintiffs To Obtain a Conditional Use Permit for [*685] Full Tourist Use of the Hotel?"—is a *conditional* yes. The need to obtain a permit exists only for those rooms for which plaintiffs cannot establish tourist rental as a permitted conditional use, which is precisely the issue left unresolved by the majority. In my view, the writ petition should be granted in part and the matter remanded to permit the superior court or the appropriate administrative agency to take evidence concerning actual tourist use and to resolve any claims that tourist use was abandoned or discontinued. The majority's abrupt termination of the litigation grants the City a windfall housing replacement fee for each room that further proceedings would have revealed to be grandfathered as a permitted conditional tourist use.

II

I agree with the majority that in-lieu fees assessed under the HCO are not subject to the "rough proportionality" test articulated in *Dolan v. City of Tigard* (1994) 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (*Dolan*). *Dolan* envisioned that some "land use [***92] regulations" would not be subject to the "rough proportionality" test. (*Id.* at p. 385.) To identify which land use regulations would be subject to the more stringent test, the court relied on two "relevant" distinctions: between "an *adjudicative* decision to condition the [owner's] application for a building permit on an individual parcel" and "essentially *legislative* determinations classifying entire areas of the city," and between "a requirement that [the owner] *deed* portions of the property to the city" and "a *limitation* on the use [the owner] might make of her own parcel." (*Ibid.*, italics added.)

[**116] In *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 911 P.2d 429 (*Ehrlich*), this court unanimously concluded that the "rough proportionality" test applied when "special, discretionary permit conditions on development by individual property owners" (*id.* at p. 881 (plur. opn. of Arabian, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.)) were "*adjudicatively* imposed" (*id.* at p. 906 (conc. & dis. opn. of Kennard, J.); *id.* at p. 891 (conc. opn. of [***93] Mosk, J.)). Here, as the majority notes, the in-lieu fee is a product of "generally applicable legislation" (maj. opn., *ante*, at p. 29) and its calculation is subject to "no meaningful government discretion." (*Id.* at p. 28.) Under those circumstances, the in-lieu fee here must be viewed as one of those land use regulations that is not subject to the "rough proportionality" test.

This much is sufficient to answer "no" to the main question the City presented in its review petition: "Where a legislatively adopted impact fee applies equally to 500 residential hotels and 18,000 residential hotel units, is it nevertheless a 'particularized' exaction subject to 'height-

ened scrutiny' [*686] because it does not apply to every property in the city?" Although the majority might have stopped the takings analysis at that point, it seems prudent to me to discuss, as the majority does, the legal standard that *does* apply to the in-lieu fee here, namely that "[a] land use regulation does not effect a taking if it 'substantially advances legitimate state interests' ...." (*Dolan*, *supra*, 512 U.S. at p. 385.)

Admittedly, this test is not easy of application. The Supreme Court acknowledges [***94] that it has not provided "a thorough explanation of the nature or applicability of the requirement that a regulation substantially advance legitimate public interests" (*Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 704, 143 L. Ed. 2d 882, 119 S. Ct. 1624 (*Del Monte Dunes*)) other than to distinguish this requirement from that used by the high court in due process and equal protection claims. (See *ibid.*, citing *Nollan v. California Coastal Comm'n.* (1986) 483 U.S. 825, 834-835, fn. 3, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (*Nollan*).) As *Nollan* stated in that footnote, "our opinions do not establish that these standards are the same as those applied to due process or equal protection claims." (*Nollan*, *supra*, 483 U.S. at pp. 834-835, fn. 3.) Rather, takings jurisprudence has diverged from due process and equal protection both in "verbal formulations" and in application. (*Ibid.*) "There is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges [***95] are identical." (*Ibid.*; see generally *Santa Monica Beach, Ltd. v. Superior Court*, (1999) 19 Cal.4th 952, 1018-1021, 968 P.2d 993 (dis. opn. of Chin, J.) (*Santa Monica Beach*).)

Thus, to the extent that the majority suggests that the property owner must prove the land use regulation is arbitrary to prevail on a *takings* claim as opposed to a *due process* claim (see maj. opn., *ante*, at p. 38, fn. 16, quoting *Dolan*, *supra*, 512 U.S. at p. 391, fn. 8), it is not faithful to the distinction the high court has drawn between those two legal doctrines. **n6** For the most part, however, the majority takes pains to distinguish the requirement under the takings clause that a land use regulation "substantially advance[] legitimate state interests" from the requirement of due process and equal protection that a regulation be "not arbitrary." To pass scrutiny under the takings clause, the majority says that in-lieu fees "must bear a reasonable relationship, in both intended use and amount, to the public impact of the development," although "the relationship between means and ends need not be so close or so thoroughly established [*687] for legislatively [***96] imposed fees as for ad hoc [**117] fees," which are subject to the "rough proportionality" test. (Maj. opn., *ante*, at p 32.) Although this formulation makes plain that something more is required than mere rational-basis review, its meaning is still opaque. The defect, I submit, is that the majority's test is too much defined by what it is *not*, rather than by what it *is*. For the courts who will be called upon to apply this standard, we must be more illuminating.

> **n6** Justice Chin cogently explained the meaning of *Dolan*'s footnote 8 in his dissenting opinion in *Santa Monica Beach*, *supra*, 19 Cal.4th at pages 1020 through 1021.

The majority's formulation correctly describes the *subjects* of the inquiry—i.e., the governmental regulation and the public impact of the development—as well as the *intensity* of the relationship between them—i.e., a reasonable relationship. What is missing is a description of the *nature* of the relationship between the public impact of the development and [***97] the governmental regulation. On this point, I find helpful the concurring and dissenting opinion in *Pennell v. San Jose* (1988) 485 U.S. 1, 15-24, 99 L. Ed. 2d 1, 108 S. Ct. 849 (conc. & dis. opn. of Scalia, J.). *Pennell* involved the kind of land use regulation that, like the in-lieu fees here, is not subject to the "rough proportionality" test. (See *Santa Monica Beach*, *supra*, 19 Cal.4th at p. 968.) Justice Scalia, joined by Justice O'Connor, observed that "traditional land use regulation (short of that which totally destroys the economic value of property) does not violate this [takings clause] principle because there is a *cause-and-effect* relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Since the owner's use of the property is (or, but for the regulation, would be) the source of the social problem, it cannot be said that he has been singled out unfairly." (*Pennell v. San Jose*, *supra*, 485 U.S. at p. 20, italics added.)

From Justice Scalia's separate opinion, it is apparent that the missing element in the majority's formulation is the *causal* [***98] connection between the property use restricted by the regulation and the social evil that the regulation seeks to remedy. Thus, I would reformulate the standard as follows: The in-lieu fee does not violate the takings clause so long as (1) there is a cause-and-effect relationship between the owner's desired use of the property and the social evil that the fee seeks to remedy, and (2) the fee is reasonably related in both intended use and amount to that social evil. This two-part standard best implements the high court's broadly stated requirement that the fee substantially advance legitimate state interests.

III

The majority, after announcing the correct standard, strays beyond the questions presented and applies the standard to *some* of the claims in [*688] plaintiffs' complaint and then, without any additional discussion, dismisses the remaining claims by affirming the trial court's judgment sustaining the demurrer. I would refrain from reaching the merits of these selected takings claims and, without analysis or even an acknowledgement of doing so, from summarily denying the others. Well-settled principles of appellate review counsel us to remand the matter to the lower [***99] courts to apply the correct legal standard in the first instance.

The most immediate reason for remanding to the lower courts, of course, is that we already need to remand for further factual findings to determine the number of rooms that require further permitting before they may be offered to tourists. When that is completed, plaintiffs will need to choose anew whether and, if so, how to satisfy the housing replacement requirement, "whether by constructing or bringing onto the market new units; by sponsoring such construction by a public or nonprofit private housing developer; or by paying, in-lieu of such construction, a fee to a designated City housing fund." (Maj. opn., *ante*, at p. 29.) Should plaintiffs choose again to pay the in-lieu fee, the appropriate City agency will need to recalculate it, taking into account the correct number of units and their replacement cost. (See *ibid.*) Only if plaintiffs then challenge the fee imposed will we be presented with an actual case or controversy that resembles the one the majority addresses here.

Even if we were not already remanding for further factual development involving the petition for writ of administrative mandate, a [***100] [**118] remand to permit the Court of Appeal to apply the correct legal standard to plaintiffs' claims would be the prudent course. The majority finds, and I agree, that the Court of Appeal erred in analyzing plaintiffs' as-applied takings challenge under a heightened scrutiny standard. (Maj. opn., *ante*, at pp. 28, 31.) It is our practice, where a lower court has applied an incorrect legal standard, to remand for application of the correct standard, even when a remand is not required for other reasons. (E.g., *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 15, 960 P.2d 1031 [where the Court of Appeal applied an erroneous standard, "regard for the structure of appellate decision-making suggests that the case should be returned to the Court of Appeal"]; *id.* at p. 25 (conc. opn. of Mosk, J., joined by George, C.J. and Werdegar, J.) ["It is therefore appropriate to remand to the Court of Appeal for reconsideration in light of the proper standard of review"]; see also *People v. Cox* (2000) 23 Cal.4th 665, 677-678 & fn. 7; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 803, 978 P.2d 2; *People v. Breverman* (1998) 19 Cal.4th 142, 164, 178-179, 960 P.2d 1094; [***101] *People v. Cahill* (1993) 5 Cal.4th 478, 510, 853 P.2d [*689] 1037.) There is no reason to deviate from our practice in this case. Indeed, the justifications for adhering to our traditional practice are numerous and compelling.

First, no hardship exists to warrant our extraordinary intervention to bring an abrupt close to the litigation. Plaintiffs have done everything the City has ordered them to do: they have secured the permits to rent to tourists and have paid the $567,000 housing replacement fee. The only issue in the litigation, as conceded by the City at oral argument, is whether plaintiffs will get some or all of their money back—and the majority's approach plainly does not aid plaintiffs. Moreover, the majority should not be under any illusion that sustaining the demurrer will bring an end to a decade of litigation over that issue. Plaintiffs have reserved their federal claims and, if rebuffed here, will resume their federal litigation, which is now subject to *Pullman* abstention. (See *San Remo Hotel v. City and County of San Francisco* (9th Cir. 1998) 145 F.3d 1095, 1106 & fn. 7.)

Second, remand would give us, a *reviewing* court, the benefit [***102] of a reasoned decision applying the correct standard to the merits of plaintiffs' claims. The Court of Appeal *declined to address* plaintiffs' facial challenge on the grounds that plaintiffs "failed to seek leave of court to replead such causes of action" and that "the present state of the pleadings is insufficient to allow us to fully assess the ultimate legal validity of the facial constitutionality of the HCO." The trial court did purport to reach the merits, but relied solely on *Terminal Plaza Corp. v. City and County of San Francisco*, *supra*, 177 Cal. App. 3d 892 and *Bullock v. City and County of San Francisco* (1990) 221 Cal. App. 3d 1072, 271 Cal. Rptr. 44. Yet, neither *Terminal Plaza* nor *Bullock* addresses the "substantially advance" branch of takings analysis. As for the as-applied challenges, the Court of Appeal applied the wrong standard, and the trial court failed to reach the merits of these claims at all, choosing instead to reject the claims categorically on the authority of *Pfeiffer v. City of La Mesa* (1977) 69 Cal. App. 3d 74, 137 Cal. Rptr. 804. The Court of Appeal held *Pfeiffer* inapplicable for several [***103] reasons, none of which the City challenges here. (See maj. opn., *ante*, at p. 13, fn. 9.) In sum, only one category of claims has even been addressed on the merits by a lower court—the as-applied claims by the Court of Appeal—and that court applied what we have now determined to be the wrong standard. I do not view these circumstances as crying out for us to deviate from our practice of remanding to permit the lower courts to apply the correct standard in the first instance.

Third, remand for application of the correct standard

would be consistent with the way the parties have framed the issues and the relief the City has sought here. The questions presented in the City's petition for review do not [*690] invite us to resolve the merits of plaintiffs' claims. Indeed, when asked at [**119] oral argument what this court should do if it adopts (as it has) a standard not urged by either party, **n7** the City's counsel replied, "I assume the court would remand for a consideration by the trial court of what standard of review the court would order to be applied."

n7 The City misperceives the applicable standard to be "akin to the rational basis test."

[***104]

Fourth, remand is appropriate to permit the lower courts to address the claims articulated in the complaint that are *not* discussed by the majority. The majority purports to affirm the trial court's judgment sustaining the demurrer to the entire complaint, yet limits its discussion only to a few facial and as-applied challenges to the HCO. Our task on demurrer is to determine whether "the complaint states a cause of action under *any* theory, regardless of the title under which the factual basis for relief is stated." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 38, 960 P.2d 513.) Viewed in this light, it is apparent that this complaint articulates a number of potential takings and other claims, none of which has yet been addressed by the majority or rejected by the Court of Appeal, including (1) that the lifetime leases effect a physical taking (see *Yee v. Escondido* (1992) 503 U.S. 519, 528, 118 L. Ed. 2d 153, 112 S. Ct. 1522 ["A different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy"]) [***105] **n25**; (2) that the HCO and fee deprived plaintiffs of their reasonable investment-backed expectations; (3) that the HCO denies plaintiffs all economically viable use of the property, inasmuch as a surplus of vacant residential hotel rooms already exists in San Francisco **n26**; and (4) that state law preempted the HCO. **n27**

n25 The Court of Appeal found that plaintiffs had properly alleged a physical taking in the complaint. The City disagrees, and urges us to reverse the Court of Appeal. On this, as with the remaining causes of action in the complaint, the majority is silent.

n26 The federal court deemed this claim unripe because state remedies for inverse condemnation on this claim were available. (*San Remo Hotel v. City and County of San Francisco*, *supra*, 145 F.3d at pp. 1101-1102.) The majority's decision to affirm the judgment sustaining the demurrer without even mentioning this claim casts grave doubt on the correctness of the federal court's understanding of state remedies—and thus will have repercussions on ripeness far beyond this case.

[***106]

n27 Since the Court of Appeal, having ordered a remand to permit plaintiffs to prove up a legal nonconforming use, found it unnecessary to reach the preemption claim, it is not surprising that plaintiffs did not use their answer to the review petition to seek our review of this issue—or of the other unrelated issues that had not yet been resolved in the litigation. What *is* surprising is the majority's rush to have this court, in the first instance, opine on a number of constitutional issues in this difficult area of law despite the existence of an unaddressed, nonconstitutional basis for decision. The majority's eagerness to discard cherished views of judicial restraint (see, e.g., *People v. Hernandez* (1998) 19 Cal.4th 835, 843, 968 P.2d 465 (conc. opn. of Werdegar, J.); *People v. Bennett* (1998) 17 Cal.4th 373, 393, 949 P.2d 947 (conc. opn. of Werdegar, J.)) merely to facilitate an abrupt and unsolicited termination of this litigation in the City's favor is puzzling.

[*691] I can think of no reason for the majority's failure to address these claims, other [***107] than the fact that none of them can even remotely be shoehorned into the issues presented by the City's petition. But the City's decision to limit issues for review can hardly be deemed a license for us to dismiss plaintiffs' entire complaint without comment, especially where viable issues remain. To affirm the demurrer here would punish plaintiffs for complying with rule 29.3(c) of the California Rules of Court, which tells the parties that "unless otherwise ordered, briefs on the merits shall be confined to those issues, and issues fairly included in them." The lesson here, if there is one, is that litigants in this court should be careful to brief against any conceivable contingency that could jeopardize any favorable ruling below, even if the arguments fall well outside the questions presented. I confess I do not think this is a good idea.

IV

I would therefore affirm the judgment of the Court of Appeal to the extent that it ordered a remand for further proceedings relating to the petition for writ of administrative mandate and affirmed the imposition of [**120] nominal penalties under the City's cross-complaint. I would reverse the Court of Appeal to the extent that it applied

[***108] a heightened-scrutiny standard to plaintiffs' taking claims and would then remand the cause to enable the Court of Appeal to apply the correct legal standard. To the extent the majority prevents plaintiffs from demonstrating their entitlement to writ relief, prematurely analyzes plaintiffs' as-applied takings claims, and summarily disposes of plaintiffs' other claims without any analysis whatsoever, I respectfully dissent.

BAXTER, J.

I CONCUR:

CHIN, J.

DISSENTING OPINION BY BROWN, J.

Americans are a diverse group of hard-working, confident, and creative people molded into a nation not by common ethnic identity, cultural legacy, or history; rather, Americans have been united by a dream—a dream of freedom, a vision of how free people might live. The dream has a history. The idea that property ownership is the essential prerequisite of liberty has long been "a fundamental tenet of Anglo-American constitutional thought." (Ely, The Guardian of Every Other Right (1998) p. 43.) "Indeed, the framers saw property ownership as a buffer protecting individuals from government coercion. Arbitrary redistribution of property destroyed liberty, and thus the framers hoped to restrain [***109] attacks on property rights." (*Ibid.*) "Property must be secured, or liberty cannot exist" (Adams, A [*692] Balanced Government (1790) in Discourses on Davila, (1805), reprinted in 6 The Works of John Adams, (1851 ed.) p. 280), because property and liberty are, upon examination, one and the same thing.

Private property is in essence a cluster of rights inuring to the benefit of the owner, freely exchangeable in accordance with the terms of private agreements, and recognized and protected by common consent. In the case of real property, this cluster of rights includes the right to exclude persons from certain physical space. In the case of intellectual property, it may include the right to employ a valuable method or process to the exclusion of others. In other words, private property represents zones of individual sovereignty—regions of autonomy within which we make our own choices.

But private property, already an endangered species in California, is now entirely extinct in San Francisco. The City and County of San Francisco has implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process—or, worse, the political powerbrokers who [***110] often control the government independently of majoritarian preferences. Thus, "the lamb [has been] committed to the custody of the wolf." (6 The Works of John Adams, *supra*, at p. 280.) San Francisco has redefined the American dream. Where once government was closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs.

I. THE SAN FRANCISCO PLANNING COMMISSION'S ZONING DECISION RESTRICTING PLAINTIFFS' ABILITY TO CONVERT THEIR HOTEL TO TOURIST USE CONSTITUTES A TAKING REQUIRING COMPENSATION

The City and County of San Francisco (the City), like other cities, seeks to provide affordable housing to its low-income residents. The most egalitarian way to achieve this goal would be to distribute the cost of subsidies as broadly as possible, but the forces attacking private property in California—though claiming the moral high ground—have proved themselves anything but egalitarian in their approach. In 1981, the City enacted the Residential [***111] Hotel Unit Conversion and Demolition Ordinance (S.F. Admin. Code, ch. 41) (the HCO; all citations to HCO are to chapter 41 of the San Francisco Administrative Code), the details of which are summarized in the majority opinion, *ante*, at pages 3 through 5. The HCO places the burden of providing low-income housing disproportionately on a relatively small group of hotel owners. These hotel owners certainly did not cause poverty in San [*693] Francisco; indeed, for a long time they voluntarily helped relieve the problem by leasing some or all of [**121] their rooms on a longterm basis to low-income residents. But as the economy of the City shifted, this residential use of their hotel rooms became increasingly unprofitable, and hotel owners began to abandon the residential rental business. It was then that the City, facing constitutional constraints on taxation and other sources of revenue, began to see the hotel owners as the most convenient—if not the most equitable—off-budget solution to its housing problems. If the City were devising a tax that would subsidize low-cost housing, I strongly doubt it would limit its tax to the owners of a few hundred residence hotels, but in the often surreal world [***112] of political expedience, these ill-fated business people were ordered to use their property for the benefit of the poor, thereby greatly depressing the market value of that property.

The express purpose of the HCO was to preserve the City's stock of low-income residential housing by requiring hotel owners to continue leasing their rooms as

residences, or to replace those residential units if they chose to convert the rooms to tourist use. (HCO, §§ 41.2, 41.3.) Obviously, the HCO is facially unconstitutional. If a person took my car and asked a ransom for its return, he or she would be guilty of theft. But what if the City, seeking to provide transportation to the poor, orders me to operate an informal carpool, or if I prefer, to buy the City a replacement car? When presented with a similar hypothetical at oral argument, the San Francisco City Attorney declared such a rule a mere "regulation of use." I disagree. The essence of private property is the right to use that property as one sees fit and for one's own advantage. The police power permits the government to regulate that use so as to promote health, safety, and the general welfare, but it does not permit the government to achieve [***113] its social agenda by ordering a political minority to dedicate its property to the benefit of a group the government wishes to favor. As I explain in more detail in part II below, such a regulation amounts, in practical effect, to a transfer of title and requires the government to pay its way.

But constitutional issues aside, the City had another problem with its HCO. In 1985, the state Legislature enacted the Ellis Act, which unequivocally guarantees the right of property owners to abandon the residential rental business. Government Code section 7060, subdivision (a), provides: "No public entity ... shall, by statute, ordinance, or regulation, or by administrative action implementing any statute, ordinance or regulation, compel the owner of any residential real property to offer, or to continue to offer, accommodations in the property for rent or lease." If this clear language left any doubt about the continuing viability of the HCO, that doubt was finally resolved against the City in *Bullock v. City and County of* [*694] *San Francisco* (1990) 221 Cal. App. 3d 1072, 1102, 271 Cal. Rptr. 44 (*Bullock*), which held that the Ellis Act preempts the [***114] HCO. "We conclude," said the court in *Bullock*, "that [the HCO] is preempted by the Ellis Act and is therefore *invalid to the extent it is applied to prevent plaintiff from going out of the residential hotel business*." (*Bullock*, at p. 1102, italics added.) In other words, state law expressly permits property owners to do what the HCO bars them from doing: it permits them to stop leasing to residents.

The City, however, was unwilling so easily to concede defeat. The Ellis Act affirms the continuing power of public entities "to grant or deny ... zoning ... approvals." (Gov. Code, § 7060.1, subd. (b).) This provision seems reasonable on its face: property owners are free to stop leasing to residents, but they still must obey zoning laws regulating the new use to which they intend to put their property. (See also Gov. Code, § 7060.7.) Conveniently, the City amended its zoning laws shortly after the Ellis Act became law. As related in the majority opinion (maj. opn., *ante*, at p. 6), one effect of this change was to require the owners of the San Remo Hotel to obtain a conditional use permit before "intensifying" any [***115] use of their property as a tourist hotel. (S.F. Planning Code, § 178, subd. (c).) The parties dispute the extent to which the rooms in the San Remo Hotel were ever, in fact, being used as residences, but as the majority points out (maj. opn., *ante*, at pp. 14–21), at least some of those rooms were [**122] historically used as residences, and to the extent the owners sought to convert *those* rooms to tourist use, the change required a permit under the new zoning ordinance. In short, the City put in place a zoning mechanism by which it could try to achieve the goals of its preempted HCO, if it chose to do so.

But the City had to proceed cautiously. *Bullock* made clear that the City could not use zoning laws pretextually to bar landlords from exercising their rights under the Ellis Act. As the court stated, "nothing in the Ellis Act gives any landlord invoking its protection the unilateral power to effect what amounts to a rezoning of his property .... [P] The City is ... not precluded from seeking to have enjoined a violation of [zoning] ordinances ...,*so long as this claim is not used as a pretext for halting* [*the property owner's*] *departure from the residential* [***116] *hotel business*." (*Bullock*, *supra*, 221 Cal. App. 3d at p. 1104, italics added.) Implicitly conceding that the Ellis Act is in direct conflict with the HCO, the majority argues (maj. opn., *ante*, at pp. 20–21) the Ellis Act has no effect here because the record does not establish that plaintiffs complied with its notice requirements. (See Gov. Code, § 7060.4.) But the power of local governments to implement the Ellis Act by requiring notice in no way negates the fact that state law has preempted the City from using zoning as a way to discourage property owners from exiting [*695] the residential rental business. Government Code section 7060.4 permits local governments to enact *notice requirements*, but it does not permit those governments to enact zoning restrictions that abrogate the very protections the Ellis Act affords. Therefore, whether plaintiffs followed the notice requirements of the Ellis Act is beside the point; the state has occupied this area of law, and the City may not enact and enforce contrary laws. Nevertheless, after the City amended its zoning laws, the preempted HCO was poised to become the ghost that drove [***117] zoning decisions in San Francisco.

Here, for example, the owners of the San Remo Hotel sought to convert their hotel to full tourist use. The City's Planning Department told them that—consistent with the recent amendments to the zoning laws—they would need a conditional use permit. Whether to issue a conditional use permit is an adjudicative decision that is exercised at the discretion of the planning commission (S.F. Planning

Code, §§ 303, 316, 316.8), and the planning commission exercised its discretion here by conditioning the San Remo Hotel permit on, among other things, compliance with the preempted HCO. The owners of the San Remo Hotel met this condition by paying, in protest, a $567,000 "in lieu fee" (representing a portion of the appraised cost of building replacement housing) and brought this action alleging, among other things, a taking without just compensation in violation of the state Constitution.

This constellation of facts makes this case indistinguishable from *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 911 P.2d 429 (*Ehrlich*). *Ehrlich* addressed the same problem that the United States Supreme Court recognized in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 [***118] (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374, 129 L. Ed. 2d 304, 114 S. Ct. 2309 (*Dolan*). When a government agency has discretionary authority to permit or prohibit a new use of property, the risk arises that governmental greed will consciously or unconsciously distort the decisionmaking process, causing the agency to exact a condition from the property owner that has nothing to do with mitigating the effects of the proposed new use. This sort of regulatory leveraging, taken to its extreme, might cause a government to impose "stringent land-use regulation which [it] then waives to accomplish other purposes" (*Nollan*, at p. 837, fn. 5), and this concern warrants a more searching inquiry by a reviewing court than might otherwise be appropriate.

In *Nollan*, for example, a California agency conditioned a permit to develop beachfront property on dedication of a public easement. The easement, which permitted the public to cross the property to gain access to the [*696] ocean, "utterly failed to further the end" of mitigating the impact of the proposed [**123] development on ocean views, and therefore lacked the "essential nexus" that the federal Constitution [***119] required and amounted to " 'extortion.' " (*Nollan*, *supra*, 483, U.S. at p. 837.) Similarly, in *Dolan* the City of Tigard conditioned a permit to greatly expand a retail sales complex on dedication of a strip of property as a pathway for pedestrians and bicycles. The high court held that a permit condition must be
" 'roughly proportional[]' " "in nature and extent" to mitigating "the impact of the proposed development" (*Dolan*, *supra*, 512 U.S. at p. 391, fn. omitted), and the City of Tigard had failed "to quantify its findings" that the pathway would mitigate increases in traffic. (*Id.* at p. 395.) In *Ehrlich*, we unanimously extended the principle of *Nollan* and *Dolan* to a case in which a city demanded a *monetary* fee from a developer rather than a dedication of an interest in real property, noting that the same risk of governmental abuse was present. (*Ehrlich*, *supra*, 12 Cal.4th at p. 876 (plur. opn. of Arabian, J.); *id.* at pp. 899–901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) The majority reaffirms the holding of *Ehrlich* [***120] today. (Maj. opn., *ante*, at pp. 25–26.)

Here, as in *Ehrlich*, a public agency (the City's Planning Commission) has made a discretionary adjudicative decision with respect to a specific permit application. Contrary to the argument of the majority (maj. opn., *ante*, at pp. 28–31), this case does not involve a legislatively imposed fee for which the risks of abuse are arguably held in check by the political process. (Maj. opn., *ante*, at p. 32.) Rather, in an adjudicative proceeding concerning a single property owner's permit request, the planning commission chose to require HCO compliance and thereby used the leverage it gained by regulating commercial uses of property to exact a $567,000 fee. On these facts, the fee must be roughly proportional in nature and extent to mitigating the impact of the proposed new use of the property. (*Ehrlich*, *supra*, 12 Cal.4th at p. 876 (plur. opn. of Arabian, J.); *id.* at pp. 899–901 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) In short, because we are dealing with a discretionary decision of the planning commission rather than direct enforcement [***121] of the HCO, the government's decision here, like the decision at issue in *Ehrlich*, was adjudicative.

The majority tries to sidestep this gaping hole in its argument with a footnote asserting that under applicable zoning laws "conversion of residential rooms to commercial use is unconditionally *prohibited* above the first floor in the North Beach district *except* insofar as permitted by the HCO (S.F. Planning Code, §§ 722.38, 790.84)." (Maj. opn, *ante*, at p. 29, fn. 11.) [*697] The majority concludes: "The planning commission, therefore, had no discretion to permit such change in use absent HCO compliance." (*Ibid.*) In other words, the majority argues the planning commission's decision here was legislative, not adjudicative, thereby permitting the majority to exploit the exception it reads into *Ehrlich* for legislatively created permit fees.

First, the majority simply misreads the City's Planning Code. San Francisco Planning Code section 722.38 prohibits conversion from residential to nonresidential use above the first floor, but section 790.84 of that code does not limit the exception from this prohibition to cases where the property owner *complies* with the HCO. [***122] Rather, section 790.84 creates an exception for conversions that are "defined and regulated in [the HCO]." The San Francisco Planning Code therefore remains neutral with respect to HCO compliance. It simply provides that its flat prohibition on conversions does not

apply when the HCO applies, thereby giving space within which the HCO can operate. Nothing in the Planning Code requires the planning commission to enforce the HCO, nor does the [**124] Planning Code state that conversions are prohibited except "as permitted by the HCO." (Maj. opn., *ante*, at p. 29, fn. 11.) In other words, the Planning Code leaves a regulatory gap with respect to conversions regulated in the HCO, and the commission has, *in its discretion*, chosen to fill that gap by requiring HCO compliance. Its decision was not compelled by any legislative rule, and therefore it is no different than the decision at issue in *Ehrlich*. At the very least, the legislative rule was ambiguous, and the planning commission's interpretation of the rule was in that sense adjudicative.

Second, the majority's exception for legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively [***123] powerless group and therefore the restraints inherent in the political process can hardly be said to have worked. (Cf. *United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152, fn. 4, 82 L. Ed. 1234, 58 S. Ct. 778.) If the agency in *Nollan* had passed a rule requiring all beachfront property owners to dedicate an easement as a condition of developing their properties, those easements would have no better mitigated the effects of development (and they would have been no less objectionable) than the easement that the agency exacted adjudicatively. Of course, when the government may prohibit a certain use of property entirely, it may opt instead to place conditions on that use (*Nollan*, *supra*, 483 U.S. at p. 836), but the conditions must be related in some real way to the justification advanced for a complete prohibition. (*Id.* at p. 837.) Otherwise, the government has transformed the police power into an efficient way to raise money by regulating political minorities and then selling exemptions from the regulatory scheme, without any real intent to advance the scheme's [*698] purported purpose. It becomes "as if California law forbade shouting fire in a [***124] crowded theater, but granted dispensations to those willing to contribute $100 to the state treasury." (*Ibid.*) The government, in effect, says: We have the power; therefore, pay us to leave you alone. By any measure, that is extortion. Moreover, it turns the takings clause on its head. Instead of the government having to pay compensation to property owners, the government now wants property owners to compensate *it* to get back the fair value of property the government took away through regulation.

A public agency can just as easily extort unfair fees legislatively from a class of property owners as it can adjudicatively from a single property owner. The nature of the wrong is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over. Therefore, I believe *Ehrlich* should apply whenever the risk is great that greed for public revenues has driven public regulatory policy. In other words, where a legislative scheme imposes a burdensome fee on a small class of property owners as a condition to buying relief from a regulation, I believe careful judicial scrutiny is appropriate, including finding a close link between the fee and the [***125] purpose of the regulation. In light of the majority's decision, however, we can be sure that agencies will now act legislatively, rather than adjudicatively, and thereby insulate their actions from close judicial scrutiny.

In addition, the HCO is structured in such a way that the same sort of discretionary, case-specific decisionmaking that triggered our holding in *Ehrlich* also takes place under the HCO. The fee that a hotel owner may pay under the HCO so as to buy the right to lease residential rooms to tourists is a fixed portion of the estimated cost of replacing the lost residential housing. (HCO, § 41.13, subd. (a)(4), (5).) Though this cost estimate must be based on two independent appraisals (*ibid.*), it nevertheless permits a discretionary element to enter into the process, with the result that the City and the property owner inevitably end up in a back-and-forth negotiation over the amount of the fee. Obviously, the City has the upper hand in this negotiation—because it is holding the conversion permit hostage—and therefore the City is free to squeeze as large a fee as possible from the property owner. That dynamic brings into play all the concerns that justified [***126] our holding in *Ehrlich*, and therefore the same careful scrutiny ought to apply.

[**125] Finally, and most importantly, the majority fails to appreciate that, if the San Francisco Planning Code somehow requires across-the-board compliance with the HCO, then the Ellis Act preempts that requirement, just as it preempts the HCO itself. The zoning exception to the Ellis Act permits the City to place certain limits on how a property owner may use property, but as *Bullock* held, the City may not use that zoning power to erect barriers to [*699] a property owner's decision to exit the residential rental business, even if the effect is to reduce the residential housing stock of the City. (*Bullock*, *supra*, 221 Cal. App. 3d at p. 1104.) In other words, the planning commission, acting under the zoning exception to the Ellis Act, might be able to block the owners of the San Remo Hotel from renting more rooms to tourists, *assuming its purpose is to limit the number of tourist hotel rooms in the area*, but the commission may not do so *to protect the City's stock of low-cost residential housing*, because that would be inconsistent with the state law right of property owners to stop leasing to [***127] residents. Nevertheless, here the majority argues (and the City concedes) that the preservation of low-cost housing was the planning commission's purpose when it required HCO compliance. (See, e.g., maj. opn., *ante*, at pp. 35-

45.) That purpose was simply impermissible under the Ellis Act, and even if it were somehow permissible, the majority acknowledges that at least *some* rooms at the San Remo Hotel were historically used as tourist rooms (maj. opn., *ante*, at pp. 14–21), and therefore it cannot, in any case, justify the planning commission's decision to charge a conversion fee for *all* rooms. (Cf. *id.* at pp. 42–43.)

Of course, despite the Ellis Act problem, the majority and the City have no choice but to assert that the planning commission's purpose was the preservation of residential housing, because if the planning commission had some other purpose, it could not—under any standard of review (rational basis, reasonable relationship, or rough proportionality)—have attached the condition that the owners of the San Remo Hotel take steps to preserve low-cost residential housing. Just as in *Nollan*, where the easement providing access to the beach was not related [***128] in any way to mitigating the obstruction of an ocean view, similarly here the preservation of low-cost housing is not related in any way to mitigating the impact of more tourist hotel rooms in the neighborhood of the San Remo Hotel. In other words, by requiring HCO compliance as a condition for renting more rooms to tourists, the planning commission has revealed its true colors: it does not care about the number of hotel rooms in the area; what it really cares about is preventing property owners from exiting the residential rental business. But this the City simply cannot do under the Ellis Act—if not for the fact that the majority has chosen to turn a blind eye.

II. THE HCO IS FACIALLY UNCONSTITUTIONAL UNDER THE TAKINGS CLAUSE OF THE CALIFORNIA CONSTITUTION

Our takings jurisprudence—both state and federal—has become so labyrinthine and compartmentalized that attempts to find just the right standard for the case often entirely miss the underlying point of the exercise. We speak of ad hoc inquiries, relevant factors, per se takings, and means-end [*700] relationships. We chip away at the problem with separate lines of cases addressing distinct issues such as development [***129] permits and price controls. And all these efforts, valid as far as they go, leave us still groping for a basic conceptual approach that takes seriously the constitutional prohibition against uncompensated takings of private property. Thus, like the Wizard of Oz, we mystify our audience with the look and feel of great erudition, while concealing the humble reality that we have yet to solve the problem in a satisfactory way.

But, here, we need not consider all these arcane standards and fragmentary theories. These are analytical tools relevant to *tough* cases—cases in which it is unclear whether property *has* been taken. This is *not* a tough case. Here, property unquestionably has been taken. No matter the analysis, the facts of this case come down to one thing—the City and County of San Francisco has [**126] expropriated the property and resources of a few hundred hotel owners in order to ameliorate—off budget and out of sight of the taxpayer—its housing shortage. In short, this ordinance is not a matter of efficiently organizing the uses of private property for the common advantage; instead, it is expressly designed to shift wealth from one group to another by the raw exercise [***130] of political power, and as such, it is a per se taking requiring compensation.

The majority rejects the legal theories on which the property owners have proceeded, but it fails to confront the more basic issue that prefigures all others: the City has replaced taxation and the provision of public services with a regulation that orders certain people to use their private property to do the government's work. If the relevant case law is sparse, it is only because no public agency has ever been so bold.

"Private property may be taken or damaged for public use only when just compensation ... has first been paid to ... the owner." (Cal. Const., art. I, § 19.) In a simple world where "property" is understood to refer to tangible property and "taking" is understood to be a formal transfer of title, this constitutional injunction is relatively easy to apply. But such a narrow application of the takings clause would trivialize the right. Restriction of any one of the several rights that constitute private property in effect takes that property. For example, a property owner cares little about the formalities of title possession when the property in question has been rendered nearly valueless [***131] by regulations prohibiting its most productive uses. In that case, the regulations have deprived the owner of so many of the rights that originally constituted the property that the property has, in effect, ceased to exist, or it has become a mere empty shell. Furthermore, in a complex and increasingly service-and information-based economy, the constitutional [*701] protection of intangible property is just as critical as the protection of physical property was to an agrarian and manufacturing economy.

Nevertheless, in countless ways, government takes property—in the sense of regulating its use—without always having to compensate the owner. In *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413, 67 L. Ed. 322, 43 S. Ct. 158 (*Penna. Coal Co.*), Justice Holmes noted that "government hardly could go on" if it had to pay its way every time a regulation restricted the use of property. The law has long recognized, for example, that government might, in the exercise of the police power, act to proscribe a nuisance, and in so doing it need not pay compensation. (See, e.g., Civ. Code, § 3479; Code Civ. Proc., § 731.)

Holmes [***132] spoke of "an average reciprocity of advantage" whereby a property regulation ultimately works for the enrichment of all, though it imposes specific limitations on the use of certain property. (*Penna. Coal Co.*, at p. 415.)

For example, business owners on a popular shopping street might generally agree that their properties would be more attractive, and hence more valuable, if all the businesses used small, attractive signs rather than huge, garish billboards. Nevertheless, without regulation, competitive forces will inevitably cause business signs to become ever larger and more visually intrusive. No business owner wants to be the only one on a shopping street to have a small sign, and transaction costs often prevent owners from coming together to negotiate an agreement that would work to their common advantage. In that case, a regulation that has the immediate effect of reducing property value by restricting sign size, has the indirect effect of enhancing that value for all affected businesses. (See generally, Epstein, Takings: Private Property and the Power of Eminent Domain (1985) pp. 195–215.)

A similar justification can be articulated in the case of the regulations proscribing [***133] nuisance. For example, if the law prohibits a property owner from operating a slaughterhouse in a residential neighborhood, the immediate effect might be to lower incrementally the value of the regulated property, but the indirect effect is to place that property in a neighborhood rendered more desirable for residential use, thereby enhancing its value. Again the same rationale can be extended to justify zoning and planning regulations that constrain the freedom of developers but enhance all property values over the long term [**127] by making cities more attractive and efficient. Finally, when a regulatory scheme creates new value for a property owner by establishing an artificial monopoly—as, for example, might be true in the case of a utility—the government can regulate the profit the property owner gains from its government-created preferential status. All these examples point to the same fundamental principle: property owners, given a choice, [*702] will prefer to own property in a community having appropriate and mutually beneficial regulations, because such property has greater value by reason of the regulation. Accordingly, regulatory authority is not inherently confiscatory in all cases. [***134]

But the corollary of this rule—one I think is implicit in the takings clause of the state Constitution—is that a regulation *is* a taking if, rather than promoting "an average reciprocity of advantage" (*Penna. Coal Co.*, *supra*, 260 U.S. at p. 415), it is merely designed to benefit one class of citizens at the expense of another; that is, if it simply shifts wealth by a raw act of government power. The government, in that case, has deprived the property owner of a right associated with his property, shifting that right to another party, but it has in no sense compensated the owner by enhancing, in some real way, the value of the rights the owner has retained.

In short, it might be perfectly legitimate for the City to help the low-income residents of San Francisco, but it may not do so at the expense of some small class of persons simply by legislating a transfer of property rights. Of course, providing assistance to low-income residents of the community incrementally benefits all members of the community both by removing the blight of homelessness and by representing a general moral good, but here the burden of this common benefit falls so disproportionately on 500 business [***135] owners in a city of 776,700 residents that careful judicial scrutiny is warranted. Where the impact is so disproportionate, we cannot say that we have "an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed 'evenly' enough so that everyone will be a net gainer." (Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law* (1967) 80 Harv. L.Rev. 1165, 1225, original italics.) Moreover, it simply stretches the police power too far to suggest that the City is somehow regulating the use of property for the common advantage when it redistributes wealth by ordering a political minority to dedicate its property to the benefit of another group. The police power can no more be used in this way than it could be used to order a rich man to give a beggar a dime. Here, the primary beneficiary of the regulation is not the common advantage but the low-income individuals who obtain the inexpensive housing. Laudable as that goal might be, the takings clause precludes the government from achieving the goal by police power regulation.

Nor can the HCO [***136] be justified under the theory that the City is merely requiring property owners to continue the existing use of their property. (See, e.g., *Penn Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104, 125, 57 L. Ed. 2d 631, 98 S. Ct. 2646.) Such a rule would punish [*703] a property holder for using property in a way that proved popular. Moreover, it fails to recognize the effect of shifting economic conditions and therefore locks property into unproductive uses. But most important, such a rule represents a dedication of property rights to the public, and in all fairness the public should have to pay for these rights, just as a private party would. For these reasons, I would not extend the holding of *Penn Central* beyond its unique factual context, including the fact that the regulatory authority in that case might have permitted a more moderate development of the property than the one the property owner sought and it gave the

property owner transferable development rights as compensation. (*Id.* at pp. 136–137.)

Here, the City has essentially said to 500 unlucky hotel owners: We lack the public funds to fill the need for affordable housing in San [***137] Francisco, so you should solve the problem for us by using your hotels to house poor people. The City might as well have ordered the owners of small grocery stores to give away food at cost. The federal takings [**128] clause "bars Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Armstrong v. United States* (1960) 364 U.S. 40, 49, 4 L. Ed. 2d 1554, 80 S. Ct. 1563.) I believe the same principle underlies our state takings clause. Accordingly, I would find the HCO facially unconstitutional.

CONCLUSION

I agree with part I of the concurring and dissenting opinion of Justice Baxter to the effect that the San Francisco Planning Code does not require a conditional use permit for tourist use of hotel rooms that were traditionally dedicated to tourist use, and therefore with respect to those rooms, a conversion fee was inappropriate under any takings standard. In addition to the points Justice Baxter makes, I would find the HCO preempted by the Ellis Act and facially unconstitutional, and therefore that the plaintiffs were free to disregard the HCO, and the HCO cannot render tourist [***138] use of their hotel illegal. Furthermore, because the HCO was in effect void, plaintiffs' admission under the HCO concerning residential use of their hotel is not binding on them. Moreover, the admission was based on a 1981 version of the HCO, which permitted tourist use of the rooms during the all-important summer season (1981 S.F. Admin. Code, § 41.16, subd. (a)(3)(B)), and therefore the City cannot use that admission against plaintiffs now that it seeks to restrict plaintiffs *under a different ordinance* from tourist use during *any* season. Therefore, I would affirm the Court of Appeal's decision with respect to the writ petition.

I would also affirm the Court of Appeal's conclusion that the *Ehrlich* " 'rough proportionality' " standard (*Ehrlich*, *supra*, 12 Cal.4th at p. 876) [*704] applies to the San Francisco Planning Commission's decision to require HCO compliance. This decision was adjudicative both in fact and form, and even if it were not, it would nevertheless be extortionate in nature and therefore suspect. I would also affirm the Court of Appeal's conclusion that, under the *Ehrlich* standard, the City has failed to show a sufficiently close link between its [***139] fee, which will subsidize low-cost residential housing, and the regulatory purpose of limiting the number of hotel rooms in the neighborhood (that being the only purpose that the planning commission could have had without impinging on plaintiffs' rights under the Ellis Act).

Once again a majority of this court has proved that " 'If enough people get together and act in concert, they can take something and not pay for it.' " (*Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, 1035, fn. 1, 953 P.2d 1188 (dis. opn. of Brown, J.), quoting O'Rourke, Parliament of Whores (1991) p. 232.) But theft is still theft. Theft is theft even when the government approves of the thievery. Turning a democracy into a kleptocracy does not enhance the stature of the thieves; it only diminishes the legitimacy of the government. Like Justice Rehnquist, I "see no reason why [constitutional protections or property rights] should be relegated to the status of a poor relation." (*Dolan*, *supra*, 512 U.S. at p. 392.) The right to express one's individuality and essential human dignity through the free use of property is just as important as the right to do so through speech, [***140] the press, or the free exercise of religion. Nevertheless, the property right is now—in California, at least—a hollow one. I dissent and hope the plaintiffs find a more receptive forum in the federal courts.

BROWN, J.

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THE PEOPLE, Plaintiff and Respondent, v. CONRAD RICHARD McKAY, Defendant and Appellant.

S091421

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 601; 41 P.3d 59; 2002 Cal. LEXIS 624; 117 Cal. Rptr. 2d 236; 2002 Cal. Daily Op. Service 2036; 2002 Daily Journal DAR 2485

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Court of Appeal of California, Second Appellate District, Division Four. B137511.

People v. McKay, 82 Cal. App. 4th 1279, 98 Cal. Rptr. 2d 858, 2000 Cal. App. LEXIS 637 (2d Dist. 2000)

Los Angeles County. Super. Ct. No. YA040916. Deanne Smith Myers.

DISPOSITION:
Affirmed.

COUNSEL:
Richard L. Fitzer, under appointment by the Supreme Court, for Defendant and Appellant.

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

OPINIONBY:
BAXTER

OPINION:

[*605] [**62] California has, in various statutes, limited the circumstances in which a peace officer may effect a custodial arrest for minor offenses. (E.g., Pen. Code, §§ 818, 827.1, 853.5, 853.6; Pub. Resources Code, § 5782.26 [***2] ; Veh. Code, §§ 40302, 40302.5, 40303, 40303.5, 40304, 40305, 40305.5.) California also has, by the passage of Proposition 8 in 1982, limited the circumstances in which a trial court may exclude relevant evidence as a sanction for the violation of these state statutes. (Cal. Const., art. I, § 28, subd. (d).) As we have previously observed, state statutes limiting police discretion are not inconsistent with the state constitutional provision limiting the exclusion of evidence as a sanction for their violation. The "substantive scope" of state statutes governing the ability of peace officers to effect a custodial arrest for minor offenses "remains unaffected by Proposition 8." (*In re Lance W.* (1985) 37 Cal.3d 873, 886, 210 Cal. Rptr. 631, 694 P.2d 744.) "What Proposition 8 does is to eliminate a judicially created *remedy* for violations of the search and seizure provisions of the federal or state Constitutions, through the exclusion of evidence so obtained, except [**63] to the extent that exclusion [***3] remains federally compelled." (*Id.* at pp. 886–887.)

In this case, the only remedy defendant Conrad Richard McKay seeks is the exclusion of a baggie of methamphetamine that was found in his sock during a search incident to his arrest for the infraction of riding his bicycle in the wrong direction on a residential street. Defendant argues that a custodial arrest for a fine-only offense, such as a traffic infraction, violates the Fourth Amendment prohibition on unreasonable seizures. He also argues, in the event the Fourth Amendment does not bar such arrests categorically, that his custodial arrest nonetheless violated the federal Constitution by the deputy's failure to comply with Vehicle Code section 40302, subdivision (a) (section 40302(a)), the state statute that governs the arrest procedure for this infraction.

We conclude, in accordance with United States Supreme Court precedent, that custodial arrests for fine-

only offenses do not violate the Fourth Amendment and that compliance with state arrest procedures is not a component of the federal constitutional inquiry. We also conclude, in the alternative, that the arrest here complied with [***4] section 40302(a). Accordingly, we affirm the judgment of the Court of Appeal.

[*606]

I

BACKGROUND

Around 6:00 p.m. on June 19, 1999, Los Angeles County Deputy Sheriff Valento observed defendant riding a bicycle in the wrong direction on a residential street. Deputy Valento initiated a traffic stop, intending to issue defendant a citation for violating Vehicle Code section 21650.1. **n1** The deputy asked defendant for identification. Defendant said he did not have any identification with him and instead told the deputy his name and date of birth. Deputy Valento took defendant into custody, pursuant to section 40302(a), based on his failure "to present his driver's license or other satisfactory evidence of his identity for examination." During a search incident to that arrest, Deputy Valento found, in defendant's left sock, a baggie containing an off-white substance he believed to be methamphetamine.

N1 Unless otherwise indicated, all further statutory references are to the Vehicle Code.

[***5]

After placing defendant in the back of the patrol car, Deputy Valento entered the name and date of birth defendant had provided into the patrol car's computer and received an address that matched the address defendant had given him and a general description that was consistent with defendant's appearance.

Defendant was charged with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and alleged to have suffered a prior strike conviction. He moved to suppress the evidence, pointing out that he had given his name and date of birth to Deputy Valento, who was subsequently able to "check it out through the computer." After the trial court denied the motion to suppress, relying on *People v. Monroe* (1993) 12 Cal.App.4th 1174 (*Monroe*), defendant pleaded guilty, admitted the prior, and was sentenced to the doubled term of 32 months. A divided panel of the Court of Appeal, once again relying on *Monroe*, affirmed his conviction.

II

Defendant was arrested for violating section 21650.1, which requires a bicycle to be operated "in the same direction as vehicles are required to be driven upon the roadway." This [***6] infraction is punishable by a fine not to exceed $100. (§§ 40000.1, 42001, subd. (a)(1).) There is no dispute that Deputy Valento was justified in stopping defendant based on this violation. Rather, defendant argues that a custodial arrest for such a minor offense violated the Fourth Amendment. If such arrests are valid, he then argues that [*607] once he provided his name and date of birth, the deputy lacked authority to effect a custodial arrest under section 40302(a) and that this asserted violation of state law thereby violated the federal Constitution.

A

Appellant's first contention, he now concedes, is foreclosed by *Atwater v. City of* [**64] *Lago Vista* (2001) 532 U.S. 318, 149 L. Ed. 2d 549, 121 S. Ct. 1536 (*Atwater*), which upheld a custodial arrest for a violation of Texas's seatbelt law, an offense punishable by a fine of not less than $25 nor more than $50. (*Id.* at p. 323.) Under *Atwater*, all that is needed to justify a custodial arrest is a showing of probable cause. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth [***7] Amendment, arrest the offender." (*Id.* at p. 354.) We must therefore conclude that there is nothing inherently unconstitutional about effecting a custodial arrest for a fine-only offense. (*United States v. McFadden* (2d Cir. 2001) 238 F.3d 198, 204 [upholding search incident to arrest for riding a bicycle on the sidewalk].)

B

Although *Atwater* permits the police to effect custodial arrests for even the most minor of offenses, many states—including California—have sought to limit this broad discretion by statute, local ordinance, or departmental regulation. Defendant relies in particular on section 40302(a), which requires the officer to effect a custodial arrest for nonfelony Vehicle Code offenses when the offender fails to present a driver's license "or other satisfactory evidence of ... identity for examination." Defendant claims that his oral statements to the deputy constituted "satisfactory evidence of ... identity" under section 40302(a), rendering his arrest unauthorized under California law. The Attorney General, on the other hand, contends that the deputy complied with California law in that section 40302(a) requires an [***8] officer to accept only a driver's license or its functional equivalent.

1

Before we resolve the dispute over the construction of section 40302(a), though, we must first determine whether compliance with state arrest procedures affects the valid-

ity of an arrest under the federal Constitution. Neither the majority nor the dissent below considered this threshold issue, nor did the majority and dissent in *Monroe*. The issue, however, cannot be ignored. [*608] With the passage of Proposition 8, we are not free to exclude evidence merely because it was obtained in violation of some state statute or state constitutional provision. " 'Our state Constitution ... forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court.' " (*People v. Camacho* (2000) 23 Cal.4th 824, 830, quoting *In re Tyrell J.* (1994) 8 Cal.4th 68, 76, 876 P.2d 519.) **n2**

n2 Although Justice Brown apparently views it as "unfortunate[]," we are nonetheless bound to follow "the Supreme Court's modern Fourth Amendment jurisprudence." (Conc. & dis. opn., *post*, at p. 5.)

[***9]

Thus, in order to prevail, defendant must show as an initial matter that a Los Angeles County deputy sheriff's compliance with *state* procedure is pivotal to the validity of an arrest under the *federal* Constitution. We requested supplemental briefing to determine whether defendant's arrest, notwithstanding its constitutionality under *Atwater*, became unconstitutional because it assertedly was not authorized by section 40302(a). **n3**

n3 Justice Werdegar contends, mistakenly, that settled principles of judicial restraint direct us to refrain from resolving this issue. (See conc. opn., *post*, at pp. 2–3.) But the cases invoking the principle of judicial restraint to avoid deciding a constitutional issue involve constitutional issues that are *parallel* to the statutory issues in the case. Thus, in *Lyng v. Northwest Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 99 L. Ed. 2d 534, 108 S. Ct. 1319, where the Native American respondents argued that the proposed governmental action would violate the Free Exercise Clause of the First Amendment and certain federal statutes, the courts were directed "to determine, before addressing the constitutional issue, whether a decision on that question could have entitled respondents to relief beyond that to which they were entitled on their statutory claims. If no additional relief would have been warranted, a constitutional decision would have been unnecessary and therefore inappropriate." (*Id.* at p. 446; accord, *Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 228, 230–231, 902 P.2d 225 [where tax was challenged as violative of state law and the state constitution, it was proper to begin with the statutory challenge]; see also *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189, 196, fn. 3 [having determined the statute was "inapplicable," it was unnecessary to determine whether the statute unconstitutionally interfered with vested pension rights]; *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 128 [addressing the statutory grounds first, when independent statutory and constitutional grounds are asserted]; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 720–721, 882 P.2d 894 [same].) By contrast, the constitutional issue here, rather than being *parallel* to the statutory issue, is a *predicate* for it.

The appropriate jurisprudential approach, in our view, can be derived from the qualified immunity case law, which deems the existence of the asserted constitutional right a predicate to the determination whether the right allegedly implicated was clearly established at the time the officer acted. (*Wilson v. Layne* (1999) 526 U.S. 603, 609, 143 L. Ed. 2d 818, 119 S. Ct. 1692.) The rationale for this approach is a practical one: "if the policy of avoidance were always followed in favor of ruling on qualified immunity whenever there was no clearly settled rule of primary conduct, standards of official conduct would tend to remain uncertain, to the detriment both of officials and individuals. An immunity determination, with nothing more, provides no clear standard, constitutional or nonconstitutional." (*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 841, fn. 5, 140 L. Ed. 2d 1043, 118 S. Ct. 1708.) Similar practical concerns are present here. After *Atwater*, it is apparent that the federal Constitution imposes few limits on police discretion to arrest for the most minor of offenses. The task of cabining officer discretion in this state must therefore be shouldered by statutes enacted by the Legislature, local government ordinances, and police department regulations and guidelines. If the responsible decisionmakers are under the misapprehension that these efforts to guide officer discretion are freighted with the harsh sanction of excluding relevant evidence for their violation, few will endeavor to create them. (See *United States v. Caceres* (1979) 440 U.S. 741, 755–756, 59 L. Ed. 2d 733, 99 S. Ct. 1465 ["we cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police

procedures. ... The result might well be fewer and less protective regulations"].)

Finally, we find it telling that the United States Supreme Court has not adopted Justice Werdegar's understanding of judicial restraint in analogous situations involving the interplay between state law and the Fourth Amendment (e.g., *California v. Greenwood* (1988) 486 U.S. 35, 43, 100 L. Ed. 2d 30, 108 S. Ct. 1625 (*Greenwood*); *Sibron v. New York* (1968) 392 U.S. 40 at 60 & fn. 20, 20 L. Ed. 2d 917, 88 S. Ct. 1889 (*Sibron*)), nor did any of the federal or state courts that have addressed this precise issue.

[***10] [**65]

[*609] This is a rickety foundation on which to base a federal constitutional argument. It is a well-settled part of " 'Our Federalism' " that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." (*Younger v. Harris* (1971) 401 U.S. 37, 44, 27 L. Ed. 2d 669, 91 S. Ct. 746.) "Anxious though it may be to vindicate and protect federal rights and federal interests," the federal government "always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." (*Ibid.*) For this reason, the United States Supreme Court has repeatedly resisted efforts to invoke the federal Constitution to force state officials to comply with state law. (See Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies* (1997) 107 Yale L.J. 77, 161 ["Such a decision seems inevitable if there is any continuing wish to maintain a federal system"].) Rather, where state officials have been derelict under state law, the high court has reminded us that the illegality of such conduct "under the state statute can neither add to nor subtract [***11] from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. [Citation.] And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature." (*Snowden v. Hughes* (1944) 321 U.S. 1, 11, 88 L. Ed. 497, 64 S. Ct. 397.)

To assert (as defendant does) that state law can transform constitutional police conduct into its opposite would unravel our federal system, since treating a state law violation as a violation of the Constitution "is to [*610] make the federal government the enforcer of state law." (*Archie v. City of Racine* (7th Cir. 1988) 847 F.2d 1211, 1217 (in bank).) This, of course, is precisely what the federal Constitution forbids. "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme [**66] authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state law." ([***12] *Pennhurst State Sch. & Hosp. v. Halderman* (1984) 465 U.S. 89, 106, 79 L. Ed. 2d 67, 104 S. Ct. 900.) "If the alchemist's wand can transmute a violation of state law into a violation of the Constitution, *Pennhurst* will be for naught, federal enforcement of state law the order of the day." (*Archie v. City of Racine*, *supra*, 847 F.2d at p. 1217.)

It will come as no surprise, then, that the United States Supreme Court has never ordered a state court to suppress evidence that has been gathered in a manner consistent with the federal Constitution but in violation of some state law or local ordinance. **n4** To the contrary, the high court has repeatedly emphasized that the Fourth Amendment inquiry does not depend on whether the challenged police conduct was authorized by state law.

n4 "The fact of the matter is ... that the Supreme Court has *never* taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of custody was deemed unnecessary (as a matter of state law or otherwise)." (1 LaFave, Search and Seizure: A Treatise on the Fourth Amendment (3d ed. 1996) § 1.5(b), p. 141.)

[***13]

In *Cooper v. California* (1967) 386 U.S. 58, 17 L. Ed. 2d 730, 87 S. Ct. 788 (*Cooper*), for example, the defendant complained that the search of his vehicle was not authorized by California's forfeiture statute and was thus unconstitutional. The court found instead that the state law inquiry and the constitutional inquiry were distinct: "the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment." (*Id.* at p. 61; see also *Sibron*, *supra*, 392 U.S. at p. 61, 88 S. Ct. 1889.) More recently, the court has observed that although individual states may construe their own laws as imposing more stringent constraints on police conduct than does the federal Constitution, "we have never intimated ... that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." (*Greenwood*, *supra*, 486 U.S. at p. 43.) "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been [***14] such an inquiry by a state court, and irrespective of how any such inquiry may have turned out. The test is one of federal law, neither [*611] enlarged by what

one state court may have countenanced, nor diminished by what another may have colorably suppressed." (*Elkins v. United States* (1960) 364 U.S. 206, 223-224, 4 L. Ed. 2d 1669, 80 S. Ct. 1437 (*Elkins*).)

Our determination of the validity of the search under the federal Constitution thus does not depend on whether "it was authorized by state law" (*Cooper*, *supra*, 386 U.S. at p. 61) or "the law of the particular State in which the search occurs" (*Greenwood*, *supra*, 486 U.S. at p. 43). According to *Elkins*, *supra*, 364 U.S. at page 224, the test "is one of federal law"—and, in this case, was disposed of by *Atwater*. Therefore, we need not consider whether defendant's arrest complied with section 40302(a).

Defendant, however, argues that a different line of Supreme Court authority makes state procedure relevant to the constitutional calculus. He begins with *United States v. Di Re* (1948) 332 U.S. 581 (*Di Re*). Di Re was convicted in federal court of knowingly possessing [***15] counterfeit gasoline coupons, which were found on his person following his arrest "by a state officer accompanied by federal officers who had no power of arrest." (*Id.* at p. 591.) The government sought to justify the search as incident to the arrest. The court stated that because "no act of Congress lays down a general federal rule for arrest without warrant for federal offenses" (*ibid.*), the rule would be that "the law of the state where an arrest without warrant takes place determines its validity." (*Id.* at p. 589.) The law of New York, where the arrest occurred, permitted an arrest where "a felony has in fact been committed" and the officer "has reasonable cause for believing the person to be arrested [**67] to have committed it." (*Id.* at p. 589, fn. 7.) Finding no probable cause to effect the arrest, the court affirmed the order suppressing the evidence seized during the search incident. (*Id.* at pp. 593-595.)

Drawing on *Di Re*'s adoption of state law as a general federal rule of arrest, defendant submits that *Di Re* compels us to measure the constitutionality of this warrantless arrest under California law [***16] in general and under section 40302(a) in particular. If *Di Re* had grounded its adoption of state law on the federal Constitution, defendant's submission would be sound. Unfortunately for defendant, the court did not do so.

A review of *Di Re* reveals that its adoption of state arrest procedure was a matter of statutory construction, not constitutional compulsion. The court [*612] derived its rule for arrests without a warrant from congressional enactments for arrests *with* a warrant. "By one of the earliest acts of Congress, the principle of which is still retained, the arrest by judicial process for a federal offense must be 'agreeably to the usual mode of process against offenders in such State.' There is no reason to believe that state law is not an equally appropriate standard by which to test arrest without warrant, except in those cases where Congress has enacted a federal rule. Indeed the enactment of a federal rule in some specific cases seems to imply the absence of any general federal law of arrest." (*Di Re*, *supra*, 332 U.S. at pp. 589-590.) The court thus was faced with an issue squarely within its supervisory power: the choice of law by which to measure the validity [***17] of arrests in federal prosecutions. Nowhere in its discussion did the court rely on or even mention the federal Constitution. Rather, the high court, in a federal prosecution, exercised its supervisory role over the federal courts—as the lower federal courts and other state courts have concluded. (E.g., *United States v. Wright* (6th Cir. 1994) 16 F.3d 1429, 1435 (*Wright*); *Fields v. City of South Houston, Texas* (5th Cir. 1991) 922 F.2d 1183, 1189-1190, fn. 7; *Street v. Surdyka* (4th Cir. 1974) 492 F.2d 368, 372, fn. 7; *People v. Dyla* (1988) 142 A.D.2d 423, 434-435 536 N.Y.S.2d 799, 806.) Commentators, too, have noted *Di Re*'s nonconstitutional foundation. (E.g., 1 LaFave, Search & Seizure: A Treatise on the Fourth Amendment, *supra*, § 1.5(b), p. 138 ["a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on nonconstitutional considerations' "]; 2 Ringel, Searches & Seizures, Arrests and Confessions (2d ed. 1979) § 23.9, p. 23-71 ["Suppression of evidence resulting from the illegal, but not unconstitutional, arrest is not mandated"].) Accordingly, the high [***18] court has cited this aspect of *Di Re* only in other federal prosecutions. (See *United States v. Watson* (1974) 423 U.S. 411, 420-421, fn. 8, 46 L. Ed. 2d 598, 96 S. Ct. 820; *Miller v. United States* (1958) 357 U.S. 301, 305-306, 2 L. Ed. 2d 1332, 78 S. Ct. 1190; *Johnson v. United States* (1948) 333 U.S. 10, 15 & fn. 5, 92 L. Ed. 436, 68 S. Ct. 367.) **n5**

n5 It is also worth noting that the statute relied on by *Di Re* "has been amended and no longer requires that an arrest be agreeable to the usual state process." (*Wright*, *supra*, 16 F.3d at p. 1435, citing 18 U.S.C. § 3041.)

Without *Di Re*, defendant is left only with dicta. In *Ker v. California* (1963) 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623, a *plurality* of the high court observed that "the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. [***19] [Citations.] *A fortiori*, the lawfulness of these arrests by state officers for state offenses is to be determined by California law." (*Id.* at p. 37 (lead opn. of Clark, J.).) Since the police [*613] had complied with California law (*id.* at p. 38), the plurality's observation was dictum.

In *Michigan v. DeFillippo* (1979) 443 U.S. 31, 61 L.

Ed. 2d 343, 99 S. Ct. 2627 (*DeFillippo*), the court stated that "whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." (*Id.* at p. 36.) This statement is as true as it is unremarkable—state law "is relevant to the validity of the arrest and search *only* as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest." (*Id.* at p. 40; accord, *Ryan v. County of DuPage* [**68] (7th Cir. 1995) 45 F.3d 1090, 1093 ["the legality under the Fourth Amendment of an arrest for violating state law depends on that law in the following sense: there must be probable cause to believe that a state crime has been committed"].) In any event, this statement too was dictum, since (as the [***20] court immediately noted) "Respondent does not contend ... that the arrest was not authorized by Michigan law." (*DeFillippo*, *supra*, at p. 36, 99 S. Ct. 2627.)

When we balance it against the forceful reasoning of *Pennhurst*, *Elkins*, *Cooper*, and *Greenwood*, we cannot accept the dicta in these two opinions as a pronouncement from the United States Supreme Court that compliance with state arrest procedures is a prerequisite to the validity of an arrest under the federal Constitution. Had the court intended to condition the constitutionality of an arrest on state law, it had ample opportunity to say so in *Atwater*. But *Atwater* nowhere rested its holding on the circumstance that Texas had by statute authorized a custodial arrest for a seatbelt offense. Indeed, the court's announcement of its holding betrayed no reliance on state law: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, *without violating the Fourth Amendment*, arrest the offender." (*Atwater*, *supra*, 532 U.S. at p. 354, italics added.) **n6**

> **n6** Nor does anything in *Knowles v. Iowa* (1998) 525 U.S. 113, 142 L. Ed. 2d 492, 119 S. Ct. 484 "reconfirm that a court must consider state law in determining whether a search incident to an arrest satisfies the mandates of the Fourth Amendment." To the contrary, *Knowles* addressed "whether the search at issue, *authorized as it was by state law*, nonetheless violates the Fourth Amendment." (*Id.* at p. 116, italics added.) The court then held that the exception for a search incident to a custodial arrest could not be applied where no custodial arrest had occurred. (*Id.* at pp. 114–116.) No one disputes the fact of the custodial arrest here, merely its validity.

[***21]

As for the federal courts of appeal, "nearly every circuit to address the issue is in accord." (*United States v. Le* (10th Cir. 1999) 173 F.3d 1258, 1264,
[*614] n. 2.) The First, **n7** Second, **n8** Fourth, **n9** Fifth, **n10** Sixth, **n11** Seventh, **n12** Eighth, **n13** Ninth, **n14** and Tenth **n15** Circuits have [**69] each held that, once the officer has probable cause to believe a violation of law has occurred, the constitutionality of the arrest does not depend upon compliance with state procedures that are not themselves compelled by the Constitution. So have a number of state courts. (E.g., *State v. Jolin* (Me. 1994) 639 A.2d 1062, 1064 ["evidence obtained from an extraterritorial arrest based on probable cause should not *per se* be excluded"]; *Commonwealth v. Lyons* (1986) 397 Mass. 644 492 N.E.2d 1142, 1144–1146 [refusing to suppress a photograph taken following an arrest that was illegal under state law]; *People v. Burdo* (1974) 56 Mich. App. 48 223 N.W.2d 358, 360 ["defendant's arrest was not constitutionally invalid, but rather merely statutorily illegal; therefore the [***22] per se exclusionary rule is not applicable" (fn. omitted)]; *State v. Eubanks* (1973) 283 N.C. 556 196 S.E.2d 706, 709 ["We hold that nothing in our law requires the exclusion of evidence obtained following an arrest which is constitutionally valid but illegal for failure to first obtain an arrest warrant"]; *State v. Droste* (1998) 83 Ohio St.3d 96 697 N.E.2d 620, 623 ["We have stated on many occasions that absent a violation of a constitutional right, the [*615] violation of a statute does not invoke the exclusionary rule"]; *State v. Rodriguez* (1993) 317 Or. 27 854 P.2d 399, 409 ["Because the arrest in this case did not violate the Fourth Amendment, the guns discovered in the subsequent consent search were not subject to suppression under the Fourth Amendment, even if the arrest violated Article I, section 9, of the Oregon Constitution"]; *Penn v. Commonwealth* (1992) 13 Va.App. 399 412 S.E.2d 189, 193–194 ["the fact that Virginia has adopted a more stringent statutory requirement for warrantless misdemeanor arrests committed outside the officer's presence does not mean that Penn has acquired a constitutional [***23] right"], affd. (1992) 244 Va. 218 420 S.E.2d 713; but see *State v. Martin* (Minn. 1977) 253 N.W.2d 404, 405–406.) **n16**

> **n7** *Vargas-Badillo v. Diaz-Torres* (1st Cir. 1997) 114 F.3d 3, 6 (violation of state law cannot support a claim for illegal arrest under 42 United States Code section 1983).
>
> **n8** *United States v. Santa* (2d Cir. 1999) 180 F.3d 20, 25; *id.* at pages 30–31 (conc. opn. of Newman, J.) (upholding an arrest based on a warrant that had previously been vacated, citing *Arizona v. Evans* (1995) 514 U.S. 1, 131 L. Ed. 2d 34, 115 S. Ct. 1185, even though an arrest based on a vacated warrant is invalid under New York law).
>
> **n9** *United States v. Van Metre* (4th Cir. 1998) 150 F.3d 339, 347 ("That the arrest may or may not have been conducted in accordance with Tennessee

state law is irrelevant to our analysis"); *Street v. Surdyka*, *supra*, 492 F.2d at page 372 ("The states are free to impose greater restrictions on arrests, but their citizens do not thereby acquire a greater federal right").

[***24]

n10 *United States v. Walker* (5th Cir. 1992) 960 F.2d 409, 415 ("the proper inquiry in determining whether to exclude the evidence at issue is not whether the state officials' actions in arresting him were 'lawful' or 'valid under state law' ").

n11 *Wright*, *supra*, 16 F.3d at page 1437 ("The fact that the arrest, search, or seizure may have violated state law is irrelevant as long as the standards developed under the Federal Constitution were not offended").

n12 *Gordon v. Degelmann* (7th Cir. 1994) 29 F.3d 295, 301 ("Because Misrac followed the procedures the Constitution prescribes for making arrests, his failure to afford Gordon additional procedures established by state law does not matter—not, at least, to a claim under the fourth amendment and [42 U.S.C.] § 1983").

n13 *United States v. Bell* (8th Cir. 1995) 54 F.3d 502, 504 ("An arrest by state officers is reasonable in the Fourth Amendment sense if it is based upon probable cause. ...Thus, the district court should not have looked to Iowa law in deciding the lawfulness of Bell's arrest").

n14 *United States v. Mota* (9th Cir. 1992) 982 F.2d 1384, 1387 ("state law governing an arrest is irrelevant to determining whether the arrest deprived an individual of rights secured by the federal constitution or a federal statute").

[***25]

n15 *United States v. Miller* (10th Cir. 1971) 452 F.2d 731, 733 (affirming the denial of the suppression motion, even though the arrest violated Oklahoma law; "the test of reasonableness in relation to Fourth Amendment protected rights must be determined by Federal law even though the police actions are those of state police officers").

n16 Some jurisdictions have held that the commission of a *civil* infraction cannot support a custodial arrest. (E.g., *Barnett v. United States* (D.C.App. 1987) 525 A.2d 197, 198–199 & fns. 2, 5; *Thomas v. Florida* (Fla. 1993) 614 So. 2d 468, 470–471.) In California, however, traffic infractions have not been decriminalized. (See *People v. Carlucci* (1979) 23 Cal.3d 249, 257–258, 152 Cal. Rptr. 439, 590 P.2d 15; *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 765 & fn. 4, 150 Cal. Rptr. 785, 587 P.2d 227; compare §§ 40000.1 and 42001 with §§ 40200 and 40203.5, subd. (b) [defining parking fines as "civil penalties"].) Other states have relied on their own constitutions to bar evidence seized in violation of state law. (E.g., *State v. Hehman* (1978) 90 Wash. 2d 45 578 P.2d 527, 529.)

[***26]

The majority view is sound. What would be gained, after all, by invoking the federal Constitution to exclude evidence seized following an arrest merely because, in violation of state law, a nonuniformed police officer failed to display a badge (e.g., *Drewitt v. Pratt* (4th Cir. 1993) 999 F.2d 774, 777 [the violation of Virginia law "did not rise to a violation of a federal constitutional magnitude"]), a uniformed officer effected an arrest beyond the officer's territorial limit (e.g., *People v. Wolf* (Colo. 1981) 635 P.2d 213, 217–218 [denying the suppression motion "despite the fact that the Denver police violated the statutes governing their authority to arrest"]), or a deputy's commission suffered from technical administrative deficiencies (e.g., *United States v. Jones* (5th Cir. 1999) 185 F.3d 459, 462–463 [state law deficiency "does not affect our analysis" of the constitutional issue])? "The exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law." (*United States v. Walker*, *supra*, 960 F.2d at p. 415.) Constitutionalizing the myriad of technical state [***27] procedures that govern arrests would not only trivialize Fourth Amendment protections but would discourage states from even enacting such rules. (Cf. *United States v. Caceres*, *supra*, 440 U.S. at pp. 755–756.)

Against this array of authority, defendant has identified only one court that has excluded evidence under the authority of the federal Constitution for an officer's failure to comply with state arrest procedures. In *United States v. Mota*, *supra*, 982 F.2d 1384 (*Mota*), the Ninth Circuit held that the failure of state [*616] police officers to comply with state procedures rendered the arrest unreasonable under the Fourth Amendment and suppressed the fruits of a subsequent search incident to the arrest. (*Id.* at pp. 1388–1389.) [**70] The Mota brothers were arrested for operating a food cart without a business license in violation of a Santa Ana municipal ordinance. A search incident to arrest uncovered 41 counterfeit $20 bills. (*Id.* at pp. 1386–1387.) California law, however, did not authorize a custodial arrest for this infraction unless the arrestee had refused to present satisfactory evidence of identity or sign [***28] a written promise to appear. (*Id.* at pp. 1388–1389.)

In suppressing the evidence based on this violation of

state procedure, the Ninth Circuit acknowledged its prior rulings that application of the exclusionary rule is a matter of federal law (*Mota*, *supra*, 982 F.2d at p. 1387) and that "in the context of a suit brought under 42 U.S.C. § 1983, ... state law governing an arrest is irrelevant to determining whether the arrest deprived an individual of rights secured by the federal constitution or a federal statute" (*ibid.*, citing *Barry v. Fowler* (9th Cir. 1990) 902 F.2d 770, 772 (*Barry*)). Conceding that other circuits had ruled otherwise, the court nonetheless deemed itself bound by *Di Re*, *DeFillippo*, and *Ker* (which it failed to note was a plurality opinion) to exclude the evidence. (*Mota*, *supra*, at pp. 1387–1388.) We find *Mota* unpersuasive.

First, as discussed above, *Di Re*, *DeFillippo*, and *Ker* do not constitutionalize state arrest procedures. Much more on point, we think, are *Cooper* and *Greenwood* (which were not cited in *Mota*) and *Atwater* (which was decided [***29] after *Mota*), all of which emphasize that state procedures are irrelevant to the Fourth Amendment inquiry.

Second, *Mota*'s holding that the custodial arrest was constitutionally unreasonable because it failed to comply with state procedure is utterly inconsistent with the Ninth Circuit's earlier holding in *Barry* that "state law governing an arrest is irrelevant to determining whether the arrest deprived an individual of rights secured by the federal constitution or a federal statute." (*Mota*, *supra*, 982 F.2d at p. 1387.)

Defendant attempts to reconcile these inconsistent rulings by quoting Professor LaFave as suggesting "that the Ninth Circuit 'might have more precisely said that though the arrest was constitutional despite the violation of state law, the incidental search was not because [*United States v.*] *Robinson* (1973) 414 U.S. 218 imposes as a prerequisite not just a constitutional arrest but, more demandingly, a "lawful custodial arrest." ' " (1 LaFave, Search & Seizure: A Treatise on the Fourth Amendment, *supra*, § 1.5(b), p. 141.) What defendant fails to include is Professor LaFave's cogent rebuttal to this [*617] alternative interpretation: [***30] "It must be asked whether the court was correct in reaching the essential conclusion that the *Robinson* test mandates 'reference to state law governing the arrest.' That is, when the Court in *Robinson* said 'lawful custodial arrest,' did the Court really mean an arrest which is lawfully custodial in a state law sense? Some of the Supreme Court's language suggests otherwise. Just before the 'lawful custodial arrest' holding, there appears this sentence: 'A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.' That seems to say that 'lawful' refers not to the limitations of state law but rather to an overarching principle that all it takes to make a custodial arrest reasonable in a Fourth Amendment sense is that it be based on probable cause. And thus it must be concluded that both of the alternative interpretations of the *Mota* holding are open to question." (*Id.* at § 1.5(b), pp. 141–142; cf. *United States v. Caceres*, *supra*, 440 U.S. at pp. 751–755 [refusing to suppress taped conversations that were [***31] obtained in violation of Internal Revenue Service regulations that were not themselves compelled by the Constitution].)

Conditioning a search incident to arrest on the degree to which an otherwise constitutional arrest complies with state procedure, moreover, makes no sense. The justification for a search incident to arrest rests on "(1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial." (*Knowles v. Iowa*, *supra*, 525 U.S. at p. 116.) Neither the need to disarm the suspect nor the need to preserve [**71] evidence depends upon the arrest's compliance with state law.

Third, *Mota*'s reliance on *Welsh v. Wisconsin* (1984) 466 U.S. 740, 80 L. Ed. 2d 732, 104 S. Ct. 2091 is misplaced. *Welsh* held that "an important factor to be considered whether any exigency exists [to effect a warrantless arrest in the home] is the gravity of the underlying offense for which the arrest is being made." (*Id.* at p. 753.) In that case, the offense was "a noncriminal violation" subject to a civil forfeiture proceeding. (*Id.* at p. 746.) *Welsh*, however, nowhere [***32] suggests that the validity of a warrantless arrest not based on exigent circumstances depends on a weighing of "the state's assessment of the gravity of the offense justifying the arrest" or "the state's expression of disinterest in allowing warrantless arrests for mere infractions." (*Mota*, *supra*, 982 F.2d at pp. 1388–1389.) Any doubt on this score was resolved by *Atwater*, in which the court said: "we confirm today what our prior cases have intimated: the standard of probable cause 'applies to all arrests, without the need to "balance" the interests and circumstances involved in particular situations.' " (*Atwater*, *supra*, 532 U.S. at p. 354.)

[*618] Last, *Mota*'s analogy between inventory searches and arrests is faulty. *Mota* sought guidance from another Ninth Circuit decision, *United States v. Wanless* (9th Cir. 1989) 882 F.2d 1459, which construed *South Dakota v. Opperman* (1975) 428 U.S. 364, 49 L. Ed. 2d 1000, 96 S. Ct. 3092 and *Colorado v. Bertine* (1987) 479 U.S. 367, 93 L. Ed. 2d 739, 107 S. Ct. 738 (*Bertine*) to require compliance with local police department procedures to uphold an inventory search. Leaving [***33] to one side the issue of whether the high court's directive that inventory searches "be conducted in accordance with standardized criteria" (*Bertine*, *supra*, 479 U.S. at p. 374,

fn. 6, 107 S. Ct. 738) necessarily requires compliance to the letter with every local procedure, those cases cannot be read to undermine an arrest that—unlike an inventory search, an administrative inspection, or a random traffic stop—is justified by probable cause. (See *Whren v. United States* (1996) 517 U.S. 806, 811–812, 817–818, 135 L. Ed. 2d 89, 116 S. Ct. 1769.) The absence of standardized local procedures is not fatal to an arrest or a search incident thereto. As the United States Supreme Court explained in upholding the search incident to an arrest for another minor traffic violation, "Though the officer here was not required to take the petitioner into custody by police regulations ... and there did not exist a departmental policy establishing the conditions under which a full-scale body search should be conducted, we do not find these differences determinative of the constitutional issue. [Citation]. It is sufficient that the officer had probable cause to arrest the petitioner and that [***34] he lawfully effectuated the arrest and placed the petitioner in custody." (*Gustafson v. Florida* (1973) 414 U.S. 260, 265, 38 L. Ed. 2d 456, 94 S. Ct. 488 (*Gustafson*).)

In sum, we find *Cooper*, *Elkins*, *Gustafson*, *Greenwood*, and *Atwater* more persuasive and conclude that so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment. In this case, then, it is of no moment that defendant's arrest assertedly violated the procedures set forth in section 40302(a) since (as defendant concedes) Deputy Valento had probable cause to believe defendant had violated a provision of the Vehicle Code.

By this decision, we in no way countenance violations of state arrest procedure. As we explained at the outset, Proposition 8 left intact the substantive scope of state statutory and constitutional rights against arrest for minor offenses. Violation of those rights exposes the peace officers and their departments to civil actions seeking injunctive or other relief. (*Garrett v. City of Bossier City* (La.Ct.App. 2001) 792 So. 2d 24, 26–28 [***35] [although the arrest for a seatbelt offense was constitutional under *Atwater*, the arrest's failure to comply with state procedure supported a private civil suit]; see [*619] generally *People v. Mayoff* (1986) 42 Cal.3d 1302, 1318, 233 Cal. Rptr. 2, 729 P.2d 166 (plur opn. of Grodin, J.).) Violation of those state rights also may subject the offending officer to an internal investigation, additional training, [**72] and departmental discipline. (See Heffernan, *Foreword: The Fourth Amendment Exclusionary Rule as a Constitutional Remedy* (2000) 88 Geo. L.J. 799, 865 ["A direct sanction imposed on individual officers—internal police discipline, for example—is likely to channel police behavior into patterns of legal conduct far more effectively than does the indirect sanction of exclusion"].) What we cannot do, out of respect for the Supremacy Clause and Proposition 8, is " 'impose such greater restrictions as a matter of federal constitutional law when [the United States Supreme] Court specifically refrains from imposing them.' " (*Arkansas v. Sullivan* (2001) 149 L. Ed. 2d 994, 532 U.S. 769, ___ [121 S. Ct. 1876, 1878, quoting [***36] *Oregon v. Hass* (1975) 420 U.S. 714, 719, 43 L. Ed. 2d 570, 95 S. Ct. 1215.)

Moreover, by removing the threat that relevant evidence will be excluded for violation of their rules, our decision today may have the salutary effect of encouraging state and local governments as well as individual police departments to seize the opportunity *Atwater* presents to craft careful and detailed regulations governing the ability of officers to arrest for minor offenses. (See *People v. Mayoff, supra,* 42 Cal.3d at pp. 1318–1319, 233 Cal. Rptr. 2, 729 P.2d 166; cf. *County of Sacramento v. Lewis*, *supra*, 523 U.S. at p. 841, fn. 5, 118 S. Ct. 1708.) Thus, eliminating the sanction of exclusion does not mean that affected individuals or the public generally are without remedy against a wayward officer. "We, the judiciary, cannot claim that we and we alone wield the only power or possess the only wisdom to enforce rules." (*People v. Hoag* (2000) 83 Cal.App.4th 1198, 1215 (conc. opn. of Morrison, J.).)

2

Even if compliance with state procedure were a predicate to the constitutionality of defendant's arrest under the Fourth Amendment, he still would not be entitled to relief [***37] in this proceeding, since (as we conclude) his arrest did not violate section 40302(a).

Our state law authorizes custodial arrests for violations of the Vehicle Code, but not in all circumstances. If the violation is declared to be felony, the offender is to be dealt with in like manner "as upon the arrest for the commission of any other felony." (Veh. Code, § 40301; see Pen. Code, § 836.) For certain enumerated nonfelony offenses, the officer has the discretion to take the offender to "the nearest or most accessible" magistrate with jurisdiction over the offense *or* to issue a citation and, upon the offender's signature of a promise to appear, release the offender. (§§ 40303, 40304.) [*620] For the remaining offenses (except driving under the influence), the officer must follow the cite-and-release procedure, unless the offender fails to present a driver's license or other satisfactory evidence of identity for examination, refuses to give a written promise to appear in court, or demands an immediate appearance before a magistrate, in which case the officer must take the offender to the magistrate. (§ 40302; *People v. Superior Court* (*Simon*) (1972) 7 Cal.3d 186, 199–200, 101 Cal. Rptr. 837, 496 P.2d 1205.)

[***38] The Legislature thus "in effect presumes that in the vast majority of cases the violator will not be taken into custody." (*Simon*, *supra*, at p. 199.)

The parties agree that the arrest here is governed by section 40302, which states in pertinent part: "Whenever any person is arrested for any violation of this code, not declared to be a felony, the arrested person shall be taken without unnecessary delay before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of the offense and is nearest or most accessible with reference to the place where the arrest is made in any of the following cases: [P] (a) When the person arrested fails to present his driver's license or other satisfactory evidence of his identity for examination." The parties disagree over whether Deputy Valento complied with this provision. The Attorney General argues that defendant's custodial arrest was justified under section 40302(a) by his failure "to present his driver's license or other satisfactory evidence of his identity for examination." Defendant, on the other hand, argues that section 40302(a) cannot be used to justify his arrest because [***39] he told the officer his name and birthdate and thus provided [**73] "other satisfactory evidence of his identity." This case therefore turns on the meaning of the requirement in section 40302(a) that the offender "present his driver's license or other satisfactory evidence of his identity for examination."

One part of the statute requires little construction. An offender may avoid a custodial arrest by presenting a driver's license to the officer for examination. So long as the license is current, valid, and raises no suspicion that it has been altered or falsified, section 40302(a) does not require a custodial arrest. On this point, there is no dispute.

There is likewise no dispute that at least one category of identification qualifies as "other satisfactory evidence of ... identity"—those forms of documentary evidence that are the functional equivalent of a driver's license. This would include a state-issued identification card (§ 13005) and other current, reliable documentary evidence of identity that, like a driver's license, bears the person's photograph, physical description, current mailing address, and signature, and is serially or otherwise numbered. (See Veh. Code, § 12811 [***40] ; cf. Civ. Code, § 1185, subd. (c) [defining " 'satisfactory [*621] evidence' " to identify the person acknowledging an instrument before a notary].)

Here, of course, defendant did not present a driver's license or other documentary evidence of his identity. He contends, though, that "nothing in the code section provides that the person to be cited must present documentary evidence of his identity," merely "satisfactory evidence of ... identity." Defendant offers an incomplete reading of the statute.

" 'In analyzing statutory language, we seek to give meaning to every word and phrase in the statute to accomplish a result consistent with the legislative purpose ....' " (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634, 927 P.2d 1175, quoting *Harris v. Capital Growth Investors XIV* (1991) 52 Cal.3d 1142, 1159, 278 Cal. Rptr. 614, 805 P.2d 873.) The statute here directs the offender to "*present* his driver's license or other satisfactory evidence of his identity *for examination*." (§ 40302, subd. (a), italics added; cf. Tenn. Code Ann. § 40-7-118(c)(3) [***41] ["No citation shall be issued under the provisions of this section if ... the person arrested cannot or will not offer satisfactory evidence of identification ...."].) By the italicized language, the Legislature plainly contemplated that the evidence of identity be capable of presentation and examination, acts that are ordinarily performed on tangible objects. Prior to the 1968 amendment, this section permitted a custodial arrest "when the person arrested fails to *exhibit* his driver's license or other satisfactory evidence of identity." (Stats. 1963, ch. 1341, § 1, p. 2864, italics added.) The 1968 amendment (Stats. 1968, ch. 647, § 1, p. 1332) was "intended to clarify that either the driver's license or identification *must be given to the officer* rather than merely exhibited, which in some instances has been complied with by showing it through a closed window. The license and identification must be *examined* to assure validity and the presence of license restrictions." (Cal. Highway Patrol, Enrolled Bill Rep. on Assem. Bill No. 1122 (1968 Reg. Sess.) prepared for Governor Reagan (July 12, 1968), p. 1, italics added.)

This interpretation of section 40302(a)'s [***42] requirement that the offender "present" a license or other evidence of identity "for examination" is consistent with the Legislature's use of this language in other statutes. (See *Stillwell v. State Bar* (1946) 29 Cal.2d 119, 123, 173 P.2d 313 ["it is a well-established rule of construction that when a word or phrase has been given a particular scope or meaning in one part or portion of a law it shall be given the same scope and meaning in other parts or portions of the law"].) Section 12951, subdivision (b), for example, provides that "the driver of a motor vehicle shall present his or her license for examination upon demand [*622] of a peace officer enforcing the provisions of this code." Section 4462, subdivision (a) requires the driver to "present the registration or identification card or other evidence of registration of any or all vehicles under his or her immediate control for examination upon demand of any peace officer." There can be little doubt that in both circumstances the driver is expected to surrender the specified document [**74] to the peace officer for ex-

amination, not merely to recite the information contained therein. When the Legislature uses the same language [***43] in section 40302(a), we can infer that the same result is intended.

By construing section 40302(a) in this manner, we do not intend to foreclose the exercise of discretion by the officer in the field in deciding whether to accept or reject other evidence—including oral evidence—of identification. It would be absurd to *require* an officer to effect a custodial arrest of an offender who is able to convince the officer, by any means, of his or her identity and willingness to appear in answer to the citation. An officer may, for example, be personally acquainted with the offender or obtain independent corroboration of the offender's identity from others present. In these and other circumstances in which the officer is convinced of the offender's identity, a custodial arrest would be unnecessary. We therefore hold that an officer has broad discretion to effect a custodial arrest under section 40302(a) unless the offender has presented a current and valid driver's license or other reliable documentary evidence of identification.

The question then arises to what extent the officer's exercise of discretion can be reviewed by a court. The mere fact that discretion has been entrusted [***44] to the officer, of course, does not warrant invalidation or revision of the statute. (*United States v. Trigg* (7th Cir. 1989) 878 F.2d 1037, 1041 ["The Court, however, has never indicated that the discretionary exercise of the arrest power, a power that is contingent upon a prior determination of probable cause, is constitutionally significant"].) Indeed, section 40303 leaves it completely to "the judgment of the arresting officer" whether to employ the cite-and-release procedure or to effect a custodial arrest for the offenses listed in subdivisions (a) through (q). Section 40304 does the same for non-Vehicle Code traffic misdemeanors. Inasmuch as California could, consistent with the federal Constitution, authorize a custodial arrest for *all* Vehicle Code violations, the fact that it has delegated *some* discretion to police officers to evaluate the sufficiency of the proffered evidence of identity is, despite Justice Brown's protestations (see conc. & dis. opn., *post*, at pp. 6, 10-11), of no constitutional concern. (See *Gustafson*, *supra*, 414 U.S. at p. 265.) As with all discretionary enforcement decisions, the officer's choices may [***45] be challenged as being based on invalid criteria, such as race, religion, or other arbitrary classification, including the exercise of protected statutory or constitutional rights. [*623] (See *Wayte v. United States* (1985) 470 U.S. 598, 608, 84 L. Ed. 2d 547, 105 S. Ct. 1524.) **n17**

n17 The officer's subjective belief that a search incident to arrest might uncover evidence of a crime, however, does not invalidate an arrest under the Fourth Amendment. (*Arkansas v. Sullivan*, *supra*, 532 U.S. at p. ___ [121 S. Ct. at p. 1878.)

Defendant interprets the statute to impose additional limits on an officer's discretion. In his view, the officer should be required to conduct sufficient inquiries calculated to elicit satisfactory evidence of identity and to accept verifiable oral evidence of identity and that the officer's failure to do so should be reviewed in the same manner as other police conduct under the Fourth Amendment. The fundamental problem with this interpretation, [***46] of course, is that the statute does not require the officer to act as defendant suggests. Rather, the statute plainly puts the burden of presenting satisfactory evidence of identity on the offender. Once the officer has made some inquiry that has put the offender on notice to produce evidence of his or her identity, the officer has done all that is required by the statute.

Moreover, defendant's proposal that the officer be required to ask a specific set of questions would facilitate the use of false identities. If, as defendant asserts, requiring the officer to ask for the offender's name, address, and date of birth "does not impose a heavy or unreasonable burden on the officer in the field," it follows that the unscrupulous offender could just as easily memorize those three bits of information, parrot it back to the officer, and thus evade responsibility for any number of Vehicle Code offenses, since the physical description available through a computer database may well be too general [**75] to adequately confirm the offender's identity. (See *Lee v. Superior Court* (2000) 22 Cal.4th 41, 43, 989 P.2d 1277 [petitioner evaded traffic citation by falsely identifying himself [***47] as his deceased brother]; accord, Cal. Highway Patrol, Enrolled Bill Rep. for Assem. Bill No. 219 (1994-1995 Reg. Sess.) prepared for Governor Wilson (July 3, 1995) p. 1 ["there have been several occasions where individuals have misrepresented themselves when they did not have photographic identification to substantiate their identity"].) If, on the other hand, the essential litany of questions is left undefined, then the officer is without guidance as to the number of questions that should be sufficient to elicit satisfactory evidence of identity or the quantum of evidence that an officer should know would be sufficient to establish identity in each instance. Case-by-case adjudication to flesh out the prerequisites for compliance with section 40302(a) does not properly credit the state's "essential interest in readily administrable rules" or comply with the high court's directive "to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made." (*Atwater*, *supra*, 532 U.S. at p. 347.)

[*624] We likewise conclude that the statute does not support judicial oversight of officer [***48] discretion beyond what we have articulated above. (See *People v. Superior Court (Simon)*, *supra*, 7 Cal.3d at p. 201 ["At the very least, he must be able to convince *the officer* ... [of] his true identity .... When he cannot do so the officer has no assurance the promise will be honored, and under those circumstances subdivision (a) prohibits the use of the citation procedure." (Italics added.)].) Unlike the cases meriting application of the exclusionary rule, an officer acting under section 40302(a) is hardly engaged in " ' "the often competitive enterprise of ferreting out crime." ' " (*People v. Amador* (2000) 24 Cal.4th 387, 396.) Indeed, it is in the interest of the police to *limit* petty-offense arrests, which carry costs that are simply too great to incur without good reason. (*Atwater*, *supra*, 532 U.S. at p. 352; accord, *People v. Grant* (1990) 217 Cal. App. 3d 1451, 1455, 266 Cal. Rptr. 587 [describing the California Highway Patrol's policy against custodial arrests when the driver merely fails to carry a license while driving].) Defendant's complaint that "an officer should not be able to ignore readily [***49] available proof of identity" overlooks the fact that the officer has no incentive to do so.

It is one thing for a court to review an officer's decision to reject a driver's license or other documentary evidence of identification, since the item itself can be brought to the magistrate to support the officer's belief it had been altered or falsified. It is quite another to review an officer's decision to reject oral evidence of identification, since that decision will be based entirely on the officer's assessment of the offender's credibility—an assessment involving intangible factors that may be difficult to reproduce in the courtroom. There is a world of difference in making that judgment as a matter of discretion "and making the same judgment when the question is the validity of the warrantless arrest itself. It is the difference between no basis for legal action challenging the discretionary judgment, on the one hand, and the prospect of evidentiary exclusion or ... personal [42 United States Code] § 1983 liability for the misapplication of a constitutional standard, on the other." (*Atwater*, *supra*, 532 U.S. at p. 350.)

Furthermore, transferring the locus of discretion [***50] from the officer in the field to the courtroom, as defendant suggests, would have perverse results. Under section 40302(a), a custodial arrest is *mandatory* when the offender fails to present a driver's license or other satisfactory evidence of identity. Under our construction of the statute, which reserves wide discretion to the officer to determine what evidence is satisfactory, the officer is authorized to use the cite-and-release procedure whenever the officer is satisfied with the evidence of identity the offender has presented. If, instead, the determination [*625] of what evidence is satisfactory [**76] will be made by the magistrate under the case law as it evolves, the officer will be compelled by section 40302(a) to effect a custodial arrest whenever the evidence offered by the offender does not meet the standard set forth in the case law—even if the officer is otherwise convinced of the offender's identity.

Defendant's final argument is not without some initial commonsense appeal: "If a person is not required by law to carry identification, he cannot be constitutionally arrested for not doing so." The flaw in defendant's argument, though, is that he was not arrested because of his [***51] failure to carry identification. Rather, he was arrested for committing a Vehicle Code infraction. A bicyclist is subject to all provisions of the rules of the road "applicable to the driver of a vehicle" (§ 21200, subd. (a)) and is subject as well to division 17 of the Vehicle Code, which includes section 40302. (§§ 231, 21200, subd. (a).) Here, of course, defendant was not arrested merely because he failed to produce a license. He was arrested because he violated the Vehicle Code. At that point, the need to obtain reliable evidence of identification and ensure compliance with a promise to appear is equally great for a bicyclist as for a driver of a motorized vehicle. Although only the latter is obligated to have a license in his or her possession at all times while driving on the road (§ 12951, subd. (a)), *both* are required to produce satisfactory evidence of identity for examination when stopped for a violation of the law. If enforcement of those laws duly enacted by the Legislature is to occur, it could hardly be otherwise. (See *People v. Mercurio* (1970) 10 Cal. App. 3d 426, 430, 88 Cal. Rptr. 750 ["The statute obviously is designed to insure that the [***52] violator will be held personally responsible for a Vehicle Code violation"].)

In sum, section 40302(a) entrusts the decision whether to accept nondocumentary evidence of identity to the discretion of the arresting officer. Because defendant makes no showing that Deputy Valento exercised his discretion in an unconstitutional manner, the arrest did not violate the statute.**III**

DISPOSITION

The judgment of the Court of Appeal is affirmed.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

CHIN, J.

MORENO, J.

CONCURBY:
WERDEGAR; BROWN

CONCUR:

CONCURRING OPINION BY WERDEGAR, J.

I concur in the majority's conclusion that Vehicle Code section 40302, subdivision (a) (section 40302(a)) permits a police officer to [*626] effect a custodial arrest of a bicyclist who, having been stopped for violating a provision of the Vehicle Code, lacks satisfactory evidence of his identity. (Maj. opn., *ante*, at p. 22 et seq.) I agree that section 40302(a) contemplates an offender will produce written or other tangible evidence of identity, but that oral evidence may suffice if, in the reasonable discretion of the officer, it is "satisfactory" to ensure [***53] the citee will honor his promise to appear. Moreover, I agree section 40302(a), as interpreted, does not violate the Fourth Amendment's protection against unreasonable searches and seizures. (*Atwater v. Lago Vista* (2001) 532 U.S. 318, 149 L. Ed. 2d 549, 121 S. Ct. 1536 (*Atwater*).) Accordingly, the search incident to the custodial arrest in this case, in which the officer found a baggie of methamphetamine, was permissible. (*United States v. Robinson* (1973) 414 U.S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467.)

Unfortunately, the majority does not stop there or, rather, does not start and stop there, but instead addresses at the outset an unresolved and unnecessary constitutional question: whether the law permitting police to conduct a search incident to an arrest is limited to those situations, as here, in which the arrest is lawful under state law, or embraces as well an arrest that complies with the minimum constitutional requirements but violates state law. Because we conclude today that defendant's arrest complied with both statutory (§ 40302(a)) and constitutional (*Atwater*, *supra*, 532 U.S. 318) prerequisites, we have no need to address [***54] this further constitutional issue. The majority's extensive analysis of the question is thus no more than obiter dictum.

[**77] As the majority knows well, **n1** " 'we do not reach constitutional questions unless absolutely required to do so to dispose of the matter before us.' [Citations.] As the United States Supreme Court reiterated, 'A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them.' [Citation.] Applying that principle, the high court observed that if statutory relief had been adequate in the case before it, 'a constitutional decision would have been unnecessary and therefore inappropriate.' " (*Santa Clara County Local Transportation Authority v. Guardino* (1995) 11 Cal.4th 220, 230-231, 902 P.2d 225, quoting *Lyng v. Northwest Indian Cemetery Prot. Assn.* (1988) 485 U.S. 439, 445, 446, 99 L. Ed. 2d 534, 108 S. Ct. 1319; see also *Three Affiliated Tribes v. Wold* [*627] *Engineering* (1984) 467 U.S. 138, 157-158, 81 L. Ed. 2d 113, 104 S. Ct. 2267; *Ashwander v. Valley Authority* (1936) 297 U.S. 288, 346-347, 80 L. Ed. 688, 56 S. Ct. 466 [***55] (conc. opn. of Brandeis, J.); *People v. Williams* (1976) 16 Cal.3d 663, 667, 128 Cal. Rptr. 888, 547 P.2d 1000.)

n1 See *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 128-129 (maj. opn. of Kennard, J.); *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 721, 882 P.2d 894 (maj. opn. of Baxter, J.); *Pearl v. Workers' Comp. Appeals Bd.* (2001) 26 Cal.4th 189, 196, fn. 3 (maj. opn. of Chin, J.).

"Principles of judicial restraint counsel that we not reach out to decide gratuitously constitutional questions of first impression. Sound jurisprudence dictates that such issues be decided only in the context of cases and controversies actually raising the issue." (*People v. Bennett* (1998) 17 Cal.4th 373, 393, 949 P.2d 947 (conc. opn. of Werdegar, J.).)

The majority seeks to evade this basic constitutional tenet by characterizing the constitutional issue as a "threshold" one (maj. opn., *ante*, at p. 5) [***56] and a "predicate" (*id.* at p. 6, fn. 3, italics omitted) to reaching the statutory issue. By so reasoning, the majority places the cart before the horse. In fact, the statutory issue (Did the arrest violate Vehicle Code section 40302?) is a predicate for the constitutional issue (*If* the arrest was bad, was the search nevertheless constitutional?). We need never reach the constitutional issue in this case because we find defendant's arrest did not violate Vehicle Code section 40302. Only in a case involving a statutory violation would we be required to continue the analysis and decide whether the fruits of a search incident to an illegal arrest nevertheless fell outside the Fourth Amendment's exclusionary rule. I would await such a case.

The majority also finds justification for its approach in its desire to reassure the Legislature, local governments and police departments that any efforts to craft laws and regulations guiding police officer discretion when making arrests will not result in the exclusion of relevant evidence as a sanction for their violation. (Maj. opn., *ante*, at pp. 6-7, fn. 3.) But as this court has often [***57] observed, " 'The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court.' " (*Salazar v. Eastin* (1995) 9 Cal.4th 836, 860, 890 P.2d 43.) We need not reiterate here the problems associated with providing gratuitous constitutional decisions. **n2** The ban on advisory opinions has existed from almost the beginning of our republic (*Hayburn's Case* (1792) 2 U.S. 409, 1

L. Ed. 436) to the present day (see, e.g., *United States v. Fruehauf* (1961) [*628] 365 U.S. 146, 157, 5 L. Ed. 2d 476, 81 S. Ct. 547; *Coleman v. Department of Personnel* [**78] *Administration* (1991) 52 Cal.3d 1102, 1126, 278 Cal. Rptr. 346, 805 P.2d 300). Nor does it matter whom the advisory opinion would benefit. (*Salazar v. Eastin*, *supra*, at p. 860 [declining to provide advisory opinion to assist the California State Board of Education]; *Younger v. Superior Court* (1978) 21 Cal.3d 102, 119, 145 Cal. Rptr. 674, 577 P.2d 1014 [declining to provide advisory opinion to assist court clerks]; *People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912, 83 Cal. Rptr. 670, 464 P.2d 126 [***58] [declining to provide advisory opinion to assist law enforcement]; *Denny's, Inc. v. City of Agoura Hills* (1997) 56 Cal.App.4th 1312, 1329, fn. 10 [declining to provide advisory opinion to assist a city in drafting a permissible ordinance].) Thus, that such constitutional guidance would be potentially useful to legislative, governmental or law enforcement entities in discharging their duties is an insufficient reason to disregard the prohibition on advisory opinions.

n2 Contrary to the majority's suggestion (maj. opn., *ante*, at p. 7, fn. 3), in neither *California v. Greenwood* (1988) 486 U.S. 35, 100 L. Ed. 2d 30, 108 S. Ct. 1625 nor *Sibron v. New York* (1968) 392 U.S. 40, 20 L. Ed. 2d 917, 88 S. Ct. 1889, did the United States Supreme Court render a *gratuitous* constitutional decision. In both cases, the high court resolved a constitutional issue that was necessary to decide the case. The qualified immunity cases cited by the majority (*Wilson v. Layne* (1999) 526 U.S. 603, 143 L. Ed. 2d 818, 119 S. Ct. 1692; *County of Sacramento v. Lewis* (1998) 523 U.S. 833, 140 L. Ed. 2d 1043, 118 S. Ct. 1708; maj. opn., *ante*, at p. 6, fn. 3) are also inapposite for in neither case did the high court give priority to a constitutional question in derogation of a statutory one.

[***59]

Our decision finding defendant's arrest valid under section 40302(a) renders it unnecessary to consider whether a search incident to an arrest in violation of a state law could nevertheless be constitutionally valid. Accordingly, I concur in the opinion with the exception of part II.B.1, about which I express no opinion.

WERDEGAR, J.

DISSENTBY:
BROWN

DISSENT:

CONCURRING AND DISSENTING OPINION BY BROWN, J.

As Justice Jackson warned in 1949: "We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit. ... [P] And we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies." (*Brinegar v. United States* (1949) 338 U.S. 160, 182, 93 L. Ed. 1879, 69 S. Ct. 1302 (dis. opn. of Jackson, J.).) From what we know of human nature, this observation seems unassailable: for every inch given, a mile will be taken.

This is a case about pushing [***60] to the limits and beyond. The majority concludes Vehicle Code section 40302, subdivision (a) (section 40302(a)) **n1** permits the full custodial arrest of a bicyclist for failure to produce written or other tangible proof of identity when the arresting officer, in the exercise of his unfettered and unreviewable discretion, rejects proffered oral evidence. I disagree with the majority's interpretation of section 40302(a). Moreover, I [*629] am not convinced the search incident to the custodial arrest—which is authorized solely as a result of the officer's decision to reject the offender's oral identification—is constitutionally permissible.

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

Mr. McKay was sentenced to a prison term for the trivial *public offense* of riding a bicycle the *wrong way* on a residential street. Well ... not exactly.

Deputy Valento observed Mr. McKay riding the "wrong way" on a residential street—a minor violation of [***61] the Vehicle Code. **n2** It was, in fact, such a minor offense that it hardly seems worth the officer's time to issue a citation. There is no indication Mr. McKay was creating any risk or threatening the public safety in any way. Not surprisingly, Mr. McKay did not have a driver's license with him. No license is required to operate a bicycle. He identified himself by telling the deputy his name and date of birth. Without making any effort to confirm McKay's identity, the officer decided instead to arrest him. In California an officer is required to arrest a person who "fails to present his driver's license or other satisfactory evidence of his identity for examination" after being arrested for a violation of the Vehicle Code. (§ 40302(a).) Well ... not exactly. **n3**

n2 Section 21650.1 provides: "A bicycle operated on a roadway, or the shoulder of a highway, shall be operated in the same direction as vehicles are required to be driven upon the roadway."

n3 The Legislature recognizes that bike riders need not have a driver's license. "When a minor is cited for an offense not involving the driving of a motor vehicle, the minor shall not be taken into custody pursuant to subdivision (a) of Section 40302 solely for failure to present a driver's license." (§ 40302.5.) Nor is the arrest of an adult who does not have a license in his possession mandatory. "If the arrestee does not have a driver's license or other satisfactory evidence of identity in his or her possession, the officer may require the arrestee to place a right thumbprint ... on the notice to appear." (§ 40500, subd. (a).)

[***62] [**79]

So what makes such minor lawbreaking worthy of attention? What if Mr. McKay rides a bicycle because he does not have a driver's license? What if, being a dedicated libertarian, he deliberately eschews all forms of government-issued identification? What if not being photographed is a tenet of his religious faith? No matter. The result according to the majority is that Mr. McKay may be subjected to a full custodial arrest, have himself and his possessions thoroughly searched, have contraband unrelated to the observed public offense or to concerns about officer safety seized and used in the prosecution of a new crime.

The majority's approach is flawed in two ways. First, its interpretation of *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 149 L. Ed. 2d 549, 121 S. Ct. 1536 (*Atwater*) turns a California procedural rule, enacted to lessen the degree of constitutional intrusion when people are detained for minor offenses, into a general warrant—a result that cannot be reconciled with the [*630] historical context of the Fourth Amendment. Second, the majority interpretation of section 40302(a) makes the failure to carry documentary proof of identification *at all times* [***63] an arrestable public offense—solely at the officer's discretion. Since the failure to carry documentary proof of identify is not itself a criminal offense, unreviewable discretion of such breadth cannot be squared with concerns about notice, due process, and discriminatory enforcement.

Thus, while I agree with the majority's conclusion in part II.B.1 that noncompliance with state procedures does not affect the validity of an arrest under the federal Constitution without an independent violation of the Fourth Amendment, I conclude that on these facts the arrest and search of defendant were unreasonable and therefore unconstitutional.

The majority insists this result is compelled by *Atwater*. I do not think so. In *Atwater*, the high court ruled that an arrest for a very minor criminal offense is not per se unreasonable under the Fourth Amendment. (*Atwater*, *supra*, 532 U.S. at pp. 353-354.) It is also true that the court had previously authorized broad searches incident to arrest (see *United States v. Robinson* (1973) 414 U.S. 218, 38 L. Ed. 2d 427, 94 S. Ct. 467 (*Robinson*); *United States v. Gustafson* (1973) 414 U.S. 260, 38 L. Ed. 2d 456, 94 S. Ct. 488; [***64] *New York v. Belton* (1981) 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (*Belton*)), and placed its imprimatur on pretextual traffic stops (*Whren v. United States* (1996) 517 U.S. 806, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (*Whren*)).

Nevertheless, the "touchstone" of the Fourth Amendment remains " 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " (*Pennsylvania v. Mimms* (1977) 434 U.S. 106, 108-109, 54 L. Ed. 2d 331, 98 S. Ct. 330; see also *United States v. Ramirez* (1998) 523 U.S. 65, 71, 140 L. Ed. 2d 191, 118 S. Ct. 992.) "The essential purpose of the proscriptions in the Fourth Amendment is to impose a standard of 'reasonableness' upon the exercise of discretion by government officials ... ' "to safeguard the privacy and security of individuals against arbitrary invasions." ' " (*Delaware v. Prouse* (1979) 440 U.S. 648, 653-654, 59 L. Ed. 2d 660, 99 S. Ct. 1391, fn. omitted (*Prouse*); *Camara v. Municipal Court* (1967) 387 U.S. 523, 528, 18 L. Ed. 2d 930, 87 S. Ct. 1727.) "The central concern of the Fourth [***65] Amendment is to protect liberty and privacy from arbitrary and oppressive interference by government officials." (*United States v. Ortiz* (1975) 422 U.S. 891, 895, 45 L. Ed. 2d 623, 95 S. Ct. 2585.)

A. **The Problem With General Warrants**

"It is familiar history that indiscriminate searches and seizures conducted under the authority of 'general warrants' were the immediate evils that [*631] motivated the framing and [**80] adoption of the Fourth Amendment [to the United States Constitution]." (*Payton v. New York* (1980) 445 U.S. 573, 583, 63 L. Ed. 2d 639, 100 S. Ct. 1371, fn. omitted.) In 1761, James Otis denounced the general warrant as " 'the worst instrument of arbitrary power' ... [because it] placed 'the liberty of every man in the hands of every petty officer.' " (*Boyd v. U.S.* (1886) 116 U.S. 616, 625, 29 L. Ed. 746, 6 S. Ct. 524, fn. omitted.) John Adams, after witnessing Otis's famous oration, declared, " 'Then and there' the child Independence was born." (*Ibid.*) At the very least, then and there the Fourth Amendment was born.

General warrants were objectionable precisely because of their indiscriminate character, and the [***66] Fourth Amendment was designed to prevent indiscriminate searches and seizures conducted by petty officials with unfettered discretion. The framers sought to preclude "the petty tyranny of unregulated rummagers." (Amsterdam, *Perspectives on the Fourth Amendment* (1974) 58 Minn. L.R. 349, 416.)

The first clause of the Fourth Amendment issues a global command: "The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated ...." The second clause—specifically prohibiting the issuance of a warrant except "upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized"—addresses the narrower compass of traditional search warrants "for contraband, stolen goods, and the like." (Amar, *Fourth Amendment First Principles* (1994) 107 Harv. L.R. 757, 765, fn. omitted.) Its purpose was probably not to make warrants mandatory, but to limit the opportunity of the executive to obtain warrants in the first place. (See Taylor, Two Studies in Constitutional Interpretation (1969) pp. 38–50.)

Unfortunately, [***67] the Supreme Court's modern Fourth Amendment jurisprudence gives new vigor to petty rummagers. In analyzing searches incident to arrest, the court has tended to equate probable cause with reasonableness, but these terms "serve distinct functions, which are lost by homogenization of the legal vocabulary." (*Gramenos v. Jewel Companies, Inc.* (7th Cir. 1986) 797 F.2d 432, 442.) In *Whren*, *supra*, 517 U.S. 806, Justice Scalia authored a unanimous opinion in which the Supreme Court ruled that when a police officer observes a traffic violation, stopping the vehicle is reasonable and the officer's subjective motivation plays no part in the Fourth Amendment analysis. (*Id.* at pp. 810, 813.) *Whren* essentially legitimized pretextual stops—the sine qua non of unjustified and arbitrary law enforcement. A pretext stop occurs when "the justification proffered by the State for an arrest is legally sufficient, but where the [*632] arresting officer was in fact making the arrest to search the arrestee incident to arrest for a reason which was legally insufficient to support the arrest." (Burkoff, *The Pretext Search Doctrine: Now You See It, Now You* [***68] *Don't* (1984) 17 U. Mich. J.L. Reform 523, 523.)

The court has clearly seen the need to curb police discretion only when law enforcement agents search and seize without probable cause (*Prouse*, *supra*, 440 U.S. at p. 663), and when police operate under vague enforcement standards which confer a virtually unrestrained power to arrest. (*Kolender v. Lawson* (1983) 461 U.S. 352, 360, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (*Kolender*).) In *Prouse*, an officer randomly stopped the defendant to check his driver's license and registration. The United States Supreme Court held that subjecting drivers to random checks, without reasonable suspicion, is unreasonable under the Fourth Amendment. (*Prouse*, at p. 663.) The *Prouse* court could not "conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more productive than stopping any other driver. [Moreover,] this kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed, at least to some extent." [***69] (*Id.* at p. 661.) *Whren* distinguished *Prouse* on the ground that the spot-checking officer did not have " 'probable cause to believe that a driver [**81] [was] violating any one of the multitude of applicable traffic and equipment regulations' " (*Whren*, *supra*, 517 U.S. at p. 817), whereas in *Whren*, the arresting officer did have probable cause to believe that the defendant had violated a traffic law.

Probable cause to believe that a traffic violation has occurred does not adequately distinguish *Whren*, *Atwater* and the case at hand from *Prouse*, however. The United States Supreme Court purportedly believes that " 'observed [traffic] violations' ... afford the ' "quantum of individualized suspicion" ' necessary to ensure that police discretion is sufficiently constrained." (*Whren*, *supra*, 517 U.S. at pp. 817–818.) In reality, an officer's discretion in deciding whom to stop is not constrained at all by a probable cause prerequisite because the officer need only point to a minor traffic violation to negate a claim of unfettered arbitrariness. (1 LaFave, Search and Seizure (3d ed. 2002) § 1.4, p. 123.) Due to the widespread violation of minor traffic [***70] laws, an officer's discretion is still as wide as the driving population is large.

In the pervasively regulatory state, police are authorized to arrest for thousands of petty malum prohibitum "crimes"—many too trivial even to be [*633] honestly labeled infractions. They are nevertheless public offenses for which a violator may be arrested. Since this indiscriminate power to arrest brings with it a virtually limitless power to search, the result is the inevitable recrudescence of the general warrant. (Salken, *The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses* (1997) 16 Pace L.Rev. 97, 146.)

An officer's observation of a very minor offense authorizes him to stop the car (*Whren*, *supra*, 517 U.S. at p. 817) or bicycle (*United States v. McFadden* (2d Cir. 2001) 238 F.3d 198), arrest the driver or rider (*Atwater*, *supra*, 532 U.S. at p. 354; *McFadden*, at p. 204), search

the driver or rider (*Robinson*, *supra*, 414 U.S. at p. 235, 94 S. Ct. 467), search the entire passenger compartment of the car including any package inside (*Belton*, *supra*, 453 U.S. at p. 460), impound [***71] the car and inventory all of its contents (*Colorado v. Bertine* (1987) 479 U.S. 367, 374, 93 L. Ed. 2d 739, 107 S. Ct. 738), and imprison the offender for up to 48 hours (*Atwater*, at p. 352; *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56, 114 L. Ed. 2d 49, 111 S. Ct. 1661).

Thus, after *Atwater*, the notion that "an individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation" (*Prouse*, *supra*, 440 U.S. at p. 662) is simply no longer true. In fact, the same rules apparently apply to those who walk, bicycle, rollerblade, skateboard, or propel a scooter. Probable cause is ubiquitous.

Given the pervasiveness of such minor offenses and the ease with which law enforcement agents may uncover them in the conduct of virtually everyone, **n4** the probable cause requirement is so diluted it ceases to matter, "for ... there exists 'a power that places the liberty of every man in the hands of every petty officer,' " precisely the kind of arbitrary authority which gave rise to the Fourth Amendment. (1 LaFave, [***72] Search and Seizure, *supra*, § 1.4(e), p. 123, quoting 2 Wroth & Zobel, Legal Papers of John [*634] Adams (1965) 141-142; see *People v. Superior Court (Simon)* (1972) 7 Cal.3d 186, 205-206, 101 Cal. Rptr. 837, 496 P.2d 1205 (*Simon*).)

n4 In a 1993 study conducted by the United States Department of Transportation, 50 percent of all vehicles monitored (71 percent on urban interstates and 80 percent on rural interstates) were violating the speed limit. (U.S. Dept. of Transportation, National Maximum Speed Limit-Fiscal Year 1993: Travel Speeds, Enforcement Efforts, and Speed-Related Highway Safety Statistics (Oct. 1995) tables 1, 3.) Add to this the traffic enforcement judgment calls—following too closely, touching lane divider lines, failing to signal, driving too slowly, and driving exactly the speed limit when an officer deems the speed unsafe for the conditions—and it becomes clear this is a game the police invariably win. In fact, driving in accordance with all traffic regulations can also be considered a suspicious circumstance. (See, e.g., *United States v. Smith* (11th Cir. 1986) 799 F.2d 704, 706-707 [criticizing use of drug courier profile that included "driving in accordance with all traffic regulations" as a factor].)

[***73] [**82]

B. **The Problem With Vagueness**

The problem of arbitrariness is compounded in circumstances like these where the enforcement standard is impermissibly vague. A statute that either forbids or requires the doing of an act in "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (*Connally v. General Const. Co.* (1926) 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126.) The basic premise of the void-for-vagueness doctrine is that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." (*Lanzetta v. New Jersey* (1939) 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618.) In the Fourth Amendment context, constitutional reasonableness should "encompass procedural regularity as well as substantive fairness" and, as these facts illustrate, the two are often "tightly intertwined." (Amar, *Fourth Amendment First Principles*, *supra*, 107 Harv. L.R. at pp. 808-809.)

In California, a Vehicle Code offender is generally arrested pursuant to section 40300 et seq. For most violations, the Vehicle [***74] Code, recognizing the lesser degree of criminality associated with traffic violations, expresses a preference for citing and releasing the offender. (§§ 40303, 40304, 40500.) However, if the offender fails to present his "driver's license or other satisfactory evidence of his identity for examination," the officer *may* bring the offender before a magistrate, except in the case of a minor. (§§ 40302, 40302.5.) Here, defendant was arrested pursuant to section 40302 because he failed, in the majority's view, to present satisfactory evidence of his identity.

The majority correctly points out that "presenting a driver's license" or its functional equivalent avoids an intrusive custodial arrest under section 40302, "so long as the [identification] is current, valid, and raises no suspicion that it has been altered or falsified." (Maj. opn., *ante*, at p. 23.) I disagree, however, with the majority's treatment of " 'other satisfactory evidence,' " namely, proffered oral identification. (*Id.* at pp. 23-26.) Effectively drafting a blueprint for arbitrary enforcement, the majority "reserves wide discretion to the officer to determine what [oral] evidence is satisfactory" and refuses [***75] to "review an officer's decision to reject oral evidence of identification, since that decision will be based entirely on the officer's assessment of the offender's credibility—an assessment involving intangible factors that may be difficult to reproduce in the courtroom." (*Id.* at p. 29.)

[*635] The principal vice is that the discretion granted to the arresting officer by the majority is impermissibly vague under *Kolender*, *supra*, 461 U.S. 352. The defendant in *Kolender* was convicted under Penal

Code section 647, subdivision (e), which required that persons who loiter or wander on the streets provide "credible and reliable" identification when asked by an officer. (*Kolender*, at p. 353.) State decisional authority defined " 'credible and reliable' " identification as " 'carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself.' " (*Id.* at p. 357.) The Ninth Circuit Court of Appeals determined that the statute violated the Fourth Amendment's proscription against unreasonable searches and seizures because it contained "a vague enforcement standard" [***76] susceptible to "arbitrary enforcement" and failed to give "fair and adequate notice of the type of conduct prohibited." (*Kolender*, at p. 355.) The United States Supreme Court agreed, noting the most important aspect of the vagueness doctrine is not actual notice but the " 'other principle element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' " (*Id.* at p. 358.) The Supreme Court held California's interpretation of the statute was unconstitutionally vague under the Fourteenth Amendment's due process clause, " 'conferring on police a virtually unrestrained power to arrest and charge persons with a violation.' " (*Kolender*, at p. 360.)

The majority's grant of discretion to law enforcement under section 40302 and subsequent [**83] refusal to review that discretion fall squarely within the central concern in *Kolender*—"the full discretion accorded to the police to determine whether the suspect has provided a 'credible and reliable' identification necessarily 'entrusts lawmaking "to the moment-to-moment judgment of the policeman on his beat" ' ... [and] 'furnishes a convenient tool for "harsh and discriminatory enforcement [***77] by local prosecuting officials, against particular groups deemed to merit their displeasure." ' " (*Kolender*, *supra*, 461 U.S. at p. 360.)

The Court of Appeal in *People v. Monroe* (1993) 12 Cal.App.4th 1174, 1191 (*Monroe*) rejected a similar vagueness attack on section 40302 by distinguishing the statute at issue in *Kolender* on the ground that section 40302 is procedural, not substantive. The validity of such a distinction is not self-evident. (*Monroe*, *supra*, 12 Cal.App.4th 1174, 1203-1204 (dis. opn. of Smith, J.).) Whether a statute is labeled procedural or substantive, it must provide "sufficiently definite guidelines for the police" to prevent "arbitrary and discriminatory enforcement." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107, 40 Cal. Rptr. 2d 402, 892 [*636] P.2d 1145; cf. *Hudson v. United States* (1997) 522 U.S. 93, 99, 139 L. Ed. 2d 450, 118 S. Ct. 488 [in assessing application of ex post facto prohibition against increased punishment, courts must consider not only legislative intent to label penalty criminal or civil, but also punitive purpose or effect].) Even assuming the procedural/substantive distinction could [***78] be determinative, it should not affect the analysis in this case. Although some cases have held that section 40302 is not a substantive criminal statute and cannot provide probable cause to arrest (*Simon*, *supra*, 7 Cal.3d at pp. 200-201), the facts of this case prove otherwise. Defendant was not legally required to have a driver's license in his possession, since only motor vehicle drivers, not bicyclists, are obligated to possess a driver's license while on the roadways. (§ 12951.) The majority asserts that *both* motor vehicle drivers and bicyclists "are required to produce satisfactory evidence of identity for examination when stopped for a violation of the law." (Maj. opn., *ante*, at p. 30.) The critical difference, however, is that the motor vehicle driver's obligation to possess a driver's license stems from substantive law; the bicyclist's or pedestrian's obligation derives solely from section 40302. In this way, as applied to defendant and any other bicyclist or pedestrian, section 40302 is *both* substantive and procedural in nature. (Cf. *Monroe*, *supra*, 12 Cal.App.4th 1174.) Therefore, *Kolender* is problematic to the majority's grant [***79] of "wide discretion to the officer to determine what evidence is satisfactory." (Maj. opn., *ante*, at p. 29.) "Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement." (*Kolender*, *supra*, 461 U.S. at p. 361.)

With this in mind, I would adopt an "objective reasonableness" standard that requires the arresting officer to articulate specific " 'facts, which taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion' of a full custodial arrest." (*Atwater*, *supra*, 532 U.S. 318, 366 (dis. opn. O'Connor, J.); see also *State v. Walker* (Tenn. 2000) 12 S.W.3d 460, 466 & fn. 12 [holding officer lacked objectively reasonable basis for rejecting oral identification offered by defendant under a cite-and-release statute "similar in many respects to our own"].) This does not mean that an officer will be obligated to accept oral identification any time that it is given. The officer must still weigh the sufficiency of the identification with a corroborating source. If the proffered [***80] oral identification is not corroborated, the identification is unsatisfactory. "This 'discretion,' if one may use that term, is not the complete unbounded discretion of which the majority speak. It is a discretion which can be abused if the officer acts unreasonably or arbitrarily." (*Monroe*, *supra*, 12 Cal.App.4th 1174, 1200 (dis. opn. of Smith, J.).)
[*637]

The Virtue of Reasonableness

In recent years, Fourth Amendment analysis has at-

tained a kind of perverse, irrational [**84] fixity: probable cause equals reasonableness. Only by insisting probable cause and reasonableness are synonymous can courts avoid the socially costly consequences of the exclusionary rule. For this false peace, we pay too high a price. We are asked to surrender our right to be protected from unreasonable intrusions. Ironically, the severe sanction of the exclusionary rule has not discouraged unreasonable searches; it has, instead, shrunk the constitutional protection against them. (See, e.g., *United States v. Castro* (5th Cir. 1999) 166 F.3d 728, 735 (dis. opn. of Politz, J.) ["technical distortions and expansion of exclusionary rule exceptions threaten to make the fourth amendment a hollow [***81] shell of its former self"].) The police have a difficult, dangerous and often thankless job. Trying to combat crime and violence and protect the public without losing the public's trust is a formidable challenge. In the cause of public trust, the exclusionary rule has been at best counterproductive and at worst pernicious. Looking beyond probable cause and viewing reasonableness as a mandate of independent vitality restores some measure of constitutional balance. Probable cause and reasonable conduct are not the same thing. Requiring the police to behave reasonably—i.e., to assess their conduct in light of all the surrounding circumstances—is not asking too much. It is the same burden we impose on every adult. The Constitution demands no less of the government.

The high court has historically applied such a reasonableness test—balancing the individual's and the state's interests—notwithstanding the existence of probable cause. In a somewhat analogous case, the court held that a nighttime entry into a house to arrest a drunk driving suspect was unreasonable even though the officers had both probable cause and a legitimate claim of exigent circumstances. (*Welsh v. Wisconsin* (1984) 466 U.S. 740, 80 L. Ed. 2d 732, 104 S. Ct. 2091.) [***82] The court found the intrusion unreasonable solely on the basis of the minor nature of the offense. "The penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." (*Welsh*, at p. 754, fn. 14.) Given this expression of the state's interest, the court ruled a warrantless home arrest could not be sustained simply because the offender's blood-alcohol level might have dissipated while police obtained a warrant. (*Ibid.*)

A similar traditional Fourth Amendment balancing of the legitimate governmental interests in arrest against the degree of intrusiveness upon an individual's privacy would reveal the unreasonableness of defendant's arrest [*638] and search in this case. (See *Wyoming v. Houghton* (1999) 526 U.S. 295, 300, 143 L. Ed. 2d 408, 119 S. Ct. 1297 [balancing "on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests"].) **n5**

n5 The *Atwater* majority suggests that state legislatures are in the best position to cure concerns about discriminatory enforcement. They can constrain officer discretion by statute. However, the fines and forfeitures collected for minor violations are a source of revenue for state and local governments. Whether their interest is in revenue or aggressive community policing, governments have no incentive to leave people alone. That is why we have a Constitution. "[The courts] are entrusted with [duties] as guardians of the Bill of Rights to apply limitations upon the legislature's power." (*United States v. Ferguson* (6th Cir. 1993) 8 F.3d 385, 398 (dis. opn. of Jones, J.).)

[***83]

Here, the state has classified the riding of a bicycle on the wrong side of the road, like most other Vehicle Code offenses, as an infraction. "An infraction is not punishable by imprisonment." (Pen. Code, § 19.6.) It is a fine-only offense subject to the Vehicle Code's cite-and-release "honor system, requiring the good faith and cooperation of the person cited." (*Simon*, *supra*, 7 Cal.3d at p. 201.) "If the State has decided that a fine, and not imprisonment, is the appropriate punishment for an offense, the State's interest in taking a person suspected of committing that offense into custody is surely limited, at best." (*Atwater*, *supra*, 532 U.S. 318, 365 (dis. opn. O'Connor, J.).)

[**85] Nor do I believe that the state's interest is significantly bolstered in this case because defendant failed to present documentary identification. The only logical reasons to confirm an offender's identity or guarantee a court appearance in the first place are to ensure that (1) the offender is held personally accountable for the traffic offense by paying the applicable fine and (2) the state actually receives the payment. What the majority fails to acknowledge is [***84] that "in today's computer age the officer in the field has a host of readily available methods of verifying the identity of a person" in an objective manner. (*Monroe*, *supra*, 12 Cal.App.4th 1174, 1199 (dis. opn. Smith, J.).) Attempting to verify oral identification would also be "consistent with California Highway Patrol policy" to avoid arresting a driver for merely failing to have a driver's license, so requiring officers to corroborate oral identification before arrest should not be problematic. (*People v. Grant* (1990) 217 Cal. App. 3d 1451, 1455, 266 Cal. Rptr. 587.) For instance, patrol cars are now equipped with laptop computers, enabling an officer to

quickly confirm proffered oral identification. (See, e.g., U.S. Dept. of Justice, Bureau of Justice Statistics, Law Enforcement Management and Administrative Statistics, 1999: Data for Individual State and Local Agencies of 100 or More Officers (Nov. 2000) pp. vi, xvi, 157–158, 193–194, 205–206, 242.) [*639] Alternatively, the officer could relay the information to the dispatcher, who, in turn, could verify the offender's identity. Or, the officer could "ask another person at the scene whose identity has been verified [***85] to vouch for the citee's identity." (*Monroe*, *supra*, 12 Cal.App.4th 1174, 1199 (dis. opn. of Smith, J.).) All of these techniques allow the arresting officer to corroborate the proffered oral identification or reject it on objective, rather than subjective, grounds.

Here, defendant furnished his name and date of birth to the officer. Only after arresting, handcuffing, searching and placing defendant in the back of the patrol car did the officer even attempt to corroborate defendant's oral identification on the laptop computer mounted in his patrol car. As it turned out, defendant's oral identification was quite accurate. When the means are readily available, an officer's failure to at least attempt to corroborate the proffered oral identification before placing the offender in custodial arrest is unreasonable per se. (See *State v. Satterwhite* (Ohio Ct.App. 1997) 123 Ohio App. 3d 322, 704 N.E.2d 259, 261 [holding that officer's failure to even attempt to verify the defendant's identity before making an arrest under a cite-and-release statute was objectively unreasonable].)

An objective reasonableness standard of review is also in accord with the Vehicle Code's [***86] cite-and-release "honor system." (*Simon*, *supra*, 7 Cal.3d at p. 201, 101 Cal. Rptr. 837, 496 P.2d 1205.) The entire legislative framework operates on the assumption that the offender will either honor his "promise to appear" in court or will mail the fine payment. (§ 40500 et seq.) Likewise, when an offender is stopped on a highway, he is trusted to furnish a valid driver's license or accurate oral identification. Oral identification may be false; documentary evidence may be fraudulent. In either case, the officer must, after corroboration, trust the citee's proffered identification or be able to articulate an objective reason for disbelieving it. The absence of a license—particularly in circumstances where no license is required—does not fatally undermine the violator's credibility. (See *Simon*, *supra*, 7 Cal.3d at p. 195.)

In the unlikely event that the officer has no readily available way to corroborate the offender's identity, I, like the majority, would hold that the officer's judgment in believing or disbelieving the offender is largely in the officer's discretion.

Every court that has approved sweeping search powers in conjunction with broad authority to arrest for minor offenses [***87] has acknowledged the *potential* for abuse. Of course, everyone who has not spent the last 20 years sealed in an ivory tower knows the problem is *real*. (But see *Atwater*, *supra*, 532 U.S. at pp. 351, 353 & fn. 12 [appen.] 121 S. Ct. a pp. 1556, 1557.) A [*640] Gallup Poll released in December 1999 indicated more than half of the Americans [**86] polled believed police actively engage in racial profiling, and 81 percent of them said they disapprove of the practice. (U.S. Dept. of Justice, A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned (Nov. 2000) p. 4 (DOJ).) Anecdotal evidence and empirical studies confirm that what most people suspect and what many people of color know from experience is a reality: there is an undeniable correlation between law enforcement stop-and-search practices and the racial characteristics of the driver. (See DOJ, *supra*, at p. 5; Brazil & Berry, *Color of Driver is Key to Stops in I-95 Videos*, Orlando Sentinel Tribune (Aug. 23, 1992) p. A1; Harris, *The Stories, The Statistics and the Law: Why "Driving While Black" Matters* (1999) 84 Minn. L.R. 265, 279, 280–281, 295.)

Empirical data on stop-and-search practices [***88] in Maryland, New Jersey and New York also confirm statistically significant disparities between the rates at which people of color are stopped and searched and the rates for Whites in similar circumstances. (DOJ, *supra*, at pp. 7–9.) Nor has California been immune. Questions have been raised about the disparate impact of stop-and-search procedures of the California Highway Patrol. (McCormick et al., *Racial Bias in CHP Searches*, S.F. Chronicle (July 15, 2001) p. A–1.) The practice is so prevalent, it has a name: "Driving while Black."

Both the *Atwater* majority and the majority here suggest pretextual stops can be adequately remedied by challenging them as "being based on invalid criteria, such as race, religion, or other arbitrary classification." **n6** (Maj. opn, *ante*, at p. 253, 41 P.3d at p. 74.) Such a suggestion overlooks the fact that most victims of pretextual stops will barely have enough money to pay the traffic citation, much less be able to afford an attorney. Even if a pretextual stop victim is able to convince an attorney to handle the case pro bono, the defendant's chances of even obtaining discovery are slight, for he must first make "a credible showing of different [***89] treatment of similarly situated persons [of other races]" (*United States v. Armstrong* (1996) 517 U.S. 456, 470, 134 L. Ed. 2d 687, 116 S. Ct. 1480)—a hurdle that has proved to be higher in the lower courts than one would initially suspect. (See, e.g., *United States v. Bell* (8th Cir. 1996) 86 F.3d 820, 823 [holding that the defendant did not meet the *Armstrong* standard because he did not present evi-

dence about the number of [*641] White bicyclists who ride their bicycles between sunset and sunrise, although he did show that (1) all persons arrested for riding their bicycle without a headlamp that month were Black and that (2) 98 percent of all bicycles in the Des Moines, Iowa, area, populated predominantly by White people, did not have headlamps].) Such evidence will be hard to come by, *not* because there is "a dearth of horribles demanding redress," but because, logically, such incidents are rarely reported. (*Atwater*, *supra*, 532 U.S. at p. 353.) Most pretextual stops and searches will prove fruitless for the police; they will have no evidence to justify an arrest and will simply release the victim. Although a cognizable injury has occurred, [***90] the victim will have little incentive to spend the time, money, and energy required to pursue such a claim. Additionally, the victim of such an incident may not be entitled to relief "beyond barring prosecution of the *traffic* charge." (1 LaFave, Search and Seizure (2002 supp.) § 1.4, p. 25.) Quite simply, the equal protection clause is of little help to victims of pretextual stops and searches.

> n6 I am of the opinion that the Fourth Amendment's reasonableness requirement, when read as broadly as it was written, includes within it a distaste for the discriminatory evils that the equal protection clause of the Fourteenth Amendment was designed to prevent. Moreover, one need not resort to the equal protection clause to challenge pretextual police conduct, when such inequitable behavior is inherently "unreasonable" under the Fourth Amendment. After all, "the security of one's privacy against *arbitrary* intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." (*Wolf v. Colorado* (1949) 338 U.S. 25, 27, 93 L. Ed. 1782, 69 S. Ct. 1359, italics added.)

[***91]

"The insult remains." (*State v. Overby* (N.D. 1999) 1999 ND 47, 590 N.W.2d 703, 708 (conc. opn. of Vande Walle, C.J.).) To dismiss people who have suffered real constitutional harms with remedies that are illusory or nonexistent allows courts to be complacent about bigotry while claiming compassion for its victims. [**87] Judges go along with questionable police conduct, proclaiming that their hands are tied. (*United States v. Herring* (D. Or. 1999) 35 F. Supp. 2d 1253, 1258.) If our hands really are tied, it behooves us to gnaw through the ropes.

CONCLUSION

In the spring of 1963, civil rights protests in Birmingham united this country in a new way. Seeing peaceful protesters jabbed with cattle prods, held at bay by snarling police dogs, and flattened by powerful streams of water from fire hoses galvanized the nation. Without being constitutional scholars, we understood violence, coercion, and oppression. We understood what constitutional limits are designed to restrain. We reclaimed our constitutional aspirations. What is happening now is more subtle, more diffuse, and less visible, but it is only a difference in degree. If harm is still being [***92] done to people because they are black, or brown, or poor, the oppression is not lessened by the absence of television cameras.

I do not know Mr. McKay's ethnic background. One thing I would bet on: he was not riding his bike a few doors down from his home in Bel Air, or Brentwood, or Rancho Palos Verdes—places where no resident would be arrested for riding the "wrong way" on a bicycle whether he had his driver's [*642] license or not. Well ... it would not get anyone arrested unless he looked like he did not belong in the neighborhood. That is the problem. And it matters. "The rule of law implies justice and equality in its application." (*Papachristou v. City of Jacksonville* (1972) 405 U.S. 156, 171, 31 L. Ed. 2d 110, 92 S. Ct. 839.) If we are committed to a rule of law that applies equally to "minorities as well as majorities, to the poor as well as the rich," we cannot countenance standards that permit and encourage discriminatory enforcement. (*Ibid.*)

According to *Atwater*, a full custodial arrest for a trivial infraction is constitutionally permissible. Broad powers to search incident to an arrest have a long common law and constitutional history. (Taylor, [***93] Two Studies in Constitutional Interpretation, *supra*, at pp. 28–29.) However, if full custodial arrest is authorized for trivial offenses, the power to search should be constrained. If broad searches incident to arrest are permitted, the power to effect a full custodial arrest should be limited. To permit both full custodial arrest for minor offenses and virtually unlimited authority to search incident to such an arrest allows officers to push past the boundaries of the Fourth Amendment. When officers may arrest for minor offenses, conduct virtually unlimited searches, *and* are granted unbounded and unreviewable discretion to select the target of such enforcement activity, the resulting search cannot be constitutionally permissible.

It is certainly possible to argue that the rationale of *Atwater* can be extended to encompass what happened here. The question is why we should do so. It is clear the Legislature could not authorize the kind of standardless discretion the court confers in this case. Why should the court permit officers to do indirectly what the Constitution directly prohibits? How can such an action be deemed constitutionally reasonable? And if we insist it is, [***94] can we make any credible claim to a

commitment to equal justice and equal treatment under law?

Well .... No. Not exactly.

BROWN, J.

14 of 37 DOCUMENTS

JOHN HESS, Plaintiff and Appellant, v. FORD MOTOR COMPANY, Defendant and Appellant.

S092697

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 516; 41 P.3d 46; 2002 Cal. LEXIS 621; 117 Cal. Rptr. 2d 220; 2002 Cal. Daily Op. Service 1853; 2002 Daily Journal DAR 2297

February 28, 2002, 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, Second Appellate District, Division Seven. B125395. Los Angeles County Super. Ct. No. NWC43057. William A. Drake*, J.

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

DISPOSITION:
Affirmed in part, reversed in part, and remanded.

COUNSEL:
For Appellant: Law Offices of Michael J. Piuze, Michael J. Piuze and John Keiser for Plaintiff and Appellant.

For Respondent: Snell & Wilmer and Richard A. Derevan for Defendant and Appellant.

Hugh F. Young, Jr., and Harvey M. Grossman for The Product Liability Advisory Council, Inc., as Amicus Curiae on behalf of Defendant and Appellant.

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

OPINIONBY:
BROWN

OPINION:

[**49]

[*520] This case presents two unrelated issues. First, the plaintiff enters into a release agreement with one tortfeasor and his insurance company. The agreement, however, contains broad language ostensibly releasing all potential tortfeasors from liability. We now consider whether this language [***2] bars the plaintiff's claims against a tortfeasor who was not a party to the release. Based on the uncontroverted evidence at trial, we conclude it does not.

Second, the plaintiff obtains a judgment more favorable than his offer of compromise under Code of Civil Procedure section 998 (section 998 offer), and is entitled to interest on the judgment from the date of the offer to the date of satisfaction of judgment pursuant to Civil Code section 3291. We now consider whether the plaintiff is entitled to interest on the prejudgment portion of the interest accrued under Civil Code section 3291, i.e., compound interest or interest on interest. We conclude he is not.

BACKGROUND

John Hess was a passenger in a Ford pickup truck on Christmas morning. At an intersection, a car driven by Charles Phillips struck the Ford truck, and [*521] the truck rolled over at least one and a half times. Hess suffered severe injuries and is now a paraplegic.

Before filing a lawsuit, Hess made a claim against Phillips and his insurance company, Continental Insurance Company (Continental). Hess's attorney at the time negotiated with Brad [***3] Sommers, the claims adjuster for Continental, and settled Hess's claim against Phillips for $15,000, the policy limit. As part of the settlement, Hess signed a one-page boilerplate release form provided by Continental (Release).

The Release stated that Hess "releases, acquits and forever discharges Charles Phillips, Continental Insurance and any and all agents and employees, UAC [the underwriters adjusting company] and any and [all] agents and employees and his, her, their, or its agents, servants, successors, heirs, executors, administrators and *all other persons, firms, corporations, associations or partnerships* of and from any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever" that Hess had or might have due to the accident. (Italics added.) The Release further stated that Hess "declare(s) and represent(s) that ... this Release contains the entire agreement between the parties hereto ...."

Several months after signing the Release, Hess hired a new attorney and filed suit against Ford Motor Company (Ford) and others, alleging negligence, strict liability and [**50] breach of warranty. Less than [***4] one year later, Hess served on Ford a section 998 offer in the amount of $2 million.

Over four years after Hess filed suit, Phillips, as cross-defendant, made a motion for determination of good faith settlement pursuant to Code of Civil Procedure section 877.6, which the trial court granted. Upon discovering the Release, Ford and the other defendants moved for summary judgment on the ground that the Release absolved *all* potential tortfeasors of liability. The court granted the motion, finding the language of the Release unambiguous.

Shortly before the summary judgment, Hess filed a separate lawsuit against Phillips and Continental for reformation of the Release pursuant to Civil Code section 3399. In the complaint, Hess asked the court to strike the language in the Release discharging "all other persons, firms, corporations, associations or partnerships" due to mutual mistake. Phillips and Continental admitted the mutual mistake in their answer, and a different judge reformed the Release by striking the above language less than 10 days after the summary judgment for Ford.

Based on this reformation of the Release, Hess moved [***5] for a new trial. The trial court denied the motion. On appeal, however, the Court of Appeal [*522] reversed the summary judgment. Relying on the declarations of Hess's first attorney and Sommers, which stated that they had not intended to release Ford, the court concluded that "there was at least a triable issue of fact as to whether [a mutual mistake occurred and] the parties intended to release all other defendants." In reaching this conclusion, the court did not rely on the reformation judgment.

At trial, Ford was the only defendant left. In support of its position on the scope of the Release, Ford submitted the written agreement and presented no other evidence. In opposition, Hess introduced his own testimony and testimony from his former attorney and the claims adjuster who had negotiated the Release.

Hess testified that, before he signed the Release at his hospital bed, he asked his first attorney about the contractual language at issue, and his attorney told him the Release was a standard form document. Hess then testified that he had not intended to release Ford from liability.

Hess's first attorney testified that he recommended settling with Phillips for the policy limit of [***6] $15,000, because an asset search revealed that Phillips had no money. He further testified that he had not intended to release Ford, and that he told Hess the Release only covered Phillips, his insurance company, and the adjusting company. Finally, the attorney stated that he had bought the Ford pickup truck involved in the accident for use as evidence in litigation against Ford after agreeing to settle with Phillips but before Hess signed the Release.

Sommers, the former claims adjuster who had settled the case on behalf of Phillips and Continental, testified that he and Hess's attorney discussed Hess's intention to sue Ford and others and that Hess's attorney told him he was settling with Phillips and Continental in order to defray future litigation costs. Sommers then testified that Hess would not have settled and signed the Release if it had released Ford. Finally, Sommers testified that he (1) had not intended to release Ford; (2) had not prepared the Release or chosen the form used; and (3) had intended to protect Phillips and his insurance companies from "future exposure."

At the close of evidence, Ford moved for a nonsuit based on the Release. The trial court denied the [***7] motion. Later, the court granted Hess's request for judicial notice of the reformation judgment, and instructed the jury that "the Los Angeles Superior Court ... ordered that the words 'and all other persons, firms, corporations, associations, or partnerships' be taken out of " the Release.

[*523] The jury returned a verdict for Hess and found Ford liable for 55 percent of Hess's injuries. The jury awarded Hess $2,701,813 in economic damages and $8,400,000 in noneconomic damages. After crediting Ford for Hess's settlements with other defendants, the trial court entered judgment against Ford in the amount of $6,644,155, plus interest from the date of the section 998 offer. In doing so, the court refused to include prejudgment interest accrued under Civil Code [**51] section 3291 in the judgment and to award interest on this prejudgment interest. The court also denied Ford's motions for judgment notwithstanding the verdict and for a new trial.

Ford appealed, contending, among other things, the trial court erred by instructing the jury that another court had reformed the Release and, in effect, directing a verdict for Hess on the issue of whether the Release covered Ford. [***8] Hess cross-appealed, seeking a recalculation of the judgment.

The Court of Appeal affirmed the verdict in an unpublished opinion, holding that any instructional error was harmless because Ford failed to establish that it was an intended beneficiary of the Release. The Court of Appeal also remanded for recalculation of the judgment, ordering that (1) "the judgment shall include" prejudgment interest accrued from the date of the offer of compromise to the date of the judgment pursuant to Civil Code section 3291; and (2) "the resulting judgment shall bear interest at the rate of 10% from" the date of the judgment until satisfied. At the date of the Court of Appeal opinion, accrued simple interest already exceeded $6.5 million.

We granted review to determine whether: (1) language in an agreement releasing "all other persons, firms, corporations, associations or partnerships" from liability encompasses a tortfeasor who was not a party to the settlement negotiations; and (2) a plaintiff may recover interest on interest accrued under Civil Code section 3291 from the date of the section 998 offer to the date of judgment because this prejudgment [***9] interest must be included in the judgment pursuant to rule 875 of the California Rules of Court. **n1**

n1 All further rule references are to the California Rules of Court.

DISCUSSION

I

The Release discharges "all other persons, firms, corporations, associations or partnerships" from liability. Ford contends this language is unambiguous and releases it from liability notwithstanding the extrinsic evidence presented by Hess. In the alternative, Ford contends the jury—and not the trial court—should have determined whether the Release covered Ford because there was a triable issue of fact. We disagree.

[*524] Under subdivision (a) of section 877 of the Code of Civil Procedure, a release given in good faith to a tortfeasor "shall not discharge any other such party from liability unless its terms so provide ...." In determining whether the "terms so provide" (*ibid.*), we apply the same rules that govern any other contract. (See Civ. Code, § 1635 [***10] ["All contracts ... are to be interpreted by the same rules, except as otherwise provided by this Code"]; see also *Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348 (*Neverkovec*); *Appleton v. Waessil* (1994) 27 Cal.App.4th 551, 554 (*Appleton*).)

A third party beneficiary may enforce a contract made for its benefit. (Civ. Code, § 1559.) However, "[a] putative third party's rights under a contract are predicated upon the contracting parties' intent to benefit" it. (*Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436, 204 Cal. Rptr. 435, 682 P.2d 1100 (*Garcia*).) Ascertaining this intent is a question of ordinary contract interpretation. (*Ibid.*) Thus, "the circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement." (*Neverkovec*, *supra*, 74 Cal.App.4th at p. 348.)

Under long-standing contract law, a "contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." ([***11] Civ. Code, § 1636.) Although "the intention of the parties is to be ascertained from the writing alone, if possible" (*id.*, § 1639), "[a] contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates" (*id.*, § 1647). "However broad may be the terms of a contract, it extends only to those things which it appears that the parties intended to contract." (*Id.*, § 1648.) [**52]

"When, through ... mistake ...,a written contract fails to express the real intention of the parties, such intention is to be regarded, and the erroneous parts of the writing disregarded." (Civ. Code, § 1640.) If there is "a mutual mistake of the parties," a written contract "may be revised, on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value." (*Id.*, § 3399.) In reforming the written agreement, a court may "transpose[], reject[], or supply" words (*Heidlebaugh v. Miller* (1954) 126 Cal. App. 2d 35, 38, 271 P.2d 557), but has " 'no power to make new contracts [***12] for the parties' " (*Bailard v. Marden* (1951) 36 Cal.2d 703, 708, 227 P.2d 10, quoting 22 Cal.Jur. (1925)

Reformation of Instruments, § 2, p. 710). Rather, the court may only reform the writing to conform with the mutual understanding of the parties at the time they entered into it, if such an understanding exists. (*Bailard*, at p. 708.)

[*525] To raise mutual mistake as a defense, the aggrieved party does not have to ask "for a reformation of the contract or" have "the same reformed." (*California Packing Corp. v. Larsen* (1921) 187 Cal. 610, 612, 203 P. 102.) The party need only allege and prove mutual mistake in order to avoid enforcement of the erroneous terms. (*Ibid.*; see also *Gillis v. Sun Ins. Office, Ltd.* (1965) 238 Cal. App. 2d 408, 414–415, 47 Cal. Rptr. 868 [affirming reformation for mistake where appellant had sufficient notice of respondent's claim of mistake]; *Pasqualetti v. Galbraith* (1962) 200 Cal. App. 2d 378, 381, 19 Cal. Rptr. 323 (*Pasqualetti*) [party who provides sufficient notice he is claiming mistake as a defense to a contract claim may introduce evidence as to that defense].)

In determining [***13] whether a mutual mistake has occurred, a court may consider parol evidence. (*Chastain v. Belmont* (1954) 43 Cal.2d 45, 51, 271 P.2d 498 (*Chastain*).) Such evidence is admissible to show mutual mistake even if the contracting parties intended the writing to be a complete statement of their agreement. (See Civ. Code, § 1856, subd. (e).) "It is the rule that, where the writing itself, through mistake, does not express the intention of the parties who entered into it ... and the writing does not therefore contain the real contract between the parties, the objection as to parol evidence is without merit." (*Pasqualetti*, *supra*, 200 Cal. App. 2d at p. 381.) Extrinsic evidence is necessary because the court must divine the true intentions of the contracting parties and determine whether the written agreement accurately represents those intentions. (See *French v. Brinkman* (1963) 60 Cal.2d 547, 552–553, 35 Cal. Rptr. 289, 387 P.2d 1.)

In this case, Hess offered no reasonable alternative construction of the contractual language ostensibly releasing Ford and therefore failed to allege any ambiguity in this language. (See *Palmer v. Truck Ins. Exchange* (1999) 21 Cal.4th 1109, 1115, 988 P.2d 568 [***14] [contractual language is "ambiguous *only* if it is susceptible to two or more reasonable constructions despite the plain meaning of its terms"].) Instead, Hess alleged mutual mistake as his only defense to Ford's claim of third party beneficiary status and merely argued that this language should have been omitted from the Release. Thus, Hess prevails *only if* he establishes that the inclusion of language ostensibly releasing Ford was a mistake. Where, as here, the sole defense to a third party beneficiary claim is mutual mistake and the meaning of the relevant contractual language is not in dispute, the party alleging the mistake—and not the party claiming third party beneficiary status (see *Garcia*, *supra*, 36 Cal.3d at p. 436 [party claiming third party beneficiary status bears burden of proof where the "interpretation of the written contract is at issue"])—bears the burden of proving that a mistake occurred (see *Crail v. Blakely* (1973) 8 Cal.3d 744, 750, fn. 3, 106 Cal. Rptr. 187, 505 P.2d 1027 [party alleging mistake bears the burden of proof]).

[*526] To determine whether Hess has proven that a mutual mistake occurred, we consider the extrinsic evidence [***15] of the contracting parties' [**53] intent introduced at trial. **n2** (See *Chastain*, *supra*, 43 Cal.2d at p. 51.) This extrinsic evidence is uncontroverted and establishes, as a matter of law, that the inclusion of contractual language ostensibly releasing Ford from liability was a mutual mistake. Therefore, any instructional error on this issue was harmless.

> **n2** Accordingly, we do not reach the issue of whether a stranger to the contract may invoke the parol evidence rule.

As an initial matter, the uncontroverted testimony about the circumstances surrounding the formation of the Release demonstrates that the contracting parties did not intend to release Ford. Ford was not involved in the negotiations and did not sign the Release. Hess's attorney at the time and Sommers, the claims adjuster who negotiated the settlement on behalf of Phillips and Continental, openly discussed Hess's intention to sue Ford after the settlement and to use the settlement proceeds to fund future litigation against [***16] Ford. Sommers even acknowledged that Hess would not have settled or signed the Release if Phillips and Continental had wanted to discharge Ford from liability. The purchase of the Ford truck by Hess's attorney *after* agreeing to the settlement further confirms that Hess did not intend to release Ford.

The uncontroverted testimony also explains how the mistake occurred. Continental provided the Release and used a standard form with boilerplate language. Sommers, the claims adjuster who negotiated the terms of the settlement on behalf of Continental, did not choose or review the form before Continental mailed it. While the failure of both sides to catch the erroneous language under these circumstances may not be excusable, it is hardly uncommon. (See Annot., Release of One Joint Tortfeasor as Discharging Liability of Others Under Uniform Contribution Among Tortfeasors Act and Other Statutes Expressly Governing Effect of Release (1992) 6 A.L.R.5th 883.)

None of the testimony cited by Ford conflicts with the testimony cited above. Sommers's testimony that he intended to protect Phillips and Continental from "future

exposure" does not contravene his unequivocal testimony [***17] that the Release was not intended to cover Ford. Indeed, Phillips's filing of a motion for determination of good faith settlement in response to cross-complaints asserted against him instead of relying on the language of the Release confirms that Phillips and Continental had no intention to release Ford. (*Neverkovec*, *supra*, 74 Cal.App.4th at pp. 352-353.)

Sommers's speculation that the phrase "all other persons, firms, corporations, associations or partnerships" covered Fidelity Casualty and Insurance [*527] Company, a company owned by Continental, also does not conflict with his testimony that this phrase was not intended to cover Ford. Even if the parties arguably intended to include some version of this phrase in the Release, the uncontroverted evidence establishes that they did not intend to include language releasing Ford. Thus, the inclusion of the exact language at issue here was still a mutual mistake notwithstanding Sommers's speculation.

Where, as here, the extrinsic evidence is not in conflict, the determination of whether a mutual mistake occurred is a question of law. (See *Alderson v. Insurance Co. of North America* (1990) 223 Cal. App. 3d 397, 412, 273 Cal. Rptr. 7 [***18] [affirming finding of mutual mistake on summary judgment where the extrinsic evidence was uncontroverted]; cf. *WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 ["The trial court's resolution of an ambiguity [in the contract] is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict"].) "It is solely a judicial function to interpret a written contract unless the interpretation turns upon the credibility of extrinsic evidence, even when conflicting inferences may be drawn from uncontroverted evidence." (*Garcia*, *supra*, 36 Cal.3d at p. 439.) Here, the extrinsic evidence is uncontroverted, and all of this evidence points to a mutual mistake and establishes that the parties to the Release did not intend to discharge Ford from liability. Hess was therefore entitled to a directed verdict on the [**54] Release issue despite the contractual language. (See *Campbell v. Republic Indemnity Co. of America* (1957) 149 Cal. App. 2d 476, 480, 308 P.2d 425 [where "there was no conflict in the evidence as to the material facts," reformation of the contract "could not reasonably have been refused"].)

In any [***19] event, the language of the Release is hardly conclusive because it arguably supports a finding that the contracting parties did not intend to release Ford from liability. For example, the small amount of the settlement—$ 15,000—despite the severity of Hess's injuries strongly suggests that the Release did not cover Ford. The failure of the Release to specifically name Ford even though the signatories to the Release had counsel and were aware of Hess's claims against Ford also suggests that the Release did not cover those claims. (See *Appleton*, *supra*, 27 Cal.App.4th at pp. 555-556 [failure of release to expressly mention defendant even though he was a key actor in the accident suggests that the parties did not intend to release him]; *Asare v. Hartford Fire Ins. Co.* (1991) 1 Cal.App.4th 856, 863 [failure of release to refer expressly to discrimination claims indicates that the parties did not intend the release to cover such claims where parties had counsel and were aware of the claims].)

Ford's challenge to the admissibility and relevance of the contracting parties' testimony is unavailing. At oral argument, Ford contended that this [*528] testimony [***20] did not support the judgment because it represented the contracting parties' subjective intent. Ford's contention, however, makes no sense. The goal of contract law is to ascertain the parties' actual intent at the time they made the contract. (Civ. Code, § 1636.) This intent is necessarily subjective. Moreover, the contracting parties did not simply offer subjective opinions about the scope of the Release but related objective facts surrounding their negotiations over the Release, including the contents of their discussions. To the extent Ford claims that this testimony only represents the undisclosed intentions of the contracting parties, Ford is wrong. The contracting parties openly discussed Hess's intention to sue Ford and to use the settlement proceeds to fund litigation against Ford during the settlement negotiations. In fact, the released party acknowledged that Hess would not have settled if the Release had absolved Ford of liability. Because the testimony of the contracting parties described their *disclosed* intentions, it was undoubtedly relevant. As such, we do not address the issue of whether undisclosed intentions are admissible "to assist the [***21] trier of fact in understanding the surrounding circumstances and negotiations ...." (*Neverkovec*, *supra*, 74 Cal.App.4th at p. 351, fn. 9.)

Likewise, Ford's claim that Sommers's testimony cannot support the judgment because he only testified as to his *personal* intentions is meritless. Ford does not dispute that Sommers negotiated the Release on behalf of Phillips and Continental and had the authority to settle the matter on their behalf. Because Sommers was the *only* agent of Phillips and Continental who negotiated the Release, his intentions necessarily represented the intentions of Phillips and Continental. (See *Garcia*, *supra*, 36 Cal.3d at p. 439, fn. 7 [testimony of agent who negotiated contract on behalf of contracting party is relevant for determining the intent of that party].)

Ford's invocation of third party beneficiary status does not compel a contrary conclusion. Determining whether Ford was a third party beneficiary of the Release is a

question of ordinary contract interpretation. (See *Garcia*, *supra*, 36 Cal.3d at p. 436.) Because the rules of contract law establish that the parties to the Release did not intend [***22] to benefit Ford (see *ante*, at pp. 9–11), Ford is an "intermeddler" and cannot enforce the terms of the Release (*Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944, 132 Cal. Rptr. 424, 553 P.2d 584). In any event, Ford acquired no rights for value and could therefore suffer no prejudice from any reformation of the Release. (Civ. Code, § 3399 [court may reform an agreement for mutual mistake if the [**55] reformation does not prejudice "rights acquired by third persons ... for value"].)

Ford's reliance on *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 926 P.2d 1061 is also misplaced. In [*529] *Rosenthal*, the plaintiffs asked the court to find an arbitration agreement void for fraud in the execution. (*Id.* at p. 423.) We held that plaintiffs' negligence in failing to review the agreement precluded the requested relief. (*Ibid.*) We, however, noted that a contracting party's negligence does not necessarily preclude equitable relief, such as reformation. (*Id.* at pp. 421–423.) Indeed, we have long held that ordinary negligence will not bar a claim of mutual mistake because [***23] "there is an element of carelessness in nearly every case of mistake ...." (*Van Meter v. Bent Construction Co.* (1956) 46 Cal.2d 588, 594, 297 P.2d 644.) Only gross negligence or "preposterous or irrational" conduct will preclude a finding of mutual mistake. (*Id.* at p. 595.) Thus, "the fact that the party seeking relief has read the instrument and knows its contents does not prevent a court from finding that it was executed under a mistake." (*Martinelli v. Gabriel* (1951) 103 Cal. App. 2d 818, 824, 230 P.2d 444; see also *Tomas v. Vaughn* (1944) 63 Cal. App. 2d 188, 194, 146 P.2d 499 ["But the law seems well settled that where the evidence was sufficient to satisfy the court that the contract did not express the intention of the parties, and that plaintiff had been mistaken in supposing that it did, then the fact of his having read the instrument would not prevent the court from finding that it was executed under a mistake"].) Likewise, representation by counsel does not preclude a finding of mutual mistake. (See *Renshaw v. Happy Valley Water Co.* (1952) 114 Cal. App. 2d 521, 523, 524–525, 250 P.2d 612 [***24] [affirming reformation for mutual mistake even though the aggrieved party's counsel made the mistake].) Here, the contracting parties knew Hess intended to sue Ford after signing the Release, but mistakenly used a boilerplate form with overly broad language to memorialize their agreement. Under these facts, Hess is, at most, guilty of ordinary negligence and not the gross negligence necessary to preclude relief. (See *Van Meter*, at p. 595, 297 P.2d 644.)

Finally, we note that our conclusion is consistent with those Court of Appeal decisions broadly construing analogous language in a release as a bar to claims against all potential tortfeasors. In two of those cases, the party opposing enforcement of the release either presented no competent evidence that the contracting parties did not intend to release all potential tortfeasors (see *General Motors Corp. v. Superior Court* (1993) 12 Cal.App.4th 435, 441), or evidence only of the undisclosed intentions of the contracting parties (see *Brinton v. Bankers Pension Services, Inc.* (1999) 76 Cal.App.4th 550, 560–561). In the other case, there was extrinsic evidence that the contracting parties intended to release all [***25] potential tortfeasors and no evidence that the contracting parties intended to exclude the defendant from the scope of the release. (See *Lama v. Comcast Cablevision* (1993) 14 Cal.App.4th 59, 63, 17 Cal. Rptr. 2d 224.) Unlike those cases, Hess presented extrinsic evidence of the disclosed intentions of [*530] the parties to the Release, and this uncontroverted evidence establishes that these parties did not intend to release Ford from liability. (See *ante*, at pp. 526–527.)

Indeed, our Courts of Appeal have consistently reversed summary judgment for defendants seeking to enforce a release where the extrinsic evidence suggests that the contracting parties did not intend to benefit the defendants. (See *Vahle v. Barwick* (2001) 93 Cal.App.4th 1323, 1329–1330; *Neverkovec*, *supra*, 74 Cal.App.4th at pp. 352–353; *Appleton*, *supra*, 27 Cal.App.4th at pp. 555–556.) Because the uncontroverted evidence establishes, as a matter of law, that the parties to the Release made a mutual mistake and did not intend to release Ford, the trial court properly removed the issue of the scope of the Release from the jury. Accordingly, the jury instruction judicially noticing the reformation [***26] judgment, even if erroneous, was harmless and [**56] does not warrant reversal. **n3** (See *Rutherford v. Owens–Illinois, Inc.* (1997) 16 Cal.4th 953, 983, 941 P.2d 1203 ["instructional error requires reversal only "where it seems probable" that the error "prejudicially affected the verdict" ' "].)

n3 Because we need not address the propriety of the reformation judgment or its impact on the resolution of this case, we decline to do so.

As a final note, we echo the advice of the Court of Appeal in *Neverkovec* and urge counsel to be wary of "overly broad, loose terms in release agreements." (*Neverkovec*, *supra*, 74 Cal.App.4th at p. 354.) "The adage that an ounce of prevention is worth a pound of cure applies here—attorneys' energies are better spent making sure that release agreements accurately reflect their clients' intentions than in litigating what their clients really intended when they signed agreements ...." (*Id.* at p. 355.)

II

Under Civil Code section 3291 [***27] , a plaintiff who makes a section 998 offer and "obtains a more favorable judgment" receives 10 percent interest per annum on the judgment "from the date of the plaintiff's first offer ... which is exceeded by the judgment ... until the satisfaction of judgment." Both parties agree that Hess is entitled to interest pursuant to Civil Code section 3291. They, however, disagree over whether any of this interest should be included in the judgment. Hess contends that interest accrued from the date of his section 998 offer to the date of the judgment should be added to the judgment pursuant to rule 875—which states in relevant part that "the clerk shall include in the judgment any interest awarded by the court ...." Thus, he is entitled to 10 percent interest on any such prejudgment interest accrued under Civil Code section 3291. Ford [*531] counters that section 3291 does not permit interest on interest, i.e., compound interest. We agree with Ford.

As always, we begin by construing the relevant statute—Civil Code section 3291. "When construing a statute, we must 'ascertain the intent of the Legislature so as to effectuate [***28] 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 words are "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.) If, however, the statutory language is not clear, then "we may resort to extrinsic sources, such as the legislative history." (*Preston v. State Bd. of Equalization* (2001) 25 Cal.4th 197, 213.)

Here, the controlling statutory language does not appear to permit the compounding of interest. Civil Code section 3291 provides in relevant part: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which the defendant does not accept prior to trial or within 30 days, whichever occurs first, and the plaintiff obtains a more favorable judgment, the judgment shall bear interest at the legal rate of 10 percent per annum calculated from the date of the [***29] plaintiff's first offer pursuant to Section 998 of the Code of Civil Procedure which is exceeded by the judgment, and interest shall accrue until the satisfaction of judgment." Under the plain meaning of this language, a plaintiff is entitled to interest on *one* amount—"the judgment." (Civ. Code, § 3291.) Compounding the interest in the manner advocated by Hess, however, results in two *separate* amounts that bear interest: (1) the amount of the jury verdict, and (2) the amount of the jury verdict plus the interest accrued on the verdict up to the date of the judgment. Because section 3291 expressly states that interest shall accrue on only one amount, it precludes any compounding of interest.

Indeed, Civil Code section 3291 does not even mention the date of the judgment. Rather, the statute carefully defines the time period for accruing interest using a date [**57] *before* the judgment—the date of the section 998 offer—and a date *after* the judgment—the date the judgment is satisfied. (See Civ. Code, § 3291.) Thus, section 3291 provides for a *single* award of interest and [***30] expressly eschews any division of this award into separate prejudgment and postjudgment components.

Even if the language of Civil Code section 3291 were arguably ambiguous, the legislative history is not. Section 3291 was enacted in April 1982, as [*532] part of Senate Bill No. 203 (1981-1982 Reg. Sess.) (Senate Bill No. 203). (Stats. 1982, ch. 150, § 1, p. 493.) During the enactment process, the Assembly amended Senate Bill No. 203 to include interest accrued under section 3291 in the judgment. **n4** (See Assem. Amend. to Sen. Bill No. 203, Aug. 18, 1981, p. 3.) Soon after, the Assembly Judiciary Committee advised that the amendment failed to consider whether prejudgment interest should be part of the judgment for purposes of determining whether the judgment was more favorable than the section 998 offer. (Assem. Com. on Judiciary, com. on Sen. Bill No. 203, as amended Aug. 19, 1981, p. 1.) The committee then recommended omitting the interest from the judgment. (*Ibid.*) Six days after the previous amendment, the Assembly deleted the language adding the interest to the judgment and amended Senate Bill No. 203 to its present form. (See Assem. Amend. to Sen. Bill [***31] No. 203, Aug. 24, 1981, p. 3.) In light of this sequence of events, we are confident the Legislature did not intend to include prejudgment interest accrued pursuant to Civil Code section 3291 in the judgment. (See *People v. Goodloe* (1995) 37 Cal.App.4th 485, 491 ["Generally the Legislature's rejection of a specific provision which appeared in the original version of an act supports the conclusion that the act should not be construed to include the omitted provision"].)

n4 The amended version of Senate Bill No. 203 stated in relevant part: "If the plaintiff makes an offer pursuant to Section 998 of the Code of Civil Procedure which is not accepted within 30 days by the defendant and the plaintiff obtains a more favorable judgment, *the court shall, in entering judgment for the plaintiff in the action, add to the amount of damages assessed by the verdict of the jury, or found by the court, interest on the amount calculated at the rate of 10 percent per annum and calculated from the date of the service of process to the date of satisfaction of the judg-*

ment, and include the interest in the judgment as a part thereof." (Assem. Amend. to Sen. Bill No. 203, Aug. 18, 1981, p. 3, first italics omitted.)

[***32]

Rule 875 does not dictate a contrary result. Rules promulgated by the Judicial Council may not conflict with governing statutes. (*People v. Hall* (1994) 8 Cal.4th 950, 960, 883 P.2d 974.) If a rule is inconsistent with a statute, the statute controls. (*In re Robin M.* (1978) 21 Cal.3d 337, 346.) Here, the language and history of Civil Code section 3291 precludes inclusion of the prejudgment portion of the interest in the judgment for purposes of compounding the interest. (See *ante*, at pp. 15-17.) Because section 3291 controls, we conclude that the phrase "any interest" as understood in rule 875 does not include interest awarded pursuant to section 3291.

The cases cited by Hess and the Court of Appeal are inapposite. These cases involved statutes or contracts with different language and/or legislative histories than Civil Code section 3291. (See *Ehret v. Congoleum Corp.* (2001) 87 Cal.App.4th 202, 206 [Code of Civil Procedure section 685.020]; [*533] *Westbrook v. Fairchild* (1992) 7 Cal.App.4th 889, 894-897 [Code of Civil Procedure sections 685.010 [***33] and 683.110]; *Big Bear Properties, Inc. v. Gherman* (1979) 95 Cal. App. 3d 908, 914-915, 157 Cal. Rptr. 443 [Civil Code section 3288]; *First American Title Ins. & Trust Co. v. Cook* (1970) 12 Cal. App. 3d 592, 597-598, 90 Cal. Rptr. 645 [compound interest provision in a promissory note]; *McNulty v. Copp* (1954) 125 Cal. App. 2d 697, 711-712, 271 P.2d 90 [Civil Code section 3288].)

Finally, our ruling does not contravene the purpose behind Civil Code section 3291. Awarding simple, rather than compound, interest still creates "an incentive for recalcitrant defendants to accept reasonable settlement offers in a timely manner." (Governor's Off., Dept. of Legal Affairs, Enrolled Bill Rep. on Sen. Bill No. 203, Apr. 6, 1982, p. 2.) Indeed, even [**58] simple interest may be substantial as evidenced by the millions of dollars of interest accrued here. An award of simple interest also reimburses plaintiff "for the added cost and delay he suffers when the defendant refuses to settle the case in good faith." (*Ibid.*)

Accordingly, we agree with [***34] the Courts of Appeal in *Steinfeld v. Foote-Goldman Proctologic Medical Group, Inc.* (1997) 60 Cal.App.4th 13, 23 and *Mendez v. Kurten* (1985) 170 Cal. App. 3d 481, 487, 215 Cal. Rptr. 924. Prejudgment interest accrued under Civil Code section 3291 is not part of the judgment, and a plaintiff may not obtain interest on this prejudgment interest. **n5**

n5 Because we resolve this issue on the basis of the statutory language, we do not consider whether compounding the interest violates article XV, section 1, subdivision (2) of the California Constitution.

CONCLUSION

We reverse the judgment of the Court of Appeal remanding for recomputation of the judgment, affirm the judgment in all other respects, and remand for further proceedings consistent with this opinion.

BROWN, J.

WE CONCUR:

BAXTER, J.

CHIN, J.

MORENO, J.

CONCURBY:
KENNARD

CONCUR:

CONCURRING OPINION BY KENNARD, J.

I concur in the majority's opinion. I write separately to express [***35] a different view as to the analysis of the issue pertaining to the release. Unlike the majority, which applies the defense of mutual mistake, I would analyze this issue under the third party beneficiary theory. Although here the majority and I reach the same result on this issue, in a future case the mode of analysis could make a difference because it affects the allocation of the burden of proof.

[*534] **I.**

Plaintiff John Hess was a passenger in a Ford pickup truck that was hit by a car driven by Charles Phillips. Plaintiff's injuries rendered him a paraplegic. Plaintiff settled his claim against Phillips and the latter's insurance company, Continental Insurance Company (Continental), for the policy limit of $15,000. Plaintiff signed Continental's one-page release form, agreeing to "forever discharge" his claims against Phillips, Continental, and "all other persons, firms, corporations, associations, or partnerships," the phrase at issue here. The Ford Motor Company (Ford) was not a party to the release.

At trial, plaintiff and the attorney who had represented him in the settlement with Phillips and Continental testified they did not intend to release Ford from liability. Continental's [***36] claims adjuster, Brad Sommers,

corroborated that testimony. Sommers testified that in the settlement discussions he had with plaintiff's former attorney, the latter made clear that the purpose of plaintiff's signing Continental's release form was to "protect Phillips and Continental from future exposure," not to release Ford.

The jury returned a verdict in favor of plaintiff, finding Ford liable for 55 percent of plaintiff's injuries. It awarded plaintiff $2,701,813 in economic damages and $8.4 million in noneconomic damages. After deducting the amount plaintiff had received in settlement from other defendants, the trial court entered judgment against Ford in the amount of $6,644,155 plus interest. The Court of Appeal upheld the jury's award of damages because Ford had failed to establish that it was an intended beneficiary of the release. We granted review.

II.

Ford contends that the generic language of the standard release form discharging plaintiff's claims against "all other persons, firms, corporations, associations or partnerships" made Ford a third party beneficiary of the release. According to the majority, plaintiff had the burden of establishing "mutual mistake [***37] as his only defense to Ford's claim of third party beneficiary status." (Maj. opn., *ante*, at p. 8.) Implicit in that statement is the assumption that Ford did show it was a third party beneficiary of the release form that Phillip's [**59] insurer, Continental, had plaintiff sign. But Ford never made that showing.

When a party not specifically identified in an agreement claims third party beneficiary status, it has the burden of proving that the contracting parties intended to benefit it. (E.g., *Garcia v. Truck Ins. Exchange* (1984) 36 Cal.3d 426, 436, [*535] 204 Cal. Rptr. 435, 682 P.2d 1100; see *Murphy v. Allstate Ins. Co.* (1976) 17 Cal.3d 937, 944, 132 Cal. Rptr. 424, 553 P.2d 584.) That burden cannot be discharged by sole reliance on the literal reading of the language in the contract. "The circumstance that a literal contract interpretation would result in a benefit to the third party is not enough to entitle that party to demand enforcement. The contracting parties must have intended to confer a benefit on the third party. (*Walters v. Calderon* (1972) 25 Cal. App. 3d 863, 871, 102 Cal. Rptr. 89; *Bancomer, S.A. v. Superior Court* [(1996)] [***38] 44 Cal.App.4th 1450, 1458; *Kalmanovitz v. Bitting* [(1996)] 43 Cal.App.4th 311, 314; *Jones v. Aetna Casualty & Surety Co.* [(1994)] 26 Cal.App.4th 1717, 1724–1725.)" (*Neverkovec v. Fredericks* (1999) 74 Cal.App.4th 337, 348.)

Here, Ford was not a party to the release. In claiming it was a third party beneficiary, Ford relied solely on the standard release form's language that the release agreement between plaintiff and Continental also applied to "all other persons, firms, corporations ...." Ford presented no evidence that the parties to the release agreement intended its provisions to apply to Ford. Thus, Ford has not met its burden of establishing it was a third party beneficiary.

Moreover, even if we were to consider the release as evidence supporting Ford's claim to be a third party beneficiary, the properly admitted evidence overwhelmingly refutes its claim. "In determining the meaning of a written contract allegedly made, in part, for the benefit of a third party, evidence of the circumstances and negotiations of the parties in making the contract is both relevant and admissible. And, 'in the absence [***39] of grounds for estoppel, the contracting parties should be allowed to testify as to their actual intention ....' [Citations.]" (*Garcia v. Truck Ins. Exchange, supra,* 36 Cal.3d at p. 437.) Here, plaintiff presented compelling evidence that he did not intend to have Ford benefit from the release agreement.

Because Ford is not a third party beneficiary here, there is no need to get into any discussion of mutual mistake by plaintiff, Phillips, and the latter's insurer, Continental.

Although the majority's analysis and mine reach the same conclusion in favor of plaintiff, that may not be the situation in another case. Anyone claiming to be a third party beneficiary, as Ford does here, has the burden of showing the contracting parties' intent to confer such a benefit. In contrast, anyone claiming mutual mistake, as plaintiff does here, has the burden of [*536] proving that the contractual language is wrong. (See maj. opn., *ante*, at p. 8, .) This difference in the burden of proof could be decisive in another case.

KENNARD, J.

WE CONCUR:

GEORGE, C.J.

WERDEGAR, J.

15 of 37 DOCUMENTS

BARRY KEENAN, Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; FRANK SINATRA, JR., Real Party in Interest.

S080284

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 413; 40 P.3d 718; 2002 Cal. LEXIS 615; 117 Cal. Rptr. 2d 1; 30 Media L. Rep. 1385; 2002 Cal. Daily Op. Service 1624; 2002 Daily Journal DAR 1957

February 21, 2002, Filed

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

PRIOR HISTORY:
Los Angeles County. Super. Ct. No. SC053294. Stanley M. Weisberg.

Keenan v. Superior Court, 72 Cal. App. 4th 681, 85 Cal. Rptr. 2d 417, 1999 Cal. App. LEXIS 53 (2d Dist. 1999)

DISPOSITION:
Reversed and remanded.

COUNSEL:
Attorneys for Appellant: Rohde & Victoroff and Stephen F. Rohde for Petitioner.

Dilan A. Esper; Peter J. Eliasberg and Mark D. Rosenbaum for ACLU Foundation of Southern California as Amicus Curiae on behalf of Petitioner.

Weil, Gotshal & Manges, R. Bruce Rich, Jonathan Bloom, Heather R. Goldstein, Josh A. Krevitt and Christopher J. Cox for The Association of American Publishers, Inc., The American Booksellers Foundation for Free Expression, Magazine Publishers of America, Inc., and PEN American Center as Amici Curiae on behalf of Petitioner.

Attorneys for Respondent: No appearance for Respondent. Corbett & Steelman, Richard B. Specter and Mark M. Monachino of Real Party in Interest.

Bill Lockyer, Attorney General, Richard M. Frank, Chief Assistant Attorney General, Carole Ritts Kornblum, Assistant Attorney General, Peter K. Shack and Kelvin C. Gong, Deputy Attorneys General, as Amici Curiae on behalf of Real Party in Interest.

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

OPINIONBY:
BAXTER

OPINION:

[*415] [**721]

We confront a claim that California's "Son of Sam law" facially violates constitutional protections of speech by appropriating, as compensation for crime victims, all monies due to a convicted felon from expressive materials that include the story of the crime. We conclude that [*416] these provisions of the California statute are facially invalid under both the free speech clause of the First Amendment to the federal Constitution **n1** as applied to the states through the Fourteenth Amendment, and the liberty of speech clause of the California Constitution (art. I, § 2, subd. (a)). **n2**

> **n1** "Congress shall make no law ... abridging the freedom of speech, or of the press ...."
>
> **n2** "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press." (Cal. Const., art. 1, § 2, subd. (a).)

[***3]

The California law was first enacted in 1983 as Civil Code section 2224.1. **n3** (Stats. 1983, ch. 1016, § 2, pp. 3581–3584.) In 1986, the law was renumbered as section 2225 (Stats. 1986, ch. 820, §§ 7, 8, pp. 2730–2733), and it has since been amended on several occasions (see Stats. 1992, ch. 178, § 2, p. 882; Stats. 1994, ch. 556, § 1, p.

2823; Stats. 1995, ch. 262, § 1; Stats. 2000, ch. 261, § 2). As currently in effect, the law seeks to prevent a convicted felon, or a profiteer, from exploiting the felon's crimes for financial gain while victims of crime go uncompensated.

n3 All statutory references are to the Civil Code unless otherwise stated.

One prong of the California statute, in effect since the law's inception, imposes an involuntary trust, in favor of damaged and uncompensated crime victims as "beneficiaries," on a convicted felon's "proceeds" from expressive "materials" (books, films, magazine and newspaper articles, video and sound recordings, radio and [***4] television appearances, and live presentations) that "include or are based on" the "story" of a felony for which the felon was convicted, except where the materials mention the felony only in "passing . . .,as in a footnote or bibliography." (§ 2225, subds. (a)(4), (6), (7), (9), (b)(1); see former § 2224.1, subds. (a)(4), (6), (7), (9), (b), Stats. 1983, ch. 1016, § 2, p. 3581.) For convenience, we sometimes hereafter refer to this portion of the statute, governing proceeds from expressive materials that include the story of the crime, by its operative provision, section 2225, subdivision (b)(1) (section 2225(b)(1)).

More recent amendments to the California statute attack the financial exploitation of crime from a second, distinctly different angle. Since 1994, the law's involuntary trust provisions have also applied to "profits" received by the felon, or his or her representative, from the sale or transfer of *any* "thing" or "right," the *value* of which "is *enhanced* by the *notoriety* gained from the commission of a felony for which a convicted felon was convicted." (§ 2225, subd. (a)(10), italics added; see also *id.*, subd. (b)(2).) In 2000, the involuntary [***5] trust provisions were further extended, with limited exceptions, to "profiteers of the felony," i.e., "any persons" who derive income by selling memorabilia, property, rights, or things for values enhanced by their felony-related notoriety. (§ 2225, subds. (a)(3)(B), (10), (b)(2)). [*417] As necessary, we sometimes hereafter refer to this prong of the statute, governing profits from things sold for their felony-related notoriety value, by its operative provision, section 2225, subdivision (b)(2) (section 2225(b)(2)). **n4**

n4 As indicated in detail below, this case does not, in fact, present a challenge to section 2225(b)(2), the distinct portion of the statute that confiscates profits from memorabilia, property, things, or rights sold for values enhanced by their felony-related notoriety value. We therefore do not address the constitutionality of this clearly severable provision. (See Stats. 2000, ch. 261, § 3.)

In 1991, the United States Supreme Court held that a somewhat similar New York law violated [***6] the First Amendment. (*Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 116 L. Ed. 2d 476, 112 S. Ct. 501 (*Simon & Schuster*).) In provisions somewhat like California's section 2225(b)(1), the statute at issue confiscated, for the benefit of crime victims, all monies a criminal was due under contract with respect to a "reenactment" of the crime, [**722] or from the expression of his or her personal thoughts or feelings about the crime, in a film, broadcast, print, recording, or live performance format.

Finding the New York law facially invalid, the *Simon & Schuster* majority reasoned that the statute, as a direct regulation of speech based on content, must fall unless it satisfied a strict level of constitutional scrutiny. The New York law failed this test, said the majority, because although the state had a compelling interest in compensating crime victims from the fruits of crime, the statute at issue was not narrowly tailored to that purpose. (*Simon & Schuster, supra,* 502 U.S. 105, 121-123.)

The flaw most clearly identified by the *Simon & Schuster* majority was that the New York statute was overinclusive. [***7] The majority noted two respects in which the New York law regulated speech too broadly for its compelling purpose. First, the law applied to expressive works in which one merely *admitted* crimes for which he or she had not been convicted. Second, it confiscated all profits from expressive works in which one made even *incidental or tangential* mention of his or her past crimes for nonexploitative purposes. (*Simon & Schuster, supra*, 502 U.S. 105, 121.)

California's analogous provision, section 2225(b)(1), similarly imposes a content-based financial penalty on protected speech. Yet section 2225(b)(1), like its New York counterpart, fails to satisfy strict scrutiny because it, too, is overinclusive. Section 2225(b)(1) contains the fundamental defect identified in *Simon & Schuster*; it reaches beyond a criminal's profits from the crime or its exploitation to reach all income from the [*418] criminal's speech or expression on any theme or subject, if the story of the crime is included.

Though section 2225(b)(1), unlike the New York law, applies only to persons actually convicted of felonies, and states an exemption for mere "passing mention of the felony, as in a footnote [***8] or bibliography" (*id.*, subd. (a)(7)), these differences do not cure the California statute's constitutional flaw. By any reasonable construction, the California statute is still calculated to confiscate all income from a wide range of protected expressive works by convicted felons, on a wide variety of subjects and themes, simply because those works include substan-

tial accounts of the prior felonies.

Because we conclude, contrary to the Court of Appeal, that section 2225(b)(1) is invalid, we will reverse the judgment of the Court of Appeal.

FACTS

On July 8, 1998, Frank Sinatra, Jr. (Sinatra, Jr.), son of the late singer, filed a complaint in Los Angeles Superior Court. Named as defendants were Barry Keenan, Joseph Amsler, John Irwin, Peter Gilstrap, Columbia Pictures (a division of Sony Pictures Entertainment, Inc.), and New Times, Inc. (New Times).

As pertinent here, the complaint alleged as follows: In 1963, Keenan and Amsler, acting pursuant to a conspiracy with Irwin, kidnapped Sinatra, Jr., from his Nevada hotel room and drove him to Los Angeles, where he was held until his father paid a ransom. During his captivity, Sinatra, Jr., suffered economic loss, physical [***9] suffering, and emotional distress. Keenan, Amsler, and Irwin were later apprehended, tried, convicted of felony offenses, and incarcerated under California law. **n5** Following their arrests, the kidnappers made media statements, since admitted to be false, that Sinatra, Jr., had conspired in his own kidnapping to extract money from his father. These defamatory statements caused further damage to Sinatra, Jr.'s business and reputation.

> **n5** In a memorandum of points and authorities accompanying his subsequent motion for a preliminary injunction, Sinatra, Jr., alleged that the kidnappers sustained *federal* convictions (see 18 U.S.C., §§ 2, 371, 875(a), 1201, 1202) and served their time in the federal penitentiary, but nonetheless qualify as "convicted felons" for purposes of section 2225, because they were convicted of felonies, as defined by either California or United States statutes, that were committed in California. (§ 2225, subd.(a)(1), (2).)

The complaint further alleged: [***10] In January 1998, Keenan and one or both accomplices [**723] arranged with Gilstrap, or with New Times (publisher of New Times Los Angeles, a tabloid magazine), for Gilstrap to interview Keenan [*419] about the kidnapping. The purpose was to produce a story for sale to print, broadcast, and film media. Monies derived from exploiting the kidnapping story would be split among Gilstrap, New Times, and the kidnappers. An article entitled *Snatching Sinatra*, authored by Gilstrap, appeared in a January 1998 issue of New Times Los Angeles. In late January 1998 and thereafter, other magazines reported that Columbia Pictures had bought the motion picture rights to *Snatching Sinatra* for up to $1.5 million. In February 1998, citing section 2225, Sinatra, Jr., made demand on Columbia Pictures to withhold from the kidnappers, and from Gilstrap and New Times as the kidnappers' "representatives," any monies otherwise due such persons or entities for the motion picture rights. Columbia Pictures refused to do so without a court order.

The complaint asserted that under section 2225, all monies due to the kidnappers, or to their "representatives" Gilstrap and New Times, for preparation for sale of the story [***11] of Sinatra, Jr.'s, kidnapping, the sale of the rights to the story, or the sale of materials that included or were based on the story, were "proceeds" as defined by subdivision (a)(9) and "profits" as defined by subdivision (a)(10), and were thus subject to an involuntary trust in favor of Sinatra, Jr., a statutory "beneficiary" (*id.*, subd. (a)(4)(A)). The complaint sought an order that the defendants, particularly Columbia Pictures and New Times, hold such present and future proceeds and profits in trust for Sinatra, Jr. It also sought an injunction to (1) prevent Columbia Pictures and New Times from paying such proceeds and profits to any other defendant, and (2) require that all such payments be made instead to Sinatra, Jr., to the extent of his damages or, in the alternative, to the superior court for distribution for the benefit of the victims of the kidnapping.

On August 5, 1998, after a hearing at which only Sinatra, Jr., Columbia Pictures, and New Times appeared, the trial court issued a preliminary injunction prohibiting Columbia Pictures, during the pendency of the action, from paying any monies to Keenan, Amsler, Irwin, or their representatives or assigns in connection [***12] with the motion picture rights to the story of Sinatra, Jr.'s, kidnapping. **n6**

> **n6** In his written motion for a preliminary injunction, Sinatra, Jr., had sought similar injunctive relief against New Times and Gilstrap, but prior to the August 5, 1998, hearing on the motion, Sinatra, Jr., stipulated he would not proceed at that time with the injunctive portion of his application.

On November 19, 1998, Keenan first appeared in the action by filing, on his own behalf only, a demurrer to the complaint. At the same time, Keenan moved to dissolve the preliminary injunction. The demurrer asserted, among other things, that section 2225 was facially invalid under the speech clauses [*420] of the federal and state Constitutions. Keenan's constitutional attack was based solely on a comparison between section 2225 and the New York law struck down in *Simon & Schuster*, *supra*, 502 U.S. 105.

In this regard, Keenan noted that because the

California statute, like its New York counterpart, targeted a criminal's income [***13] from telling the story of his crime, it penalized the content of speech, required strict scrutiny, and was not narrowly tailored to compensate crime victims from the profits of crime. Keenan urged that, by the standards set forth in *Simon & Schuster, supra*, 502 U.S. 105, the California statute was both underinclusive, because it reached only expressive activity, not other sources of crime-related income, and overinclusive, because it penalized all expressive works by convicted felons which included more than passing mention of their crimes.

In response, Sinatra, Jr., asserted that the *Simon & Schuster* majority had only found New York's law overinclusive. Sinatra, Jr., argued that section 2225 solves the overinclusiveness problem identified in *Simon & Schuster* by covering only "convicted" felons and exempting expressive materials that contain only a "passing mention of [the] felony." Moreover, he contended, section 2225 is not [**724] underinclusive because it is precisely drawn to ensure that victims of crime are compensated before the felon profits from telling the story of their victimization.

On December 22, 1998, the trial court issued an order overruling Keenan's [***14] demurrer "for the reasons stated in [Sinatra, Jr.'s,] opposition papers." In the same order, the court denied Keenan's motion to dissolve the preliminary injunction, reiterating its findings, made when the injunction was granted, that "section 2225 [is] not unconstitutional as written ... [and] ... was narrowly drafted to overcome the over-inclusive effects found by the Supreme Court" in *Simon & Schuster*.

On December 31, 1998, Keenan filed in the Court of Appeal the instant petition for mandate or other appropriate relief. The petition requested a writ directing the superior court to vacate its orders overruling his demurrer and granting the preliminary injunction, to enter a new order sustaining the demurrer without leave to amend, and to dissolve the preliminary injunction. On January 14, 1999, the Court of Appeal stayed proceedings in the trial court, ordered the parties to appear for oral argument on the merits of the petition, and called for the filing of a return and reply. **n7**

n7 We deem this procedure as equivalent to an order for the issuance of an alternative writ, and the parties have proceeded under that assumption. (But see Code Civ. Proc., §§ 1086 - 1087; *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 177-178, 203 Cal. Rptr. 626, 681 P.2d 893.)

[***15]

The parties' briefs in the Court of Appeal, like those in the trial court, focused entirely on comparisons between California's Son of Sam law and [*421] the New York counterpart addressed in *Simon & Schuster*. Again Keenan claimed the California statute singled out expressive activity for regulation on the basis of content, required strict scrutiny, and was both overinclusive and underinclusive by the standards set in that case. Again Sinatra, Jr., urged that section 2225 solved the *overinclusiveness* problem identified in *Simon & Schuster* because, unlike the New York statute, California's law applied only to convicted felons and exempted expressive materials which made mere "passing mention" of the felony.

The Court of Appeal denied writ relief, concluding, among other things, that section 2225 does not infringe constitutional rights of speech. In this regard, the Court of Appeal accepted Sinatra, Jr.'s, arguments that section 2225 lacks the defects of overbreadth identified in *Simon & Schuster*, because it is limited to convicted felons and does not confiscate a felon's proceeds from expressive materials that contain mere "passing mention" of the felony.

The Court of Appeal [***16] declined to decide whether the California statute was impermissibly underinclusive. The court reasoned it need not do so because, contrary to Keenan's insistence, *Simon & Schuster* had not expressly found the New York statute underinclusive. Because Keenan "does not otherwise elaborate on the issue of underinclusiveness," said the court, "and since [his] attack on section 2225 is limited to those issues considered in *Simon & Schuster*, our discussion of the statute is similarly limited." We granted review. **n8** We now reverse.

n8 In addition to the parties' briefs on the merits in this court, several amicus curiae briefs have also been filed. The Attorney General of California (Attorney General) has filed an amicus curiae brief in support of Sinatra, Jr. In support of Keenan, an amicus curiae brief has been filed on behalf of the ACLU Foundation of Southern California (ACLU), and a joint amicus curiae brief has been filed on behalf of the Association of American Publishers, Inc., The American Booksellers Foundation for Free Expression, Magazine Publishers of America, Inc., and PEN American Center.

[***17]

DISCUSSION

In the late 1970s, New York was terrorized by serial killer David Berkowitz, popularly known as the Son of Sam. By the time Berkowitz was apprehended, publicity about the case had enhanced the value of the rights to his story. New York's Legislature sought to prevent Berkowitz

and other notorious criminals from exploiting for profit the tales of their sensational crimes while their victims went uncompensated. The resulting statute, discussed in greater detail below, was dubbed the "Son of Sam law." (*Simon &* [*422] [**725] *Schuster*, *supra*, 502 U.S. 105, 108–110, 116 L. Ed. 2d 476, 112 S. Ct. 501.) In 2000, the United States and over 40 states, including California, had some form of Son of Sam law. (See Kealy, *A Proposal for a New Massachusetts Notoriety for Profit Law* (2000) 22 W. New Eng. L.Rev. 1, 22; Comment, *Son of Sam Laws* (1999) 20 Whittier L.Rev. 949, 953, & fns. 48, 49.) **n9**

n9 "Ironically, the [New York] statute was never applied to the Son of Sam himself; David Berkowitz was found incompetent to stand trial, and the statute at that time applied only to criminals who had actually been convicted. [Citation.] According to the [New York State Crime Victims] Board, Berkowitz voluntarily paid his share of the royalties from the book Son of Sam, published in 1981, to his victims or their estates. [Citation.]" (*Simon & Schuster*, *supra*, 502 U.S. 105, 111.)

[***18]

California's version, as pertinent here, provides that all past and future "proceeds" (§ 2225, subds. (a)(9), (b)(1)) paid or owing to a "convicted felon" (*id.*, subds. (a)(1), (b)(1)) from the sale of expressive "materials" **n10** or the rights thereto (§ 2225, subds. (a)(6), (b)(1)) are subject to an involuntary trust for designated "beneficiaries" (§ 2225(b)(1)) if the materials "include or are based on the story" of the felony (*ibid.*). A "convicted felon" is one "convicted ...,or found not guilty by reason of insanity" (*id.*, subd. (a)(1)) of a felony, as defined by "any California or United States statute" (*id.*, subd. (a)(2)), which was committed in California (*id.*, subd. (a)(1)). "Story" means "a depiction, portrayal, or reenactment of a felony" but "shall not be taken to mean a passing mention of the felony, as in a footnote or bibliography." (*Id.*, subd. (a)(7).) A "beneficiary" is one who has a legal claim against the convicted felon, including a survivorship or wrongful death claim, for physical, mental, or emotional injury, or pecuniary loss, caused by the felony. (*Id.*, subd. (a)(4).)

n10 Section 2225, subdivision (a)(6) defines "materials" as "books, magazine or newspaper articles, movies, films, videotapes, sound recordings, interviews or appearances on television and radio stations, and live presentations of any kind."

[***19]

The trust continues for five years from the conviction, or from the payment of any covered proceeds to the felon, whichever is later. (§ 2225(b)(1).) The felon's unpaid obligations for restitution, restitution and penalty fines, and crime-related attorney fees have first priority against the trust. (*Id.*, subd. (d).) Within the five-year trust period, beneficiaries may bring actions to recover their respective interests in the remaining funds (*id.*, subd. (c)(1),(2)), and the filing of such an action extends the trust period until such actions are concluded (*id.*, subd. (b)(1)). Each beneficiary's interest is an equitable share, given the funds available, of his or her recoverable damages from the crime, less any compensation already received from the felon or from the Restitution Fund (*id.*, subds. (a)(5), (d)). Payment to the beneficiary may be ordered from proceeds already received [*423] by the felon and, as necessary, from proceeds to be received in the future. (*Id.*, subd. (c)(3).)

Within one year after the conviction or the felon's receipt of covered proceeds, whichever is later (§ 2225, subd. (e)(2)), the Attorney General may also bring an action to impose an [***20] "express trust" on covered proceeds, thus requiring their placement in a bank depositary (*id.*, subd. (e)(1); see also *id.*, subd. (e)(3)), if he proves it is "more probable than not" that there are beneficiaries entitled to compensation for the felony (*id.*, subd. (e)(3)). Either a beneficiary or the Attorney General may, in appropriate circumstances, obtain a preliminary injunction to prevent waste of proceeds subject to the involuntary trust. (*Id.*, subd. (f)(1), (2).)

Funds subject to the trust, but not claimed by a beneficiary at the end of the trust period, do not revert to the felon's ownership. Instead, they must be transferred to the Controller for allocation to the Restitution Fund. (§ 2225(b)(1); see also *id.*, subd. (e)(3).)

As indicated above, the United States Supreme Court struck down a similar New York law in *Simon & Schuster*, *supra*, 502 U.S. 105. We conclude the analysis of *Simon & Schuster* governs this case and renders section 2225(b)(1) invalid as well. Both the New York and California laws impose content-based financial penalties on protected speech. [**726] Thus they must, at a minimum, satisfy strict constitutional scrutiny. [***21] Both laws seek to serve compelling interests in preventing criminals from exploiting their crimes for profit, and in compensating crime victims from the profits of crime. Yet both laws are *overinclusive* for those purposes, because they confiscate all income from all expressive materials, whatever their general themes or subjects, that include significant discussions of their creators' past crimes.

Our reasoning requires, of course, a detailed examination of *Simon & Schuster*. The New York statute there at issue provided that if any person "accused or convicted of a crime in this state" was due money under contract

with respect to a "reenactment" of the crime " 'by way of a movie, book, magazine article, tape recording, phonograph record, radio or television presentation, [or] live entertainment of any kind,' " or for expressions of the person's thoughts or feelings about the crime, the contract must be reported to the New York State Crime Victims Board (New York Board), and the money due must be paid over to the New York Board to be placed in an escrow account, primarily for the benefit of victims who, within five years thereafter, won money judgments against the criminal. [***22] (*Simon & Schuster*, *supra*, 502 U.S. 105, 109; see N.Y. Exec. Law § 632-a(1), (4) [*424] (McKinney 1982 & 1991 supp.).) The statute defined "convicted" persons to include those who had "voluntarily and intelligently admitted" crimes for which they were not prosecuted. (*Simon & Schuster*, *supra*, at p. 110, italics omitted; N.Y. Exec. Law, § 632-a(10)(b).) **n11**

n11 The New York law, like section 2225(b)(1), established priorities of claims against the account, including the criminal's valid claim for expenses of legal representation. (*Simon & Schuster, supra*, 502 U.S. 105, 110; see N.Y. Exec. Law, § 632-a(7), (8), (11).) Unlike section 2225(b)(1), the New York law allowed general creditors of the criminal to reach the impounded funds (*Simon & Schuster*, *supra*, at p. 110; see N.Y. Exec. Law, § 632-a(11)(c)), but provided that if no claims against the account were pending at the end of the five-year period, remaining funds in the account would be repaid to the criminal (*Simon & Schuster, supra*, at p. 109; see N.Y. Exec. Law, § 632-a(4)).

[***23]

While the law was in effect, Simon & Schuster, Inc., contracted to finance and publish a book by Henry Hill, a former gangster turned government witness. The book would tell the story of Hill's organized crime career. After considerable investment of time and effort by Hill and his coauthor, the book, Wiseguy, was published in 1986. Its colorful account of Hill's many criminal exploits, and of life inside the Mafia, met with commercial and critical success.

When the New York Board learned of Wiseguy's publication, it invoked the Son of Sam law. After reviewing the book, and Simon & Schuster's contract with Hill, the New York Board determined that all moneys paid or owed to Hill under the contract were subject to the statute's escrow provisions. Simon & Schuster was ordered to pay the New York Board all future sums due to Hill, and Hill was ordered to pay the New York Board all sums already remitted to him. Simon & Schuster filed a federal suit, seeking a declaration, under 42 United States Code section 1983, that the New York law was facially invalid under the First Amendment. The federal district court granted the New York Board's motion for summary judgment, [***24] and a divided court of appeals affirmed. (*Simon & Schuster, supra,* 502 U.S. 105, 115.)

The United States Supreme Court unanimously concluded that the judgment of the court of appeals must be reversed. **n12** Six justices, in an opinion authored by Justice O'Connor, first noted that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech. *Leathers v. Medlock*, 499 U.S. 439, 447, 113 L. Ed. 2d 494, 111 S. Ct. 1438 (1991). ... [P] In the context of financial regulation, it bears repeating, as we did in [*425] *Leathers*, that the government's ability to impose content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace. 499 U.S. at 448-449. The First Amendment presumptively [**727] places this sort of discrimination beyond the power of the government." (*Simon & Schuster*, *supra*, 502 U.S. 105, 115-116.)

n12 Justice Thomas did not participate.

[***25]

New York's Son of Sam law was a presumptively invalid content-based burden on speech, said the majority, because "it singles out income derived from expressive activity for a burden the State places on no other income, ... is directed only at works with a specified content," and "plainly imposes a financial disincentive only on speech of a particular content." (*Simon & Schuster*, *supra*, 502 U.S. 105, 116.) Because the statute penalized speech on the basis of its content, the majority concluded, the law must survive "strict" constitutional scrutiny, i.e., " 'the State must show that its regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.' [Citation.]" (*Id.*, 502 US at p. 118, 112 S. Ct. 501.)

The majority emphasized that the state had no compelling interest in shielding readers and victims from negative emotional responses to a criminal's public retelling of his misdeeds. Indeed, the majority observed, the protection of offensive and disagreeable ideas is at the core of the First Amendment. (*Simon & Schuster*, *supra*, 502 U.S. 105, 118.) On the other hand, the majority agreed, states do have compelling interests in "ensuring that victims [***26] of crime are compensated by those who harm them" (*ibid.*), "preventing wrongdoers from dissipating their assets before victims can recover" (*ibid.*), "ensuring that criminals do not profit from their crimes" (*id.*, 502 US at p. 119), and transferring the fruits of crime from

the criminals to their victims (*id.*, 502 US at pp. 119-120). Moreover, the majority concluded it could "assume without deciding" that royalties from a criminal's book about his crimes, the form of income at issue in the case before it, "represent[ ] the fruits of crime." (*Id.*, 502 US at p. 119.)

Of course, the majority observed, New York could not defend its statute by narrowly defining the interest at stake in terms of the actual operation of its law. New York claimed a compelling interest in preventing criminals from retaining the profits of *storytelling* about their crimes before their victims were compensated. However, the majority noted, the state could not show why it had a greater interest in compensating crime victims from the profits of such storytelling than from the criminal's other assets. "Nor [could the state] justify ... a distinction between this expressive activity and any [*426] other activity [***27] in connection with its interest in transferring the fruits of crime from criminals to their victims." (*Simon & Schuster*, 502 U.S. 105, 119-120, 116 L. Ed. 2d 476, 112 S. Ct. 501.) "In short," the majority concluded, "the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime." (*Id.*, at pp. 120-121.)

Accordingly, the majority reasoned, it must examine whether New York's statute was "narrowly tailored to advance the former, not the latter, objective." (*Simon & Schuster*, *supra*, 502 U.S. 105, 121.) The New York statute was not so tailored, the majority determined, for "as a means of ensuring that victims are compensated from the proceeds of crime, the Son of Sam law is significantly *overinclusive*." (*Ibid.*, italics added.) In the majority's view, two factors in particular illustrated the statute's overbreadth. First, "the statute applies to works on *any* subject, provided that they express the author's thoughts or recollections about his crime, however tangentially or incidentally. [Citation. [***28]]" (*Ibid.*, italics in original.) Second, "the statute's broad definition of 'person convicted of a crime' enables the Board to escrow the income of any author who admits in his work to having committed a crime, whether or not the author was ever actually accused or convicted. [Citation.]" (*Ibid.*)

"These two provisions," said the majority, "combine to encompass a potentially very large number of works. Had the Son of Sam law been in effect at the time and place of publication, it would have escrowed payment for such works as The Autobiography of Malcolm X, which describes crimes committed by the civil rights leader before he became [**728] a public figure; Civil Disobedience, in which Thoreau acknowledges his refusal to pay taxes and recalls his experience in jail; and even the Confessions of Saint Augustine, in which the author laments 'my past foulness and the carnal corruptions of my soul,' one instance of which involved the theft of pears from a neighboring [orchard]. [Citations.] *Amicus* Association of American Publishers, Inc., has submitted a sobering bibliography listing hundreds of works by American prisoners and ex-prisoners, many of which contain descriptions of [***29] the crimes for which the authors were incarcerated, including works by such authors as Emma Goldman and Martin Luther King, Jr. A list of prominent figures whose autobiographies would be subject to the statute if written is not difficult to construct: The list could include Sir Walter Raleigh, who was convicted of treason after a dubiously conducted 1603 trial; Jesse Jackson, who was arrested in 1963 for trespass and resisting arrest after attempting to be served at a lunch counter in North Carolina; and Bertrand Russell, who was jailed for seven days at the age of 89 for participating in a sit-down [*427] protest against nuclear weapons. The argument that a statute like the Son of Sam law would prevent publication of *all* of these works is hyperbole - some would have been written without compensation - but the Son of Sam law clearly reaches a wide range of literature that does not enable a criminal to profit from his crime while a victim remains uncompensated." (*Simon & Schuster*, *supra*, 502 U.S. 105, 121-122, fn. omitted, italics in original.)

In sum, said the majority, New York's Son of Sam law "has singled out speech on a particular subject for a financial burden that it places [***30] on no other speech and no other income. The State's interest in compensating victims from the fruits of crime is a compelling one, but the Son of Sam law is not narrowly tailored to advance that objective. As a result, the statute is inconsistent with the First Amendment." (*Simon & Schuster*, *supra*, 502 U.S. 105, 123.)

In separate opinions, Justices Blackmun and Kennedy concurred in the judgment. Justice Blackmun opined that the New York law was underinclusive as well as overinclusive, and "we should say so." (*Simon & Schuster*, *supra*, 502 U.S. 105, 123-124 (conc. opn. of Blackmun,J.).) Justice Kennedy suggested that a statute is unconstitutional per se if it regulates the specific content of speech which is neither defamatory, nor tantamount to a criminal act, nor an impairment of some other constitutional right, nor an incitement to lawless action, nor calculated to bring about an imminent harm the state has the substantive power to prevent. A statute that regulates the content of speech beyond these narrow limits, said Justice Kennedy, cannot be saved by finding that it is narrowly tailored to serve a compelling state interest. (*Id.*, at pp. 124-128 [***31] (conc. opn. of Kennedy,J.).) **n13**

n13 One jurisdiction's Son of Sam law has been invalidated since *Simon & Schuster*. (*Bouchard v. Price* (R.I. 1997) 694 A.2d 670, 675-678.) The laws in two other states have been challenged, but the appeals in those matters were decided on grounds other than the constitutionality of the statutes at issue. (See *Rolling v. State ex rel. Butterworth* (Fla.Dist.Ct.App. 1994) 630 So. 2d 635; *Curran v. Price* (Md.Ct.Spec.App. 1994) 334 Md. 149, 638 A.2d 93.)

In his efforts to distinguish section 2225(b)(1), Sinatra, Jr., first makes a cursory argument that California's statute, unlike New York's, is not a presumptively invalid content-based regulation of speech. The effort must fail. Section 2225(b)(1), like the New York statute at issue in *Simon & Schuster*, places a direct financial disincentive on speech or expression about a particular subject. The California statute explicitly targets and confiscates a convicted [***32] felon's proceeds from books, films, articles, recordings, broadcasts, interviews, or performances that include the story of the felon's crime. [*428] While certain classes of speech - obscenity, fighting words, some defamation - may be subject to viewpoint-neutral regulation because of their directly injurious nature (see. e.g., *R.A.V. v. St. Paul* (1992) 505 U.S. 377, 382-390, 120 L. Ed. 2d 305, 112 S. Ct. 2538; *Chaplinsky v. New Hampshire* (1942) 315 U.S. 568, 571-572, 86 L. Ed. [**729] 1031, 62 S. Ct. 766), discussions of crime have never been included in this limited category. **n14**

n14 Concluding that the New York's Son of Sam law was a content-based regulation of speech, the *Simon & Schuster* majority noted, in a brief passage, that the law "singles out income derived from expressive activity for a burden the State places on no other income." (*Simon & Schuster*, *supra*, 502 U.S. 105, 116.) As noted above, California's Son of Sam law has a feature New York's did not; besides confiscating a convicted felon's income from telling his crime story, the California statute, by amendments adopted after *Simon & Schuster*, also confiscates profits earned by a convicted felon, or a profiteer, from the sale of memorabilia, property, things, or rights for a value enhanced by their felony-related *notoriety value*. (§ 2225(b)(2).) Thus, it cannot be said that California's law, read as a whole, burdens income from speech as distinct from *all other crime-related income*. The Attorney General urges that this distinction between the California and New York statutes means the California law is not a content-based regulation of speech. We disagree. California's effort to reach the fruits of crime beyond those derived from storytelling about the crime might bear on whether our statute is unconstitutionally *underinclusive*, an issue we need not and do not decide. However, we do not read this brief language of *Simon & Schuster* to mean that a statute can escape examination as a content-based regulation of speech merely by targeting, in separate provisions, nonspeech income as well. There can be no doubt that section 2225(b)(1) itself meets the definition of a content-based speech regulation; it focuses directly and solely on income from speech and "is directed only at works with a specified content." (*Simon & Schuster*, *supra*, 502 U.S. 105, 116.)

[***33]

Sinatra, Jr., asserts that laws imposing financial penalties on speech do not necessarily violate the First Amendment. He cites cases for the principle that the government need not subsidize the exercise of free speech or other constitutional rights. (E.g., *Lyng v. Automobile Workers* (1988) 485 U.S. 360, 99 L. Ed. 2d 380, 108 S. Ct. 1184 [denial of food stamps to household with striking worker]; *Regan v. Taxation With Representation of Wash.* (1983) 461 U.S. 540, 76 L. Ed. 2d 129, 103 S. Ct. 1997 [denial of tax exemption to organizations engaged in lobbying]; *Harris v. McRae* (1980) 448 U.S. 297, 65 L. Ed. 2d 784, 100 S. Ct. 2671 [denial of federal funds to reimburse abortions].) But he fails to show how section 2225(b)(1), by confiscating income from speech based on its content, departs from the presumptively unconstitutional form of statute at issue in *Simon & Schuster*.

Nor does it matter that New York's law focused on *media entities*' contracts for crime stories, while section 2225(b)(1) targets crime story proceeds in the hands of the criminal himself. As *Simon & Schuster* noted with respect to the facts in that [***34] case: "Whether the First Amendment 'speaker' is considered to be Henry Hill, whose income the statute places in [*429] escrow because of the story he has told, or Simon & Schuster, which can publish books about crime with the assistance of only those criminals willing to forgo remuneration for at least five years, the statute plainly imposes a financial disincentive only on speech of a particular content." (*Simon & Schuster*, *supra*, 502 U.S. 105, 116, 112 S. Ct. 501, 116 L.Ed 2d 476.) "The government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker" (*Simon & Schuster, supra,* at p. 117), and section 2225(b)(1), like the New York statute, "establishes a financial disincentive to *create or publish* works with a particular content" (*Simon & Schuster, supra,* at p. 118, italics added). **n15**

n15 By denying compensation for an expressive work, a law may chill not only the free speech rights of the author or creator, but the reciprocal First Amendment right of the work's audience to *receive* protected communications. (*Va. Pharmacy Bd. v. Va. Consumer Council* (1976) 425 U.S. 748, 756, 48 L. Ed. 2d 346, 96 S. Ct. 1817; see *Pacific Gas. & Elec. Co. v. Public Util. Comm'm* (1986) 475 U.S. 1, 8, 89 L. Ed. 2d 1, 106 S. Ct. 903 (plur. opn. of Powell,J.).) The chilling effect of financial disincentives was recognized again in *United States v. Treasury Employees* (1995) 513 U.S. 454, 468–470, where the court struck down a congressional ban on the receipt by certain high level government employees of honoraria for speeches. (See also *Va. Pharmacy Bd.*, *supra*, 425 U.S. at pp. 756–757; *Mine Workers v. Illinois Bar Ass'n.* (1967) 389 U.S. 217, 222, 19 L. Ed. 2d 426, 88 S. Ct. 353; *Mazer v. Stein* (1954) 347 U.S. 201, 219, 98 L. Ed. 630, 74 S. Ct. 460.)

[***35]

Section 2225(b)(1) is thus a suspect content-based regulation of speech. As such, the section is unconstitutional unless, at a minimum, it is narrowly tailored to serve compelling state interests. (*Simon & Schuster*, [**730] *supra*, 502 U.S. 105, 118; *Sable Communications of Cal., Inc. v. FCC* (1989) 492 U.S. 115, 126, 106 L. Ed. 2d 93, 109 S. Ct. 2829.) In applying this standard, we must first determine what, if any, such compelling interests section 2225(b)(1) seeks to serve.

By its terms, section 2225(b)(1) confiscates, for the benefit of uncompensated victims of crime, sums due or owing to a convicted felon from expressive materials that include the story of the felony. It thus appears the purpose of section 2225(b)(1) is to assure that the "fruits" of one's crimes – in this case, proceeds from exploiting the story of those crimes – will be used to compensate crime victims.

Statements of legislative intent confirm this inference. When the predecessor of section 2225(b)(1) was adopted in 1983, the Legislature declared, as justification for the law, that "victims of felonies have a special relationship to proceeds from the sale of stories about those felonies which [***36] are written by persons convicted of committing them." (Stats. 1983, ch. 1016, § 1, p. 3581.) It further recited that the new law "amplifies [and] supplements [Civil Code] sections 2224 [making one an involuntary trustee, for the [*430] benefit of the true owner, of any thing gained by fraud, accident, mistake, undue influence, violation of trust, or other wrongful act] and 3517 [confirming the duty to compensate for injury or damage caused by one's legal wrong]." (*Id.*, § 3, p. 3584.) In connection with more recent amendments to section 2225, the Legislature asserted, in a paraphrase from *Simon & Schuster*, that "the state has a compelling interest in ensuring that convicted felons do not profit from their crimes and that the victims of crime are compensated by those who harm them." (Stats. 2000, ch. 261, § 1, subd. (b)).

Though there is no compelling interest in targeting a criminal's storytelling proceeds *in particular* for the purpose of compensating crime victims (*Simon & Schuster*, *supra*, 502 U.S. 105, 119–120), the state does have a compelling interest in using the fruits of crime *generally* for that purpose. (*Id.*, at pp. 118–121.) [***37] We may assume, in this regard, that the fruits of crime include a criminal's proceeds from exploiting the story of the crime. (*Id.*, at p. 119.) The question thus arises whether section 2225(b)(1), within its sphere of operation, is narrowly tailored to ensure that the fruits of crime are used to compensate the victims of crime.

Of course, to be narrowly tailored does not require "that there be no conceivable alternative, but only that the regulation not 'burden substantially more speech than is necessary to further the government's legitimate interests' [citation]." (*Board of Trustees, State Univ. of N.Y. v. Fox* (1989) 492 U.S. 469, 478, 106 L. Ed. 2d 388, 109 S. Ct. 3028.) We examine whether section 2225(b)(1) meets this test. **n16**

n16 Though it elsewhere clearly concluded that New York's Son of Sam law was a *content-based* regulation of speech which must be narrowly tailored to serve a *compelling* state interest, the *Simon & Schuster* majority also noted that "because the [New York] law is so overinclusive," there was no need to address the Board's claim that the statute was *content neutral* under the test set forth in such cases as *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746 and *Renton v. Playtime Theaters, Inc.* (1986) 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925. (*Simon & Schuster*, *supra*, 502 U.S. 105, 122, asterisked fn.) As *Simon & Schuster* majority explained, *Ward* and *Renton* fall within a line of authority suggesting that regulations are content neutral, despite their incidental effect on some but not all speakers, if they are justified by concerns unrelated to the content of speech. (*Ward*, *supra*, at p. 791 [anti-noise regulation requiring city sound equipment and city sound technician for outdoor concert, as applied to anti-racism organization]; *Renton*, *supra*, at p. 48 [zoning regulation of adult theaters].) The *Simon & Schuster* majority indicated that although a content-neutral regulation of expression need not serve a *compelling* state interest, it must nonetheless be "narrowly tailored" to serve whatever nonspeech

interest the state asserts. (*Simon & Schuster*, *supra*, at p. 122, fn.*) The majority concluded that even if New York's Son of Sam law was analyzed as content neutral rather than content based, it was still "too overinclusive" to meet this test. (*Ibid.*) For reasons explained below, we reach a similar conclusion with respect to section 2225(b)(1).

[***38]

Keenan urges that section 2225(b)(1) is *underinclusive*, because it confiscates profits [**731] from expressive activity, i.e., storytelling about one's crimes, [*431] while leaving undisturbed other gains and profits the criminal might realize from the crimes or their exploitation. Portions of the majority's discussion in *Simon & Schuster, supra,* 502 U.S. 105, imply such a flaw in the New York statute there at issue. At several points, the majority stressed that the statute singled out a criminal's profits from expressive activity to the exclusion of all other crime-related profits, and suggested that the state could demonstrate no compelling interest in such a distinction when fashioning a law to compensate crime victims from the fruits of crime. (*Id.,* at pp. 116, 119-121, 123.) Justice Blackmun suggested this was tantamount to a conclusion that the New York statute was underinclusive. (*Id.*, at pp. 123-124 (conc. opn. of Blackmun,J.).)

However, having determined that the New York law was overinclusive, the high court expressly stated it need not decide whether the law was underinclusive as well. (*Simon & Schuster*, *supra*, 502 U.S. 105, [***39] 122, fn.*). Noting that Keenan's attack on the California statute was focused primarily on *Simon & Schuster*, the instant Court of Appeal similarly refused to address the issue of underinclusiveness. Because we hereafter conclude that California's law, like New York's, is overinclusive in any event, we pursue a similar course.

Indeed, any conclusion that the New York statute was underinclusive might not apply to California's law. As noted above, the California statute, unlike New York's, *does* confiscate at least one additional category of a criminal's crime-related profits, those derived from sales of memorabilia, property, things, or rights for a value enhanced by their crime-related notoriety value. (§ 2225(b)(2).) In the posture of this case, and lacking further development of the issue by the parties in their briefs, we need not and do not decide whether the California statute, which includes but reaches beyond speech-related profits, is underinclusive.

We are persuaded, however, that section 2225(b)(1), like the New York law at issue in *Simon & Schuster*, is overinclusive and therefore invalid. As did the New York statute, section 2225(b)(1) penalizes the content [***40] of speech to an extent far beyond that necessary to transfer the fruits of crime from criminals to their uncompensated victims. Even if the fruits of crime may include royalties from exploiting the story of one's crimes, section 2225(b)(1) does not confine itself to such income. Instead, it confiscates *all* a convicted felon's proceeds from speech or expression on *any* theme or subject which includes the story of the felony, except by mere [*432] passing mention. By this financial disincentive, section 2225(b)(1), like its New York counterpart, discourages the creation and dissemination of a wide range of ideas and expressive works which have little or no relationship to the exploitation of one's criminal misdeeds.

In at least one respect, the involuntary trust provision of section 2225(b)(1) operates more harshly against expressive materials that depict the creator's past crimes than did the escrow account provided for by the New York law at issue in *Simon & Schuster*. Under the New York statute, proceeds from a crime story contract were to be turned over to the New York Board for placement in escrow, but if, at the end of five years, no valid claims of the criminal's victims or [***41] creditors were pending, remaining funds in the account were returned to the criminal. (*Simon & Schuster*, *supra*, 502 U.S. 105, 109; see N.Y Exec. Law, § 632-a(4).) Under section 2225(b)(1), by contrast, any entrusted amounts not subject to legitimate individual claims at the end of the five-year trust period are turned over to the Controller for allocation to the Restitution Fund. **n17**

n17 The ACLU suggests that, for this reason alone, the statute is an impermissibly overbroad deterrent to creative expression for compensation, since it forces a convicted felon to give up speech-related income for the benefit of *crime victims generally*, even after his own victims have been compensated. Section 2225(b)(1) does appear to impose an involuntary trust on the convicted felon's proceeds from materials that include the story of the crime, and to confiscate such proceeds after five years for the benefit of crime victims generally, even if there *never were* "beneficiaries" with specific claims against the felon. In order to impose an "express trust" in a bank depositary, the Attorney General must show it is "more probable than not" that beneficiaries exist (*id.*, subd. (e)(3)), and only a beneficiary or the Attorney General may obtain a preliminary injunction to prevent waste or dissipation of entrusted funds (*id.*, subd. (f)(1)). However, the trust character of the proceeds in the felon's hands, and their ultimate forfeiture to the state's Restitution Fund, do not appear to depend on the actual existence of uncompensated victims

of the felon's crime.

> The Attorney General responds that the state has a compelling interest in using the fruits of a particular crime not only to compensate that crime's direct victims, but also as a source of criminal restitution generally. As we conclude elsewhere in this opinion, section 2225(b)(1) is overbroad in any event, because it confiscates speech-related income on the basis of its content, and thus discourages such protected speech, far beyond the degree necessary to reach the fruits of crime.

[***42]

[**732] Sinatra, Jr., nonetheless urges that two features of section 2225(b)(1) cure the overinclusiveness problem identified in *Simon & Schuster*. First, he notes, section 2225(b)(1), unlike New York's law, applies only to persons *actually found guilty* of *felonies* committed in this state. (§ 2225, subd. (a)(1), (2).) Thus, Sinatra, Jr., points out, California's statute, unlike New York's, presents no danger that an innocent person will be penalized, or that income from an expressive work will be confiscated simply for inclusion of a past offense that was minor, or for which the work's creator was never prosecuted. Second, Sinatra, Jr., observes, section 2225(b)(1) applies only to [*433] expressive materials that include the "story" of a felony for which one was convicted, and exempts mere "passing mention of the felony, as in a footnote or bibliography." (*Id.*, subd. (a)(7).) These restrictions, Sinatra, Jr., insists, negate *Simon & Schuster*'s concern, with respect to the New York statute, that all profits from an expressive work would be confiscated though the work mentioned a past offense only "tangentially or incidentally." (*Simon & Schuster*, *supra*, 502 U.S. 105, [***43] 121.)

We are not persuaded. In *Simon & Schuster*, the Supreme Court *illustrated* the overbroad sweep of the New York statute by showing that it encompassed even minor, unprosecuted offenses or mere "tangential[ ] or incidental[ ]" mention of past crimes in a larger context. (*Simon & Schuster, supra,* 502 U.S. 105, 121.) But we do not read *Simon & Schuster* as suggesting that a statute which exhibited marginal narrowing in these particular regards would necessarily pass constitutional muster.

Instead, the court's concern was with the essential values of the First Amendment. As the court's lengthy discussion discloses, the vice of the New York law was that in order to serve a relatively narrow interest- compensating crime victims from the fruits of crime - the statute targeted, segregated, and confiscated *all* income from, and thus unduly discouraged, a wide range of expressive works containing protected speech on themes and subjects of legitimate interest, simply because material of a certain content - reference to one's past crimes - was included.

Thus, the California statute's limitation to *felony convictions* does not suffice to avoid an overbroad [***44] infringement of speech. As *Simon & Schuster* made clear, one motivated in part by compensation might discuss his or her past crimes, including those that led to felony convictions, in many contexts not directly connected to exploitation of the crime. One might mention past felonies as relevant to personal redemption; warn from experience of the consequences of crime; critically evaluate one's encounter with the criminal justice system; document scandal and corruption in government and business; **n18** describe the conditions of prison life; or provide an inside look at the criminal underworld.

> **n18** As Publishers Association points out, discussion of governmental affairs is at the core of the First Amendment. (*Gentile v. State Bar of Nevada* (1991) 501 U.S. 1030, 1034-1035, 115 L. Ed. 2d 888, 111 S. Ct. 2720.)

Mention of one's past felonies in these contexts may have little or nothing to do with exploiting one's crime for profit, and thus with the state's interest in compensating crime [***45] victims from the fruits of crime. Yet section 2225(b)(1) entrusts and permanently confiscates all income, whenever received, from all expressive materials, whatever their [**733] subject, theme, or [*434] commercial appeal, that include a substantial description of such offenses, whatever their nature and however long in the past they were committed. **n19** Thus, even as so limited to felony convictions, section 2225(b)(1) is not narrowly tailored to achieve the compelling interests it purports to serve.

> **n19** As indicated above, section 2225(b)(1) imposes an involuntary trust upon all "proceeds ... received by or owing to" a convicted felon for expressive materials that include the story of the crime (*id.*, subd. (a)(9). The statute imposes no limit on the time that may elapse between the crime and receipt of the proceeds. The trust period begins when proceeds are received or due, then continues, as extended pending the completion of suits by beneficiaries, for five years after the conviction, or five years after the payment of proceeds to the felon, "whichever is later." (§ 2225(b)(1).)

[***46]

As indicated above, the *Simon & Schuster* majority also found overbreadth in the New York statute because it confiscated profits from expressive works that "expressed

the author's thoughts or recollections about his crime, *however tangentially or incidentally*." (*Simon & Schuster*, *supra*, 502 U.S. 105, 212, italics added.) Sinatra, Jr., urges that the California statute avoids this defect because it applies only to expressive materials containing the "story" of the felony - i.e., a "depiction, portrayal, or reenactment" of the criminal episode (§ 2225, subd. (a)(7)), and because it expressly exempts mere "passing mention of the felony, as in a footnote or bibliography" (*ibid.*). Thus, Sinatra, Jr., suggests, the California statute applies only when an expressive work provides *narrative detail* about a felony for which the work's author or creator was convicted, and does not discourage mere *acknowledgement* of a prior felony conviction in the context of another subject.

The Attorney General echoes this view, suggesting that a "story," as defined by the section 2225, subdivision (a)(7), is a "vivid" depiction, portrayal, or reenactment. Further, the Attorney [***47] General suggests, the exemption is for "passing mention . . .,*as in* a footnote or bibliography" (*ibid.,* italics added), demonstrating that the example given is illustrative only, and that other forms of "passing mention" are also exempt.

These arguments do not convince us that section 2225(b)(1) focuses with sufficient precision on the fruits of crime, while leaving other speech-related income undisturbed. *Simon & Schuster* illustrated the overbreadth of the New York statute by observing that it reached even incidental and tangential mention of past crimes, but nothing in *Simon & Schuster* suggests the New York law could have cured its overinclusive effect simply by providing an exemption for tangential or incidental references. Moreover, *Simon & Schuster* neither stated nor implied that the federal Constitution might allow confiscation, on behalf of crime victims, of all proceeds from any expressive work that includes a descriptive account, or even a vivid account, of a past crime committed by the author.

[*435] Such arbitrary demarcation lines do not comport with the basic rationale of *Simon & Schuster*. A statute that confiscates all profits from works which make [***48] more than a passing, nondescriptive reference to the creator's past crimes still sweeps within its ambit a wide range of protected speech, discourages the discussion of crime in nonexploitative contexts, and does so by means not narrowly focused on recouping profits from the *fruits of crime*.

Indeed, Keenan, joined by his amici curiae, urges that the "passing mention" exemption is so *imprecise* and *unclear* that it constitutes an impermissibly vague basis for the censorship of protected speech. (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 109, 33 L. Ed. 2d 222, 92 S. Ct. 2294; see also *Reno v. American Civil Liberties Union* (1997) 521 U.S. 844, 874.) We need not resolve the vagueness issue, because we are persuaded that, by any reasonable interpretation, the statute remains overinclusive. Certainly the statutory definition of "story" includes any *substantial* account of the facts and circumstances of a past felony which led to conviction, and the "passing mention" exemption would not provide safe harbor to materials containing such a substantial account. But there are multiple [**734] contexts in which expressive materials, with diverse subjects [***49] and themes unrelated to the exploitation of one's crimes, might include substantial accounts of those episodes.

Had section 2225(b)(1) been in effect at the time and place of publication, the statute would have applied to numerous works by authors whose discussions of larger subjects make substantial, and often vividly descriptive, contextual reference to prior felonies of which they were convicted. **n20** A statute which operates in this fashion disturbs or discourages protected speech to a degree substantially beyond that necessary to serve the state's compelling interest in compensating crime victims from the fruits of crime. Accordingly, we conclude, in conformity with *Simon & Schuster*, that section 2225(b)(1) is facially invalid under the First Amendment to the United States Constitution.

> **n20** These include, for example, Alex Haley and Malcolm X's The Autobiography of Malcolm X (Ballantine Books ed. 1992), in which the murdered civil rights leader describes early burglaries for which he was convicted (*id.*, pp. 161-172); Eldridge Cleaver's Soul on Ice (1968), which discusses his rapes of White women, for which he was incarcerated, as since-repented acts of racial rage (*id.*, pp. 14-15); memoirs by Charles Colson (Born Again (1976)), G. Gordon Liddy (Will! (1980)), and John Dean (Blind Ambition: The White House Years (1976)) detailing their criminal roles in the Watergate coverup; and the memoirs of Patricia Hearst, the scion of a publishing dynasty, who was kidnapped by the Symbionese Liberation Army and later participated with her captors in an armed bank robbery for which she was imprisoned (Hearst & Moscow, Every Secret Thing (1981)).

[***50]

[*436] We reach a similar result under the liberty of speech clause of the California Constitution (art. I, § 2, subd. (a)). **n21** The California provision provides similar, and sometimes greater, protection of speech than the First Amendment (e.g., *Los Angeles Alliance for Survival v. City of Los Angeles* (2000) 22 Cal.4th 352, 366-367 & fn. 12, 993 P.2d 334), and neither party suggests any

reason why it should provide lesser protection under the circumstances of this case. **n22**

n21 We stress the narrow nature of our holding under both the federal and California Constitutions. We conclude only that section 2225(b)(1) is an overinclusive infringement of protected speech because it targets and confiscates *all* a convicted felon's proceeds from expressive materials that include any *substantial account* of the felony, in whatever context. We express no views on whether a statute targeting the income gained from expressive works that include accounts of the author's crimes could be drafted narrowly and precisely enough to overcome this problem of constitutional overbreadth. Moreover, nothing we say here precludes a crime victim, as a judgment creditor, from reaching a convicted felon's assets, including those derived from expressive materials that describe the crime, by generally applicable remedies for the enforcement and satisfaction of judgments. (See generally Code Civ. Proc., §§ 481.010 et seq., 680.010 et seq.) Nor do we intend, by our analysis in this case, to preclude further legislative steps, not directly related to the content of speech, to ensure that a convicted felon's income and assets, including those derived from storytelling about the crimes, are and remain available to compensate persons injured or damaged by the felon's crimes.

Finally, because we conclude that section 2225(b)(1) is overbroad for its legitimate purpose, we need not and do not address Keenan's contention, derived from Justice Kennedy's concurring opinion in *Simon & Schuster*, that a content-based regulation of speech is unconstitutional per se, and can never be justified by an interest of the state.

[***51]

n22 The Attorney General argues that even if section 2225(b)(1), confiscating proceeds from expressive materials that include a felon's story of the crime, is invalid, we should affirmatively uphold section 2225(b)(2), which confiscates profits from memorabilia, property, things, or rights sold for values enhanced by their felony-related notoriety. The Attorney General represents that he has pending a case, *Lockyer v. Brown, aka "X-Raided"* (Super.Ct. Sacramento County, 1999, No. 99AS02640) seeking to confiscate, under section 2225(b)(2), "profits" from a compact disc entitled *Unforgiven*, which features defendant Brown, a rap artist and convicted murderer. At the Attorney General's request, we have taken judicial notice of the complaint in the Sacramento action.

However, as indicated above, neither the parties nor the Court of Appeal have focused on the "notoriety value" provisions of section 2225(b)(2), which is clearly severable, but have debated only whether section 2225(b)(1), dealing with *storytelling* about the crime, is constitutional. At oral argument, Sinatra, Jr.'s, counsel acknowledged that, despite its brief prayer for statutory "profits" (§ 2225, subds. (a)(10), (b)(2)) as well as "proceeds" (*id.*, subds. (a)(9), (b)(1)), Sinatra, Jr.'s, complaint is premised solely on section 2225(b)(1), the storytelling provision. Counsel for both parties agreed that the applicability and validity of section 2225(b)(2) are not before us except as raised, for the first time in this court, by the Attorney General as amicus curiae. Under the circumstances, we decline the Attorney General's invitation to opine upon the constitutionality of section 2225(b)(2), and we leave that issue for a case presenting it more directly.

Similarly, because we conclude that the challenged provisions are invalid infringements on speech, we need not and do not address Keenan's argument, raised at all stages, that application to him of section 2225, which was enacted long after the kidnapping of Sinatra, Jr., violates federal and state constitutional prohibitions of ex post facto legislation.

[***52]

[*437] [**735] **CONCLUSION**

The trial court overruled Keenan's demurrer to Sinatra, Jr.'s, complaint, reasoning that the storytelling provision of California's statute (§ 2225(b)(1)), on which the complaint is solely based (see fn. 22, *ante*), is not unconstitutional. The Court of Appeal affirmed on similar grounds. Because we have concluded, contrary to both lower courts, that section 2225(b)(1) is invalid, we must reverse the judgment of the Court of Appeal.

The judgment of the Court of Appeal is reversed, and the cause is remanded for further proceedings consistent with the views expressed in this opinion.

BAXTER, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

WERDEGAR, J.

CHIN, J.

MORENO, J.

CONCURBY:
BROWN

CONCUR:

CONCURRING OPINION BY BROWN, J.

The majority correctly observes Civil Code section 2225, subdivision (b)(1), **n1** shares the essential constitutional flaws condemned in *Simon & Schuster, Inc. v. Members of N. Y. State Crime Victims Bd.* (1991) 502 U.S. 105, 116 L. Ed. 2d 476, 112 S. Ct. 501 (*Simon & Schuster*). Lest it seem the moral of the story is crime *does* pay, I write separately to [***53] dispel the understandable misconception that every "Son of Sam" law is unconstitutional. A properly drafted statute can separate criminals from profits derived from their crimes while complying with the First Amendment.

n1 All statutory references are to the Civil Code unless otherwise stated.

The *Simon & Schuster* court recognized the fundamental difference between works like The Confessions of Saint Augustine or Letter from Birmingham Jail and a ghost-written work entitled Snatching Sinatra. In the former examples, it is the public prominence, fame, wit, passion and eloquence of the authors that make these stories valuable. The "crimes" caused negligible harm to any actual victim and added nothing to the marketability of the stories. In contrast, Mr. Keenan's crime involved both a serious harm and is the source of his work's profitability; judging by the title of his literary effort, it is the celebrity status of his victim that makes the story noteworthy.

Notwithstanding today's decision, the state [***54] may constitutionally seize any asset of a criminal to redress the harm inflicted upon his victim. Additionally, the state may seize the fruits of the crime to render it unprofitable. For some works, like The Autobiography of Malcolm X, it may be difficult to determine the extent to which royalties result from the author's criminal [*438] involvement or his literary skill. But the existence of hard cases that might win an as-applied challenge does not mean all such laws are facially unconstitutional. The First Amendment protects schlock journalism as well as great literature. Thus, Mr. Keenan has every right to tell his story. That does not mean the First Amendment guarantees he can keep the money. And therein lies the tale.

In *Simon & Schuster*, *supra*, 502 U.S. at pages 118-119, the United States Supreme Court found New York's law could further two compelling state interests, which reflect the notion that crime should neither impoverish the victim nor enrich the criminal. Toward the former imperative, the court recognized the compelling interest in "ensuring that victims of crime are compensated by those who harm them." (*Id.* at p. 118.) Toward the [***55] latter end, the court acknowledged the compelling interest in "ensuring that criminals do not profit from their crimes." (*Id.* at p. 119.) The fulfillment of these interests restores both victim and criminal to the status [**736] quo ante and nullifies the tangible effects of the crime.

Simon & Schuster invalidated the New York law, however, because it seized speech-generated revenues without necessarily serving either state interest. "Should a prominent figure write his autobiography at the end of his career, and include ... a brief recollection of having stolen ... a nearly worthless item ... the Board would control his entire income ...." (*Simon & Schuster*, *supra*, 502 U.S. at p. 123.) Because the book's popularity would be due to the author's lawful prominence rather than his (perhaps previously undiscovered) crime, the author's income would not be a fruit of the crime, and thus seizure would not serve the antiprofit interest. Since the stolen item was nearly worthless, seizure would not serve the compensation interest. Accordingly, the court found the law "significantly overinclusive." (*Id.* at p. 121.) A properly structured statute [***56] could avoid this overinclusivity by seizing only assets that would compensate the victim or render crime unprofitable.

The hypothetically prominent figure who mentions a minor theft in his autobiography bears a strong resemblance to Saint Augustine, and very little to defendant. Defendant's kidnapping created more than trivial harm, and it appears the notoriety of his criminal conduct is substantially responsible for the salability of his literary efforts. Thus, seizure of defendant's royalties serves one or both of the compelling state interests. If so, the state may constitutionally distinguish between Snatching Sinatra and The Confessions of Saint Augustine.

The constitutionality of seizing a criminal's assets to compensate his victims is beyond dispute. As *Simon & Schuster* observed, every state has a [*439] body of tort law serving this exact interest. (*Simon & Schuster*, *supra*, 502 U.S. at p. 118.) To effect compensation, it is immaterial whether the funds come from the fruits of crime or the defendant's other assets.

Although compensation may have been a goal of New York's law, it failed to achieve it constitutionally. The law seized only those assets generated by [***57] the offender's storytelling. The problem was not the law's underinclusivity per se; after all, a statute need not solve every problem to be constitutional. A law would be underinclusive if it granted the victim only a partial share of the profits or compensation only up to a maximum sum. **n2** These limitations, however, would not create the constitutional defect cited in *Simon & Schuster*: the content-

based nature of the speech restriction.

> **n2** Indiana law, for example, seizes only 90 percent of income derived from crime. (Ind. Code Ann. § 5-2-6.3-3(a)(1)(B).) According to the logic underlying the Laffer curve (i.e., by suppressing the profit incentive, a 100 percent taxation rate will not yield revenue), a defendant who may retain some profits will be more inclined to write about his crime, thereby generating income with which to compensate the victim. To a significant degree, the compensation and antiprofit imperatives are thus in tension.

The high court deemed [***58] the law presumptively unconstitutional because it imposed a financial burden on speakers due to the content of their speech. (*Simon & Schuster*, *supra*, 502 U.S. at pp. 115-116.) The New York statute "singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content." (*Id.* at p. 116.) The dissenting opinion of Judge Newman in the court below demonstrated this content-based discrimination. (*Simon & Schuster, Inc. v. Fischetti* (2d Cir. 1990) 916 F.2d 777, 784 (*Fischetti*) (dis. opn. of Newman, J.).) Judge Newman observed the New York Crime Victims Board applied the law to the autobiography of Jean Harris, who had killed " 'Scarsdale Diet' Doctor Herman Tarnower" (*Simon & Schuster*, at p. 111) because the book referred to the homicide in two chapters. (*Fischetti*, at p. 785.) If her book had concerned only the conditions at her prison, her royalties, though enhanced by the notoriety of her crime, would have been protected from seizure. (*Ibid.*) The distinction between the treatment of the actual book and the hypothetical book shows how "the [***59] Son of Sam law establishes a financial [**737] disincentive to create or publish works with a particular content." (*Simon & Schuster*, at p. 118.)

The content-based discrimination triggered strict scrutiny, whereby the state must show the law is narrowly drawn to further a compelling state interest. (*Simon & Schuster*, *supra*, 502 U.S. at p. 118.) But New York limited the law's reach to " 'storytelling' " only; the [*440] court found no rational reason "why the State should have any greater interest in compensating victims from the proceeds of such 'storytelling' than from any of the criminal's other assets." (*Id.* at p. 119.) The content-based limitation thus not only created the need to establish a compelling interest, it also rendered the state's interest less than compelling: "the State has a compelling interest in compensating victims from the fruits of the crime, but little if any interest in limiting such compensation to the proceeds of the wrongdoer's speech about the crime." (*Id.* at pp. 120-121.) A law that shields assets such as Ms. Harris's home or stock portfolio from a compensation order hardly serves that interest.

The high court's reasoning shows that a law without [***60] this limitation would likely survive review, because the law would not be content based (thus avoiding strict scrutiny) and the law would narrowly serve the compelling interest of victim compensation, and thus, a fortiori, survive a lesser level of scrutiny. The Rhode Island Supreme Court discussed the validity of such a broader law in *Bouchard v. Price* (R.I. 1997) 694 A.2d 670 (*Bouchard*). **n3** "Neither plaintiffs nor the Attorney General justified the act's applicability solely to expressive activity. The state's compelling interest in compensating victims from the proceeds of crime would be better served, for example, by making available to a victim *all* the criminal's assets, however and wherever derived. Such an expansion of the resources potentially available to a victim would avoid the statute's Achilles' heel of singling out only expressive activity for a special burden. We note that victims of a crime may normally bring a civil action against the offender to recover damages. After a judgment has been obtained, a victim may proceed against the defendant's assets whether or not these assets represent royalties obtained from the commercial exploitation [***61] of the crime. The enforcement of such a civil judgment against a defendant's assets following a personal injury or property loss has not heretofore presented a First Amendment problem." (*Bouchard*, at pp. 677-678, fn. omitted.) Indeed, *Simon & Schuster* itself approved of New York's content-neutral "statutory provisions for prejudgment remedies and orders of restitution." (*Simon & Schuster*, *supra*, 502 U.S. at p. 118), and the majority likewise observes the propriety of content-neutral seizure of a defendant's assets to compensate a victim. (Maj. opn., *ante*, at p. 30, fn. 21.)

> **n3** The *Bouchard* court struck down a statute resembling New York's law in that it confiscated royalties from storytelling: i.e., " 'any publication, reenactment, dramatization, interview, depiction, explanation, or expression through any medium of communication which is undertaken for financial consideration. The term includes ... a movie, book, magazine or newspaper article, tape recording, still photograph, radio or television program, live presentation, or reproduction or presentation of any kind.' " (*Bouchard*, *supra*, 694 A.2d at p. 674, quoting definition of "commercial exploitation" in Criminal Royalties Distribution Act of 1983, R.I. Gen. Laws § 12-25.1-2(3).)

[***62]

[*441] A state may thus seize a defendant's assets in a content-neutral manner to ensure compensation. "*Simon & Schuster* does not ... stand for the proposition that the government cannot recoup the proceeds of expressive activity relating to crime. Rather, the government cannot single out those proceeds for special treatment while ignoring other assets." (*United States v. Seale* (3d Cir. 1994) 20 F.3d 1279, 1285, fn. 7.) Courts may thus constitutionally order restitution from sources including, but not limited to, the defendant's income from storytelling. (*Ibid.*; *U.S. v. Jackson* (5th Cir. 1992) 978 F.2d 903, 915.) The law may prevent a criminal from enjoying any of his wealth while his victim remains uncompensated.

The state may also pursue the compelling interest of depriving criminals of their profits. [**738] New York's law was defective in this regard; it did not fully deprive criminals of their profits, only those profits resulting from storytelling. If Jean Harris exploited her criminal notoriety by writing a book, the state could confiscate those royalties. If instead of telling her story she chose to exploit her notoriety by charging $25 for [***63] underwear depicting the "Scarsdale Diet" logo with a red slash through it, **n4** these royalties would be protected from seizure. The law's message was not that *crime doesn't pay* but that *speaking about crime doesn't pay*. Deterring crime is a compelling state interest, deterring speech is not. The disparate treatment accorded the income from her book and from the hypothetical merchandise reveals the discriminatory nature of the New York law.

n4 (See Learned, *The Constitutionality of Cashing in on Crime: Free Expression, Free Enterprise, and Not-Profit Conditions of Probation* (1995) 1 Suffolk J. Trial & Appellate Advoc. 79, fn. 10 (Learned) [describing the $25 boxer shorts marketed by convicted call girl/panderer Heidi Fleiss].)

Furthermore, the discrimination undermined the compelling nature of the interest served by the law. The state could not "offer any justification for a distinction between [storytelling] and any other activity in connection with its interest in transferring [***64] the fruits of crime from criminals to their victims." (*Simon & Schuster*, *supra*, 502 U.S. at pp. 119-120.) There is a compelling interest in depriving criminals of their profits, but little if any interest in limiting such deprivation to the proceeds of the wrongdoer's storytelling. (See *id.* at pp. 120-121.)

Whether the law pursues the compensation or antiprofit interest, a limitation on the law's scope to storytelling is the Achilles' heel of a Son of Sam provision. Virginia law, therefore, bars a defendant from exploiting her criminal notoriety through any means. It seizes "any proceeds or profits received or to be received directly or indirectly by a defendant or a transferee of that defendant from any source, as a direct or indirect result of his [*442] crime or sentence, or the notoriety which such crime or sentence has conferred upon him." (Va. Code Ann. § 19.2-368.20.) Regardless of whether a Virginia criminal profited by selling her account of the crime, her autograph, **n5** or her furniture for an exorbitant price, **n6** she could not enjoy such revenues under this law. **n7**

n5 (See *Rolling v. State ex rel. Butterworth* (Fla. Dist.Ct.App. 1999) 741 So. 2d 627.)

[***65]

n6 (See Learned, *supra*, 1 Suffolk J. Trial & Appellate Advoc. at p. 79, fn. 4 [describing sale of serial killer Jeffrey Dahmer's household goods].)

n7 Some states seizing profits do not expressly cover the fruits of criminal notoriety, instead defining as profits "any property obtained through or income generated from the commission of a crime; any property obtained by or income generated from the sale, conversion or exchange of proceeds of a crime, including any gain realized by such a sale, conversion or exchange; and any property that the offender obtained by committing the crime or income generated as a result of having committed the crime, including any assets obtained through the use of unique knowledge obtained during the commission of, or in preparation for the commission of, the crime, as well as any property obtained by or income generated from the sale, conversion or exchange of the property and any gain realized by such a sale, conversion or exchange." (Me. Rev. Stat. Ann. tit. 14, § 752-E; see also Colo. Rev. Stat. Ann. § 24-4.1-201; N.Y. Crime Victims Board Law § 632-a; N.D. Cent. Code § 32-07.1-01; W. Va. Code § 14-2B-3; Wyo. Stat. Ann. § 1-40-302.) It is not evident whether proceeds from writings about subjects unrelated to the crime would qualify as "income generated as a result of having committed the crime." (Me. Rev. Stat. Ann. tit. 14, § 752-E.)

[***66]

Section 2225, subdivision (b)(2) similarly avoids content discrimination in its seizure of profits. In conjunction with section 2225, subdivision (a)(10), it authorizes seizure of "all income from anything sold or transferred by the felon ... including any right, the value of which thing or right is enhanced by the notoriety gained from the commission of a felony ...." The statute is indifferent to the *thing's* expressive or nonexpressive character, and if expressive, its content. The majority correctly observes section 2225, subdivision (b)(2) is "clearly sever-

able" from subdivision (b)(1) (maj. opn., *ante*, at p. 31, fn. 22), and today's decision does not affect the continuing validity of the former provision. [**739]

The content neutrality of section 2225, subdivision (b)(2) is arguable, insofar as the law distinguishes between income-generating activity that exploits criminal notoriety and that which does not. For example, if Mr. Keenan published a book of poetry anonymously, the royalties would probably not qualify as profits as defined by the subdivision. But if he marketed the poems as "Sizzling Sonnets from the Sinatra Snatcher," the royalties would be enhanced by his [***67] criminal notoriety, and thus subject to seizure. **n8**

> **n8** Statutes that exclude from coverage works about topics unrelated to the crime would face an even stronger challenge, as the topic (content) would determine whether the state seized the royalties.

On the other hand, *Simon & Schuster* observed statutes may be content neutral, and thus avoid strict scrutiny, where they are intended to serve [*443] purposes unrelated to the content of the regulated speech, notwithstanding their incidental effects on some speakers or messages but not others. (*Simon & Schuster*, *supra*, 502 U.S. at p. 122, fn. *, citing *Ward v. Rock Against Racism* (1989) 491 U.S. 781, 105 L. Ed. 2d 661, 109 S. Ct. 2746; *City of Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41, 89 L. Ed. 2d 29, 106 S. Ct. 925.) Although New York's law was too overinclusive to qualify, a more narrowly drawn statute might face only intermediate scrutiny under *Ward* and *City of Renton*. (*Simon & Schuster* [***68] , *supra*, at p. 122, fn. *.) Moreover, even if held to be content based, a statute that pursues a compelling interest (depriving criminals of all their profits) and is narrowly drawn (seizing only profits) could survive strict scrutiny.

A law that neutrally seizes all profits of crime comports with *Simon & Schuster*, *supra*, 502 U.S. 105 and thus the First Amendment. Even when his victim has been fully compensated, a criminal is not entitled to profit from his crimes.

As the foregoing analysis shows, a state may constitutionally seize assets by pursuing the compelling interest of compensating victims, in which case the state may seize assets from any source (including assets that are not the fruits of the crime) up to the amount of the victim's damages. Likewise, a state may constitutionally seize assets by pursuing the compelling interest of depriving criminals of assets that are the fruits of crime. And there is no apparent reason why a state must select only one compelling interest to pursue. A state may pursue both interests separately; seizing all assets up to the amount of damage under the compensation rationale, and then all fruits of crime under the antiprofit [***69] theory. Because each phase would neutrally seize assets in furtherance of a compelling state interest, the law would avoid the constitutional pitfalls noted in *Simon & Schuster*.

BROWN, J.

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THE PEOPLE, Plaintiff and Respondent, v. ALFONSO CORTEZ CROSSDALE, Defendant and Appellant.

S097222

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 408; 39 P.3d 1115; 2002 Cal. LEXIS 617; 116 Cal. Rptr. 2d 686; 2002 Cal. Daily Op. Service 1633; 2002 Daily Journal DAR 1969

February 21, 2002, Filed

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

PRIOR HISTORY:
Kern County. Super. Ct. No. 77144. Lee Phillip Felice.

People v. Crossdale, 88 Cal. App. 4th 248, 105 Cal. Rptr. 2d 622, 2001 Cal. App. LEXIS 260 (5th Dist. 2001)

DISPOSITION:
Reversed and remanded.

COUNSEL:
Attorneys for Appellant: John Steinberg, under appointment by the Supreme Court, for Defendant and Appellant.

Attorneys for Respondent: Bill Lockyer, Attorney General, David P. Druliner and Robert R. Anderson, Chief Assistant Attorneys General, Jo Graves, Assistant Attorney General, Patrick J. Whalen and Robert M. Morgester, Deputy Attorneys General, for Plaintiff and Respondent.

JUDGES:
BROWN, J. WE CONCUR: GEORGE, C.J., KENNARD, J., WERDEGAR, J., CHIN, J., MORENO, J., Mc KINSTER, J. *

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division 2, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINIONBY:
BROWN

OPINION:

[*409] [**1115] The issue in this case is whether a first offense for **n1**Penal Code section 502.7, subdivision (a) (section 502.7(a)) can be punished as a felony if the amount of the loss does not exceed $400. The Court of Appeal concluded section 502.7(a) incorporates the grand theft loss provision of section 487, subdivision (a), and [***2] therefore reduced the offense [*410] to a misdemeanor and remanded for resentencing. We disagree, and therefore reverse the Court of Appeal's judgment.

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

I. FACTS AND PROCEDURAL BACKGROUND

The underlying facts are undisputed and largely immaterial to this question of statutory interpretation. We therefore adopt our statement of facts from that of the Court of Appeal.

Defendant Alfonso Cortez Crossdale was convicted by a jury of one count of obtaining telephone services by fraud (§ 502.7(a)), one count of possession of a firearm by a convicted felon (§ 12021, subd. (a)(1)), three counts of receiving stolen property (§ 496, subd. (a)), 18 counts of possessing completed checks with the intent to defraud (§ 475, subd. (a)), and one count of possessing a forged check with the intent to defraud (§ 475). In a bifurcated proceeding, the trial court found defendant had suffered a prior serious felony conviction, [***3] and two prior prison terms (§§ 667, subds. (b)-(i), 667.5, subd. (b)).

The loss from the telephone service obtained by fraud was less than $400. Defendant does not contest the sufficiency of the evidence that he violated section 502.7(a).

Rather, defendant contended, and the Court of Appeal agreed, that he cannot be convicted of a felony if the loss does not exceed $400. The court therefore reduced his conviction to a misdemeanor and remanded for resentencing.

We granted the Attorney General's petition for review.

II. DISCUSSION

Section 486 divides theft into two degrees, grand and petty theft. Grand theft is generally a "wobbler," punishable in the court's discretion as either a misdemeanor or a felony. (§§ 17, 489, subd. (b).) It is committed [**1116] in a variety of ways, including when money, labor, or property taken is of a value exceeding $400. **n2** (§ 487, subd. (a).) "Theft in other cases is petty theft" (§ 488), generally punishable as a misdemeanor. (§ 490; 2 Witkin & Epstein, [*411] Cal. Criminal Law, Crimes Against Property (3d ed. 2000) § 7, p. 26 ["Petty theft includes all thefts other than grand theft"].)

n2 Grand theft is also committed under other circumstances, including when domestic fowl, avocados, olives, and other farm crops of a value exceeding $100 are taken (§ 487, subd. (b)(1)(A)), when property is taken from the person of another, or when the property taken is an automobile, firearm, horse, sheep, or pig (§ 487, subds. (c), (d)); *People v. Salorse* (1882) 62 Cal. 139, 142 [grand larceny of horse committed without reference to its value]; *People v. Smith* (1968) 268 Cal. App. 2d 117, 119-120, 73 Cal. Rptr. 859 [grand theft from the person does not require any specified amount].) In addition, it is grand theft to sell, transfer, or convey an access card without the cardholder's or issuer's consent and with intent to defraud, with no

amount of loss stated. (§ 484e, subd. (a).) It is likewise grand theft to feloniously steal certain animal carcasses or another's gold dust, amalgam, or quicksilver, again with no amount of loss stated. (§§ 487a, subd. (a), 487d.) Other statutes set amounts of loss at other than the $400 figure. (§§ 484b [wobbler if loss exceeds $1,000], 487b [under specified circumstances, straight felony grand theft to convert real estate valued at $100 or more].)

[***4]

Section 502.7(a) provides: "Any person who, knowingly, willfully, and with intent to defraud a person providing telephone or telegraph service, avoids or attempts to avoid, or aids, abets or causes another to avoid the lawful charge, in whole or in part, for telephone or telegraph service by any of the following means is guilty of a misdemeanor or a felony, *except as provided in subdivision (g)*." (Italics added.) Section 502.7, subdivision (g) provides, "Theft of any telephone or telegraph services under this section by a person who has a prior misdemeanor or felony conviction for theft of services under this section within the past five years, is a felony."

As of 1985, violation of section 502.7 was punishable only as a misdemeanor. (Stats. 1984, ch. 1432, § 2, pp. 5020–5022.) In 1986, former section 502.7(a) was amended to provide that a person violating that subdivision "is guilty of a misdemeanor or a felony, *as provided in subdivision (f)*." (Stats. 1986, ch. 802, § 1, p. 2695, italics added.) Former subdivision (f) provided: "If the total value of all telephone or telegraph services obtained in violation of this section aggregates over four hundred dollars ($ 400) [***5] within any period of twelve (12) consecutive months during the three years immediately prior to the time the indictment is found or the case is certified to the superior court, or prior to the time the information is filed, or if the defendant has previously been convicted of an offense in excess of four hundred dollars ($ 400) under this section or of an offense in excess of four hundred dollars ($ 400) under the laws of another state or of the United States which would have been an offense under this section if committed in this state, a person guilty of such offense is punishable by imprisonment in the county jail not exceeding one year, or by a fine not exceeding one thousand dollars ($ 1,000), or both, or by imprisonment in the state prison, by a fine not exceeding ten thousand dollars ($ 10,000), or both." (Stats. 1986, ch. 802, § 1, p. 2697.)

Thus, under former section 502.7(a), a person could only be convicted of a felony or misdemeanor "*as provided in subdivision (f)*." Under former subdivision (f), a person was only guilty of either a misdemeanor or felony if the amount of the loss during the relevant period was in [*412] excess of $400, or if the person had previously been [***6] convicted of a predicate offense in excess of $400.

By contrast, the current version of the statute, as amended in 1993, provides that a violation of section 502.7(a) may be either a felony or a misdemeanor "*except* as provided in subdivision (g)." (Italics added.) Under section 502.7, subdivision (g), a violation is not a wobbler but a felony if the person has a predicate prior conviction. Other than the reference to subdivision (g), section 502.7(a) contains no other limitation on when its violation is either a misdemeanor or a felony. In particular, the statute no longer refers to a loss in excess of $400.

Thus, the plain language of the statute does not incorporate section 487, subdivision (a)'s $400 demarcation between grand and petty theft. Nor does it reference section 487, subdivision (a). [**1117] Rather, the language of section 502.7, subdivisions (a) and (g) demonstrates that the Legislature has expressly declared violation of the statute to be a wobbler for first offenders without reference to a monetary amount. If the Legislature had wanted to incorporate the $400 demarcation, it could have easily done so.

Section 502.7 addresses a growing problem in an increasingly [***7] technological age, and when there is no predicate prior conviction allows sentencing as either a felony or misdemeanor in the court's discretion based on factors doubtlessly including but not limited to the amount of loss. Apart from dollar loss, the court might well exercise its discretion to find the offense a felony when, for example, a sophisticated conspiracy is involved, or to find the offense a misdemeanor for less culpable offenders.

DISPOSITION

The judgment of the Court of Appeal is reversed, and the case remanded to that court for further proceedings consistent with this opinion.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

WERDEGAR, J.

CHIN, J.

MORENO, J.

McKINSTER, J. *

* Associate Justice of the Court of Appeal, Fourth Appellate District, Division 2, assigned by

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

17 of 37 DOCUMENTS

AMELCO ELECTRIC, Plaintiff and Respondent, v. CITY OF THOUSAND OAKS, Defendant and Appellant.

S091069

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 228; 38 P.3d 1120; 2002 Cal. LEXIS 589; 115 Cal. Rptr. 2d 900; 2002 Cal. Daily Op. Service 1056; 2002 Daily Journal DAR 1285

February 4, 2002, Filed

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

SUBSEQUENT HISTORY:
Rehearing Denied March 13, 2002, Reported at: 2002 Cal. LEXIS 1689.

PRIOR HISTORY:
Court of Appeal of California, Second Appellate District, Division Six. B129406. Ventura County. Super. Ct. No. 157153. Joe D. Hadden, Judge.

Amelco Electric v. City of Thousand Oaks, 82 Cal. App. 4th 373, 98 Cal. Rptr. 2d 159, 2000 Cal. App. LEXIS 570 (2d Dist. 2000)

DISPOSITION:
Reversed and remanded.

COUNSEL:
Attorneys for Appellant: Mark G. Sellers, City Attorney; Negele & Associates, James R. Negele; Lascher & Lascher and Wendy C. Lascher for Defendant and Appellant.

Parker, Milliken, Clark, O'Hara & Samuelian, Brown, Winfield & Canzoneri, Nowland C. Hong, Michael M. Mullins and Michael S. Simon for the League of California Cities as Amicus Curiae on behalf of Defendant and Appellant.

Attorneys for Respondent: Watt, Tieder, Hoffar & Fitzgerald, Michael G. Long, Gregory J. Dukellis and Dwight C. Hirsh for Plaintiff and Respondent.

Kamine, Steiner & Ungerer, Kamine Ungerer, Bernard S. Kamine, Matt Steiner and Joseph M. Rossini for Engineering Contractors' Association as Amicus Curiae on behalf of Plaintiff and Respondent.

Monteleone & McCrory, Thomas P. McGuire and Joseph C. Malpasuto for Southern California Contractors Association as Amicus Curiae on behalf of Plaintiff and Respondent.

Crowell & Moring, Donald [***2] E. Bradley; Rogers Joseph O'Donnell & Phillips, Neil H. O'Donnell and Aaron P. Silberman for the Associated General Contractors of California as Amicus Curiae on behalf of Plaintiff and Respondent.

Perkins & Miltner and Timothy E. Salter for the National Electrical Contractors Association, District Nine as Amicus Curiae on behalf of Plaintiff and Respondent.

Case, Ibrahim & Clauss, Brian S. Case, F. Albert Ibrahim and Charles W. Losness for Associations of Specialty Contractors as Amici Curiae on behalf of Plaintiff and Respondent.

JUDGES:
BROWN, J. WE CONCUR: GEORGE, C.J., BAXTER, J., CHIN, J., MORENO, J. DISSENTING OPINION BY

WERDEGAR, J. I CONCUR: KENNARD, J.

OPINIONBY:
BROWN

OPINION:

[**1122]

[*231] In this case we determine whether the abandonment theory of liability applies against a public agency, and whether plaintiff public works contractor, which sued for breach or abandonment of the public works contract, is entitled to compensation under a total cost method of measuring damages. The jury found the contract was breached and abandoned, and awarded total cost damages. The Court of Appeal affirmed. We conclude the [*232] theory of abandonment does not apply against a public entity, and that Amelco Electric [***3] failed to adduce sufficient evidence to warrant instructing the jury on total cost damages for breach of contract. We therefore reverse the judgment of the Court of Appeal.

I. FACTUAL AND PROCEDURAL BACKGROUND

In 1992, defendant City of Thousand Oaks (City) solicited bids for electrical work to be performed in the construction of the Civic Arts Plaza, a project including a civic center or office building, a dual-purpose 400-seat council chamber and forum theater, an 1,800-seat civic auditorium or performing arts theater, and an outside area (the project). Instead of a general contractor, the project was managed by Lehrer McGovern Bovis, Inc. (LMB), and the City solicited bids for the various prime contracts. City received five electrical work bids. Amelco Electric (Amelco), one of the largest electrical contractors in the United States, bid $6,158,378, and was awarded the contract. All five bids came within 10 percent of each other and the three lowest bids were within 3 percent of each other.

During the two-year construction process, City furnished 1,018 sequentially numbered sketches to the various contractors to clarify or change the original contract drawings, or to [***4] respond to requests for information. The vast majority of the changes were to one building, the civic center or office building, and to the outside lighting. Of the sketches issued, 248 affected the electrical cost. Amelco requested 221 change orders, and City and Amelco agreed upon 32 change orders encompassing these change order requests. As a result of these change orders, City paid Amelco $1,009,728 above the contract price, an increase of nearly 17 percent.

Amelco claimed at trial that the project involved an unusually high number of sketches that were difficult to work with. Amelco further claimed that scheduling the various contractors' work became more difficult as a result of the changes. Amelco testified it was at times required to delay or accelerate particular tasks and to shift workers among tasks to accommodate work by other trades. While Amelco maintained daily records of its work activities, it was unable to produce documentation of instances in which its performance of a work directive or [**1123] change order was delayed or interfered with by LMB's actions, and for which it was not compensated. The general foreman, the person responsible for actually recording the information, [***5] was given a hypothetical regarding recordkeeping practices: "If you came to this courtroom to work today, ... and the wall was moved, that would be something you would put in your daily log?" "No." "You wouldn't note that?" "I wouldn't put it down on my daily log."

[*233] Amelco's vice-president asserted the sheer number of changes made it "impossible" to keep track of the impact any one change had on the project or on Amelco, likening the effect to "death by 1,000 cuts." Amelco conceded it was inefficient in performing the work, but assigned responsibility for virtually all of that inefficiency to LMB.

In May 1993, Amelco wrote to LMB concerning "Work Directive 48, addendum No. 1," which Amelco asserted improperly shifted engineering documentation responsibilities to Amelco. Amelco also expressed concern that the electrical drawings being issued did not identify all revisions, or contain all prior revisions, and gave examples of how these omissions interfered with its performance. Amelco requested a change order and $203,759 in additional funds to hire a drafter to update the drawings, a foreperson, and a project engineer. LMB refused additional funds on the ground that these tasks [***6] were included in the original contract price. Amelco claimed at trial that it accepted this decision, did not hire any additional personnel to do the work, and signed a change order for zero dollars and zero additional time, because LMB verbally promised that "things are going to get better."

On July 29, 1994, over a year later, and approximately two months before the project was completed, Amelco sent a letter requesting a second change order be issued for Work Directive No. 48. Amelco asserted the executed change order did "not include any field productive labor impact or related problems," and that "the price for this work will follow in the near future."

In January 1995, Amelco submitted a $1.7 million total cost claim for costs allegedly resulting from the noncaptured costs of the change orders. The testimony was in conflict whether LMB had requested that Amelco submit such a claim; in any event, the claim was rejected.

Amelco filed this action, ultimately alleging abandonment and breach of the construction contract. By the time of trial, Amelco's claim had increased to $2,224,842 because of the discovery of additional costs.

The City asserted Amelco lost money on the project [***7] because it failed to start work promptly on the project, did not coordinate its work with other trades, such as by regularly attending mandatory coordination meetings, reduced its workforce so that it did not have enough workers to install the major electrical system components efficiently, did not have an organized manner of incorporating changes into the drawings (unlike other contractors on the project), performed work on the project under at least one subcontract for a different subcontractor during this period, and generally mismanaged its work.

[*234] After a five-week trial, the jury found the City had both breached and abandoned the contract, and awarded Amelco $2,134,586 respectively (but not cumulatively) for each claim.

The Court of Appeal affirmed. As relevant here, it concluded that as a matter of law a public works contract can be abandoned, and the jury was properly instructed on the measure of damages.

We granted the City's petition for review.

II. DISCUSSION

A. Does the Abandonment Theory of Liability Apply Against a Public Entity?

1. Background

In general, under long-standing California law, if a public contract is declared void, a contractor may not be [***8] paid for work performed under that contract. (*Miller v. McKinnon* (1942) 20 Cal.2d 83, 89, 124 P.2d 34 (*Miller*).) In *Miller*, we explained, "Persons dealing with the public agency are presumed to know the law with respect to the requirement of competitive bidding and act at their peril. ... [P] If, as we have seen, [**1124] the contract is absolutely void as being in excess of the agency's power, the contractor acts at his peril, and he cannot recover payment for the work performed." (*Miller*, at p. 89.)

Similarly, this court has not generally allowed quantum meruit recovery for extra work performed beyond the contract requirements. (*Zottman v. San Francisco* (1862) 20 Cal. 96, 101, 105-106 (*Zottman*).) In *Zottman*, the contractors were hired by the City of San Francisco to do work improving Portsmouth Square, including constructing a fence around the square. (*Id.* at p. 99.) After the contract was entered into, the officials appointed by the city's common council, "in [the] presence of the City Attorney, the President of the Board of Aldermen, and of different members of the Board, ordered the contractors to perform . [***9] . . extra work ... - that is, to construct a stone base in place of the one of wood, and to paint the iron of the fence - and assured them that the city would pay them therefor. ... All the members of the Common Council must have been aware of the order to the contractors, as the work was in full view from the windows of the Council chambers, and was the subject of general conversation and approval by the members at their various sessions and elsewhere, and no opposition to it was ever expressed by any member." (*Id.* at p. 99.) When the contractors were [*235] not paid for the extra work, they sued the city, and nonsuit was entered in the city's favor. (*Id.* at p. 100.)

We affirmed on the ground the city charter authorized only a contract given to the lowest bidder. (*Zottman, supra*, 20 Cal. at pp. 103, 108.) "A contract made in disregard of these stringent but wise provisions cannot be the ground of any claim against the city. ... The mode in which [the Common Council] could bind the [municipal] corporation by a contract for the improvement of city property was prescribed by the charter, and no validity could be given by them to a contract [***10] made in any other manner." (*Id.* at pp. 101-102.) We observed, " 'It may sometimes seem a hardship upon a contractor that all compensation for work done, etc., should be denied him; but it should be remembered that he, no less than the officers of the corporation, when he deals in a matter expressly provided for in the charter, is bound to see to it that the charter is complied with. If he neglects this, or chooses to take the hazard, he is a mere volunteer, and suffers only what he ought to have anticipated. If the statute forbids the contract which he has made, he knows it, or ought to know it, before he places his money or services at hazard.' " (*Id.* at pp. 104-105; *Los Angeles Dredging Co. v. Long Beach* (1930) 210 Cal. 348, 353, 291 P. 839 [it is "settled that the mode of contracting, as prescribed by the municipal charter, is the measure of the power to contract; and a contract made in disregard of the prescribed mode is unenforceable"]; *First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 669 ["No case has ever held that a city may be bound to a contract by estoppel"]; *id.* at p. 671 [***11] ["The proposition that a contract with a city is not binding unless formed in accordance with the city charter has been in place in California at least since the time of the Civil War, and is based on analogous authority traceable back to Chief Justice Marshall"].)

The question in this case is whether a public entity is liable under an abandonment theory to a contractor when it makes numerous changes to the contract work, and these changes allegedly make it difficult and more

costly to perform the contract because of delay, interference with the work of other trades, and other problems not captured in the price of the executed change orders. In California, the Courts of Appeal have concluded that private parties may impliedly abandon a contract when they fail to follow change order procedures and when the final product differs substantially from the original. (*Opdyke & Butler v. Silver* (1952) 111 Cal. App. 2d 912, 913-914, 916, 918-919, 245 P.2d 306 (*Opdyke*) [owner made numerous changes, the parties consistently ignored the requirement that changes be in writing and priced before the work was done, and owner paid sums substantially over the maximum contract [***12] limit without requesting justification [**1125] for [*236] the extra work]; *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal. App. 3d 151, 154-156, 159, 92 Cal. Rptr. 120 [summary judgment reversed because of disputed issues of fact on abandonment and other issues; noted "the parties consistently ignored the procedures provided by the contract for the doing of extra work," and that "abandonment of the contract can occur in instances where the scope of the work when undertaken greatly exceeds that called for under the contract"].)

In *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal. App. 3d 628, 632-634, 218 Cal. Rptr. 592 (*Peterson*), Container Corporation of America (CCA) contracted with C. Norman Peterson Co. (CNP) to modernize CCA's recycling mill based in part on drawings by CCA's engineer Industrial Mechanical Corporation. "During the first 14 months, the work was to be performed while the papermill was in operation. During the next two months, work was to be performed while the mill was shut down. This shutdown period was the most critical phase of the project; time was of the essence during this period so the mill could be restarted. [***13] There was then to be a two-month cleanup period." (*Id.* at p. 633.) During the shutdown phase hundreds of changes were ordered, and the written change order procedure was abandoned—"it became 'strictly oral.' " (*Id.* at p. 637.)

On appeal, the court affirmed the judgment entered in CNP's favor. It noted, a construction contract is abandoned "when an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered." (*Peterson*, *supra*, 172 Cal. App. 3d at p. 640.) "Abandonment requires a finding that *both* parties intended to disregard the contract." (*Id.* at p. 643; *Ben-Zvi v. Edmar Co.* (1995) 40 Cal.App.4th 468, 474 ["Abandonment occurs ... only where both contracting parties agree 'that the contract is terminated and of no further force and effect' "].) "Although the *contract* may be abandoned, the *work* is not." (*Peterson*, at p. 640.)

In *Peterson*, there were "hundreds of changes, many of them significant, resulting in extra work having to be performed by CNP. As in *Opdyke*, the requirement [***14] for written change orders was ignored during most of the project period, and it was completely abandoned during the critical shutdown stage." (*Peterson*, *supra*, 172 Cal. App. 3d at p. 641.) Moreover, the Industrial Mechanical Corporation engineer spent 16,414 hours redesigning the project after work had begun. (*Id.* 172 CA3d 628 at pp. 636, 642.)

The Court of Appeal also upheld the trial court's further finding that CCA had breached the contract. (*Peterson*, *supra*, 172 Cal. App. 3d at pp. 642-644.) "Rather than being inconsistent with abandonment, ... breaches by CCA [*237] were actually the precipitating cause for the construction contract being abandoned within the meaning of *Daugherty* and *Opdyke* and the subsequent implicit understanding by the parties to proceed with the project on a quantum meruit basis. So long as there was no double recovery based on the trial court's dual findings, we conclude the trial court could properly find both a breach of the contract and a subsequent abandonment of the contract brought about by the breach." (*Id.* at pp. 643-644.)

Dodge v. Harbor Boat Bldg. Co. (1950) 99 Cal. App. 2d 782, 222 P.2d 697 (*Dodge*) also appears [***15] to be cited by Amelco as an abandonment case, but it does not seem to rely on this theory. In *Dodge*, National Ship Service Co., Inc. (National Ship) performed subcontracting work for Harbor Boat Building Co. (Harbor Boat) "moth-balling" two naval vessels. (*Id.* at pp. 784-785.) While the project was ongoing, the Navy stated that change orders would be issued to account for certain extra work, and invited the contractors to submit a request. (*Id.* at p. 786.) National Ship submitted to Harbor Boat a detailed description of its $79,592.65 of extra work (*id.* at p. 789) requested by Harbor Boat that was " 'different from the original specifications or not specified at all.' " (*Id.* at p. 787.) [**1126] National Ship invited Harbor Boat to inspect its records; Harbor Boat accepted them as correct. (*Id.* at p. 791.) Harbor Boat submitted a consolidated request to the Navy which did not separately delineate National Ship's costs. (*Id.* at pp. 789, 791.) While Harbor Boat was paid $141,622 from the Navy for the extra work, it paid National Ship nothing. (*Id.* at p. 789.) The trial [***16] court awarded National Ship a net judgment of $61,610, apparently on a quantum meruit theory. (*Id.* at p. 791.)

The Court of Appeal affirmed, noting there was an implicit "determination by the trial court that the value of the work done by National Ship provided a proper basis for a judgment in its favor and that it was unnecessary to

sue on the original contract." (*Dodge*, *supra*, 99 Cal. App. 2d at p. 790.) The court noted that "a [*238] different result would not have been reached if plaintiff had sued upon the contract, and also for the extra work." (*Id.* at p. 791.)

Hence, in *Dodge*, it appears the contractor carefully delineated its $79,592.65 in costs (*id.* at p. 789) from the extra work requested by Harbor Boat that was " 'different from the original specifications or not specified at all.' " (*Dodge*, *supra*, 99 Cal. App. 2d at p. 787.) Harbor Boat was paid for that and its own extra work, but failed to pass on any portion of the Navy's payment to National Ship. This obvious inequity does not suggest the Court of Appeal concluded the contract was abandoned, but rather that National Ship was found to be entitled to [***17] payment for at least a portion of the authorized extra work. Indeed, the Court of Appeal noted that "a different result would not have been reached if plaintiff had sued upon the contract, and also for the extra work." (*Id.* at p. 791.)

The United States Federal Court of Claims has historically recognized government breach of contract liability under the doctrine of cardinal change. Here, Amelco asserts the abandonment doctrine is coextensive with the cardinal change doctrine. In fact, the theories are fundamentally different. Under *Opdyke* and *Peterson*, once the parties cease to follow the contract's change order process, and the final project is materially different from the project contracted for, the contract is deemed inapplicable or abandoned and is set aside. The plaintiff may then recover the reasonable costs for all of its work. (*Peterson*, *supra*, 172 Cal. App. 3d at p. 645; see *Opdyke*, *supra*, 111 Cal. App. 2d at p. 919.) There is little, if any, separation between the theory of liability and the measure of damages. This is the approach Amelco urges we apply here.

Under the cardinal change doctrine, the cardinal change "constitutes [***18] a material breach of the contract." (*Alliant Techsystems, Inc. v. U.S.* (Fed. Cir. 1999) 178 F.3d 1260, 1276 (*Alliant*).) The contractor may recover breach of contract damages for that additional work. (*Saddler v. United States* (Ct.Cl. 1961) 152 Ct. Cl. 557, 287 F.2d 411, 414-416 [cardinal change entitled contractor to expenses properly attributable to changes defendant required]; *Air-A-Plane Corporation v. United States* (Ct.Cl. 1969) 187 Ct. Cl. 269, 408 F.2d 1030, 1033.) There is no hint in any Federal Circuit or Court of Claims case to which we have been directed that the terms of the federal contract are held inapplicable or set aside for the period prior to the breach, or that the government's payments for other work not affected by the cardinal change are suddenly compensated on a quantum meruit basis. (See, e.g., *Stone Forest Industries, Inc. v. U.S.* (Fed. Cir. 1992) 973 F.2d 1548, 1552 ["If only a severable portion of a contract was breached, the non-breaching party can recover damages for that portion of the contract but its remaining contractual duties are not discharged"] and cited in [***19] *Alliant*,at p. 1276; *Stone Forest Industries*, at p. 1552 ["if a contract is not clearly divisible ... the breaching party can not require the non-breaching party to continue to perform what is left of the contract"]; *Alliant*, at p. 1276 ["Such a material breach has the effect of freeing the contractor of its obligations under the contract, including its obligations under the disputes clause"].) Moreover, the jury in this case was never instructed on the cardinal change theory. [**1127] We therefore do not reach the issues of whether the cardinal change theory applies in California, and whether the change here was cardinal.

2. Analysis

We now consider whether the abandonment theory of liability applies against a public entity. We conclude it does not, since such a theory [*239] is fundamentally inconsistent with the purpose of the competitive bidding statutes.

Under the abandonment doctrine, once the parties cease to follow the contract's change order process, and the final project has become materially different from the project contracted for, the entire contract—including its notice, documentation, changes, and cost provisions—is deemed inapplicable or abandoned, and the plaintiff [***20] may recover the reasonable value for all of its work. Were we to conclude such a theory applied in the public works context, the notion of competitive bidding would become meaningless.

Even assuming there is substantial evidence of abandonment in this case, the entire notion of the parties abandoning a public works contract, with its strict statutory requirements, is anomalous. General law cities, such as the City of Thousand Oaks, are statutorily required to award public contracts in excess of $5,000 to the lowest responsible bidder. (Pub. Contract Code, § 20162.) We have generally not allowed recovery on a quantum meruit basis where there is a defect in the bidding rendering the contract void. (*Miller*, *supra*, 20 Cal.2d at p. 89.) Amelco asserts this principle is inapplicable when the underlying contract was valid when entered into, and that "the competitive bidding laws are irrelevant to the propriety of the award" in this case. However, if we were to agree the City's numerous changes could result in the public contract being set aside in its entirety, Amelco would find itself in no different situation, and should receive no different treatment, [***21] than a contractor who has performed under a void contract. The City would not have

had the authority to contract with Amelco for a quantum meruit payment, free from any of the prior contract's restraints, but would have been required to bid the project. "*A fortiori* the court [is] without authority to abrogate the bidding statute and make a new contract between the parties which the defendants were powerless to do." (*Paterson v. Board of Trustees* (1958) 157 Cal. App. 2d 811, 819, 321 P.2d 825.)

"It is clear 'that neither the doctrine of estoppel nor any other equitable principle may be invoked against a governmental body where it would operate to defeat the effective operation of a policy adopted to protect the public.' " (*Kajima/Ray Wilson v. Los Angeles County Metropolitan Transportation Authority* (2000) 23 Cal.4th 305, 316 (*Kajima*).) "We have stated that the competitive bidding statutes are ' "enacted for the benefit of property holders and taxpayers, and not for the benefit or enrichment of bidders, and should be so construed and administered as to accomplish such purpose fairly and reasonably with sole reference to the public interest. " ' " [***22] (*Id.* at pp. 316–317, 96 Cal. Rptr. 2d 747, 1 P.3d 63.) It is difficult, however, to [*240] ascertain how the general public benefits by allowing a contractor to claim abandonment of the public works contract following completion of the work, and recover for the reasonable value of its work; indeed, just the opposite seems true. Permitting such recovery would appear to unduly punish the taxpaying public.

Moreover, allowing a contractor to claim, following completion of the work, that the parties implicitly set aside a public works contract implicates significant public policy concerns. Under the abandonment doctrine, the plaintiff need not demonstrate—and even now Amelco cannot state—at what point the contract was abandoned. As one of Amelco's experts testified, "So there's no one point in time where Amelco could have sat back and said, gee, they've abandoned the contract, except maybe at the end when they got all their costs together and they looked back and said, wow, what just happened to us. And I guess that's when they knew it was abandoned." Amelco's project manager did not even determine Amelco had a claim on the project until November 1994, after the work was completed. Under Amelco's approach, [***23] a certain number of changes may be [**1128] permissible, but at some indeterminate point, the next requested change makes the number "excessive," the competitively bid contract is set aside, and the contractor recovers on a quantum meruit basis from the beginning of the project onward. Such a vague definition fails to provide any meaningful guidance as to when that line has been crossed. Public entities would not receive timely notice of claims that would allow them to make project management, budget, or procedural adjustments during the course of construction. Rather, contractors would be permitted to wait until a project was completed before giving notice of "too many" changes, thus creating intolerable uncertainty in the budgeting and financing of construction projects.

In addition, allowing contractors to recover in quantum meruit for the actual as opposed to the bid cost of a project would encourage contractors to bid unrealistically low with the hope of prevailing on an abandonment claim based on the numerous changes inherent in any large public works project. One of the purposes of the public contracting laws is to prevent collusion and favoritism in selecting contractors. ([***24] Pub. Contract Code, § 100, subd. (d) [Legislature's intent in enacting Public Contract Code includes "eliminating favoritism, fraud, and corruption in the awarding of public contracts"].) One can imagine a situation where a friend of a public official bids extremely low, with the understanding that numerous changes in the contract, many perhaps not even affecting the contractor, will be forthcoming. Such scenarios would simply provide an endrun around the public works bidding requirements. Moreover, if abandonment is recognized as a theory of recovery for public works, "the possibility of significant monetary gain alone may [*241] encourage frivolous litigation and further expend public resources." (*Kajima*, *supra*, 23 Cal.4th at p. 317.) Finally, "prudence is warranted whenever courts fashion damages remedies in an area of law governed by an extensive statutory scheme." (*Ibid.*)

Public Contract Code section 7105 provides in part that a public works contract required to be awarded by competitive bid, "may be terminated, amended, or modified only if the termination, amendment, or modification is so provided in the contract or is authorized [***25] under provision of law other than this subdivision. The compensation payable, if any, for amendments and modifications shall be determined as provided in the contract. The compensation payable, if any, in the event the contract is so terminated shall be determined as provided in the contract or applicable statutory provision providing for the termination." (Pub. Contract Code, § 7105, subd. (d)(2).)

Amelco contends Public Contract Code section 7105 applies only to compensation for termination, amendment, or modification of a contract, not to damages for its abandonment. Under the abandonment theory, however, the original contract is set aside and the contractor paid for the reasonable value of its work. It is difficult to understand how such a radical change is not a modification or termination of the public contract subject to section 7105. Indeed, given a public works project must generally be governed by a valid contract, abandonment cannot be one of the changes "authorized under provision

of law" contemplated by section 7105.

Amelco observes Civil Code section 3262, pertaining to mechanic's [***26] liens, was amended in 1993 to include "abandonment" in subdivision (d)(1) and (2). Subdivision (d)(1) and (2) specifies that waiver and release forms required from a contractor to receive progress payments must contain substantially the following language: "This release of any mechanic's lien, stop notice, or bond right shall not otherwise affect the contract rights, including rights between parties to the contract based upon a rescission, *abandonment*, or breach of the contract, or the right of the undersigned to recover compensation for furnished labor, services, equipment, or material covered by this release if that furnished labor, services, equipment, or material was not compensated by the progress payment." (Italics added.) Amelco argues that by this amendment, "the Legislature has clearly recognized the doctrine of abandonment in the construction contract context." Asserting Civil Code section 3262 is applicable to both private and public [**1129] contracts, Amelco argues it evidences a legislative intent "that abandonment claims are valid against public agencies and not inconsistent with the statutory competitive bidding scheme it created."

It is not clear [***27] what the Legislature meant in amending the sample forms in Civil Code section 3262. The amended language does not, however, ineluctably mean the Legislature is endorsing the abandonment theory for public [*242] contracts. It may mean nothing more than if such a claim is available, it is not waived by signing the release. Indeed, it is unlikely the Legislature intended to recognize the abandonment doctrine for public works as well as private contracts. Such a conclusion, arguably overturning decades of case law regarding the unavailability of quantum meruit recovery against a public entity, would no doubt be more prominently featured than by simply amending a sample form regarding mechanic's liens.

While Amelco relies on California abandonment cases, such as *Opdyke*, *supra*, 111 Cal. App. 2d 912 and *Peterson*, *supra*, 172 Cal. App. 3d 628, they are distinguishable on the ground they involved private, not public parties. Amelco is one of the largest electrical contractors in the country, and certainly was aware at the time it was building this project that public works contracts are the subject of intensive statutory regulation and lack the freedom of [***28] modification present in private party contracts.

Amelco also asserts the City is liable for a breach of its agreement in the same manner as a private party. That is correct, and in this case the jury found the City had breached the contract. Recovery for a specific breach, however, with its requirements of causation and damages, is far different from abandonment, in which the entire competitively bid contract is set aside, and the contractor recovers on a quantum meruit basis from the beginning of the project onward.

The dissenting opinion broadly refers to "the rule usually applied in this country." (Dis. opn. of Werdegar, J., *post*, at p. 5.) It cites, however, no out-of-state or federal authority upholding the abandonment doctrine in the public works context. Rather, it relies solely on the cardinal change doctrine, which as we have already described, is materially different from abandonment. (See *ante*, pp. 9–11.)

B. Measure of Damages

We next consider whether Amelco adduced sufficient evidence to warrant instructing the jury on the total cost method of measuring damages. The City does not argue total cost recovery is never appropriate against a public agency, [***29] only that such a damages theory is inappropriate here. For this reason, we do not determine whether total cost damages are ever appropriate in a breach of public contract case, but rather whether the theory for such damages was in this case properly submitted to the jury.

Nor does the City challenge the jury's finding of breach of contract; rather, it challenges only the manner in which damages were calculated. In particular, it asserts that in order to proceed on a total cost theory Amelco [*243] should have been required to establish (1) the impracticality of proving actual losses directly; (2) the plaintiff's bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs. (*Servidone Construction Corp. v. United States* (1991) 931 F.2d 860, 861 (*Servidone*); see Aaen, *The Total Cost Method of Calculating Damages in Construction Cases* (July 1991) 22 Pac. L.J. 1185, 1195–1196 (Aaen), citing *WRB Corporation v. United States* (1968) 183 Ct.Cl. 409, 426 (*WRB*).) The Court of Appeal concluded the City had waived this claim by failing to request an appropriate jury instruction. However, as we [***30] understand the City's claim, the City essentially asserts not instructional error, but that there was not sufficient evidence to warrant instructing the jury on the total cost theory of damages. (See *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572, 882 P.2d 298 [a party is entitled upon request to instruction on every theory supported by substantial evidence].)

1. Background

Under a breach of contract theory, the plaintiff must demonstrate a contract, [**1130] plaintiff's performance or excuse for nonperformance, defendant's breach, and

damage to the plaintiff. (4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 476, p. 570.) " 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. [Citations.] This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550, 981 P.2d 978.) [***31] "Predictability about the cost of contractual relationships plays an important role in our commercial system." (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683, 254 Cal. Rptr. 211, 765 P.2d 373.)

The total cost method of determining damages is generally disfavored. (*Servidone*, *supra*, 931 F.2d at p. 861 ["A trial court must use the total cost method with caution and as a last resort"]; *WRB*, *supra*, 183 Ct.Cl. at p. 426 ["This theory has never been favored by the court and has been tolerated only when no other mode was available"].) Under this method, damages are determined by "subtracting the contract amount from the total cost of performance." (Aaen, *supra*, 22 Pac. L.J. at p. 1187, fn. omitted; see also *State of California ex rel. Dept. of Transportation. v. Guy F. Atkinson Co.* (1986) 187 Cal. App. 3d 25, 32–34, 231 Cal. Rptr. 382 [upholding application of jury verdict method, which is "used to determine a rough approximation of damages, especially in sizable construction cases when mathematical precision is impossible"].) Before this method may be used, the trial court [*244] bears the initial responsibility [***32] of determining that each element of the four-part test set forth above can be met. (See Aaen, at pp. 1195–1196; *id.* at p. 1187 ["Courts have developed a four-part test which must be met before the total cost method will be used" (fn. omitted)]; cf. *Geolar, Inc. v. Gilbert/Commonwealth Inc.* (Alaska 1994) 874 P.2d 937, 945.) If prima facie evidence under this test is established, the trier of fact then applies the same test to determine the amount of total cost or modified total cost damages to which the plaintiff is entitled. "The total cost method is not a substitute for proof of causation," (Aaen, at p. 1190) and "should be applied only to the smallest affected portion of the contractual relationship that can be clearly identified." (*Id.* at p. 1198.) As the United States Court of Appeals for the Federal Circuit has stated, "Clearly, the 'actual cost method' is preferred because it provides the court ... with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that – equitable – and not a windfall for either the government or the contractor." (*Dawco Construction, Inc. v. United States* (Fed.Cir. 1991) 930 F.2d 872, 882, [***33] overruled on other grounds in *Reflectone, Inc. v. Dalton* (Fed. Cir. 1995) 60 F.3d 1572, 1583.)

In *Boyajian v. United States* (Ct.Cl. 1970) 191 Ct. Cl. 233, 423 F.2d 1231 (*Boyajian*), the United States Court of Claims dismissed certain contract claims because of the failure to demonstrate proof of damages. In *Boyajian*, plaintiff combined all of the alleged breaches of contract, and "without in any way attempting to relate any specific damage items to any particular breach, simply claimed the excess of the entire amount spent in performing the contract over the total contract amount received." (*Id.* 423 F2d 1231 at p. 1241.) "The proof ... in effect consisted only of a schedule, supported by an accountant's testimony, indicating what plaintiff's books and records showed were plaintiff's total contract costs, the total contract receipts, and plaintiff's total loss, being the difference between the costs and the receipts .... This is not in and of itself acceptable 'proof.' ... 'The costs must be tied in to fault on defendant's part. Plaintiff's claim is something like an attempt to secure damages based on the difference between costs and the contract [***34] price or a bid price.' " (*Id.* 423 F2d 1231 at p. 1239.) " 'Proof that the plaintiff's costs exceeded his payments under the contract would not in the usual case give rise to his right to recover the difference.' " (*Ibid.*) "Recovery of damages for a breach of contract is not allowed unless acceptable evidence demonstrates that the damages [**1131] claimed resulted from and were caused by the breach." (*Id.* 423 F2d 1231 at p. 1235.) "Contrary to these basic causal-connection damage principles, no attempt is here made to relate any specific amount of increased costs to any particular alleged breach. Nor is any satisfactory explanation given as to why such an attempt was not made or why it would not have produced reasonably accurate results." (*Ibid.*) "On this record, it is not possible to [*245] conclude that plaintiff's total contract loss, *i.e.*, the difference between plaintiff's contract expenditures and its contract receipts, is reasonably to be equated with the increased costs directly resulting from defendant's alleged breaches." (*Id.* 423 F2d 1231 at p. 1236; see *WRB*, *supra*, 183 Ct.Cl. at p. 426 [this case fails the four-part test because of "plaintiff's complete failure to maintain accurate cost records [***35] during performance" and failure to rebut government evidence that increased cost is partly plaintiff's fault].)

Likewise in *Huber, Hunt & Nichols, Inc. v. Moore* (1977) 67 Cal. App. 3d 278, 136 Cal. Rptr. 603, the contractor claimed that the architect's plans and specifications were negligently prepared and contained errors and omissions, and that the architects were negligent and dilatory in approving change orders, approving shop drawings, and in the overall supervision of the work. (*Id.* at p. 289.) Relying on *Boyajian*, *supra*, 423 F.2d 1231, the

court rejected the contractor's claim that it should have been entitled to rely on the total cost theory (*Huber*, at pp. 307–309), stating, "it is obvious that Contractor could have maintained a proper accounting system to establish its alleged damage proximately caused by [defendant's] alleged negligence, if it had desired to do so." (*Id.* at p. 309.) "If we were to accept Contractor's contention as the law of this state, the result would, for all practical purposes, nullify all laws regarding competitive bidding on public contracts. Under such a concept, contractors [***36] could submit any bid necessary to obtain the job knowing that the public agency (or its architects) would be required to pay whatever costs contractor incurred on the project if contractor could discover some error or omission *however irrelevant* in the plans and specifications." (*Id.* at p. 310.) "In the final analysis what Contractor actually complains of is that the amount of money which Owner paid Contractor under the 25 [change orders] and the time allowed for the changes or additional work was not sufficient to reimburse Contractor for its total cost and total delay." (*Ibid.*) "It was within Contractor's legal power to compute estimated change order costs in a manner which would compensate Contractor for its total loss. It failed to do so." (*Ibid.*)

2. Analysis

We conclude Amelco failed to adduce substantial evidence to warrant instructing the jury on the four-part total cost theory of damages. In particular, Amelco failed to adduce evidence to satisfy at least the fourth element of the four-part test, i.e., that it was not responsible for the added expenses. A corollary of this element of the test is that the contractor must demonstrate [***37] the defendant, and not any one else, is responsible for the additional cost. (*S.W. Electronics & Manufacturing Corp. v. United States* (Ct.Cl. 1981) 228 Ct. Cl. 333, 655 F.2d 1078, 1087 ["defendant is not liable for all of the added expense which plaintiff incurred and therefore plaintiff's total cost claim must fail"]; Aaen, *supra*, 22 [*246] Pacific L.J. at p. 1202 [In complex situations that may involve multiple prime contractors, the "plaintiff must prove not only that he or she was not liable for the extra cost in this situation but that the defendant was responsible"].)

Here, as in *Boyajian*, *supra*, 423 F.2d 1231, Amelco alleged and the jury was instructed it could find a breach of the contract on numerous grounds, including breach of the implied warranty of correctness, breach of contract by preventing or hindering plaintiff's performance of the contract, providing an inadequate design, making excessive changes to the project, making changes in a disorganized manner, failing to properly coordinate the work of the multiple prime contractors, accelerating Amelco's work, and failing to make payments to [**1132] Amelco in a timely manner. [***38] **n1** Amelco never attempted to demonstrate how a particular alleged breach caused certain damages. Rather, Amelco conceded no effort was made during the project to distinguish between those inefficiencies that were Amelco's and those believed to be the [*247] responsibility of the City (and presumably other prime contractors and subcontractors). Moreover, Amelco conceded it had been inefficient in performing the contract and that it had reduced its claim by an apparently arbitrary 5 percent, or $116,843, to account for any inefficiency on its part in performing the contract. For the remaining 95 percent, the jury was simply asked to assume this inefficiency was the fault of LMB.

n1 The jury was instructed regarding the breach of contract claim, "By furnishing plans and specifications to bidders on a construction project, the owner thereby warrants that the plans and specifications are reasonably accurate and suitable for their intended purpose." "The City breached the contract if the City provided important facts about the project to Amelco, at bid time, such as in the plans or specifications, which Amelco relied upon, but the City: 1. Failed to disclose other material facts which materially qualified the facts which were disclosed; or 2. Failed to disclose other material facts, the absence of which made the facts disclosed likely to mislead Amelco; or 3. Failed to disclose other material facts which were known or accessible only to the City, and which the City knew were not known by Amelco, [and] not reasonably discoverable by Amelco." The City "breached the contract if [it] prevented or hindered plaintiffs ... performance of the contract." In addition, the jury was instructed, "Amelco claims the City breached and/or abandoned the contract by doing the following: 1. Providing an inadequate design; 2. Making excessive changes to the project; 3. Making changes in a disorganized manner; 4. Failing to properly coordinate the work of the multiple prime contractors; 5. Accelerating Amelco's work; and 6. Failing to make payments to Amelco in a timely manner."

"If you find that the City breached or abandoned the contract, then Amelco is entitled to recover the reasonable value of the work performed by it less the payments made by the City, and less any costs incurred by Amelco which are not fairly attributable to the City." "The measure of damages for the breach of contract is that amount which will compensate the injured party for all the detriment or loss caused by the breach, or which in the ordinary course of things, would [be] likely to result therefrom. The injured party should receive

> those damages naturally arising from the breach, or those damages which might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probable result of the breach. As nearly as possible, the injured party should receive the equivalent of the benefits of performance. [P] Damages must be reasonable. A party cannot receive a greater amount as damages than he could have gained by full performance of the contract." "Once a Plaintiff ... proves that it is reasonably certain that it has suffered a particular loss or type of harm as a result of the breach by the Defendant ...,the law does not require Plaintiff ... to prove the exact amount of that loss or harm." "You may not award any damages for a loss or harm resulting from a breach of contract if Defendant proves that Plaintiff could have avoided that loss or harm by making reasonable efforts or expenditures once it became aware of the breach."

[***39]

Nor did Amelco demonstrate when any particular breach occurred. Rather, it sought to recover all of its costs over the life of the contract if the jury found at any undetermined point the contract had been breached.

Amelco asserts we have applied the total cost method in cases involving breach of the implied warranty of correctness, citing *Warner Constr. Corp. v. City of Los Angeles* (1970) 2 Cal.3d 285, 85 Cal. Rptr. 444, 466 P.2d 996, and *City of Salinas v. Souza & McCue Construction Co., Inc.* (1967) 66 Cal.2d 217, 57 Cal. Rptr. 337, 424 P.2d 921, disapproved on other grounds in *Helfend v. Southern Cal. Rapid Transit Dist.* (1970) 2 Cal.3d 1, 14, 84 Cal. Rptr. 173, 465 P.2d 61. At the outset, it is not clear the jury here found the City had breached the implied warranty of correctness. As noted, the jury was instructed on several possible breach theories, and was not required to indicate which theory its verdict was based on. In any event, both *Warner* and *City of Salinas* appear to award only those damages attributable to the breach, not the contractor's total costs under the entire contract. (*Warner*, at p. 301 [plaintiff [***40] should recover additional cost of construction attributable to city's misrepresentation]; *City of Salinas*, at p. 225 [difference between fair and reasonable cost of actual performance, and what it would have been in the absence of misrepresentation, due to the City's misrepresentation].) As noted, Amelco [**1133] has failed to demonstrate such a causal connection here.

Amelco asserts that even if the jury should have been instructed on the four-part total cost test, that error was harmless because these factors were adequately covered by other instructions. As we view the City's contention, however, the issue is whether the jury should have been instructed on the theory of total cost damages at all.

In any event, we disagree the jury was sufficiently guided by the totality of the instructions that damages had to be linked to a particular breach by the City. The jury was instructed, "If you find that the City breached or abandoned the contract, then Amelco is entitled to recover the reasonable value of the work performed by it less the payments made by the City, and less any costs incurred by Amelco which are not fairly attributable to the City." Under such global instruction, caused [***41] in part by the misinstruction on [*248] abandonment, the jury was led to believe if it found any basis for breach of contract, regardless of when it occurred in the performance of the contract, Amelco was entitled to receive damages for the reasonable value of work performed by it during the life of the contract. Indeed, relying on this instruction, Amelco argued to the jury, "If you find either that Amelco's and the city's contract was abandoned or it was breached, the method of calculating the damage is the same." Amelco conceded it was unable to identify those costs attributable to the City and those costs attributable to itself and others. Hence, it is unclear what evidence the jury would have looked to in determining those amounts "not fairly attributable to" the City's actions. Nor did other breach of contract instructions clarify the jury was to correlate the damages to a particular breach, and not simply award damages for the reasonable value of the work performed over the life of the contract if any breach was found.

Amelco also asserts that if we fail to uphold the total cost method here, "public entities [will] be motivated to change, mismanage and disrupt problem projects as [***42] much as possible to make it impossible for a contractor to determine the separate cost of each distinct change." Here, Amelco has simply failed to demonstrate the existence of such impossibility.

Under these circumstances, the jury should not have been instructed to calculate Amelco's loss from any breach of contract under a total cost measure of damages.

DISPOSITION

The judgment of the Court of Appeal is reversed, and the part regarding breach of contract is remanded to the Court of Appeal with instructions to remand to the trial court for a retrial on the issue of damages.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

BAXTER, J.

CHIN, J.

MORENO, J.

DISSENTBY:
WERDEGAR

DISSENT:

DISSENTING OPINION BY WERDEGAR, J.

It has long been the rule in this state, **n1** in other states, **n2** and in federal court, **n3** that when an owner enters into a construction contract with a builder or contractor, and the owner thereafter [*249] "imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered" (*Peterson*, *supra*, 172 Cal. App. 3d 628 at p. 640), the law provides the contractor a remedy. [***43] When such a situation arises in this state, the original contract is [**1134] considered mutually abandoned and replaced with a new contract that allows the contractor to recoup its actual costs. (*Id.* at p. 645.) Whether labeled an "abandonment" of the contract or a "cardinal change," **n4** the doctrine is limited to the construction context. Albeit rarely invoked, **n5** the doctrine operates as a safety valve for contractors to recover their actual costs for construction projects that, through no fault of their own, go out of control, far beyond the intention of the contracting parties.

n1 *C. Norman Peterson Co. v. Container Corp. of America* (1985) 172 Cal. App. 3d 628, 640, 218 Cal. Rptr. 592 (*Peterson*); *Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal. App. 3d 151, 92 Cal. Rptr. 120 (*Daugherty*); *Opdyke & Butler v. Silver* (1952) 111 Cal. App. 2d 912, 245 P.2d 306 (*Opdyke*).

n2 See, e.g., *Greenlee County v. Webster* (1923) 25 Ariz. 183, 199 215 P. 161, 166; *H.T.C. Corporation v. Olds* (Colo.Ct.App. 1971) 486 P.2d 463, 466-467; *Baerveldt & Honig Const. Co. v. Dye Candy Co.* (Mo. 1948) 357 Mo. 1072, 212 S.W.2d 65; *Douglas Const. Inc. v. Marcais* (N.Y.App.Div. 1997) 239 A.D.2d 803 657 N.Y.S.2d 835; *Hayden v. Astoria* (1915) 74 Or. 525, 533 145 P. 1072; *Rhodes v. Clute* (1898) 17 Utah 137 53 P. 990.
[***44]

n3 See, e.g., *Edward R. Marden Corporation v. United States* (Ct.Cl. 1971) 194 Ct. Cl. 799, 442 F.2d 364, 369-370; *Air-A-Plane Corp. v. United States* (Ct.Cl. 1969) 187 Ct. Cl. 269, 408 F.2d 1030; see also *Wunderlich Contracting Company v. United States* (Ct.Cl. 1965) 173 Ct. Cl. 180, 351 F.2d 956, 965-966 (finding no cardinal change).

n4 See generally 11 part 1 California Jurisprudence Third (1996) Building and Construction Contracts, section 21, pages 30-31 (abandonment); 13 American Jurisprudence Second (2000) Building and Construction Contracts, section 102, page 87 (same); Stein, Construction Law (1992) Modification of Construction Contracts, paragraph 4.02[3], page 4-7 (cardinal change); Keyes, Government Contracts Under the Federal Acquisition Regulation (2d ed. 1996) Contract Modifications, section 43.15, page 925 (cardinal change).

n5 Only three reported cases in California deal with the doctrine.

Until today, no court, state or federal, has limited this doctrine only to contractors and builders that contract [***45] with a *private* owner. Nor, indeed, is this defendant City of Thousand Oaks's (the City) main argument, as the City primarily urges us to abolish the doctrine in its entirety. **n6** Because the majority refuses to abolish the doctrine, yet fails adequately to explain why such a limit is justified by previous authority or supported by present policy concerns, I respectfully dissent.

n6 The City in its briefing adopts a fallback position, arguing in the alternative that limiting the abandonment doctrine to private entities would also be satisfactory.

I

I begin by setting forth the general rules applicable to public contracts. Public Contract Code section 20162, which is applicable to cities such as the City, provides that "when the expenditure required for a public project exceeds five thousand dollars ($ 5,000), it shall be contracted for and let to the lowest responsible bidder after notice." It is undisputed that plaintiff Amelco Electric (Amelco) participated [***46] in the bidding and was the lowest responsible bidder for the project at issue in this case.

Civil Code section 1635 is also relevant. It provides: "All contracts, whether public or private, are to be interpreted by the same rules, except as [*250] otherwise provided by this Code." This directive is consistent with prior case law, which holds that once the public bidding is over and the contract awarded, the "contract between a governmental body and a private party is to be construed by the same rules which apply to the construction of contracts between private persons [citation], and the public entity is bound in the same manner as an individual." (*Tonkin Construction Co. v. County of Humboldt* (1987)

188 Cal. App. 3d 828, 831–832, 233 Cal. Rptr. 587; see also *Souza & McCue Constr. Co. v. Superior Court* (1962) 57 Cal.2d 508, 510, 20 Cal. Rptr. 634, 370 P.2d 338 [holding the state "is liable for a breach of its agreement in like manner as an individual" and rejecting application of the doctrine of governmental immunity].)

The general rule applicable to construction contracts with public entities thus requires that we treat a public [***47] entity such as the City the same as any other contracting party once the public bidding process has terminated and a valid contract has been awarded. The majority's reliance on *Miller v. McKinnon* (1942) 20 Cal.2d 83, 124 P.2d 34 (maj. opn., *ante*, at pp. 4–5) is thus inapposite, for in that case, the parties entered into the contract in question without competitive bidding, resulting in a contract that was *void at its inception*. By contrast, Amelco was the lowest responsible bidder, and that it had a valid contract with the City is undisputed.

As the majority recognizes, the general rule in California is that "in the specific context of construction contracts, ... when an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found. [Citations.] In these cases, the contractor, with the full approval and expectation of the owner, may complete the project. [**1135] [Citation.] Although the *contract* may be abandoned, the *work* is not." (*Peterson*, *supra*, 172 Cal. App. 3d at p. 640, citing [***48] Daugherty, *supra*, 14 Cal. App. 3d 151, and *Opdyke*, *supra*, 111 Cal. App. 2d 912.) Under these circumstances, an "abandonment of a contract may be implied from the acts of the parties" (*Daugherty*, *supra*, at p. 156), and a contractor is not precluded from recovering the costs expended if it continues to perform the work (*id.* at pp. 156–157). **n7** [*251] The legal basis for this rule is the recognition in law, that when a contractee's changes to a construction contract are so numerous and substantial that the contractor is no longer building the project the parties originally intended be built, fairness requires that the contractor be afforded a remedy. The basis of this remedy is not dependent on the private or public character of the contractee. Indeed, the majority cites no authority in this state or any other jurisdiction in this country that recognizes the public/private distinction in this context. In fact, the rule usually applied in this country leans in a direction contrary to the majority's rule here, for building contractors that enter into construction contracts with the federal government are afforded a remedy under the analogous cardinal change doctrine [***49] when the government "effects an alteration in the work so drastic that it effectively requires the contractor to perform duties materially different from those originally bargained for." (*Allied Materials & Eq. Co. v. United States* (Ct.Cl. 1978) 215 Ct. Cl. 406, 569 F.2d 562, 563–564.) Of course, all federal cases applying the federal cardinal change doctrine involve a public entity as the contractee, namely, the federal government.

n7 The majority misreads applicable precedent when it opines that "the Courts of Appeal have concluded that private parties may impliedly abandon a contract *when they fail to follow change order procedures* and when the final product differs substantially from the original." (Maj. opn., *ante*, at p. 6, italics added.) Although the failure to follow prescribed change order procedure is mentioned in the three California cases addressing the abandonment doctrine (*Peterson*, *supra*, 172 Cal. App. 3d at p. 637; *Daugherty*, *supra*, 14 Cal. App. 3d at p. 156; *Opdyke*, *supra*, 111 Cal. App. 2d at p. 918), none of these cases describes such failure as a prerequisite to a finding the parties intended to abandon their construction contract. I thus agree with the Court of Appeal below when it stated: "[In prior cases,] the parties also ignored contractual change order procedures and were unable to keep accurate cost records. These facts, however, are not essential elements of an abandonment claim. Instead, they are evidence that the number of changes made to a project was excessive and beyond the original intent of the parties. These facts support a finding of abandonment; they are not essential to it."

In any event, whether or not Amelco reserved the right to seek additional compensation despite partial attempts to utilize the contractual change order procedure, and whether or not the City acceded to those attempts, was a hotly contested issue at trial. Viewing the facts in a light favorable to the prevailing party below, as we must, the evidence showed, as the Court of Appeal stated, that the parties deviated from the contract's change order procedure by performing many changes on a "price and proceed" basis, with Amelco reserving the right to seek additional compensation later, rather than following the procedure described in the contract.

[***50]

Setting aside the majority opinion's complete absence of supporting legal precedent, I am also unpersuaded by the majority's sole supporting rationale that permitting Amelco to recover against a public entity will render competitive bidding laws "meaningless." (Maj. opn., *ante*, at p. 11.) Although circumvention of competitive bidding laws is a concern, no facts in this case suggest Amelco somehow evaded the applicable competitive bidding laws.

Instead, viewing the facts in a light favorable to Amelco, the prevailing party below (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053, 946 P.2d 427), it appears the City let the project out for bid before its plans were sufficiently complete to permit knowledgeable and informed bidding by building contractors, placed itself under an unreasonable time pressure by booking entertainment into the new facility without allowing a reasonable amount of time to complete the project, and then [*252] imposed numerous and substantial changes to the project while giving Amelco no extra time to complete the additional work. As the Court of Appeal noted, "there was substantial evidence that City abandoned the contract by changing every [***51] aspect of the electrical work. [**1136] City issued 1,018 detail sketches changing, clarifying or correcting the original contract drawings. Two hundred and thirteen of these were electrical sketches and at least 248 directly impacted Amelco's work. None of the witnesses, including two of City's expert witnesses, had ever been involved in a project with as many sketches as this one." "By the time construction was completed, City had changed *every part of the electrical work at least once*," in one room alone making more than 40 changes. The concern that allowing recovery under the abandonment doctrine might improperly reward a contractor that circumvented bidding procedures designed to protect the public from fraud is not implicated by the facts of this case.

Moreover, the majority's argument that applying the abandonment doctrine against a public entity like the City "would encourage contractors to bid unrealistically low with the hope of prevailing on an abandonment claim" (maj. opn., *ante*, at p. 13) is fallacious. To believe a contractor would deliberately submit an abnormally low bid in hopes of obtaining a job and, once obtaining it, would expend the time and expense of completing [***52] it, with the intention of thereafter incurring the high cost—in dollars, delay and inconvenience—of modern litigation to recoup several years later its additional expenses, defies common sense. Such a hypothetical contractor, moreover, would also have to hope the public entity would make so many substantial changes to the original project that a plausible claim of abandonment could be made. Were insufficient changes imposed, the contractor would simply be left to bear the losses of its below-market bid. The dearth of cases asserting abandonment (see fn. 5, *ante*) bespeaks the difficulty of establishing it. The majority's argument ignores practicality.

Contrary to the majority's view that recognition of the abandonment doctrine in the context of public contracts would compromise the public welfare, the doctrine may be seen actually to benefit the public. First, its recognition would deter public entities from prematurely putting a project out to bid, motivating them instead, as the Court of Appeal reasoned, first to determine what they want built with adequate plans and specifications so that intelligent competitive bidding can take place. By this, the public as well as the contracting [***53] agency and contractors would benefit. Second, its availability would allow a contractor faced with a project whose very character has been altered by excessive changes to finish the project (clearly in the public interest) and recoup its actual cost, rather than the alternative, which would be to stop building, thereby requiring the public agency to draw [*253] up plans, allow for new bidding and award a new contract, with all the delays and increased costs attendant thereto.

The majority also purports to find "significant public policy concerns" (maj. opn., *ante*, at p. 12) in the fact that Amelco cannot pinpoint the exact time and date the contract was abandoned. This argument has two answers. First, the majority's concern betrays a misunderstanding of the abandonment doctrine itself, for unlike the traditional doctrine of abandonment in which both sides to a contract expressly announce their intention to abandon it, releasing both sides from their respective duties under the contract (also called mutual rescission; see *Pennel v. Pond Union School Dist.* (1973) 29 Cal. App. 3d 832, 837-838, 105 Cal. Rptr. 817), abandonment in the construction context is different, both [***54] because the contractor is not released from the obligation to complete the project, and because an abandonment in the construction context results from the aggregation of numerous changes to the contract over time, and not at an identifiable moment in time.

The difference was explained in *Peterson*, *supra*, 172 Cal. App. 3d at page 640: "[Traditional] abandonment [of a contract] may start with an intent to abandon by one or both of the contracting parties and conclude with an agreement by each that the contract is terminated and of no further force and effect. Using this analytical approach, completion of the contract would be inconsistent with a holding that a contract was abandoned. [P] In the specific context of construction contracts, however, it has been held that when an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the [**1137] work under the original contract has been altered, an abandonment of contract properly may be found. [Citations.] In these cases, the contractor, with the full approval and expectation of the owner, may complete the project. [Citation.] Although the *contract* may be abandoned, [***55] the *work* is not."

Second, the majority's concern over the absence of a specific time and date of abandonment goes to the viability of the doctrine itself, and not just to its application

to public entities. Thus, it is not only public entities that "would not receive timely notice of claims that would allow them to make project management, budget, or procedural adjustments during the course of construction." (Maj. opn., *ante*, at p. 13.) Private parties also would lack such notice. The majority's concern in this regard thus does not advance its proposition that the abandonment doctrine should be limited to private contractees.

The only plausible support for the majority's conclusion is Public Contract Code section 7105, subdivision (d) (hereafter section 7105(d)). That [*254] statute provides: "(d) (1) Where authority to contract is vested in any public agency, excluding the state, the authority shall include the power, by mutual consent of the contracting parties, to terminate, amend, or modify any contract within the scope of such authority. [P] (2) Paragraph (1) shall not apply to contracts entered into pursuant to any statute expressly requiring [***56] that contracts be let or awarded on the basis of competitive bids. *Contracts of public agencies, excluding the state, required to be let or awarded on the basis of competitive bids pursuant to any statute may be terminated, amended, or modified only if the termination, amendment, or modification is so provided in the contract or is authorized under provision of law other than this subdivision.* The compensation payable, if any, for amendments and modifications shall be determined as provided in the contract. The compensation payable, if any, in the event the contract is so terminated shall be determined as provided in the contract or applicable statutory provision providing for the termination." (Italics added.)

The provision in section 7105(d) limiting "terminations" of public contracts that are subject to competitive bidding laws would apply here if, by "termination," the statute means to include "abandonment." But that the Legislature meant to include abandonment of a construction contract is not evident. Certainly the plain meaning of the word "terminations," as used in section 7105(d), does not clearly embrace "abandonment," which is more akin to a mutual rescission. All three [***57] California cases relying on the abandonment doctrine in the construction context (*Peterson*, *supra*, 172 Cal. App. 3d 628; *Daugherty*, *supra*, 14 Cal. App. 3d 151; *Opdyke*, *supra*, 111 Cal. App. 2d 912) preceded the earliest version of section 7105(d) by several years (see Stats. 1990, ch. 694, § 6, pp. 3261–3263 [adding Pub. Contract Code, former § 7104, subd. (d)]), a sequence suggesting the Legislature did not intend "termination" and "abandonment" to be synonymous. Had the Legislature desired to affect the abandonment of a public construction contract, knowing as it must have that applicable appellate opinions dealing with construction contracts spoke in terms of an "abandonment," in distinction from a "termination," it could readily have used the word "abandonment." (See *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1178–1179, fn. 9, 847 P.2d 1031 [Legislature presumed to be aware of existing case law].) As the Court of Appeal correctly observed, there is a presumption that statutes do not, by implication, repeal established common law rules; thus, a statute generally will be construed to avoid conflict with the common law. [***58] (*California Assn. of Health Facilities v. Department of Health Services* (1997) 16 Cal.4th 284, 297, 940 P.2d 323.) Because Public Contract Code section 7105 does not expressly repeal the established common law rule that the contractual liability of a public agency is the same as that of a private individual, we should [*255] not presume it was intended to do so. Accordingly, I conclude that section 7105(d) does not require reversal in this case.

There being no authority or persuasive reason to prohibit application of the abandonment [**1138] doctrine to construction contracts with public entities, I dissent.

WERDEGAR, J.

I CONCUR:

KENNARD,J.

18 of 37 DOCUMENTS

ROSEANNE HOOKER, Plaintiff and Appellant, v. DEPARTMENT OF TRANSPORTATION, Defendant and Respondent.

S091601

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 198; 38 P.3d 1081; 2002 Cal. LEXIS 464; 115 Cal. Rptr. 2d 853; 2002 Cal. Daily Op. Service 942; 2002 Daily Journal DAR 1157

January 31, 2002, Filed

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

SUBSEQUENT HISTORY:
Related Case of January 31, 2002, Reported at: 2002 Cal. LEXIS 465.

Counsel Amended January 31, 2002.

Rehearing Denied March 27, 2002, Reported at: 2002 Cal. LEXIS 2014.

PRIOR HISTORY:
Superior Court of Los Angeles County. Super. Ct. No. BC152695. David A. Horowitz, Judge. Court of Appeal of California, Second Appellant District, Division Four. B128914.

DISPOSITION:
Court of Appeals is reversed and the matter remanded.

COUNSEL:
Attorneys for Appellant: Paul & Janofsky, Gary M. Paul, John S. Janofsky; Lewis, Goldberg & Ball, Michael L. Goldberg and Michael D. Hutchinson for Plaintiff and Appellant.

Ian Herzog; William L. Veen; James C. Sturdevant; Brian C. Unitt; Dennis M. Elber; David A. Rosen; The Arns Law Firm, Morgan C. Smith and Robert S. Arns for the Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiff and Appellant.

Attorneys for Respondent: Neumeyer & Boyd, Carol Boyd, Katherine A. Tatikian; Seifert, Henderson & Farricker and Edward Wm. Farricker for Defendant and Respondent.

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

John P. Carpenter for Associated General Contractors of California as Amicus Curiae on behalf of Defendant and Respondent.

Fred J. Hiestand for the Civil Justice Association of California as Amicus Curiae on behalf of Defendant [***2] and Respondent.

Radoslovich Law Office, Frank M. Radoslovich and Brad J. Stephens for Production Framing Systems, Inc., as Amicus Curiae on behalf of Defendant and Respondent.

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

OPINIONBY:
BROWN

OPINION:

[**1082]

[*200] This is the latest in a series of cases in which we have considered whether an employee of an independent contractor may sue the hirer of the contractor under tort theories covered in chapter 15 of the Restatement Second of Torts (hereafter Restatement). **n1** In *Privette v. Superior Court* (1993) 5 Cal.4th 689, 854 P.2d 721 (*Privette*) and [*201] *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 955 P.2d 504 (*Toland*), we held that an employee of a contractor may not sue the hirer of the contractor under either of the alternative versions of the *peculiar risk* doctrine set forth in sections 413 and 416. 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 [***3] of that work, can be liable if the contractor's negligent performance of the work causes injury to others. Under section 416, even if the hirer has provided for special precautions in the contract or otherwise, the hirer 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. Most recently, in *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 (*Camargo*), we held that an employee of a contractor may not sue the hirer of the contractor under the *negligent hiring* theory set forth in section 411. Under section 411, a hirer is liable for physical harm to third persons caused by the hirer's failure to exercise reasonable care to employ a competent contractor to perform work which will involve a risk of physical harm unless it is skillfully and carefully done, or to perform any duty which the hirer owes to third persons.

n1 Unless otherwise indicated, all section references are to the Restatement Second of Torts.

[***4]

The question presented in this case is whether an employee of a contractor may sue the hirer of a contractor for the tort of *negligent exercise of retained control* set forth in section 414. **n2** Section 414 provides: [**1083] "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

n2 In both *Toland* and *Camargo*, we noted we were not reaching this question. "Our grant of review did not extend to, and therefore we do not decide, a second issue raised by Toland: whether *Privette*, *supra*, 5 Cal.4th 689, would preclude an employee of an independent contractor from seeking tort recovery for workplace injuries under the theory of section 414 of the Restatement Second of Torts that the general contractor or landowner 'retained control' over the operative details of the hired work. As the Court of Appeal unanimously concluded, the facts Toland offered in opposing summary judgment were insufficient to raise a triable issue on that question." (*Toland*, *supra*, 18 Cal.4th at p. 264, fn. 2.) "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. Department of Transportation*, 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." (*Camargo*, *supra*, 25 Cal.4th at p. 1245, fn. 2.)

[***5]

[*202] We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries. In this case, although plaintiff raised triable issues of material fact as to whether defendant retained control over safety conditions at the worksite, plaintiff failed to raise triable issues of material fact as to whether defendant actually exercised the retained control so as to affirmatively contribute to the death of plaintiff's husband. Therefore, the trial court properly granted summary judgment in favor of defendant, and the Court of Appeal erred in reversing that judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Paul Hooker was a crane operator. He was employed by a general contractor hired by the California Department of Transportation (Caltrans) to construct an overpass. The overpass was 25 feet wide and the crane with the outriggers extended was 18 feet wide, so Hooker would retract the outriggers to allow other construction [***6] vehicles or Caltrans vehicles to pass. Shortly before the fatal accident, Hooker retracted the outriggers and left the crane. When Hooker returned, he attempted, without first reextending the outriggers, to swing the boom. Because the outriggers were retracted, the weight of the boom caused the crane to tip over. Hooker was thrown to the pavement and killed.

With regard to the question whether Caltrans had negligently exercised the control it had retained over safety at the jobsite, plaintiff relied on the safety chapter of the Caltrans construction manual and the testimony of Caltrans officials responsible for supervising the jobsite. The safety chapter of the Caltrans construction manual provided in pertinent part: "Caltrans is responsible for obtaining the Contractor's compliance with all safety laws and regulations. ... [P] The construction safety coordinator must be familiar with highway construction procedures and equipment, *construction zone traffic management* and be able to *recognize and anticipate unsafe*

conditions created by a Contractor's operation. ... [P] The Construction Safety Coordinator shall visit contracts [*sic*] periodically to observe the [***7] Contractor's operation and traffic conditions affected by the construction." (Italics added.) The manual further gave the Caltrans resident engineer authority to set compliance schedules for the correction of dangerous conditions and to shut down affected operations until the dangerous conditions were corrected.

The senior Caltrans representative on the jobsite, whose responsibilities included safety, had previously observed the crane operators on this project [*203] retract their outriggers to let other vehicles pass; he knew they did so "from time to time[] or frequently"; and he realized that a crane would be unstable if its boom were extended over its side when its outriggers were retracted. The resident Caltrans engineer on the project had the power to shut the project down because of safety conditions and to remove employees of the contractor for failing to comply with safety regulations. He answered "probably" to the following two questions: (1) "Do you agree that if [the crane operator] had been given priority in the area he was working in and the [overpass] was flagged off, that he wouldn't have had to retract his outriggers to permit vehicles to pass?" and (2) "And if he [***8] hadn't retracted his outriggers, the crane wouldn't have become unstable and tipped over, correct?" A Caltrans transportation engineer on the project, whose responsibilities included bringing unsafe conditions to the attention of the resident engineer or the [**1084] general contractor, conceded that if he had seen a crane operator retract the outriggers to permit vehicles to pass, he would have felt "odd" because the more the outriggers are extended, "the better the stability. That's simple physics."

Plaintiff, Hooker's widow, received workers' compensation benefits for his death from the contractor's insurer. Plaintiff also sued Caltrans on the theory Caltrans had negligently exercised control it had retained over safety conditions at the jobsite. Caltrans moved for summary judgment. The motion was based on the ground, among others, that a suit against a hirer of an independent contractor by an employee of the contractor for negligent exercise of retained control was barred by our decisions in *Privette* and *Toland*. The trial court granted Caltrans's summary judgment motion, but the Court of Appeal reversed. We granted review and limited the issue to be briefed and argued to the question [***9] whether, under our decisions in *Privette* and *Toland*, an employee of an independent contractor is barred from pursuing a lawsuit against the hirer of the independent contractor on the theory the hirer negligently exercised control it had retained. After review was granted, we issued our decision in *Camargo*, extending *Privette* and *Toland* to the tort of negligent hiring, and we then requested counsel to file supplemental letter briefs exploring the significance of *Camargo* for the question whether an employee of an independent contractor may bring an action for the tort of negligent exercise of retained control against the hirer of the contractor.

DISCUSSION

I. The Rationale of *Privette*, *Toland*, and *Camargo*

In *Toland*, we summarized the peculiar risk doctrine and explained why we had concluded in *Privette* that under the doctrine a hirer's liability [*204] does not extend to the hired contractor's employees. "Under the doctrine of peculiar risk, a person who hires an independent 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 [***10] doctrine serves to ensure that innocent bystanders or neighboring landowners injured 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 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 [***11] 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.)

As we have indicated, the doctrine of peculiar risk, insofar as it was relevant in *Privette* and *Toland*, is described in sections 413 and 416. 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 [**1085] rule of 'direct liability.' " (*Toland*, *supra*, 18 Cal.4th at p. 259.) Under section 416, even if the hiring person has provided for special [***12] 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 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 [*205] 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 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 [***13] 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 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.)

In *Camargo*, we held that an employee of a contractor is barred from suing the hirer of the contractor under the negligent hiring theory set forth in section 411. Under section 411, a hirer is liable for physical harm to third persons caused by the hirer's failure [***14] to exercise reasonable care to employ a competent contractor to perform work that will involve a risk of physical harm unless it is skillfully and carefully done, or to perform any duty the hirer owes to third persons. We rejected the argument that *Privette* and *Toland* were distinguishable on the ground that in a negligent hiring case the hirer is, in a sense, being taxed with his *own* negligence, making his liability *direct*. "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 hiring person when the liability of the contractor, the one primarily [***15] responsible for [*206] the worker's on-the-job injuries, is limited to providing workers' compensation coverage.' (*Toland*, *supra*, 18 Cal.4th at p. 267.)" (*Camargo*, *supra*, 25 Cal.4th at p. 1244, 108 Cal. Rptr. 2d 617, 25 P.3d 1096.)

II. Applying the Rationale of *Privette*, *Toland* and *Camargo* to the Doctrine of Negligent Exercise of Retained Control

Again, section 414 provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to *others* for whose safety the employer owes [**1086] a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care." (Italics added.)

Defendant Caltrans contends that employees of a contractor are not *others* for the purposes of section 414. There are no illustrations to section 414, and the comments to section 414 cast no light on this question. (See § 414, coms. a-c, pp. 387-388.) However, section 414—like sections 413 and 416, which set out the peculiar risk doctrine at issue in *Privette* and *Toland*, and section 411, which sets out the negligent hiring doctrine at issue in *Camargo*—appears in chapter 15 of [***16] the Restatement. And as we noted in *Toland*, and reiterated in *Camargo*, "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 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.)" (*Camargo*, *supra*, 25 Cal.4th at p. 1241.)

In *Camargo*, we noted that "the overwhelming majority of the courts of other jurisdictions that have addressed the question have concluded that an employee of a contractor is *not* a third person for the purposes of section 411. [Citations.]" (*Camargo*, *supra*, 25 Cal.4th at p.

1241.) Unfortunately, the courts of our sister states have not developed a similar consensus, nor have they spoken with anything like the same clarity, with regard to the question whether employees of contractors are *others* for the purposes of section 414.

The courts of a number of states have assumed, without directly addressing the question, [***17] that an employee of a contractor may sue the hirer of the contractor for negligent exercise of retained control, and these courts have focused, instead, on whether a triable issue was presented as to retention of control or on whether a judgment in favor of the plaintiff was supported by sufficient evidence as to retention of control. (See *Alabama Power Co. v.* [*207] *Beam* (Ala. 1985) 472 So. 2d 619, 622-625; *Elkins v. Arkla, Inc.* (Ark. 1993) 312 Ark. 280, 849 S.W.2d 489, 490-492; *Corsetti v. Stone Co.* (Mass. 1985) 396 Mass. 1, 483 N.E.2d 793, 799; *Clausen v. Aberdeen Grain Inspection* (S.D. 1999) 1998 SD 66, 594 N.W.2d 718, 721-723; *Hittel v. Wotco, Inc.* (Wyo. 2000) 996 P.2d 673, 676-678.)

The courts of states that have directly addressed it are evenly split on the question whether an employee of a contractor may sue the hirer of the contractor for negligent exercise of retained control.

Answering the question in the affirmative, the Supreme Court of North Dakota has stated the rule broadly. "Employees of an independent contractor fall within the protection of Section 414, and an employer of an independent [***18] contractor owes a duty to the independent contractor's employees to exercise the retained control with reasonable care." (*Fleck v. ANG Coal Gasification Co.* (N.D. 1994) 522 N.W.2d 445, 447 (*Fleck*).)

Taking a more nuanced position, the Supreme Court of Utah has held that a hirer is not liable to an employee of an independent contractor for negligent exercise of retained control, unless the hirer's conduct meets the *active participation standard*. (*Thompson v. Jess* (Utah 1999) 1999 UT 22, 979 P.2d 322, 326-328 (*Thompson*).) "Under the 'active participation' standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer directs that the contracted work be done by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. [Citations.]" (*Id.* at p. 327.) Therefore, *retained control* is somewhat of a misnomer for the doctrine [***19] as the Utah Supreme Court applies it. "Under the standards announced herein, a duty of care is imposed if the principal employer asserts affirmative control over or actually participates actively in the manner of performing the contracted work. 'Retained,' to the extent [**1087] the word implies passivity or nonaction, is inapt." (*Id.* at p. 328, fn. 3.)

Like the North Dakota Supreme Court in *Fleck*, *supra*, 522 N.W.2d 445, the Supreme Court of New Mexico has voiced a broad theory of liability. "If [an employer of an independent contractor] has the right to, and does, retain control of the work performed by the independent contractor, he owes the duty of care to the independent contractor's employee which, if breached, can result in liability to the employee. [Citation.]" (*Valdez v. Cillessen & Son, Inc.* (N.M. 1987) 105 N.M. 575, 734 P.2d 1258, 1262.) However, the New [*208] Mexico Supreme Court announced this broad rule in a case in which the hirer's conduct would have more than satisfied the active participation standard announced by the Utah Supreme Court in *Thompson*, *supra*, 979 P.2d 322. An employee of a lathing and plastering subcontractor [***20] was injured in the collapse of scaffolding. A grant of summary judgment in favor of the hirer was reversed by the New Mexico Supreme Court because there was evidence in the record that the hirer had issued detailed directions to the subcontractor concerning virtually every aspect of the job, including the manner in which the scaffolding was to be erected, and that the hirer, through its superintendent at the jobsite, had "fired the employees of subcontractors, instructed employees on how, when, and where to do their jobs, and assigned employees to tasks other than those which they had been hired to do." (*Valdez*, at pp. 1262-1263.)

On the other hand, the courts of other states have concluded that an employee of an independent contractor is barred from suing the hirer of the contractor for negligent exercise of retained control. The Court of Appeals of Kentucky concluded that "nothing in the discussions of Sections 413, *414*, 416, and 427 of the Restatement, Torts 2d, indicates that an employee of an independent contractor is within the class of 'others' protected by those sections." (*King v. Shelby Rural Electric Cooperative Corp.* (Ky.Ct.App. 1974) 502 S.W.2d 659, 662, [***21] italics added.) In *Parker v. Neighborhood Theatres* (Md.Ct.Spec.App. 1988) 76 Md. App. 590, 547 A.2d 1080, the Court of Special Appeals of Maryland, after concluding the plaintiff had failed to establish retention of control, added that the plaintiff had also failed to provide the court "with any authority that an employee of an independent contractor injured by the negligence of his own master is a person intended to be included among the class of persons to whom the owner owes a nondelegable duty of reasonable care. ... No matter how appellant phrases it, what he is unsuccessfully attempting

is an end run on the Worker's Compensation Law." (*Id.* at p. 1085.) In *Sutherland v. Barton* (Minn. 1997) 570 N.W.2d 1, the Supreme Court of Minnesota found that no triable issue had been presented as to retained control, and so it reinstated the summary judgment in favor of the hirer, which had been reversed by the intermediate appellate court. In the course of reaching that conclusion, the court noted that "when applying the Restatement [Second of Torts] sections that impose liability on companies hiring independent contractors, we have held that 'others' [***22] does not include the employees of an independent contractor. [Citation.] This limitation also applies to § 414." (*Id.* at p. 5, fn. omitted.)

Recently, the Courts of Appeal of California that have addressed the question have agreed that a hirer may, under certain circumstances, be liable to an employee of a contractor under a retained control theory. However, [*209] they have disagreed as to whether mere retention of control is sufficient, or whether something more, something like the Utah Supreme Court's concept of *active participation*, must be shown. (Compare *Grahn v. Tosco Corp.* (1997) 58 Cal.App.4th 1373 (*Grahn*) with *Kinney v. CSB Construction, Inc.* (2001) 87 Cal.App.4th 28 (*Kinney*).) Under *Grahn*, "the hirer may be held liable to the independent contractor's employee where the hirer retains sufficient control over the work of an independent contractor *to be able to* prevent or eliminate through the exercise of reasonable care the dangerous condition causing injury to the independent contractor's employee. [Citations.]" (*Grahn*, at p. 1393, italics added.) Under *Kinney*, on the other hand, mere retention of [***23] the ability to control safety conditions is not enough. "[A] general contractor owes [**1088] no duty of care to an employee of a subcontractor to prevent or correct unsafe procedures or practices to which the contractor did not contribute by direction, induced reliance, or other affirmative conduct. The mere failure to exercise a power to compel the subcontractor to adopt safer procedures does not, without more, violate any duty owed to the plaintiff. Insofar as section 414 might permit the imposition of liability on a general contractor for mere failure to intervene in a subcontractor's working methods or procedures, without evidence that the general contractor affirmatively contributed to the employment of those methods or procedures, that section is inapplicable to claims by subcontractors' employees against the general contractor." (*Kinney*, at p. 39.)

The *Kinney* court, we conclude, correctly applied the principles of our decisions in *Privette* and *Toland*, whereas the *Grahn* court made much the same mistake in applying *Privette* to section 414 as it did in applying that case to section 411 (see *Camargo*, *supra*, 25 Cal.4th at pp. 1242–1245, disapproving [***24] *Grahn*, *supra*, 58 Cal.App.4th 1373, insofar as it was inconsistent with that opinion).

In *Grahn*, an employee of an independent contractor sued the hirer of the contractor under three theories of negligence, including negligent hiring (§ 411) and negligent exercise of retained control (§ 414). (*Grahn*, *supra*, 58 Cal.App.4th at pp. 1389–1396.) *Grahn* was decided after *Privette* but before *Toland*, and 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*, at p. 1384.) To the contrary, as we explained in *Toland* and reiterated in *Camargo*, "the rationale of our decision in *Privette* extends to cases where the hirer is [*210] *directly* negligent in the sense of having failed to take precautions against the peculiar risks involved in the work entrusted to the contractor. [***25] To repeat: In *Toland*, we rejected the plaintiff's argument that *Privette* did not bar recovery for direct liability under section 413, but only for vicarious liability under section 416." (*Camargo*, *supra*, 25 Cal.4th at pp. 1243–1244.)

The *Grahn* court repeated its mistake in applying *Privette* to the doctrine of retained control. "Having retained control of the independent contractor's work, the hirer has a *direct* and nonimputed obligation to see that reasonable precautions are taken to eliminate or reduce the risk of harm to the employees of its independent contractors." (*Grahn*, *supra*, 58 Cal.App.4th at p. 1394, italics added.) Again, the conclusion that a hirer's liability can be characterized as *direct* does not end the inquiry into whether the hirer should be held liable for injuries to a contractor's employees, as we explained in *Camargo*. "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*, at p. 1385.) However, the same could be said with regard to an action brought under the peculiar risk theory set forth in [***26] 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 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.)" (*Camargo*, *supra*, 25 Cal.4th at p. 1244.)

[**1089] Similarly, because the liability of the contractor, the person primarily responsible for the worker's on-the-job injuries, is limited to providing workers' compensation coverage, it would be unfair to impose tort liability on the hirer of the contractor merely because the hirer retained the ability to exercise control over safety at [***27] the worksite. In fairness, as the *Kinney* court recognized, the imposition of tort liability on a hirer should depend on whether the hirer *exercised* the control that was retained in a manner that *affirmatively* contributed to the injury of the contractor's employee. "We are persuaded that the holdings of *Privette* and *Toland* should also apply to employees' claims under section 414 at least where, as here, (1) the sole factual basis for the claim is that the hirer failed to exercise a general supervisory power to require the contractor to correct an unsafe procedure or condition of the contractor's own making, and (2) there is no evidence that [*211] the hirer's conduct contributed in any way to the contractor's negligent performance by, e.g., inducing injurious action or inaction through actual direction, reliance on the hirer, or otherwise. The fairness rationale at the core of *Privette* and *Toland* applies equally to preclude imposition of liability on a hirer for mere failure to exercise a general supervisory power to prevent the creation or continuation of a hazardous practice, where such liability would exceed that imposed on the injured plaintiff's immediate employer, [***28] who created the hazard." (*Kinney*, *supra*, 87 Cal.App.4th at p. 36.)

In *Kinney*, an employee of a subcontractor (PBE) was injured in a fall from scaffolding, and he sued the general contractor, CSB Construction, Inc. (CSB), for negligent exercise of retained control. *Kinney* is strikingly similar to the present case in that, although the hirer in theory retained a high degree of control over safety conditions at the jobsite, there was no indication the hirer contributed to the accident by an affirmative exercise of that control. "The parties agreed for purposes of the summary judgment motion that during the performance of the subcontract, CSB 'had the right to order any safety means or measures that it felt were appropriate' on the jobsite. ... [According to the testimony of CSB's site superintendent], if he saw an unsafe condition, he 'had a right to do whatever [he thought was] appropriate.' ... Specifically, 'if a subcontractor was working without adequate fall protection and [he] felt that fall protection was required, [he] would ... tell them that they needed fall protection' and 'would ... stop the work until they had good fall protection.' ... [***29] However, he did not recall an instance in which he actually directed PBE or any of the other subcontractors on the job to alleviate an unsafe condition." (*Kinney*, *supra*, 87 Cal.App.4th at p. 31.)

The question, as the *Kinney* court framed it, was "whether a general contractor who claims the power to control all safety procedures on the worksite may be liable to the injured employee of a subcontractor for failing to direct the subcontractor to take safety precautions where there is no evidence that any conduct by the general contractor contributed affirmatively to the injuries." (*Kinney*, *supra*, 87 Cal.App.4th at p. 30.) *Kinney* answered that question in the negative. "We hold that in light of recent California Supreme Court holdings limiting the liability of general contractors for injuries to employees of subcontractors, liability cannot be imposed on the general contractor based upon a mere failure to require the subcontractor to take safety precautions, where the general contractor's failure is not shown to have affirmatively contributed to the creation or persistence of the hazard causing the plaintiff's injuries. Accordingly, we affirm the judgment for defendant. [***30] " (*Ibid.*)

The *Kinney* court correctly applied our prior decisions. Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has [*212] affirmatively contributed **n3** to the injuries of the contractor's employee is consistent with the rationale of our [**1090] decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is *not* " 'in essence "vicarious" or "derivative" in the sense that it derives from the "act or omission" of the hired contractor.' " (*Camargo*, *supra*, 25 Cal.4th at p. 1244, quoting *Toland*, *supra*, 18 Cal.4th at p. 265.) To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term.

> n3 Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury.

[***31]

Unlike the rule announced in *Grahn*, the rule announced in *Kinney* is not susceptible to the objection raised by Caltrans that a defendant will never be able to prevail on a motion for summary judgment in an action for negligent exercise of retained control. To the contrary, where, as here, the plaintiff fails to present a triable issue as to whether the defendant's exercise of retained control affirmatively contributed to the employee's injuries, summary judgment is appropriate.

Caltrans also objects that two policy considerations that we have relied upon in barring employees of independent contractors from bringing tort actions against the hirers of the contractors under the peculiar risk doctrine or the negligent hiring doctrine also apply to actions brought under the retained control doctrine.

Caltrans finds support in the following passage from *Camargo*: "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 [***32] 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 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 (*id.* at pp. 699–700)." (*Camargo*, *supra*, 25 Cal.4th at pp. 1244–1245, fn. omitted.)

Caltrans's reliance is misplaced. While it is true that the cost of workers' compensation insurance coverage is as likely to have been calculated into [*213] the contract price paid by the hirer in a retained control case as it is in peculiar risk or negligent hiring cases, the contract price could not have reflected the cost of injuries that are attributable to the hirer's affirmative conduct. The contractor has no way of calculating an increase in the costs of coverage that are [***33] attributable to the conduct of third parties, which is why the employee, despite the existence of the workers' compensation system, is not barred from suing a third party who proximately causes the employee's injury. (See Lab. Code, § 3852.)

Moreover, a close reading of our opinion in *Privette* reveals another ground for distinguishing between peculiar risk and negligent hiring cases, on the one hand, and negligent exercise of retained control cases, on the other, in this regard. "At common law, a person who hired an independent contractor generally was not liable to third parties for *injuries caused by the contractor's negligence* in performing the work. [Citations.] *Central to this rule of nonliability was the recognition that a person who hired an independent contractor had ' " no right of control as to the mode of doing the work contracted for" '* (*Green v. Soule* (1904) 145 Cal. 96, 99, 78 P. 337; accord, *McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788, 285 P.2d 902.)[**n4**] [**1091] The reasoning was that the work performed was the enterprise of the contractor, who, as a matter of business convenience, would [***34] be better able than the person employing the contractor to absorb accident losses incurred in the course of the contracted work. This could be done, for instance, by indirectly including the cost of safety precautions and insurance coverage in the contract price. [Citations.]" (*Privette*, *supra*, 5 Cal.4th at p. 693, italics added.) On the other hand, if a hirer does retain control over safety conditions at a worksite and negligently exercises that control in a manner that affirmatively contributes to an employee's injuries, it is only fair to impose liability on the hirer.

> n4 In *McDonald v. Shell Oil Co.*, *supra*, 44 Cal.2d 785, we did not have occasion to grapple with the question presented by this case—whether an employee of a contractor may sue the hirer of a contractor for the tort of negligent exercise of retained control. *McDonald* did involve a negligence suit by an employee of a contractor against the hirer of the contractor. And our discussion did begin with a recitation of the following general principles: "The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work. [Citation.] An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made [citation] *or unless he exercises active control over the men employed* or the operations of the equipment used by the independent contractor. [Citation.]" (*Id.* at pp. 788–789, italics added.) However, in *McDonald* we found the hirer of the contractor had retained no more than the general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract. (See *id.* at p. 790.) Moreover, of course, *McDonald* long predated *Privette*.

[***35]

[*214] Similarly, if an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an *unwarranted windfall*. The tort liability of the hirer is warranted by the hirer's own affirmative conduct. The rule of workers' compensation exclusivity "does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury" (*Privette*, *supra*,

5 Cal.4th at p. 697), and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer.

Grahn, *supra*, 58 Cal.4th 1373, is disapproved insofar as it is inconsistent with this opinion.

III. By Merely *Permitting* Traffic to Use the Overpass, Caltrans Did Not *Affirmatively Contribute* to Mr. Hooker's Death

In oral argument before this court, a question was raised as to whether Caltrans *required*, in the sense of *ordered*, the crane operator to retract his outriggers [***36] to permit vehicles to pass. The record does *not* reflect that any such order was issued by Caltrans. Indeed, in response to a question from the bench, counsel for the plaintiff admitted: "The honest answer to your question ... is [Caltrans] permitted it to happen. They permitted this traffic to happen on the overpass. They didn't direct it to happen."

Confusion in this regard was generated by an earlier statement made by plaintiff's counsel. In arguing that Caltrans's exercise of retained control affirmatively contributed to Mr. Hooker's death, plaintiff's counsel stated, "I think it's an affirmative act when Caltrans's own engineer specifically comes up and requires the operator to retract the outriggers." He later explained what he meant by this: "There was evidence in the record that the Caltrans Senior Engineer himself used the overpass as a shortcut to traverse the construction and had to wait until the operator retracted the outriggers." This narrower statement is supported by the record.

Perhaps the clearest way to put it is this: Caltrans *permitted* construction vehicles, as well as vehicles owned and operated by Caltrans, to use the overpass while the crane was [***37] being operated, and because the overpass was narrow, the crane operator was *required* to retract the outriggers in order to let the traffic pass. That is what plaintiff asserted below: "Given the narrow width of the portion of the [high occupancy vehicle] lane where he was working, Mr. Hooker was regularly required to retract his extended outriggers to permit construction vehicles, including vehicles owned and operated by Defendant State of California, to pass."

[*215] We are not persuaded that Caltrans, by *permitting* traffic to use the overpass while [**1092] the crane was being operated, *affirmatively contributed* to Mr. Hooker's death. Interestingly, when pressed for a standard, plaintiff's counsel referred to a passage in the *Thompson* opinion of the Utah Supreme Court quoted above: "Under the 'active participation' standard, a principal employer is subject to liability for injuries arising out of its independent contractor's work if the employer is actively involved in, or asserts control over, the manner of performance of the contracted work. [Citation.] Such an assertion of control occurs, for example, when the principal employer *directs* that the contracted work be done [***38] by use of a certain mode or otherwise interferes with the means and methods by which the work is to be accomplished. [Citations.]" (*Thompson*, *supra*, 979 P.2d at p. 327, italics added.) To repeat, Caltrans did *not* direct the crane operator to retract his outriggers to permit traffic to pass.

Accordingly, under the standard we announce today, summary judgment was appropriate here. Plaintiff raised triable issues of material fact as to whether defendant retained control over safety conditions at the worksite. However, plaintiff failed to raise triable issues of material fact as to whether defendant actually exercised the retained control so as to affirmatively contribute to the death of plaintiff's husband. While the evidence suggests that the crane tipped over because the crane operator swung the boom while the outriggers were retracted, and that the crane operator had a practice of retracting the outriggers to permit construction traffic to pass the crane on the overpass, there was no evidence Caltrans's exercise of retained control over safety conditions at the worksite affirmatively contributed to the adoption of that practice by the crane operator. There was, at most, [***39] evidence that Caltrans's safety personnel were aware of an unsafe practice and failed to exercise the authority they retained to correct it.

DISPOSITION

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

BROWN, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

BAXTER, J.

CHIN, J.

MORENO, J.

DISSENTBY:
WERDEGAR

DISSENT:

DISSENTING OPINION BY WERDEGAR, J.

I respectfully dissent. While I agree with the majority that a party hiring an independent contractor may be

liable in tort to employees of the contractor for negligent exercise of control the hirer has retained over any part of the work, I disagree that such liability may exist [*216] only when the hirer's exercise of control "*affirmatively* contributed to the injury of the contractor's employee" (maj. opn., *ante*, at p. 15, italics in original). The majority's analysis, and the result it reaches in this case, usurp the factfinding and fault allocation functions assigned to the jury under our comparative fault system.

The evidence produced on summary judgment showed that California Department of Transportation (Caltrans) employees had permitted construction [***40] traffic on the overpass where plaintiff's decedent was working, and had driven Caltrans's own vehicles on the overpass. The Caltrans construction manual required the construction safety coordinator to know proper "construction zone traffic management," implying that Caltrans bore responsibility for exercising such management. A reasonable trier of fact could infer that Caltrans retained control over construction zone traffic management and that, in exercising this retained control, Caltrans used, and permitted other vehicles to use, the overpass. The resulting traffic frequently required the decedent to retract the outriggers of his crane, a practice that led proximately to his fatal accident. Evidence showed as well that Caltrans representatives had observed the outriggers being repeatedly retracted, knew the crane was unstable in that state, and knew that if they were to flag off the overpass the crane operator would not have to retract the outriggers. This complex of evidence raises at least a triable issue of fact (Code Civ. Proc., § 437c) as to whether Caltrans negligently exercised its retained control over construction zone traffic, contributing [***41] to the decedent's death.

To be sure, the evidence suggests that Caltrans did not bear *sole* fault in the accident. [**1093] Caltrans apparently did not *order* the decedent to retract the outriggers for passing traffic; nor, apparently, did Caltrans direct the decedent to attempt operating the crane before reextending the outriggers. It may be that a jury, hearing all the evidence, would find the decedent largely at fault for his own death and assign to Caltrans only a small share of the fault, based on its having permitted and contributed to the overpass traffic. In that case, Caltrans's liability would be reduced; the comparative fault system operates to reduce the liability of a negligent hirer in the same manner as it reduces the liability of other third parties for employee injuries. (See *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 280, 955 P.2d 504 (conc. & dis. opn. of Werdegar, J.).) No special *judicial* test of negligence is required in order to achieve a fair allocation of fault.

The majority's "affirmatively contribute" test of negligence liability reflects the notion that a person who actually performs a dangerous act, or directs its [***42] performance, is likely to be more at fault for the resulting accident [*217] than a person who merely fails to correct the conditions creating the danger. One might expect that generalization to be reflected, as well, in a jury verdict on liability: to the extent the hirer's fault is seen as resting solely on inaction, the jury is likely to assign the hirer a low share of fault in comparison to those who contributed to the injury by their actual participation in the operation. But the determination of comparative fault in this manner, like any negligence determination, rests on the specific facts of the case: to whom was the danger apparent; who had the ability to alleviate the danger, and by what means and at what costs? From the distinctions between activity and passivity, act and omission, which a jury might properly use to measure and compare fault, the majority fashions a purported bright-line rule for courts to apply. **n1** Its effort is both unnecessary and inimical to the jury system.

> n1 The line drawn is actually rather fuzzy in light of the majority's suggestion that some "omissions" may be deemed "affirmative" contributions to an injury. (Maj. opn., *ante*, at p. 17, fn. 3.) The majority further fails to explain why a hirer's "promise[]" (*ibid.*) to exercise control allows for possible liability while the contractual retention of control is held insufficient as a matter of law, even, as in this case, where the hirer's retention of control could reasonably have led the contractor and its employees to expect that the hirer would in fact exercise its control when necessary.

[***43]

I do not suggest every retained-control claim must go to a jury. The mere fact that a contract gives the hiring party general control over the project and the authority to stop work should not create liability if, in practice, the hirer's supervision and control did not actually extend to any part of the operation contributing to the hazard. As the Restatement Second of Torts cautions: "It is not enough that [the hirer] has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. ... There must be such a retention of a right of supervision that the contractor is not entirely free to do the work in his own way." (Rest.2d Torts, § 414, com. c, p. 388; see also *Hobbs v. Mobil Oil Corporation* (Alaska 1968) 445 P.2d 933, 936 [hirer not liable to a contractor's employee if "under the contract and in actual practice" the hirer's control does not affect the contractor's "methods of work" or the "operative detail"

of the work].)

The present case, however, is not merely one of contractual or formal [***44] control. Plaintiff has produced evidence from which one can infer that Caltrans's *actual* exercise of control over traffic on the site affected the manner in which the crane operations were conducted; the contractor, consequently, was *not* "entirely free to do the work in his own way." (Rest.2d Torts, § 414, com. c, p. 388.) Whether after full discovery and trial a jury [*218] would agree with plaintiff that Caltrans's management of traffic at the site was partly responsible for the crane's unsafe operation and the resulting accident is not at issue at this point in the proceedings. To properly obtain summary judgment, defendant must show that plaintiff "has not established, *and cannot reasonably expect to establish*, a prima [**1094] facie case" of negligent exercise of retained control. (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768, italics added.) Defendant has not made that showing.

I would affirm the judgment of the Court of Appeal.

WERDEGAR, J.

19 of 37 DOCUMENTS

BRIAN McKOWN, Plaintiff and Respondent, v. WAL-MART STORES, INC., Defendant and Appellant.

S091097

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 219; 38 P.3d 1094; 2002 Cal. LEXIS 465; 115 Cal. Rptr. 2d 868; 2002 Cal. Daily Op. Service 947; 2002 Daily Journal DAR 1164

January 31, 2002, Filed

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

SUBSEQUENT HISTORY:
Related Case of January 31, 2002, Reported at: 2002 Cal. LEXIS 464.

PRIOR HISTORY:
Court of Appeal of California, Fourth Appellate District, Division Two. E025572.
McKown v. Wal-Mart Stores, Inc., 82 Cal. App. 4th 562, 98 Cal. Rptr. 2d 214, 2000 Cal. App. LEXIS 582, 65 Cal. Comp. Cas. (MB) 816 (4th Dist. 2000)
San Bernardino County Super. Ct. No. RCV23345.

Ben T. Kayashima, Judge.

DISPOSITION:
Affirmed.

COUNSEL:
Attorneys for Appellant: Snyder & Strozier, Snyder, Strozier, Maho & Tomlinson, Barry Clifford Snyder and Will Tomlinson for Defendant and Appellant.

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

Attorneys for Respondent: Garza, Garza & Pacheco, John M. Pacheco; Law Offices of Robert H. Pourlavi and Robert H. Pourvali for Plaintiff and Respondent.

Ian Herzog; William L. Veen; James C. Sturdevant; Brian C. Unitt; Dennis M. Elber; David [***2] A. Rosen; The Arns Law Firm, Morgan C. Smith and Robert S. Arns for the Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiff and Respondent.

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

OPINIONBY:
BROWN

OPINION:

[**1094]

[*222] This is the third in a series of recent cases in which we have been called upon to consider the reach of our decisions in *Privette v. Superior Court* (1993) 5 Cal.4th 689, 854 P.2d 721 (*Privette*) and *Toland v. Sunland Housing Group, Inc.* (1998) 18 Cal.4th 253, 955 P.2d 504 (*Toland*). In *Privette* and *Toland*, we [**1095] held that an employee of a contractor may not sue the hirer of the contractor under either of the alternative versions of the peculiar risk doctrine set forth in sections 413 and 416 of the Restatement Second of Torts (hereafter Restatement), **n1** but is restricted instead to a claim against the contractor under the workers' compensation insurance system. The two prior cases, respectively, raise the question whether, under the rationale of *Privette* and *Toland*, an employee of an independent contractor is barred from suing [***3] the hirer of the contractor under the tort theories of (1) negligent hiring, and (2) negligent exercise of retained control. In *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235 (*Camargo*), we held that an employee of an independent contractor is barred from suing the hirer of the contractor for the tort of negligent hiring. In *Hooker v. Department of Transportation* ,2002 Cal. LEXIS 464, (Jan. 31, 2002, S091601) (*Hooker*),a companion to this case, we held that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries. In this case, we hold that a hirer is liable to an employee of an independent contractor insofar as the hirer's provision of unsafe equipment affirmatively contributes to the employee's injury. **n2**

n1 Unless otherwise indicated, all section references are to the Restatement Second of Torts.

[***4]

n2 In *Camargo*, we noted we were not reaching this question. "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. Department 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, S091097,2000 Cal. LEXIS 8039)—and our opinion today should not be read as having prejudged those questions." (*Camargo*, *supra*, 25 Cal.4th at p. 1245, fn. 2.)

[*223] **FACTUAL AND PROCEDURAL BACKGROUND**

McKown was the employee of an independent contractor hired by defendant Wal-Mart Stores, Inc. (Wal-Mart) to install sound systems in its stores, including [***5] the store in Chino where this accident occurred. Installation of the sound systems involved running wires and installing speakers in the store ceilings. Wal-Mart requested that the contractor use Wal-Mart's forklifts whenever possible in performing the work. The request was understood not to be a directive. The forklift that Wal-Mart employees furnished McKown had equipment for overhead work, consisting of a work platform along with a four-foot extension to raise the platform. For safety, the extension was supposed to be chained to the forklift, and the platform chained to the forklift or to the extension. However, only one chain, securing the extension to the forklift, was provided by Wal-Mart. After discussing the advisability of using the forklift without a chain securing the platform to the extension or the forklift, McKown and his colleague decided to do so. While his colleague was driving the forklift and McKown was working on the platform, the platform hit a ceiling pipe, disengaged from the extension, and fell about 12 to 15 feet to the floor with McKown on it.

A jury found that Wal-Mart was negligent in providing unsafe equipment and allocated 55 percent of the responsibility [***6] for the accident to McKown's employer, 23 percent to Wal-Mart, 15 percent to the manufacturer of the equipment, and 7 percent to McKown. The Court of Appeal affirmed the judgment, concluding that "plaintiff's claim that Wal-Mart negligently supplied unsafe equipment was viable notwithstanding *Privette* and *Toland*." We granted review, and limited the issue to be briefed and argued to the question whether, under our decisions in *Privette* and *Toland*, an employee of an independent contractor is barred from pursuing a lawsuit against the hirer of the independent contractor on the theory the hirer negligently provided unsafe equipment. After review was [**1096] granted, we issued our decision in *Camargo*, extending *Privette* and *Toland* to the tort of negligent hiring, and we then requested counsel to file supplemental letter briefs exploring the significance of *Camargo* for the question whether an employee of an independent contractor may bring an action for the tort of

negligent provision of unsafe equipment against the hirer of the contractor. The judgment of the Court of Appeal, which affirmed the judgment of the trial court in favor of plaintiff McKown, is affirmed. [***7]

DISCUSSION

The line of cases bearing on the question presented here is discussed in the companion to this case, *Hooker*, *supra*, 2000 Cal. LEXIS 464, so that [*224] discussion need not be repeated at length here. To summarize: In *Privette* and *Toland*, we held that an employee of a contractor may not sue the hirer of the contractor under either of the alternative versions of the peculiar risk doctrine set forth in sections 413 and 416 of the Restatement. 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. Under section 416, even if the hirer has provided for special precautions in the contract or otherwise, the hirer 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. In [***8] *Toland*, we rejected the argument that *Privette* did not bar recovery for *direct* liability 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.)

In *Camargo*, *supra*, 25 Cal.45h 1235, we held that an employee of a contractor may not sue the hirer of the contractor under the *negligent hiring* theory set forth in section 411. Under section 411, a hirer is liable for physical harm to third persons caused by the hirer's failure to exercise reasonable care to employ a competent contractor to perform work that will involve a risk of physical harm unless it is skillfully and carefully done, or to perform any duty the [***9] hirer owes to third persons. In *Camargo*, we rejected the argument that *Privette* and *Toland* were distinguishable on the ground that in a negligent hiring case the hirer is, in a sense, being taxed with his *own* negligence, making his liability *direct*. "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 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.)" (*Camargo* [***10] , *supra*, 25 Cal. 4th at p. 1244.)

[*225] In *Hooker*, we held that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control affirmatively contributed to the employee's injuries. Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries [**1097] of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo*, because the liability of the hirer in such a case is *not* in essence *vicarious* or *derivative* in the sense that it derives from the act or omission of the hired contractor. "To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker*, *supra*, 2002 Cal. LEXIS 464.)

For the same reason, [***11] when a hirer of an independent contractor, by negligently furnishing unsafe equipment to the contractor, affirmatively contributes to the injury of an employee of the contractor, the hirer should be liable to the employee for the consequences of the hirer's own negligence. "The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work. [Citation.] An owner is not liable for injuries resulting from defective appliances *unless he has supplied them* or has the privilege of selecting them or the materials out of which they are made [citation] or unless he exercises active control over the men employed or the operations of the equipment used by the independent contractor. [Citation.]" (*McDonald v. Shell Oil Co.* (1955) 44 Cal.2d 785, 788-789, 285 P.2d 902, italics added.) *McDonald* predates *Privette*, but as the Court of Appeal here observed, it serves to underline the fact that, " [***12] where the hiring party actively contributes to the injury by supplying defective equipment, it is the hiring party's own negligence that renders it liable, not that of the contractor." Indeed, the jury in this case clearly

distinguished between the liability of the contractor and that of the hirer, allocating 55 percent of the responsibility to the contractor and 23 percent to the hirer, Wal-Mart.

Wal-Mart contends it should not be held liable for provision of the unsafe equipment because it merely requested, and did not insist, the contractor use its forklift. To the contrary: The contractor had several contracts with Wal-Mart for the installation of sound systems in Wal-Mart stores, and Wal-Mart, the world's largest retailer, was a customer the contractor was presumably loathe to displease. (The chief executive officer of the contractor testified that Wal-Mart had requested that the contractor use Wal-Mart's forklifts whenever possible, and "as a businessman I found that if a [*226] customer has a legitimate request, it's usually best to do what the customer asks.") Wal-Mart presumably believed the forklift it provided was safe, and plaintiff may well have believed that refusal to use it [***13] would have generated ill will. The extra expense of renting a forklift would have been chargeable to Wal-Mart. Moreover, renting a forklift would have entailed delaying the installation project for at least 24 hours for the following reasons: The installation work was to occur at night when the store was closed. Wal-Mart provided the forklift to the contractor's employees around midnight. At that time of night rental yards, where substitute equipment might have been obtained, were closed. Admittedly, Wal-Mart was not the only one at fault, but then the jury's verdict reflected that.

With regard to the jury's verdict, Wal-Mart contends it should not be held liable for its negligence because the jury found the contractor was *primarily* (55 percent) at fault. We have stated that " '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.' " (*Camargo*, *supra*, 25 Cal.4th at p. 1244, quoting *Toland*, *supra*, 18 Cal.4th at p. 267.) However, in this case, as well as in *Hooker*, the hirer's affirmative contribution [***14] to the employee's injuries eliminates the unfairness in imposing liability where the contractor is primarily at fault.

Finally, Wal-Mart contends that, in a suit for negligent provision of unsafe equipment, imposition of liability on a hirer for injuries to an employee of an independent contractor would violate the spirit of the workers' compensation exclusivity rule and give the employee an unwarranted windfall. For the reasons stated in *Hooker*, these contentions [**1098] should be rejected. (See *Hooker*, *supra*, 2002 Cal. LEXIS 464 .)

The judgment of the Court of Appeal is affirmed.

BROWN, J.

WE CONCUR:

GEORGE, C.J.

KENNARD, J.

BAXTER, J.

CHIN, J.

MORENO, J.

CONCURBY:
WERDEGAR

CONCUR:

CONCURRING OPINION BY WERDEGAR, J.

I concur in the result. But as in the companion case, *Hooker v. Department of Transportation* (Jan. 31, 2002, S091601) 27 Cal. 4th 198, 115 Cal. Rptr. 2d 853, 38 P.3d 1081, 2002 Cal. LEXIS 464 (*Hooker*), I disagree with the majority's rule limiting a hirer's liability for its own negligence to acts that "affirmatively contribute" to the injury of a contractor's employee (maj. opn., *ante*, at p. 2). That limitation is an [***15] unwarranted intrusion into the jury's role in finding facts and allocating fault.

In the present case, Wal-Mart Stores, Inc. (Wal-Mart) argues it should not be liable because the jury found it only 23 percent at fault, while finding the [*227] contractor 55 percent at fault, arguably making the contractor the party "primarily" at fault. Wal-Mart's position is in obvious conflict with the principles of comparative fault. That one party is deemed less responsible than another, or that the more responsible party is assigned more than 50 percent of the fault, does not exonerate or immunize the less responsible party, though it may reduce that party's ultimate liability. The majority is therefore correct to reject Wal-Mart's position, but in substituting its own "affirmatively contribute" test (maj. opn., *ante*, at pp. 7-8), the majority makes essentially the same error as Wal-Mart. As I explain in my dissent in *Hooker*, *supra*, 27 Cal. 4th 198, 215, 115 Cal. Rptr. 2d 853, 38 P.3d 1081, 2000 Cal. LEXIS 464, that one party is deemed to have negligently contributed to an accident only by *omission*, or that another party contributed to the accident by affirmative act, does not exonerate or immunize the party contributing by omission, though [***16] it may well reduce that party's ultimate liability.

The distinction between act and omission, or activity and passivity, is likely to be important to a jury in allocating fault, but it does not properly play a role in a court's decision whether a hirer may be liable *at all* for injuries to a contractor's employee. (See Hooker, supra, 2002 Cal. LEXIS 464 (dis. opn. of Werdegar, J.).) Just as the major-

ity in this case accepts the jury's allocation of fault even though Wal-Mart "requested," rather than "insisted," that its own forklift be used (maj. opn., *ante*, at p. 7), so should it accept a jury's allocation of fault (if supported by all the evidence) without imposing a rule of complete immunity for hirers who contribute to an accident by negligent omission rather than affirmative act.

WERDEGAR, J.

20 of 37 DOCUMENTS

DELANEY GERAL MARKS, Petitioner, v. THE SUPERIOR COURT OF ALAMEDA COUNTY, Respondent; THE PEOPLE, Real Party in Interest.

S085224

SUPREME COURT OF CALIFORNIA

27 Cal. 4th 176; 38 P.3d 512; 2002 Cal. LEXIS 275; 115 Cal. Rptr. 2d 674; 2002 Cal. Daily Op. Service 732; 2002 Daily Journal DAR 953

January 28, 2002, Filed

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

SUBSEQUENT HISTORY:
Rehearing Denied March 27, 2002, Reported at: 2002 Cal. LEXIS 2013.

PRIOR HISTORY:
Superior Court of Alameda County. Super. Ct. No. 109184. Jeffrey W. Horner, Judge.

DISPOSITION:
Remanded for resettlement of the statement on appeal.

COUNSEL:
Attorneys for Appellant: Michael Lawrence, Gary Sowards and Mary Jane Mona for Petitioner.

Attorneys for Respondent: No appearance for Respondent. Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Ronald A. Bass, Assistant Attorney General, Thomas A. Brady, Laurence K. Sullivan and Sharon Wooden, Deputy Attorneys General, for Real Party in Interest.

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

OPINIONBY:
BROWN

OPINION:

[*179] [**515] Appeal from a judgment of death is automatic. (Pen. Code, § 1239, subd. (b).) If, as in most cases, the defendant is indigent, this court will appoint counsel to prosecute the appeal. (*Id.*, § 1240.1.) Until 1998, appointed counsel's obligations also included "a duty to investigate factual and legal grounds for the filing of a petition for writ of habeas corpus." (Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, policy 3, former std. 1-1; see *In re Sanders* (1999) 21 Cal.4th 697, 717-718, 981 P.2d 1038; [***2] see also *In re Anderson* (1968) 69 Cal.2d 613, 73 Cal. Rptr. 21, 447 P.2d 117.) Since 1998, the court's policies have alternatively provided for the appointment of separate counsel to represent death penalty defendants on direct appeal and in habeas corpus/executive clemency proceedings. We issued an order to show cause in this matter to clarify the authority of habeas corpus counsel to participate in the correction, augmentation, and settlement of the record on appeal. Having assessed considerations of both policy and practicality, we conclude that, should the timing of the appointment permit, habeas corpus counsel may

submit to appellate counsel suggestions for correction, augmentation, and settlement. Appellate counsel, however, retains ultimate and plenary control of the record correction process **n1** on the defendant's [**516] behalf, bearing in mind the obligation to "consult with and work cooperatively with habeas corpus counsel." (Cal. Supreme Ct., Policies Regarding Cases Arising from Judgments of Death, policy 3, std. 1-1 (Supreme Court Policies).)

n1 In general, references to "record correction" and "record correction process" throughout this opinion will include correction and augmentation of the record and settlement of the statement on appeal.

[***3]

[*180] Accordingly, respondent court did not abuse its discretion in declining to permit petitioner's habeas corpus counsel to participate in record correction. We further conclude, however, that the procedures utilized for settling the statement on appeal substantially failed to conform to rules 7 and 36(b) of the California Rules of Court. **n2** In the interests of judicial economy since the matter is currently before us, we will exercise our inherent authority to direct resettlement in conformance with the prescribed procedure. (Cf. *People v. Wright* (1990) 52 Cal.3d 367, 401, fn. 6, 276 Cal. Rptr. 731, 802 P.2d 221.)

n2 Hereafter, all references to rule or rules are to the California Rules of Court.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner Delaney Geral Marks was sentenced to death on June 3, 1994. On September 22, 1998, this court appointed Richard Power (Power; appellate counsel) to represent him on direct appeal. On March 18, 1999, the court appointed the Habeas Corpus [***4] Resource Center (HCRC; habeas corpus counsel) to represent him in habeas corpus and executive clemency proceedings.

On June 3, 1999, Power filed "Appellant's Request for Correction of Record, Augmentation of Record, Viewing and Distribution of Sealed Record, Preparation of Settled Statement" (Appellant's Request for Correction). Thereafter, the HCRC electronically transmitted to Power four documents containing suggested additional record corrections for his review. These documents also identified several apparently unreported proceedings and unreported comments by defendant in open court. Power had no objection to the additional requests, which did not duplicate any he had already submitted; but he did not formally incorporate any of the HCRC's documents in his previously filed request.

At a record correction hearing held July 23, 1999, before respondent superior court (Judge Jeffrey Horner), both appellate and habeas corpus counsel appeared as did Albert Thews, who had represented petitioner at trial, and Judge Kenneth Burr, who had been the deputy district attorney. Also present was Assistant District Attorney James Anderson, who had been the prosecutor during a Penal Code section 1368 [***5] competency hearing. Neither Deputy Public Defender Susan Sawyer, who had represented petitioner at that hearing, nor Judge Michael Ballachey, who had presided, was present.

Neither the court nor any other participant objected to the HCRC's presence, and habeas corpus counsel actively participated. Power apprised respondent of the HCRC's suggestions for correction and augmentation of the record and distributed printed copies of the HCRC's documents to the [*181] court clerk and the district attorney. The HCRC explained these documents were drafts for appellate counsel's review and requested permission to file a finalized pleading as an addendum to Appellant's Request for Correction, a request Power seconded. The HCRC subsequently filed its documents as "Addendum to Appellant's Request for Correction of Record, Augmentation of Record, Viewing and Distribution of Sealed Record, Preparation of Settled Statement Filed June 3, 1999" (Addendum).

In the course of the hearing, numerous gaps in the recorded proceedings appeared, which would require contacting several other parties, including those involved in petitioner's competency hearing, to determine appropriate settlement. The HCRC expressed [***6] a willingness to assist in this effort. While respondent did not expressly authorize the HCRC's involvement in this regard, neither did it reject the offer. Respondent continued the hearing to November 12, 1999.

In the meantime, the HCRC continued to review additional portions of the record, including four boxes of juror questionnaires, to determine whether additional correction or [**517] augmentation was needed. **n3** Based on this review, the HCRC sent to appellate counsel on November 1, 1999, a draft of further record correction requests for his consideration and comment. Although he had no objection to any of the requests, Power declined to amend his original motion because in his view these requests were not relevant to petitioner's appeal. Instead, he suggested the HCRC file a motion directly with respondent court, which the HCRC did on November 9, 1999, as "Defendant's Supplemental Request for Correction of Record, Augmentation of Record, Viewing and Distribution of Sealed Record, Preparation of Settled Statement" (Supplemental Request).

n3 Power had previously indicated he did not need to have the juror questionnaires provided to him.

[***7]

At the November 12 hearing, appellate counsel and the HCRC again appeared on behalf of petitioner. **n4** When the hearing commenced and without prior notice, Anderson stated that on behalf of both the Attorney General and the district attorney he objected to further participation by the HCRC in the [*182] record correction process. Respondent then ruled the HCRC lacked "standing" to appear or submit pleadings or other documents on behalf of petitioner in the current proceedings. **n5** Respondent based this ruling, at least in part, on its belief that the Addendum had substantially duplicated Appellant's Request for Correction resulting in considerable extra effort in reviewing the requests. It was later discovered that the court had inadvertently compared the draft and finalized versions of the same HCRC documents, copies of the former having been provided to the court clerk by Power on July 23, 1999. The court further determined petitioner's Supplemental Request was untimely and declined to file it on that basis rather than lack of standing.

n4 Shortly prior to the hearing, habeas corpus counsel observed Anderson enter the courtroom from Judge Horner's chambers. In support of the brief in opposition, the Attorney General has submitted a declaration by Anderson acknowledging he had an in camera ex parte discussion with Judge Horner prior to the November 12 hearing, but denying the discussion concerned any matter relating to the hearing except that Anderson would be representing the Attorney General's Office as well as the district attorney. Petitioner has submitted no evidence to the contrary.

[***8]

n5 The court also ruled HCRC could no longer independently view or copy court files or exhibits; appellate counsel must accompany anyone conducting such review. Apparently, the Alameda County Superior Court does not generally restrict access to superior court files; the only restriction is that an exhibit technician must accompany anyone viewing exhibits. Accordingly, the Attorney General "agrees that habeas counsel should be allowed [whatever] access [is] afforded under the county's procedures ...."

Following its rulings, respondent distributed the "Court's Settled Statement Re: Suggested Corrections to Reporter's Transcript/Unreported Chambers Discussions - Guilt and Penalty Trials in Department 13 Before Judge Horner" (Court's Settled Statement) and ordered that it be the final settled statement for all settlement requests relating to those phases of petitioner's trial.

A third record correction hearing was held December 10, 1999, at which time the HCRC submitted a "Motion To Reconsider the Court's Ruling of November 12, 1999" (Motion To Reconsider) seeking reconsideration of [***9] (1) the ruling on "standing," (2) the preparation and filing of the Court's Settled Statement as contrary to the rules, and (3) the refusal to file petitioner's Supplemental Request. Anderson reiterated opposition to the HCRC's participation in record correction. Power took no position other than to defer to the HCRC. Respondent denied the Motion To Reconsider in its entirety.

The court then indicated it was prepared to settle those portions of the record regarding the competency hearing referenced in the Addendum. In addition to Anderson, Sawyer was present, but Judge Ballachey was not. Based on counsel's recollections or lack thereof, respondent settled the statement and then certified the record on appeal.

Petitioner now seeks review of the denial of his Motion To Reconsider.

[*183]

DISCUSSION

I.

At the second record correction hearing, both respondent court and appellate counsel [**518] noted that recent changes in this court's procedures for appointment of counsel following a judgment of death had given rise to some procedural uncertainty in the correction process. As respondent expressed the point, "cooperation between [habeas corpus and appellate counsel] doesn't necessarily [***10] mean that everyone gets to file a separate brief, everyone gets to file a separate request. ... The fact that I was responding to a multiplicity of moving papers, requests, certification notices resulted in multiplying my time by a factor far greater than two, and that is something that I know that the Supreme Court and the Judicial Council are all very concerned with, the expenditure of the Court's time."

For some perspective on the issue, a brief overview of the historical context is helpful.

Prior to 1998, all death penalty appointments were dual, i.e., were for both the direct appeal and habeas corpus/executive clemency proceedings. (See generally Supreme Ct. Policies, policy 3, former std. 1-1, as adopted June 6, 1989; Cal. Supreme Ct., former

Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court, as amended Feb. 4, 1998; Cal. Supreme Ct., former Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court, as amended Feb. 4, 1998.) **n6** With respect to the appeal, counsel's responsibilities included record review and correction. [***11] (See Cal. Supreme Ct., Guidelines for Fixed Fee Appointments, on Optional Basis, to Automatic Appeals and Related Habeas Corpus Proceedings in the California Supreme Court, guideline 5 (Fixed Fee Guidelines); Cal. Supreme Ct., Payment Guidelines for Appointed Counsel Representing Indigent Criminal Appellants in the California Supreme Court, guideline II.I (Payment Guidelines).) Policy 3 further provided that "appellate counsel ... shall have a duty to investigate factual and legal grounds for filing of a petition for writ of habeas corpus. The duty to investigate is limited to investigating potentially meritorious grounds for relief that have come to counsel's attention in the course of preparing the appeal." (Supreme Ct. Policies, policy 3, former std. 1-1, as adopted June 6, 1989.)

n6 This case does not raise any question governed by a previous version of the applicable statutes, court rules, or Supreme Court Policies and Fixed Fee and Payment Guidelines. Therefore, unless otherwise indicated, all subsequent references are to the current provisions.

[***12]

[*184] Beginning in 1998, this court modified its policies and the guidelines for payment of counsel in response to certain state and federal statutory changes intended to expedite review in death penalty cases. (*In re Robbins* (1998) 18 Cal.4th 770, 792, fn. 13, 959 P.2d 311; see, e.g., Gov. Code, former § 68650 et seq., added by Stats. 1997, ch. 869, § 3, and renumbered § 68660 et seq. by Stats. 1998, ch. 485, § 95; Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132 (Apr. 24, 1996) 110 Stat. 1214; see also 28 U.S.C. § 2254.) The Supreme Court Policies, Fixed Fee Guidelines, and Payment Guidelines now provide for the option of appointing separate counsel to represent death penalty defendants on direct appeal and in habeas corpus/clemency proceedings. In such case, "appointment of habeas corpus counsel for a person under a sentence of death shall be made simultaneously with appointment of appellate counsel or at the earliest practicable time thereafter." (Supreme Ct. Policies, policy 3, std. 2-1.)

With respect to the appointment of habeas corpus counsel, the Legislature has established the HCRC, which is authorized "to employ [***13] up to 30 attorneys who may be appointed by the Supreme Court to represent any person convicted and sentenced to death in this state ... for the purpose of instituting and prosecuting postconviction actions in the state and federal courts, challenging the legality of the judgment or sentence imposed against that person, and preparing petitions for executive clemency. Any such appointment may be concurrent with the appointment of the State Public Defender or other counsel for purposes of direct appeal under Section 11 of Article VI of the California Constitution." (Gov. Code, § 68661, subd. (a).) [**519]

In the case of bifurcated appointments, the Supreme Court Policies impose on appellate counsel the duty to "take and maintain detailed, understandable and computerized transcript notes and ... compile and maintain a detailed list of potentially meritorious habeas corpus issues that have come to appellate counsel's attention" in the course of preparing the appeal. (Supreme Ct. Policies, policy 3, std. 1-1.) Until the appointment of habeas corpus counsel, he or she also has the duty to "preserve evidence that comes to the attention of appellate counsel if that evidence [***14] appears relevant to a potential habeas corpus investigation." (*Ibid.*) Upon appointment of habeas corpus counsel, "appellate counsel shall deliver ... copies of the list of potentially meritorious habeas corpus issues, copies of the transcript notes, and any preserved evidence relevant to a potential habeas corpus investigation, and thereafter shall update the issues list and transcript notes as warranted." (*Ibid.*)

Separate habeas corpus counsel "shall have a duty to investigate factual and legal grounds for the filing of a petition for a writ of habeas corpus. The [*185] duty to investigate is limited to investigating potentially meritorious grounds for relief that come to counsel's attention in the course of reviewing appellate counsel's list of potentially meritorious habeas corpus issues, the transcript notes prepared by appellate counsel, the appellate record, trial counsel's existing case files, and the appellate briefs, and in the course of making reasonable efforts to discuss the case with the defendant, trial counsel and appellate counsel." (Supreme Ct. Policies, policy 3, std. 1-1.) As noted in *In re Robbins*, *supra*, 18 Cal.4th at page 792, footnote 13, this language [***15] "merely clarifies the previously imposed duty, and accounts for the involvement, under the recent legislation, of separate direct appeal and habeas corpus counsel. The amendment effects no substantive change in the scope of counsel's duty to conduct a habeas corpus investigation." In this regard, the Supreme Court Policies anticipate that appellate counsel "shall consult with and work cooperatively with habeas corpus counsel to facilitate timely investigation, and timely preparation and filing (if warranted)

of a habeas corpus petition by habeas corpus counsel." (Supreme Ct. Policies, policy 3, std. 1-1.)

II.

A.

Having described the legal and historical background against which this case arises, we turn to the threshold issue of respondent's ruling that the HCRC did not have standing to participate in the record correction process.

The legal concept of standing arises in a variety of contexts. (See, e.g., *Klopstock v. Superior Court* (1941) 17 Cal.2d 13, 17-19, 108 P.2d 906 [distinguishing between lack of capacity to sue and lack of right to sue corporation by legatee, rather than personal representative, of deceased shareholder]; *Rakas v. Illinois* (1978) 439 U.S. 128, 139, 58 L. Ed. 2d 387, 99 S. Ct. 421 [***16] [defendant's challenge to unlawful search or seizure depends upon whether he "is asserting his own legal rights and interests rather than basing his claim for relief upon the rights of third parties"].) In whatever context, however, it generally does not concern the authority of an attorney to appear in court in a representative capacity. (Cf. *People ex rel. Tyler v. Pratt* (1866) 30 Cal. 223.) Clearly, petitioner as a party to the appeal had standing to participate in record correction proceedings. Equally clearly, Power, as appellate counsel, had authority to and did appear on his behalf. (See rules 35(c), 36(b); Supreme Ct. Policies, policy 3, std. 2-1; Fixed Fee Guidelines, guideline 5; see also Pen. Code, § 190.8, subd. (g); rule 39.55(b).) The only question is whether the HCRC, as habeas corpus counsel, could separately appear and participate.

[*186] Characterizing the HCRC as "cocounsel," petitioner argues habeas corpus counsel has essentially the same authority to appear as appellate counsel, albeit for a different purpose. If not inaccurate, this description is at least inexact, since habeas corpus counsel and appellate counsel are appointed [***17] independently to discharge distinct and essentially unrelated functions on behalf [**520] of a death penalty defendant. (See Supreme Ct. Policies, policy 3, std. 2-1; Fixed Fee Guidelines, guideline 5; Payment Guidelines, guideline II.I; see also Pen. Code, § 1473.) Petitioner also characterizes respondent's action as "curtailing petitioner's right to habeas corpus counsel" and in effect removing his attorney. This begs the question, however, since the scope of habeas corpus counsel's authority to participate in record correction is the very issue now before this court, and in any event petitioner was not without representation by the attorney principally charged with these responsibilities. (Cf. *Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697, 122 Cal. Rptr. 778, 537 P.2d 898 [trial court's action improper in abruptly removing deputy public defenders and replacing them with unprepared substitute counsel in ongoing proceedings].)

We conclude the scope of authority to participate should reflect the purpose and attendant duties of the separate appointments. This court's policies and guidelines, as well as the court rules and [***18] statutes, both explicitly and implicitly contemplate appellate counsel will assume primary, if not exclusive, control of record correction on behalf of a death penalty defendant. Accordingly, habeas corpus counsel should have no direct or active role in that process.

As relevant here, Supreme Court Policies, policy 3, standard 2-1, states, "This court's appointment of appellate counsel for a person under a sentence of death is for the following: (i) pleadings and proceedings related to preparation and certification of the appellate record; (ii) representation in the direct appeal before the California Supreme Court ...." (See Fixed Fee Guidelines, guideline 5 [progress payment made following submission of "a draft first request for correction of the record (and, if appropriate, any motion for augmentation and/or settled statement)"; additional payment due "after certification of the record"]; see also Payment Guidelines, guideline II.I.) No comparable duty devolves to habeas corpus counsel, nor does habeas corpus counsel receive payment for completing these tasks. (See Supreme Ct. Policies, policy 3, std. 2-1; Fixed Fee Guidelines, guideline 5; Payment Guidelines, guideline II. [***19] I.)

By contrast, "the appointment of habeas corpus counsel is for the following: (i) investigation, and preparation and filing (if warranted), of a habeas corpus petition in the California Supreme Court, including any [*187] informal briefing and evidentiary hearing ordered by the court and any petition to exhaust state remedies ...." (Supreme Ct. Policies, policy 3, std. 2-1; see Fixed Fee Guidelines, guideline 5; Payment Guidelines, guideline II.I.) To that end, "habeas corpus counsel should expeditiously investigate potentially meritorious bases for filing a petition for a writ of habeas corpus. If the timing of separate appointments permits, this investigation should be done concurrently with appellate counsel's review of the appellate record and briefing on appeal ...." (Supreme Ct. Policies, policy 3, std. 2-2.) Thus, notwithstanding that potentially meritorious claims may appear in the record on appeal (see *In re Robbins*, *supra*, 18 Cal.4th at p. 793, fn. 15), the terms of the policies do not contemplate habeas corpus counsel's participation in the correction process.

Neither does any statutory authority or the rules. Penal Code section 190.6, [***20] subdivision (a), articulates the Legislature's finding "that the sentence in all capital cases should be imposed expeditiously." Section 190.8 of the Penal Code sets forth the procedure and tim-

ing for prompt certification of the record on appeal for completeness and accuracy; rules 39.50 through 39.57 implement its directives. Although these provisions apply only to cases in which trial commenced after January 1, 1997 (rule 39.53(b)), they inform our determination of the question presented.

Pursuant to Penal Code section 190.8, subdivision (b), the clerk and court reporter are to begin preparation of the trial transcripts within 30 days of the imposition of death. Certification occurs "in two stages, the first for completeness and the second for accuracy ...." (*Id.*, subd. (a).) Under rule 39.54, the transcripts are delivered to defense counsel and the prosecuting attorney, who must submit declarations either stating that they have determined the transcripts [**521] are complete or requesting the inclusion of additional materials or the correction of errors. (Rule 39.54(c).) The trial court may not certify the record as complete except [***21] upon the submission of such declarations. (Rule 39.54(e); see also Pen. Code, § 190.8, subd. (e).)

Rule 39.55 governs certification of the record for accuracy. (See also Pen. Code, § 190.8, subd. (g).) Following delivery of the record, "appellate counsel shall file any request for corrections or additional transcripts" within a specified time. (Rule 39.55(b).) This rule applies to both defense counsel and the prosecutor. (See Pen. Code, § 190.8, subd. (i).) The trial court then holds a hearing "to address the completeness and accuracy of the record, in accordance with the procedures and timeliness set out in rule 39.54(d)" (rule 39.55(c)); orders any necessary corrections or additions; and certifies the record as accurate (rule 39.55(d)).

Although rule 35 governs petitioner's case (see rule 39.53(b)) and its procedures differ somewhat in detail and time limits from rules 39.50 [*188] through 39.57, for present purposes it describes essentially the same process for correction and augmentation of the record. Rule 35(c)(3) provides that upon completion of the clerk's and reporter's transcripts, "a copy shall be delivered [***22] to counsel on appeal ...." Thereafter, "any party may serve and file a request for correction of these transcripts .... The trial judge shall determine whether the requested corrections shall be made .... After corrections have been made, the judge shall certify that all objections have been determined, and that the transcripts have been corrected in accordance with such determination, and shall redeliver the transcripts to the clerk." (Rule 35(c)(4).)

None of the foregoing assigns any role to habeas corpus counsel in record correction. Nevertheless, the question remains whether this court should, in the exercise of its inherent authority in these matters, authorize habeas corpus counsel's involvement and, if so, under what circumstances and to what extent.

Petitioner asserts the "HCRC's participation in the record correction phase of this case is directly and intrinsically related to the ultimate preparation of habeas corpus claims." We reject this argument for several reasons.

First, petitioner submits no particulars in which the record as certified may be deficient for the purpose of preparing habeas corpus claims on his behalf. As discussed more fully below, the appellate [***23] record does not provide the basis for raising such claims but only for developing them based on matters outside the record. Petitioner identifies no potential claim that the HCRC's exclusion from record correction will prevent him from adequately developing.

Second, to the extent the argument implies habeas corpus claims derive principally from the record on appeal, it conflicts with the rule that collateral review by habeas corpus is not a reiteration of or substitute for an appeal. (See *In re Waltreus* (1965) 62 Cal.2d 218, 225, 42 Cal. Rptr. 9, 397 P.2d 1001 [court will not consider merits of claim previously raised and rejected on appeal]; *In re Dixon* (1953) 41 Cal.2d 756, 759, 264 P.2d 513 [court will not consider claims that could have been but were not raised on appeal].) Thus, while the appellate record may be a starting point for developing habeas corpus claims, it is not the primary basis for asserting them. (*In re Robbins*, *supra*, 18 Cal.4th at p. 793, fn. 15 ["duty to investigate ... *may* arise based on triggering facts that appear on the face of the record"]; see Supreme Ct. Policies, policy 3, std. 1-1.) As we have stated, [***24] "a duty to investigate ... also may arise based upon triggering facts that appear nowhere on the face of the record"; and this court has expressly declined to [*189] limit the availability of habeas corpus investigation funds "to 'claims that are discoverable by reference to the four corners of the appellate record' or claims that are 'revealed by the record.' [Citation.]" (*In re Robbins*, *supra*, 18 Cal.4th at p. 793, fn. 15.)

Third, we have no reason to anticipate the record correction performed by appellate counsel will be inadequate for purposes of discovering or substantiating habeas corpus [**522] claims. The Supreme Court Policies provide that "appellate counsel shall consult with and work cooperatively with habeas corpus counsel to facilitate timely investigation, and timely preparation and filing (if warranted) of a habeas corpus petition." (Supreme Ct. Policies, policy 3, std. 1-1.) As it relates to record correction, this directive contemplates appellate counsel's consideration of any timely suggestions habeas corpus counsel may offer for correction, augmentation, or settlement of the record, particularly as they relate to potential habeas corpus claims.

In addition, recent [***25] statutory changes should minimize the need for any but minor record correction. Penal Code section 190.9, subdivision (a)(1), requires, "In any case in which a death sentence may be imposed, all proceedings conducted in the municipal and superior courts, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present. The court reporter shall prepare and certify a daily transcript of all proceedings commencing with the preliminary hearing. Proceedings prior to the preliminary hearing shall be reported [and transcribed when the municipal or superior court receives notice that the death penalty is being sought]." (See rule 39.52.) Moreover, "during the course of the trial in which the death penalty is being sought, trial counsel shall alert the court's attention to any errors in the transcripts incidentally discovered by counsel while reviewing them in the ordinary course of trial preparation. The court shall periodically request that trial counsel provide a list of errors in the trial transcript during the course of trial and may hold hearings in [***26] connection therewith." (Pen. Code, § 190.8, subd. (c).)

With respect to proceedings in the municipal court, rule 39.52(g) requires trial counsel to "(1) review the docket sheets to ensure that transcripts of all proceedings have been made; [P] (2) examine the municipal court file to determine whether it is complete; [P] (3) review the reporter's transcript; and [P] (4) consult with opposing counsel to determine whether all other discussions have been properly transcribed." (See also rule 39.52(h) [declaration that counsel has performed tasks required by rule 39.52(g)].) As to superior court proceedings, trial counsel is required to review the record for completeness (rule 39.54(b)) and, if necessary, file "a request for any additional [*190] materials to be included in the record and any corrections of errors that have come to the attorney's attention." (Rule 39.54(c)(2).)

Pursuant to Penal Code section 190.7, subdivision (a)(1), the record on appeal in a capital case consists of not only all the reporter's transcripts but a clerk's transcript as well. (See rule 39.51(a).) "The clerk's transcript shall include all documents filed [***27] or lodged in the municipal and superior court files in the case, including all items listed in rule 33(a) and juror questionnaires of all potential jurors, regardless of whether the jurors were selected to sit on the case." (Rule 39.51(a)(1).) The statute also requires the inclusion of "[a] copy of any other paper or record on file or lodged with the superior or municipal court and a transcript of any other oral proceeding reported in the superior or municipal court pertaining to the trial of the cause." (Pen. Code, § 190.7, subd. (a)(1).) Additionally, "all documents filed confidentially under Penal Code section 987.9 or 987.3 shall be sealed and copies provided only to the reviewing court and to counsel for the defendant to whom the documents relate. All transcripts of in camera proceedings shall be sealed and copies provided only to the reviewing court and to counsel for those parties present at the proceedings." (Rule 39.51(b).)

Scrupulous attention to these preparation and review procedures by both the trial court and counsel will substantially reduce the need for correction and augmentation or settled [***28] statements to ensure a complete and accurate record on appeal. Moreover, these dictates make clear, and we emphasize, neither the trial court nor counsel may decline to include any portion of the proceedings in the record on appeal.

Finally, according habeas corpus counsel an independent or active cocounsel role in record correction proceedings raises the potential for serious logistical complications and delays in certification, contrary to [**523] legislative intent that the record correction process proceed expeditiously. (See Pen. Code, § 190.8; rule 39.50 et seq.; see also Pen. Code, § 190.6.) Because, as here, appointment of separate appellate and habeas corpus counsel may not occur simultaneously, habeas corpus counsel's requests for correction, augmentation, or settlement may fall well outside the time frame imposed by statute and rules (see, e.g., rule 39.55) even if submitted as soon as reasonably possible after review of the record. **n7**

n7 To date, this court has simultaneously appointed appellate and habeas corpus counsel in only three cases, and the delay in appointment of habeas corpus counsel has varied from a few months to more than a year.

[***29]

Petitioner also contends he is disadvantaged by the appointment of separate counsel when a dual appointment would allow his habeas corpus [*191] counsel to act on his behalf during record correction. He offers no basis, however, for assuming separate appellate counsel will not proceed with adequate record correction. (See *ante*, at pp. 15–17.) Petitioner further suggests an element of judicial economy supports counsel's early involvement: "If habeas corpus counsel must wait for record correction to end for the opportunity to correct deficiencies in the record, these remedies will be limited to making requests to this Court, rather than to the trial court, or raising the matter as a potential habeas corpus claim." The function of the record, however, is principally to facilitate meaningful appellate review. Moreover, if habeas corpus counsel are in a position to seek relief in this court allowing for correction of the record (cf. rule 12(b)) or if the matter can

be raised on habeas corpus, then petitioner is not without a remedy.

We do not intend the foregoing discussion to be read as foreclosing habeas corpus counsel from having input in record correction, only as subordinating any role [***30] to that of appellate counsel. This secondary role accommodates both the assignment of responsibility for record correction to appellate counsel and the duty imposed by the Supreme Court Policies that habeas corpus counsel's investigation of potentially meritorious claims, including review of the appellate record and briefing on appeal, "should be done ...,in any event, in cooperation with appellate counsel." (Supreme Ct. Policies, policy 3, std. 2-2.)

Habeas corpus counsel may therefore proffer suggestions for correction, augmentation, or settlement of the record for appellate counsel's consideration, but with the latter making the ultimate determination whether to include any or all in the defendant's formal request to the trial court. At the same time, we reiterate that appellate counsel has no authority to limit the record on appeal to less than the "entire record" designated by statute and the rules. (Pen. Code, § 190.7; rule 39.51.) Furthermore, submission of habeas corpus counsel's suggestions cannot delay or interfere with the timely processing of the record. The statutes and rules impose definite outside time limits on the correction process. Appellate [***31] counsel and the trial court must work expeditiously to meet them. (See Pen. Code, §§ 190.6, 190.8, subds. (b), (d), (g); rules 39.50(b), 39.52(g)-(i), (*l*), 39.54; see also rule 35(a)-(c).) Coordinating belated requests would put an undue burden on both. For the same reasons, habeas corpus counsel also may not challenge during the correction process appellate counsel's decision not to adopt any or all suggestions.

Our discussion nevertheless should not be read to prevent appellate counsel from designating habeas corpus counsel as the defendant's representative in record correction if circumstances warrant. In that event, however, the [*192] appearance would not be by habeas corpus counsel *qua* habeas corpus counsel but as appellate counsel's designee.

Accordingly, we conclude respondent did not abuse its discretion in precluding the HCRC from participating in record correction or in denying petitioner's Motion To Reconsider. (See also *Bloniarz v. Roloson* (1969) 70 Cal.2d 143, 147-148, 74 Cal. Rptr. 285, 449 P.2d 221 ["every court of record has powers requisite to its proper functioning as an independent constitutional [***32] department of government"].)

[**524] As to petitioner's Supplemental Request, the court based its ruling on timeliness grounds, not standing; and it appears the court did not abuse its discretion in that regard either. Requests for correction and augmentation must be filed no later than "90 days after the date the record was delivered to appellate counsel ...." (Rule 35(c)(4); see rule 39.55(b) [same].) Accordingly, we decline to remand the matter for Power to consider whether to request any additional record correction based on that document, particularly in light of the fact he has filed the appellant's opening brief without requesting further augmentation, correction, or settlement.

B.

Petitioner's Motion To Reconsider also raised a claim concerning settlement of the record, asserting the procedures adopted by respondent court failed to conform to the rules.

The record on appeal in a capital case "includes, but is not limited to, the following: [P] (1) The normal and additional record prescribed in the rules adopted by the Judicial Council pertaining to an appeal taken by the defendant from a judgment of conviction. [P] (2) A copy of any other paper or record on file or [***33] lodged with the superior or municipal court and a transcript of any other oral proceeding reported in the superior or municipal court pertaining to the trial of the cause." (Pen. Code, § 190.7, subd. (a)(1), (2).) "In any case in which a death sentence may be imposed, all proceedings conducted in the municipal and superior courts, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present." (*Id.*, § 190.9, subd. (a)(1).)

Nevertheless, as here, gaps in the record may occur, in which case the rules provide a procedure for filling them in.

In criminal cases, the process is governed by rules 7 and 36(b). (See also rule 39.50(a) [rules governing criminal appeals apply to appeals from death penalty judgments].) That process may be divided into nine steps:

[*193] First, the appellant shall "serve and file an application for permission to prepare a settled statement," which "shall be verified and shall contain a statement of the facts or a certificate of the clerk showing that a reporter's transcript cannot be obtained." (Rule 36(b); see also rule [***34] 4(e).)

Second, the judge "shall decide the application ... ,and, if the showing is sufficient, shall make an order permitting the preparation of a settled statement" of the oral proceedings in question. (Rule 36(b).)

Third, upon such an order, the appellant must "serve and file a condensed statement [thereof] in narrative form

...." (Rule 7(b); see rule 36(b).) While it is unclear precisely what this contemplates, the rule does provide that "if necessary for accuracy, clarity, or convenience, portions of the evidence may be set forth by question and answer, subject to the approval of the court in settling the statement." (Rule 7(b).) We may thus infer that verbatim statements would be the exception. (See, e.g., *Sweet v. Markwart* (1953) 115 Cal. App. 2d 735, 743, 252 P.2d 751 [finding the appellant's "chronological recitation of occurrences during the trial" and " 'Partial Transcript by Question and Answer' " "not a proper way to prepare a narrative statement"]; cf. *People v. Tuilaepa* (1992) 4 Cal.4th 569, 585, 842 P.2d 1142 ["The settlement, augmentation, and correction process does not allow parties to create proceedings, make records, [***35] or litigate issues which they neglected to pursue earlier"].)

Fourth, the respondent may "serve and file proposed amendments" to the proposed settled statement. (Rule 7(b).)

Fifth, the superior court's clerk "shall set a time ... for settlement of the statement" and "give ... notice to all parties of the time set ...." (Rule 7(d).)

Sixth, at this hearing "the judge who tried the case" "shall settle the statement and fix the time within which the appellant shall engross it as settled." (Rule 7(d).)

Seventh, "the appellant shall engross the statement in accordance with the order of the [**525] judge," and "serve and file the engrossed statement." (Rule 7(d).)

Eighth, if the respondent thereafter serves and files timely objections, the judge must determine whether the statement was prepared in accordance with the order; if not, changes are required. (Rule 7(d).)

Finally, once the statement is determined to conform to the order, the judge then certifies it. (Rule 7(d).)

[*194] In sum, these rules contemplate that the appellant will review the record for any apparent omissions in the recording of the proceedings and seek the court's permission to include a settled statement of those proceedings. [***36] Counsel must verify the application for permission and either explain its factual basis or include the clerk's certification that the proceedings were not recorded. If the court grants permission to proceed by settled statement, the appellant files a narrative description without unnecessary detail of the subject proceedings. Once the appellant has drafted and served the narrative statement, the respondent may propose any amendments. At a subsequent hearing after notice to the parties, the trial judge who presided resolves the differences and directs the appellant to engross the statement, i.e., to incorporate any changes from the original submission. Absent any objection by the respondent, the judge then certifies the statement as settled.

For various reasons, the settled statements in this case failed to conform to the foregoing procedures.

As previously noted, Judge Horner presided at the guilt and penalty phases of the trial, petitioner was represented by Attorneys Thews and Weis (now deceased), and the prosecutor was Deputy District Attorney (now Judge) Burr. At the Penal Code section 1368 competency hearing, Judge Ballachey presided, Deputy Public Defender [***37] Sawyer appeared on behalf of petitioner, and the prosecution was represented by Assistant District Attorney Anderson.

Both Appellant's Request for Corrections and the HCRC's Addendum identified apparently unrecorded portions of the trial and competency hearing. However, neither document nor any subsequent filing contained an application with verification or court clerk certification as required by rule 36(b); nor did either set forth "a condensed statement in narrative form of ... the oral proceedings ...." (Rule 7(b).) Instead of directing compliance with rule 7 at the July 23, 1999, hearing, respondent (Judge Horner) indicated—as to the trial proceedings—"I'll need to review this with both Mr. Thews and Judge Burr," neither of whom was present at that point. Later, the court elaborated, "And I indicated that I would pursue this matter by reading the appropriate pages in the transcript, and I would discuss the matter with Judge Burr, who was then the trial deputy district attorney, and Mr. Thews, after I've had the opportunity to make those references and would be prepared to – presumably to address this subject at our next meeting." It then designated September 17, 1999, as [***38] the date for these trial counsel to be present to review the transcript and provide input. The record is silent as to whether this meeting occurred as scheduled. (Cf. rule 7(d).) It is clear, however, that respondent did not direct petitioner, as appellant, to [*195] engross any statement as settled; nor did it certify such a statement. (See rule 7(d).) Rather, it ordered the filing of the Court's Settled Statement and stated, "This is my settled statement. This is not proposed. I'm not negotiating this. This is my settled statement."

In deciding whether to remand the matter for compliance with rule 7, we note that the scant decisional authority construing settlement procedures suggests courts generally will not elevate form over substance if the statement as settled fully and accurately reflects the omitted oral proceedings. "The rules confer full power over such a record in the trial judge. As long as the trial judge does not act in an arbitrary fashion he has full and complete power over such a record." (*St. George v. Superior Court* (1949) 93 Cal. App. 2d 815, 817, 209 P.2d 823; cf. *Sweet*

v. Markwart, *supra*, 115 Cal. App. 2d at p. 743 ["While appellant [***39] here ought to have obeyed these rules, nevertheless, if his statement as proposed actually contained those portions of [**526] the oral proceedings which he deemed material to the determination of his points on appeal, the court could not strike it out, but must proceed to settle it"]; *Williams v. Goldberg* (1944) 66 Cal. App. 2d 40, 45–46, 151 P.2d 853 [although procedure adopted by the trial court "was not in accord with the procedure provided by the Rules on Appeal," the record was clear as to what statement the court intended to settle].)

Nevertheless, "under the rules it is the duty of the trial court to settle a proposed statement, not to make one." (*Stevens v. Superior Court* (1958) 160 Cal. App. 2d 264, 269, 325 P.2d 204.) Here, the procedures completely short-circuited the established format and effectively eliminated the role of the parties in the process.

Substantial departures from established procedures marked settlement of the statement with respect to the Penal Code section 1368 proceedings as well. Respondent court solicited input regarding unrecorded discussions from Assistant District Attorney Anderson at the July [***40] 23 hearing but noted, "Obviously, Miss Sawyer is not here, Judge Ballachey is not here, and I wasn't present, so I would suggest that perhaps if appellate counsel wants to inquire of Miss Sawyer, for example, to see if her recollection differs [from Anderson's] or if she has any additional recollection. If not, at our next hearing I'd be prepared to settle that as a statement of what just was discussed at the bench, but I want to give you the opportunity to check with the other parties if you wish to do that." Habeas corpus counsel also volunteered to "assist Mr. Power in picking the brains of the individuals who participated in any unreported proceedings and draft up a proposed settled statement."

Despite the opportunity, no such draft document was submitted. At the November 12, 1999, hearing, Anderson placed on the record his best recollection as to the substance of unreported proceedings during the competency [*196] hearing. Deputy Public Defender Sawyer appeared at the December 17, 1999, hearing. In general, she either deferred to or confirmed Anderson's rendition or gave her own similar version of what had transpired. In the latter circumstance, respondent indicated without objection [***41] from appellate counsel, "What I will propose here and invite comment is to accept both Mr. Anderson's statement and Ms. Sawyer's statement, and together they will be the settled statement of what occurred on that occasion. In other words, I'm not believing - I'm not disbelieving either attorney. I'm accepting both their statements, and that will be what the Appellate Court will review." As to those proceedings Anderson could not recall, Sawyer was generally able to provide her own recollection. In one instance, however, neither could remember; and respondent stated, "Then the 'no recollection' by both parties, that will constitute the settled statement with respect to that particular entry." Apparently neither appellate nor habeas corpus counsel contacted or sought input from Judge Ballachey; respondent certified the statement for the competency hearing without doing so as well.

In terms of prescribed procedure, the foregoing initially runs afoul of the provision that "the judge who tried the case" settles the statement. (Rule 7(d); cf. rule 51 [providing for substitution of another judge when "any act is required [by the rules] to be done by the judge who tried the case, and such [***42] judge is unavailable or unable to act at the time fixed therefor"].) A primary reason for this requirement lies in the concern for resolving conflicts between the appellant and respondent as to the proper contents of the statement. (See rule 7(b).) "Once settlement is ordered, the court has broad discretion to accept or reject counsel's representations in accordance with its assessment of their credibility. [Citations.] However, it cannot refuse to make that assessment. It may decline to settle a statement only if, after resort to all available aids, including the judge's own memory and those of the participants, it is affirmatively convinced of its inability to do so. [Citation.]" (*People v. Gzikowski* (1982) 32 Cal.3d 580, 585, fn. 2, 186 Cal. Rptr. 339, 651 P.2d 1145; see *Burns v. Brown* (1946) 27 Cal.2d 631, 636, 166 P.2d 1 [trial judge's "familiarity with the trial and knowledge of what took place there make him uniquely qualified to determine what the evidence was and whether it has been correctly [**527] stated"]; *Sidebotham v. Superior Court* (1958) 161 Cal. App. 2d 624, 628, 326 P.2d 890.)

Settlement of the competency hearing [***43] statement also failed to comply with the requirement for verification or certification and for a condensed narrative by the appellant and proposed amendments by the respondent. The court did not direct preparation of an engrossed settled statement; the People had no opportunity to register any objections; and no such statement was certified as accurate.

[*197] Strict compliance with rule 7 assumes particular significance in capital cases by avoiding questions as to the sufficiency of the appellate record (see, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 63, 841 P.2d 118; cf. *Gardner v. Florida* (1977) 430 U.S. 349, 360–361, 51 L. Ed. 2d 393, 97 S. Ct. 1197) and obviating delays if insufficiencies arise after briefing. (See, e.g., *People v. Wright*, *supra*, 52 Cal.3d at p. 401, fn. 6.) Collaterally, proper settlement of the record also preserves a death penalty defendant's interests with respect to the investi-